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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1935.

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.
THE HON. FREDERICK GEORGE TANNER LUCAS.

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.

MEMORANDUM.

On the 3rd day of December, 1934, Frederick George Tanner Lucas, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia in the room and stead of the Honourable William Alexander Macdonald, resigned.

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OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

BEATON v. SCHULZ AND COLPE.

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BEATON v. SCHULZ AND COLPE

Placer mining—Creek and bench leases—Lay agreement—Assignability—Interest in land—Accounting.

The plaintiff, the lessee under two mining leases, and McP., lessee under a third lease of adjoining property, entered into a lay agreement with P. and V. for a period of five years in respect of all the land included in the first two leases and a part of the land included in the third, on terms that the plaintiff and McP. were to receive 20 per cent. of all gold mined during the term of the agreement. The agreement gave the laymen an option to purchase the leases at the termination of the lay agreement. The laymen assigned to the defendant S. a one-third interest in the lay agreement, and P. made an agreement with the defendant C. to assign to him all his interest therein. The defendant C., with the assent of the defendant S. and P., went into possession of and worked the properties. The plaintiff, alleging that the lay agreements were personal contracts, and therefore not assignable, and that the laymen P. and V., by failing to carry on mining operations in person and by permitting the defendant C. to take possession of the property, had made such a breach of their contractual obligation that the plaintiff was entitled to treat the agreement as void, brought an action for a declaration to this effect and for possession, damages for trespass and an accounting.

Held, on appeal, reversing, on this point, the judgment of FISHER, Co. J., that a lay agreement is an interest in land equivalent to the interest of a leaseholder, and is therefore assignable.

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Held, further, *per* MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A., in this respect affirming the judgment of FISHER, Co. J., that as the plaintiff is by consent entitled to a percentage of the gold mined under the lay agreement, he is entitled to an accounting of all gold taken from the claims.

BEATON *v.* SCHULZ AND COLPE

APPEAL by defendants Schulz and Colpe from the decision of FISHER, Co. J. of the 4th of December, 1933. The plaintiff was owner of a creek placer mining lease "Sunlight" on Spruce Creek in the Atlin Lake Mining Division and bench placer mining lease "Goodwill" adjoining the "Sunlight" on its north side. The defendant McPherson owned bench placer mining lease "Clydesdale" which adjoined the "Goodwill" on its down-stream side. On July 23rd, 1929, Beaton and McPherson gave a five-year lay of 200 feet of the "Clydesdale" and 400 feet of the "Goodwill" adjoining the "Clydesdale" to the defendants Pini and Vial, the laymen agreeing to pay the owners 20 per cent. of the amount of the gold mined. On the 10th of August following a formal lay agreement was signed by Beaton and McPherson, amplifying the first lay and including an agreement on the part of Beaton to give a lay on the balance of the "Goodwill" and the "Sunlight" on the same terms as the first lay. The agreement further contained a clause giving the laymen the right at the expiration of the five years to purchase the 600 feet referred to and the balance of the "Goodwill" and the "Sunlight" for $15,000. On August 10th, 1929, Pini and Vial entered into a partnership agreement with two men named Elia and Lazzareschi, whereby the two latter were given a one-third interest in the lay. By endorsement on the partnership agreement in 1930 Lazzareschi assumed to transfer his interest therein to Schulz. On July 25th, 1931, Vial assigned to Schulz all his interest in the agreement of August 10th, 1929, and on the 16th of September, 1932, Pini executed a document called an "acknowledgment of debt" by which it was recited that he had agreed to assign to Colpe all his interest therein. The three instruments were duly recorded in the mining recorder's office. On September 21st, 1931, Beaton and McPherson executed cross bills of sale so that Beaton had two-thirds of the 600 feet in question and McPherson one-third, and on the 26th of Sep-

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tember, 1931, McPherson assigned to Schulz all his interest in 260 feet of the "Clydesdale" lease adjoining the "Goodwill" and a one-third interest in four hundred feet of the "Goodwill." In April, 1932, Schulz entered into an agreement for sale to Colpe for $12,000 of an undivided two-thirds' interest in the lay on the "Goodwill" and "Sunlight" claims, the agreement being left in escrow in the gold commissioner's office. He at the same time transferred to Colpe all his interest in the 260 feet of the "Clydesdale" claim adjoining the "Goodwill." Both instruments were recorded on July 15th, 1933. The plaintiff alleged that the lay agreement was a personal contract and was therefore not assignable; that the laymen Pini and Vial by failing to carry out the contract personally and by attempting to assign it and by allowing Colpe to take possession had made such a breach of the contract that the plaintiff was entitled to treat the contract as null and void, and that defendant Colpe was a trespasser. Plaintiff therefore claimed a declaration that the agreement was no longer in force, judgment for possession and damages for trespass and an account of gold mined by the defendants.

Statement

The appeal was argued at Victoria on the 16th, 17th and 18th of July, 1934, before MACDONALD, C.J.B.C., MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C. (*Ralston,* with him), for appellant: The formal agreement takes the place of the first agreement: see Leake on Contracts, 8th Ed., 609; *Doe d. Biddulph* v. *Poole* (1848), 11 Q.B. 713. The learned judge below erred in holding that the lay agreement of August 10th, 1929, was not assignable. There was no prohibition in the agreement and we say this is an interest in land and assignable: see *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243; 2 M.M.C. 254 at p. 268. The word "exclusive" in the lay agreement means "exclusive possession." That a lay is a lease and assignable see Williams on Landlord and Tenant, 2nd Ed., p. 641, article 138; *Seymour* v. *Lynch* (1885), 7 Ont. 471; (1887), 14 A.R. 738; (1888), 15 S.C.R. 341; *Anonymous* (1705), 3 Salk. 222; 91 E.R. 789; *Reg.* v. *Winter* (1705), 2 Salk. 588; 91 E.R. 493; *Doe dem. Mitchinson*

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v. *Carter* (1798), 8 Term Rep. 57; 101 E.R. 1264 at p. 1266; *Church* v. *Brown* (1808), 15 Ves. 258; 33 E.R. 752 at p. 754. As to an interest in land with regard to leasehold estates see *Webber* v. *Lee* (1882), 9 Q.B.D. 315 at pp. 316-7; *Rex* v. *Surrey County Court Judge* (1910), 2 K.B. 410; Woodfall on Landlord and Tenant, 23rd Ed., 154; *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405 at p. 408. A mineral lease is a sale of an interest in land: see *McIntosh* v. *Leckie et al.* (1906), 13 O.L.R. 54 at p. 57; *Gowan* v. *Christie* (1873), L.R. 2 H.L. (Sc.) 273 at p. 284; *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475 at pp. 483-4. The effect of the instrument is to give the holder an exclusive right of occupation of the land. *Muskett* v. *Hill* (1839), 5 Bing. (N.C.) 694; 132 E.R. 1267. There was a demise of the right to enter and a layman is a leaseholder with an interest in land: see *Woodall* v. *Clifton* (1905), 2 Ch. 257; *London and South Western Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562. Even if the lay was not assignable there was consent and acquiescence on the part of the plaintiff. *Bowers* v. *Colby* (1841), 1 Hare 109 at p. 139.

Argument

As to the 600 feet referred to in the lay the cross bills of sale between Beaton and McPherson do not affect the situation. The learned judge erred in cancelling the lay agreement, as no lease can be forfeited unless there is a forfeiture clause or a breach of a condition.

Craig, K.C. (*Pierce*, with him), for respondent: One of the conditions was that the laymen were to work continuously and when Pini and Vial did not carry on the lay became forfeited. The learned judge erred in holding that the cross bills of sale between Beaton and McPherson were not intended to take effect as bills of sale, but were only intended to shew the proportion in which the gold was to be divided. These documents transferred the interests therein stated. Evidence is not admissible to give a limited or restricted meaning to expressions of clear import: see *Hayes* v. *Standard Bank of Canada* (1927), 60 O.L.R. 461 at p. 472. Plaintiff appeals from the finding of the learned judge below in this regard. These two bills of sale should be given effect. The transfer of Elia and Lazzareschi's

one-third interest in the lay to Schulz was only signed by Lazzareschi who had no authority to sign for Elia. Section 115 of the Placer-mining Act was not complied with. The gold commissioner's assent to these assignments was never obtained. The lay agreements are sub-leases and subject to the prohibition of the statute as to the consent of the gold commissioner. Because a document has an interest in land is not conclusive as to its assignability. It is submitted that the statement in article 138 at p. 641 of Williams on Landlord and Tenant, 2nd Ed., is erroneous and is not supported by the cases there cited. If there is an implied condition that it is not to be assigned that is sufficient to prevent it. That the lay does not carry an assignable interest see *Doe* v. *Wood* (1819), 2 B. & Ald. 724 at p. 738; *Guise-Bageley* v. *Vigars-Sheir Lumber Co.* (1913), 9 D.L.R. 4; *In re Leeds and Batley Breweries and Bradbury's Lease* (1920), 2 Ch. 548; *Ross* v. *Fox* (1867), 13 Gr. 683. The second lay was under seal, but the assignment under which Colpe received title had no seal and the document therefore conveyed no title to Colpe.

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Bull, in reply: This was an action for trespass. The question of our title was never pleaded or argued below. The *onus* was never on us to shew title as a defence. As to the assignment signed by Lazzareschi, he and Elia were partners. We might have to account to Elia. As to the interpretation of the "acknowledgment of debt" between Pini and Colpe of September 16th, 1932, see *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499 at p. 506.

Cur. adv. vult.

25th July, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff and one McPherson were the holders of Crown leases of placer ground in the Atlin District. Some time in July, 1929, they gave a lay to Marco Pini and Marco Vial on portions of these claims and on the 10th of August, 1929, they gave a formal document, *viz.*, a lease to said Pini and Vial for five years on the properties with which we are concerned. It was declared the said lay was exclusive, I think, of the first one. The said Pini and Vial were to pay a

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portion of the gold extracted from the claims to the plaintiff and McPherson. The said lay also contained an option on the part of the said laymen to purchase the property at the end of the lease, *viz.*, five years from its date for $15,000. The said lay was the equivalent of a lease—see *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243. Pini and Vial thereafter transferred their possession of the mines to the defendants Schulz and Colpe. This is partially evidenced by certain assignments of their interests in the lay of Pini and Vial which do not, I think, give a perfect paper title to the whole of these interests but there is evidence in the case which shews that the said defendants Schulz and Colpe were given possession of the property in question and still retain such possession. The said Pini and Vial are out of possession and are making no claim to the same. The said lease is, I think, an interest in land—*Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83; *McMeekin* v. *Furry* (1907), 13 B.C. 20; section 2 of the Placer-mining Act, title "Placer claim"; *Stussi* v. *Brown* (1897), 5 B.C. 380 at pp. 388-9, and a number of other cases in our Courts. The defendants, therefore, being in possession are *prima facie* owners of the lease in controversy. Odgers's Common Law, 3rd Ed., Vol. 2, p. 591. The respondent's contention, in fact the principal contention made by his counsel, was that the lease or lay was not assignable and that therefore he is entitled to possession. That question was fully argued by counsel and a large number of authorities were cited which to my mind shew that the lease was assignable, but this is immaterial since defendants' case is founded on possession. This issue therefore must be decided against the respondent. The result then of this branch of the case is that the defendants are in possession and therefore have title against the whole world except the real owner. The Crown is not a party to the action and no question is raised in the pleadings concerning the terms of the Crown leases. The Crown leases contain forfeiture clauses but the parties, I think very wisely in their own interest, have avoided raising the question of forfeiture in these proceedings. It is clear to my mind that the plaintiff has entirely failed to shew that within the five years of the lease he is entitled to the prop-

erty in question as against the defendants. There is, however, another question involved in the judgment appealed from, that is to say in regard to a conveyance of an interest in 260 feet of the "Clydesdale" lease (Exhibit 4) which 260 feet is marked on plan Exhibit 9. Subsequently to the lease McPherson gave to the plaintiff a two-thirds' interest in the up-stream 200 feet of this portion of the "Clydesdale" and McPherson also took a one-third interest in the 400 feet of the "Goodwill" also shewn on the said plan. These bills of sale were not recorded at the time of their execution but were well known to Schulz and were kept by him in his possession until subsequently he obtained from McPherson a bill of sale (Exhibit 8) of all his right title and interest in 260 feet including said 200 feet shewn on said plan, Exhibit 8.

MACDONALD, C.J.B.C.

The plaintiff gave notice of cross-appeal in this case, claiming a declaration that the said interest obtained by Schulz evidenced by Exhibit 8, is subject to Exhibit 4. He is entitled under these proceedings to such a declaration and I would grant it to him. This is a matter which does not affect the lay from Pini and Vial to the defendants. It is a question which affects only the interest of the plaintiff after the expiration of the lease but it has been raised in the Court below and the judgment deals with it adversely to the respondent. Therefore, I think I ought to make the declaration aforesaid although it ought not to affect the costs of this appeal.

No case has been made out for an accounting. The division of the gold was made from month to month up to a certain time and if an accounting should be directed it should be by Pini and Vial to respondent and this was not raised by the pleadings, nor were sections 24 or 57 of the Placer-mining Act (see *Stussi* v. *Brown, supra*). But the parties have consented to an account.

I would, therefore, allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I may say that I am in agreement with my learned brother the Chief Justice's judgment, except as to one important point, and that is on the question of account. In my opinion in a Court of Equity you must apply equitable principles; it comes to a question of interest in land.

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My view is that the plaintiff is entitled to an account of all the gold taken out of the claim; upon the basis, as I understood counsel not to dispute before this Bar that Beaton the plaintiff would have two-thirds of 20 per cent.

After a careful consideration of this case I do not think upon the evidence it could be at all contested that an accounting must be had; in fact it has been agreed to. My judgment is that the defendants must account; and that I understand is the view of the majority.

In regard to the predecessors in title to the defendants, the lay people, who got the original lay agreement, they are parties to this action, and they have not appealed, and they are concluded, in my opinion. And the plaintiff is entitled to look to the defendants for this account.

MCPHILLIPS, J.A.

I think that is the only point—and a most important point—in which I differ from the judgment of my learned brother the Chief Justice.

Upon the question of the conveyances I am in agreement with what the learned Chief Justice said in his judgment. The case is somewhat involved, but I think that the essential points for decision have now been dealt with.

I would allow the appeal.

MACDONALD, J.A.: Appeal from the judgment of the County Court judge of Prince Rupert holding that appellants Schulz and Colpe are trespassers without right or title to work certain mining claims the subject of a lay agreement; that certain transfers should be cancelled and making a declaration as to the intendment of two cross transfers—Exhibits 4 and 5. The latter justify because of rights acquired by transfers hereinafter referred to. In disposing of this appeal, as it was intimated that further litigation might follow in respect to rights, if any, acquired on the termination of the lay, I purposely confine myself to a discussion of the question of trespass and the issue between the respondent and McPherson dealing only with matters that affect these issues and expressing no opinion on points that may be material in another action, if launched.

MACDONALD, J.A.

The respondent Beaton is lessee from the Crown of the

"Goodwill" and "Sunlight" bench placer-mining leases on Spruce Creek, Atlin District, and one McPherson a defendant but not a party to this appeal is the lessee of the "Clydesdale" adjoining the "Goodwill." On July 23rd, 1929, Beaton and McPherson as grantors entered into a lay agreement with the defendants Marco Pini and Marco Vial for a term of five years covering 200 feet of the "Clydesdale" and 400 feet adjoining in the "Goodwill" the laymen agreeing to pay to the grantors 20 per cent. of the amount of gold mined. Beaton on his part agreed to give a lay upon the same terms on the balance of the "Goodwill" and "Sunlight" leases and the "first chance" to purchase at the end of the term for $15,000. The terms were amplified in a formal document dated August 10th, 1929, prepared by solicitors and again executed by the grantors. A material difference is that by the latter agreement the lay was "to be exclusive"; also a covenant to work continuously was omitted. Both agreements were recorded in the mining office on the date of execution. As the parties agreed to embody part of the first agreement together with additional terms in a more elaborate formal document the latter must be taken as superseding and displacing the former.

On the same date, *viz.*, August 10th, 1929, by a partnership agreement not recorded until July 15th, 1933, after this action commenced Pini and Vial in consideration of $500—one-half of the amount paid by them to the grantors—admitted one Elia and Lazzareschi as participants in the lay. It provided that no partner should sell his individual interest without a written consent from the remaining partners. By endorsement on the partnership agreement Elia and Lazzareschi transferred to the appellant Schulz "all our interest in this partnership." This was signed only by Lazzareschi on behalf of both. No formal written consent of the remaining parties was obtained but the right of the appellants to possession is not affected thereby.

On July 25th, 1931 (recorded March 20th, 1932), Vial assigned to Schulz all his interest (defined as one-third) in to and under the lay agreement of the 10th of August, 1929, aforesaid, while Pini on September 16th, 1932, by a document styled

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as an "acknowledgment of debt" (recorded July 15th, 1933) assigned to appellant Colpe all his interest therein. It was submitted that this latter document because of its terms did not pass any interest to Colpe. Without doubt it enabled him to take possession. It follows that appellants Schulz and Colpe acquired by assignment (if they might legally do so) the right title and interest of Pini, Vial, Elia and Lazzareschi under the original lay, and, at least, so far as possession is concerned the assignees stand in the shoes of the first laymen.

It will be observed that by the original lay to Pini and Vial Beaton and McPherson were entitled to share in 20 per cent. of the gold recovered. McPherson, as stated, owned the "Clydesdale"; Beaton the "Goodwill" and "Sunlight." On a date prior to the grant of the lay they entered into an oral agreement as to division of interests, later reduced to writing in the form of cross assignments of even date. Bills of sale were executed by each in favour of the other (September 21st, 1931) carrying out, according to the evidence accepted by the trial judge, the terms of the oral agreement referred to. McPherson transferred to respondent Beaton (Exhibit 4) all his right, title and interest in and to "an undivided two-thirds' interest in 200 feet of the 'Clydesdale' bench placer lease" while Beaton transferred to McPherson (Exhibit 5) "all my right, title, interest, claim and demand in and to an undivided one-third interest to 400 feet in the 'Goodwill' bench placer-mining lease" adjoining the "Clydesdale." The trial judge found that these cross bills of sale were exchanged for the sole purpose of defining the respective proportions of gold to be received by each under the lay to Pini and Vial. Respondent seeks to reverse this finding submitting that Exhibit 4 (and it follows Exhibit 5) is a valid and subsisting bill of sale conveying to Beaton a two-thirds' interest in 200 feet of the "Clydesdale." The appellants Schulz and Colpe are not concerned with this issue. Even if they should be treated as bills of sale unaffected by an oral arrangement they do not derogate from the original lay agreement to Pini and Vial executed two years before and with five years to run. That lay transferred not a part, but the whole interest in the 200 and 400 feet affected by Exhibits 4 and 5 and it is as

assignees thereof that appellants base their claims. But McPherson is a party defendant in the action and as against him the respondent Beaton is entitled to a declaration. It was an issue and unless set aside the declaration of the trial judge stands. It is true that parol evidence may be admitted to prove that an agreement absolute in form was intended to operate only upon certain contingencies arising but that is not this case. Even if we might consider the oral evidence I think the true view is that Beaton and McPherson decided—whether to effect a division of interests or to assist in ascertaining proportions to which each should be entitled, it matters not—that in any event an absolute and operative bill of sale in the terms of Exhibits 4 and 5 should be given to transfer the interests therein outlined. Both were formally recorded as conveying interests on July 19th, 1932. If not intended so to operate as absolute bills of sale one would not expect to find them so placed on record. We have not had the benefit of any submission on the part of McPherson and the appellants professed no interest in this issue. My view is that we must take Exhibits 4 and 5 as we find them and I would vary the judgment of the trial judge accordingly. I may add that McPherson so regarded it because on September 26th, 1931, a few days later by bill of sale he assigned to Schulz (1) an "undivided one-third interest [all that remained] in the 200 feet of the 'Clydesdale'"; (2) all his interest in a further 60 feet of the same lease adjoining the 200 feet, and (3) the one-third interest he acquired from Beaton by Exhibit 5 in 400 feet of the "Goodwill." This bill of sale, however, was not recorded. On October 1st, 1931, another bill of sale was executed by McPherson (recorded on March 20th, 1932) transferring to Schulz "all my right, title, interest, claim and demand in and to 260 feet of the 'Clydesdale' . . . adjoining the 'Goodwill.'" This so far as the 200 feet are concerned must be read as a transfer of a third interest—all that remained to him.

MACDONALD, J.A.

On the —— day of April, 1932, Schulz entered into an agreement with Colpe—Exhibit 20—concerning only the "Goodwill" and the "Sunlight." It recites the lay given by Beaton to Pini and Vial of August, 1929, on the "Goodwill" and "Sunlight" placer leases; that Schulz is the owner of a two-thirds'

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interest therein, and in consideration of $12,000 of which $5,000 was paid on execution, the balance in two payments of $3,500 each, be transferred to Colpe an undivided two-thirds' interest "in and to the said lease and in and to the lands and premises comprised therein," etc. The agreement was to be deposited in escrow with the gold commissioner until all payments were made. Schulz covenanted that "the said lease is a good valid and subsisting lease and that he has good right full power and absolute authority to assign an undivided two-thirds' interest therein." This agreement was recorded on July 15th, 1933. Then on April 5th, 1932, by bill of sale he transferred to Colpe "all my right title and interest in and to 260 feet of the north end of 'Clydesdale' placer lease adjoining the 'Goodwill.'" His right to so convey does not depend solely on transfers from McPherson already referred to, but rather on the transfers to him by Vial and by Elia and Lazzareschi. This bill of sale was also recorded on July 15th, 1933. Then, in order of date, the document Exhibit 22, styled "acknowledgment of debt" already referred to whereby Colpe professed to acquire from Pini all his interest in the original lay, completes a chain of title to support his right of possession unless displaced by a higher title dependent, however, on the assignability in law of the original lay (Exhibit 7).

This is the decisive point in the appeal. The trial judge based his conclusion of non-assignability on the view that the "personal element" entered into such a grant of, I take it, a mere licence, the grantor relying on the honesty and good faith of the grantee. If so concerned it is possible to insert a covenant against assigning as in an ordinary lease where the personal element may also enter.

In *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243 at 255-6, Mr. Justice MARTIN, delivering the judgment of the Court, in dealing with the submission that only a recorded owner of land or a mine could apply for or obtain a water record, after quoting sections of the Act, said (p. 256):

> Now, a "layman" is really a leaseholder and an occupant of a claim within the meaning of that definition, the peculiar feature of his tenure being that the amount of the rent he pays is contingent since it depends

upon the clean-up, and he is bound to work the claim continuously in a miner-like manner during the mining season.

On the same page referring to the phrase "owner of such placer mines" in section 29 of the Act considered he said that expression

is clearly intended to include a layman; to seriously contend otherwise, bearing in mind the way placer mining operations are carried on, seems to me to be impossible.

It is at least an estate equivalent to the interest of a leaseholder (the grantors divest themselves of possession giving exclusive possession to the laymen) and as it disposes of an interest in land it is assignable.

This view of the conveyance of a leasehold interest is carried out in the terms employed in Exhibit 7:

The parties of the first part [Beaton and McPherson] agree and covenant that they will give, and lease unto the parties of the second part [Pini and Vial] a lay for five years on each of the said properties, which said lay is to be exclusive, on the following terms, . . .

The owner parts with his right to work the mine and all his interest therein for five years and the laymen by reason of their tenure may for certain purposes "represent the owner as well as himself" (*Brown* v. *Spruce Creek Power Co., supra,* 256). Except in cases of tenancy at will or on sufferance one with leasehold interests or even a more limited estate or interest in lands may transfer it by assignment unless restrained by a covenant.

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The lease considered in *Seymour* v. *Lynch* (1885), 7 Ont. 471, was in essential particulars similar to the lay in question. The exclusive privilege was granted to enter upon certain lands to search for, dig, excavate, mine and carry away the iron ores found with quarterly payments of royalty. It was argued that the instrument was merely a licence or exclusive privelege of entering for the purpose of mining and not a demise of the land conferring an estate or interest in the soil. I quote from the judgment of Armour, J. where he refers to and comments on an extract from Bacon's Abridgment, p. 476, as follows:

"Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most

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proper and pertinent words had been made use of for that purpose." Bacon's Ab. Lease, K. Having regard to this canon I have come to the conclusion that the instrument in question is in construction of law a lease. It gives the exclusive right, liberty, and privilege of entering at all times for and during the term of ten years in and upon the west half of lot 11, 5th concession of Madoc. This excludes any right of entry by the lessor, and indicates an intention on his part to divest himself of the possession of the land: *Roads* v. *Overseers of Trumpington* [(1870)], L.R. 6 Q.B. 56; *Carr* v. *Benson* [(1868)], 3 Chy. App. 524; *Chetham* v. *Williamson* [(1804)], 4 East 469.

This decision was affirmed on an equal division in two Appellate Courts ((1887), 14 A.R. 738 and (1888), 15 S.C.R. 341).

If the lay simply confers authority to do certain acts it is a licence; but if, as it does, it grants an exclusive right of entry as against the grantor for a term of years with the right to take profits it is a lease and concerns an interest in land.

In *Regina* v. *Winter* (1705), 2 Salk. 587; 91 E.R. 493, Powel, J. said:

> If H. license another to enter into his land and take the profits, it is a lease at will; and if the licence was for a year, it is a lease for a year; otherwise of a licence to hunt.

MACDONALD, J.A.

As Lord Kenyon, Ch. J. stated in *Doe* v. *Carter* (1798), 8 Term Rep. 57; 101 E.R. 1264, at p. 1266:

> Generally speaking, the grant of an estate carries under it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant.

However, this point need not be further pursued. If it is a leasehold interest its assignability is beyond question; nor is it necessary that assigns should be mentioned in the document.

Even if not a leasehold interest but a more limited estate coupled with an interest, it is assignable. In *Webber* v. *Lee* (1882), 9 Q.B.D. 315, a grant of a right to shoot over land and to take away a part of the game killed was held to convey an interest in land because as pointed out by Bowen, J. at p. 317, the right to shoot was coupled with the right to take away a portion of the profits derived from the land and although not involved in the decision that interest would be assignable in the absence of a restrictive covenant. If one conveys an estate in fee a covenant not to assign cannot be enforced as it is repugnant to the grant. The reason for such a restriction disappears where

limited estates or interests in land are conveyed. No rule of law is violated by preventing their assignment if the parties covenant to do so.

In *Rex* v. *Surrey County Court Judge* (1910), 2 K.B. 410, the right conferred by a demise of the exclusive right of sporting and shooting over land for two years was held to be a profit *a prendre* giving the tenant an interest in the land within the 4th section of the Statute of Frauds. It is immaterial whether it is called a licence or a lease (although the lay is described as a lease—a sublease granted by the original lessees from the Crown): if it is a contract for exclusive possession for a fixed or determinate period it is a lease. "It is not a question of words but of substance" as pointed out by Lord Davey in *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405 at p. 408, where an instrument conferring the right to cut lumber and carry it away was held to convey an interest in the land itself.

In *McIntosh* v. *Leckie* (1906), 13 O.L.R. 54, Boyd, C. dealing with an instrument giving the exclusive right to drill on certain oil lands for five years, said at p. 57:

MACDONALD, J.A.

> The legal effect of this instrument (by whatever name it may be called) is more than a licence; it confers an exclusive right to conduct operations on the land in order to drill for and produce the subterraneum oil or gas which may be there found during the period specified. It is a profit *a prendre*, an incorporeal right to be exercised in the land described: *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475, 483.

Lord Cairns in *Gowan* v. *Christie* (1873), L.R. 2 H.L. (Sc.) 273 at 284 puts it thus:

> What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.

Even if only regarded as a profit *a prendre*, that is a right to take something from the land of another, it is an incorporeal hereditament and not a mere licence which in its nature is personal and unassignable. If it was not exclusive other considerations might arise, *e.g.*, the right possibly of the grantor to also take minerals from the same ground.

The case of *Muskett* v. *Hill* (1839), 5 Bing. (N.C.) 694; 132 E.R. 1267 is to my mind conclusive. If, as there held, the mere

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"licence and authority" to search for and raise metals and to convert them to the licensee's use passed an interest capable of being assigned there can be no question that the lay in question herein is assignable. At pp. 1272-3 Tindal, C.J. said:

> The first point, therefore, which presents itself for our consideration is, whether the interest conveyed to Setree and Stacy was capable of being assigned. No authority was cited to shew that the interest was not assignable; but the case of *Doe dem. Hanley* v. *Wood* [(1819)], 2 B. & Ald. 724 was relied on as establishing that the grant from the defendant Hill operated strictly and merely as a licence; and it was contended, that a licence was, in its nature, personal and not assignable. In the case referred to, the indenture relied on did not, perhaps, substantially differ from that now under discussion, and that indenture was held not to amount to a demise of the mine, so as to entitle the grantee to maintain an ejectment; and it was in that case said by the Court to be "nothing more than a grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore as should be found or got, the grantor parting with no estate or interest in the mines, metals, and materials."
>
> Now, assuming this description of the instrument to be correctly applicable to the deed now under consideration, it is to be observed, that the deed in this case operates not merely as a licence, but as a grant also; and this view is conformable to what is laid down in Vaughan Rep. 351, in the case of *Thomas* v. *Sorrell* [(1667)], where it is said, "a dispensation or licence properly passes no interest, but only makes an action lawful which without it had been unlawful; as a licence to go beyond the seas; to hunt in a man's park; to come into his house; are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carrying away the deer killed to his own use; to cut down a tree in a man's ground and to carry it away the next day after to his own use; are licences as to the acts of hunting and cutting down, but as to the carrying away the deer killed, and tree cut down, they are grants." And that such a grant to a man and his assigns carries an interest which is assignable, appears from *Palmer's Case* [(1601)], 5 Co. Rep. 24 b, reported also in Cro. Eliz. 819, under the name of *Basset* v. *Maynard*. In that case, Sir Thomas Palmer being seized in fee of a wood, bargained and sold to one Cornforth and his assigns, 600 cords of wood, to be taken by the assignment of Sir Thomas Palmer. Cornforth assigned his interest to the plaintiff. And the first resolution in the case was, that Cornforth had an interest which he might assign over, and not a thing in action or possibility only. And the case of *Grantham* v. *Hawley* [(1615)], Hob. 132 leads to a similar conclusion.

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I cannot agree with Mr. *Craig's* submission that on the theory that as the intention of the parties may be expressed in an implied condition as well as by actual words it is an implied term of the lay that the grantees cannot assign. His strongest support is obtained from the decision in *Doe dem. Hanley* v.

Wood (1819), 2 B. & Ald. 724, discussed by Tindal, C.J. *supra*, a case that has been referred to and distinguished. It is apparent from the judgment of Abbott, C.J. at pp. 738-9, that "the free liberty licence power and authority" to dig, work, mine and search for tin and other metals was not an exclusive right. The grantor parted only with such metals as the grantee might search for and get within the described lands. Even such a non-exclusive grant of a licence to search and take away minerals is treated as irrevocable "on account of its carrying an interest." But the distinction as indicated is that the grantor retained his estate or interest in all the lands and in the minerals not found by the grantee in pursuing his rights under a licence to search. That is not this case.

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We are aided to some extent by our statute. By section 24 of the Placer-mining Act, Cap. 169, R.S.B.C. 1924:

> The interest of a free miner in his placer claim shall . . . be deemed to be a chattel interest, equivalent to a lease.

And in *Stussi* v. *Brown* (1897), 5 B.C. 380, it is, at p. 383, treated by DRAKE, J. as "an interest in land," and this view was not reversed on appeal, consideration of the point going off on a question of pleading.

I conclude therefore that even apart from the option to purchase given in the lay it transferred an assignable interest now held by the appellant Colpe, a *bona fide* purchaser for value.

I would allow the appeal.

MCQUARRIE, J.A.: During the argument it became apparent that the main point in controversy was whether the lay agreement between Beaton and McPherson and Pini and Vial, as set out in Exhibits 6 and 7, was assignable or not. On the answer to that question depended the solution of the unfortunate dispute which had developed between men of some standing in one of our most promising mining districts. The learned trial judge found that the lay agreement was not assignable and on that premise held that the appellants were trespassers and made the various declarations contained in the formal judgment. With all deference and due regard for the extensive experience of the learned trial judge in mining matters, I cannot agree with him,

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but instead would adopt the reasons of the learned Chief Justice on this appeal and his conclusion that the lay agreement is assignable. If that is correct the finding of trespass against the appellants and the other declarations in the formal judgment directed against them must be set aside.

I would, therefore, allow the appeal but would indicate that the interests of the plaintiff be adequately protected. If any difficulty arises between the parties as to fixing their interests in the mining claims involved and the gold produced or to be produced therefrom, I think there should be a reference for the determination thereof.

Appeal allowed.

Solicitor for appellants: *J. C. Ralston.*
Solicitor for respondent: *George Black.*

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1933

Dec. 16.

LYTTON GOLD MINES LTD. v. MUNRO.

Company—Authority to bring action—Directors' meeting authorizing action—No notice of meeting—Subsequent meeting properly called ratifying resolution passed at first meeting—Ratification in reasonable time.

LYTTON GOLD MINES LTD. v. MUNRO

The plaintiff company instructed the defendant, who was a director of the company, to obtain a renewal of an option from the owners of a group of mineral claims, and gave him a draft agreement setting out the terms for renewal thereof. The defendant, on interviewing the owners, obtained a renewal of the option but in his own name instead of that of the company. The directors of the company then called a meeting, but did not give the defendant notice thereof, and at the meeting on the 23rd of September, 1933, passed a resolution authorizing their solicitor to bring an action for a declaration that the defendant is a trustee for the plaintiff in respect of the option. Subsequently and after the plaintiff had been served by the defendant with notice to strike out the action on the ground that the writ was issued without authority, a meeting of the directors duly called was held on the 9th of December, 1933, and a resolution passed ratifying the resolution passed at the first meeting. At the trial held on the 12th of December, 1933, on the defendant's motion to strike out the action:—

Held, that in the circumstances of this case, as the defendant had not been injured and had not altered his position in any way by reason of the delay, the resolution passed on the 9th of December, 1933, was passed within a reasonable time, there was power to ratify and the motion should be dismissed.

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1933

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LYTTON GOLD MINES LTD. v. MUNRO

ACTION for a declaration that the defendant is trustee for the plaintiff in respect of all benefits under an option agreement obtained by him from the owners of the Independence Group of mineral claims in the Ashcroft Mining Division on the 9th of August, 1933, for an order directing him to assign and transfer the said option to the plaintiff or alternatively an order vesting the benefits of said agreement in the plaintiff, and for an injunction restraining the defendant from disposing of the said option agreement. Tried by McDONALD, J. at Vancouver on the 12th of December, 1933. On the 10th of August, 1932, the plaintiff company obtained an option from the owners of the Independence Group for the purchase of the claims for $56,000, the first payment of $6,000 to be made on the 10th of August, 1933. The defendant was a director of the plaintiff company and on the 7th of August, 1933, the company instructed the defendant, as its agent, to proceed to Lytton and procure from the vendors a renewal of the option on behalf of the company. He proceeded to Lytton and obtained a renewal of the option from the vendors in his own name instead of that of the company. When the other directors of the plaintiff company learned of the defendant taking the option in his own name they held a meeting of directors on the 23rd of September, 1933, and passed a resolution authorizing their solicitor to bring this action. No notice to the defendant was given of that meeting but on the 9th of December following a meeting of directors was held after proper notice thereof was given to all directors, and a resolution was passed ratifying and confirming the resolution passed on the 23rd of September, and approving what had been done pursuant thereto.

Statement

A. M. Whiteside, K.C., and *L. P. MacDonald*, for plaintiff.
Marsden, for defendant.

16th December, 1933.

McDONALD, J.: The defendant and three Grant brothers were the directors of the plaintiff company which company held an agreement by way of option upon certain mineral claims known as the Independence Group which option had originally

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been given by certain Indians and others to defendant and assigned by him to the plaintiff. Under this agreement, an instalment of $6,000 was about to fall due on August 10th, 1933, when by arrangement with his co-directors defendant proceeded to Lytton with a new draft agreement with instructions, if possible, to obtain the signatures of the proposed vendors thereto. The defendant proceeded to Lytton, saw the vendors but substituted his own name for that of the plaintiff in the draft agreement and obtained the vendors' signatures. His excuse for this glaring breach of trust is that the Indians refused to give an option to the defendant. The evidence does not bear out this statement of the defendant. I am quite satisfied upon the whole of the evidence that the vendors were not interested in the question of who took the option provided that the defendant was satisfied with the arrangements made. On this branch of the case I have had no difficulty in reaching the conclusion that the defendant is a trustee for the plaintiff company of the rights that he obtained under the agreement in question.

Judgment

On the opening of the trial defendant moved to strike out the action upon the ground that the writ had been issued without the authority of the plaintiff. That motion was dismissed for the reason that the notice had been given out of time. I did however give the defendant leave to rely upon this as matter by way of defence to the action and this question must be considered. When defendant's co-directors learned that he had taken the agreement in his own name they held a meeting of directors on the 23rd of September, 1933, and passed a resolution authorizing their solicitor to bring this action. No notice was given to defendant of that meeting although I would hold that the defendant was in Vancouver and notice could have been given to him either at the office of one *Phipps* or at his residence, both of which addresses were known to his co-directors and their solicitor. It would seem clear, therefore, that the resolution passed on the 23rd of September, 1933, was of no effect. Subsequently, however, on Saturday, the 9th day of December, when the plaintiff's solicitor received the notice of motion above

mentioned, a meeting of directors duly called was held and a resolution was passed ratifying and confirming the resolution passed on the 23rd of September, 1933, and approving of what had been done pursuant thereto. Meanwhile it may be noted at the annual meeting of shareholders held between September 23rd, 1933, and December 9th, 1933, the defendant had not been re-elected as a director.

It is contended that, although there was power in the directors to ratify, such ratification must take place within a reasonable time and that in this case the meeting to ratify was held too late. The authorities seem clear that ratification in such a case must take place within a reasonable time and as Bowen, L.J. said in *In re Portuguese Consolidated Copper Mines, Limited* (1890), 45 Ch. D. 16 at p. 35:

> The measure of the reasonableness of the time depends entirely upon the circumstances of the case.

Judgment

In the circumstances of this case I would hold that inasmuch as the defendant has not been injured and has not altered his position in any way by reason of the delay, the resolution passed on the 9th of December, 1933, was passed within a reasonable time. There seems no question at all that there is power to ratify in a case such as this. See *Daimler Company, Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1916), 2 A.C. 307, *per* Lord Atkinson at p. 327 (referring to an action brought by the secretary of the company without any instructions whatever):

> If the directors were in England when he did so, they could, of course, ratify and adopt his act.

There will be judgment for the plaintiff with costs.

The defendant will be ordered to forthwith assign and transfer unto the plaintiff all his rights under the agreement in question.

Judgment for plaintiff.

MURPHY, J. (In Chambers)

1934

April 26.

REX v. BERU.

Criminal law—Narcotic drugs—Habeas corpus—Application for order nisi—Jurisdiction of magistrate—Whether poppy heads "morphine"—Criminal Code, Sec. 767—Can. Stats. 1929, Cap. 49.

REX v. BERU

The accused having had poppy heads in his possession, was convicted of having in his possession a drug, to wit, morphine. On an application for an order *nisi* for a writ of *habeas corpus*, it was contended that poppy heads are not morphine within the meaning of The Opium and Narcotic Drug Act, 1929, and the magistrate acted without jurisdiction.

Held, that this is a question of fact and not a matter going to the magistrate's jurisdiction. He could try such a charge under the summary conviction provisions of the Code, and the application should be dismissed.

Statement

APPLICATION for an order *nisi* for a writ of *habeas corpus*. Heard by MURPHY, J. in Chambers at Victoria on the 24th of April, 1934.

Stuart Henderson, for the application.
R. A. Wootton, for the Crown.

26th April, 1934.

Judgment

MURPHY, J.: Application for an order *nisi* for a writ of *habeas corpus*. It was agreed at the hearing that a copy of the warrant (Exhibit A) should be taken as the return and that the matter be dealt with as if such return had been formally made. There being no *certiorari* in aid the Court is confined to an examination of the warrant as returned and to the question of the magistrate's jurisdiction. No objection is taken that the warrant is invalid on its face in any particular but it is said there was another warrant issued at some earlier date than the one returned and it is attempted to found some objection based on that fact under section 767 of the Criminal Code, R.S.C. 1927, Cap. 37. The short reply to this is that the matter is not before the Court and could only be brought before it by the obtaining of a writ of *certiorari*.

Then it is said the magistrate acted without jurisdiction. The warrant shews applicant to have been convicted of having in his

possession a drug, to wit, morphine. What applicant really had in his possession were poppy heads and the contention is that poppy heads are not morphine within the meaning of The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49. This is not in my opinion a matter going to the magistrate's jurisdiction but is a question of fact for his decision on the hearing. The nature of the charge here is the having morphine in possession. Admittedly the convicting magistrate could try such a charge under the summary conviction provisions of the Code when the offence was committed within his jurisdiction. The question, so far as jurisdiction is concerned, is not did the magistrate come to a wrong conclusion but ought he never to have begun the inquiry? *Reg.* v. *Bolton* (1841), 1 Q.B. 66 at 72; 4 P. & D. 679.

In view of the Code provisions and of the facts as shewn on the face of the return it in my opinion is hopeless to contend that the magistrate ought never to have begun the inquiry. The application is dismissed.

Application dismissed.

FISHER, J.

1934

July 21.

TATROFF v. RAY.

Mortgage—Non-payment of taxes—Right of foreclosure—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 6.

TATROFF v. RAY

When a mortgagor covenants to pay taxes and the taxes become delinquent, the mortgagee may bring action for foreclosure, and it is not a defence that the mortgagee has not himself paid any of the taxes.

Due payment of the 1933 taxes means payment at or before the time when otherwise the taxes would become delinquent, which in this case would be on the 31st of December, 1933, according to section 61 of the Vancouver Incorporation Act, 1921.

Houghton v. *Trust and Loan Co.* (1933), 41 Man. L.R. 299; 2 W.W.R. 125 applied.

Statement

APPLICATION for an order of foreclosure. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 14th and 15th of June, 1934.

Fleishman, and *C. F. MacLean,* for plaintiff.
G. L. Fraser, for defendant.

21st July, 1934.

Judgment

FISHER, J.: In this matter I have to say that notwithstanding the very complete argument of Mr. *Fraser* my opinion is that there is a covenant on the part of the mortgagor to pay taxes contained in the mortgage in question herein. I think also that this includes due payment of the 1933 taxes, that is payment of taxes after as well as before default: see *B.C. Land & Investment Agency* v. *Robinson* (1922-3), 32 B.C. 375 at p. 379. Due payment would seem to me also to mean payment at or before the time when otherwise the taxes would become delinquent which in this case would be on the 31st day of December, 1933, according to section 61 of the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55.

It is further contended, however, on behalf of the defendant that even if there is such a covenant to pay taxes the right of the mortgagee to bring an action for foreclosure does not arise until he has paid the taxes. In *Tillet* v. *Carlson* (1932), 45 B.C. 52, I held against such contention but counsel for the

defendant here points out that though the said mortgage purports to be made in pursuance of the Short Form of Mortgages Act it does not contain the usual or formal acceleration clause and he refers also to a paragraph of the said mortgage reading in part as follows:

> And it is hereby agreed that the mortgagee may pay any liens, taxes, rates, charges or encumbrances upon the said lands, and moneys for insurance against damage by fire, tempest or lightning, and the amount so paid . . . shall be a charge on the said lands in favour of the mortgagee and shall be payable forthwith by the mortgagor to the mortgagee with interest at the rate aforesaid until paid. . . .

Counsel for the defendant relies also on certain American authorities but it may be noted that in *Cullin* v. *Rinn* (1887), 5 Man. L.R. 8, Dubuc, J. says that the English and Canadian authorities are at variance with the American cases which hold that in an action on a covenant against encumbrances the plaintiff, if he has paid nothing, can only recover nominal damages. Dubuc, J. refers to *Lethbridge* v. *Mytton* (1831), 2 B. & Ad. 772, and *Loosemore* v. *Radford* (1842), 9 M. & W. 657. These cases are also referred to in *Houghton* v. *Trust & Loan Co.* (1933), 41 Man. L.R. 299 where, at p. 302 (2 W.W.R. 125 at p. 128), Prendergast, C.J.M., citing them, says:

Judgment

> I take the rule to be quite clear that in an action for breach of a covenant to pay a certain sum to a third party, it is not a defence that the plaintiff has not himself paid the third party the covenanted amount, and it is equally immaterial that he has made the payment.

Counsel on behalf of the defendant seeks to distinguish these cases from the present one on the ground that even on the assumption that there is a covenant to pay taxes, such covenant upon a proper construction of the mortgage here is a covenant to pay to the mortgagee taxes which the mortgagee may have paid to the City of Vancouver. I cannot agree with this suggested construction of the mortgage. As already intimated I hold that there is a covenant in the mortgage to pay the taxes on or before the 31st day of December, 1933. I also hold that upon a proper construction of the mortgage such covenant is a covenant to pay the taxes to the municipal authorities and therefore the rule referred to in the *Houghton* case, *supra*, would apply. As to the right of the mortgagee to bring an action for foreclosure forthwith upon default in payment of interest on a

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certain day, see *Little* v. *Hill* (1916), 23 B.C. 321 and *Scottish Temperance Life Assurance Co. Ltd.* v. *Johnson* (1918), 1 W.W.R. 402, in which latter case MARTIN, J.A., at p. 403, says as follows:

> So far as the alleged premature bringing of the action is concerned, I am of the opinion that the point is in principle covered by *Edwards* v. *Martin* (1856), 25 L.J., Ch. 284, wherein the following *dictum* of Lord Chancellor Sugden in *Burrowes* v. *Molloy* [(1845)], 2 Jo. & Lat. 521; 8 Ir. Eq. R. 482 was approved: "Supposing that the principal sum had been made payable on a given day, no matter whether it was one year or twenty years after the date of the mortgage, with interest thereon half-yearly in the mean time, and that, before the day of payment of the principal money, default had been made in the payment of the interest thereon, the mortgagee would, at any time after that event, have had a right to file his bill for a foreclosure; because his right became absolute at law by the non-payment of the interest, the estate having been conveyed subject to a condition which had not been fulfilled."

In the present case I would hold that there has been a breach on the part of the mortgagor in the condition upon which he held the property. His right of redemption was subject to the performance on his part, *inter alia,* of the payment of taxes for 1933 on or before the said 31st day of December, 1933, and the estate became forfeited at law by default as the money was not paid by the mortgagor on or before that date nor has it been paid since. The right of the mortgagee to bring an action for foreclosure therefore arose subject of course to the provisions of our Mortgagors' and Purchasers' Relief Act and subject to the power of the Court to relieve against forfeiture. See *Howe* v. *Howe* (1916), 22 B.C. 550. I see no difficulty in the fact that "the ordinary form of judgment in a foreclosure action in its simplest form directs an account to be taken of what is due to the plaintiff under and by virtue of the mortgage." See Coote on Mortgages, 9th Ed., 1058. In my view the plaintiff is entitled to have all proper or necessary accounts taken of what is due and owing under and by virtue of the said mortgage and would thus be entitled to have an account taken of what is due and owing under the covenant of the defendant as aforesaid with respect to the taxes and water rates payable to the City of Vancouver.

Judgment

This brings me to a consideration of the plea or counterclaim of the defendant for relief from forfeiture. It would seem as

though the defendant had made an arrangement satisfactory to the municipal authorities in the meantime to pay the taxes by monthly instalments of $50 per month and the water rates, at the rate of $15 per month. It is apparent, however, from the evidence, that the defendant may receive a net revenue from the property of more than $65 per month and in view of the annual taxes being the substantial amount of approximately $2,000, I think the defendant should make every possible effort to make larger substantial monthly payments and in any event should apply on account of the taxes and water rates in arrears the net income from the property each month and there will be liberty to the plaintiff to apply in case it should seem that the defendant is not doing so or in case of any other default. Subject to such right of the plaintiff to apply, the order I make is that upon payment by the defendant of the costs of the plaintiff up to the time of the filing and service of the statement of defence within three months from the taxation thereof without any set-off and upon payment by the defendant of the said arrears of taxes and water rates by monthly instalments as aforesaid and in any event the full amount of such arrears on or before the 31st day of December, 1935, the action will be dismissed but if there should be any default by the defendant in the payment of the said costs or of the said taxes and water rates as aforesaid the plaintiff will be entitled forthwith to judgment and the order of foreclosure as asked for with costs. I might add that I have carefully considered the question of costs and do not think the defendant should be allowed any costs as requested by counsel on his behalf.

Judgment

Order accordingly.

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1934

June 5.

CLAYTON v. BRITISH AMERICAN SECURITIES LTD.

CLAYTON *ET AL.* v. BRITISH AMERICAN SECURITIES LIMITED.

Practice—Fresh or further evidence — Application to adduce — Judgment delivered but not entered — Diligence — Conclusiveness—Discretion—Appeal.

John Clayton died on the 9th of January, 1910, and probate of his will was granted to three executors therein named. In April, 1911, by petition the British American Trust Company was appointed trustee in place of two of the trustees and continued to act with the third until he died in October, 1917, the company then continuing to act as sole trustee. The defendant Haynes was at all times manager of the company and the defendant *Innes* was its solicitor. In 1919 a petition was launched to transfer the trusts from the company to Haynes and *Innes*, but shortly after this was abandoned and a transfer of the trust property to Haynes and *Innes* was effected by deed under the Trustee Act. The trustees realized from the sale and getting in of the estate, about $203,000 and of this sum about $195,000 was let out on mortgages between 1911 and 1917. A large portion of the properties upon which the loans were made were as time went on sold for taxes without principal or interest being paid. In an action by the beneficiaries in September, 1932, the learned trial judge found the company guilty of breaches of trust in respect of improvident investment and careless supervision of mortgage securities. The Statute of Limitations pleaded by the company constituted a good defence as to a considerable portion of the breaches unless incidents arose subsequently to the impugned transactions which amounted to fraudulent concealment and prevented its operation. On the trial the question arose as to whether the beneficiaries were represented by solicitors on the application to change the trustees by deed under the Trustee Act in 1919. Haynes advised the beneficiaries that the change would be effected by petition and that Mr. *Shandley*, a solicitor, would represent them on the application, but it was found by the trial judge that Haynes did not instruct *Shandley* to act for the beneficiaries and that in fact, as *Shandley* testified, he acted on instructions for the company, and the beneficiaries were not represented. The defendants now apply before the judgment is entered for a rehearing and to introduce new evidence to shew that *Shandley* was mistaken in his recollection and that he did in fact appear for the beneficiaries. The evidence sought to be introduced includes that of Mr. *Maunsell*, a solicitor, who deposed that although *Shandley* prepared the petition, he (*Maunsell*) acted for the company and *Shandley* appeared for the beneficiaries. A bill of costs of *Innes* (now deceased) and one of the firm of *Elliott, Maclean & Shandley* were exhibited to support this contention, also Chambers Court records shewing appearances. Leave is asked also to cross-examine *Shandley* in the light of

the suggested new evidence. The trial judge concluded he should reopen the trial and allow the defendant company to adduce further evidence.

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

Per MACDONALD, C.J.B.C. and MARTIN, J.A.: The burden of proving due diligence has not been discharged, and apart from and in addition to lack of diligence if the learned judge below had applied his mind to the relevant material only, before him, he should have come to the conclusion that it could not be said that the proposed further evidence might probably have altered the judgment, and the motion to reopen should have been dismissed.

Per MCPHILLIPS and MACDONALD, JJ.A.: Before entry of judgment the trial judge has power to reopen the trial unfettered by any rules as to diligence, conclusiveness or otherwise and the Appellate Court cannot review that decision.

Per MACDONALD, J.A.: That even if the rules as to diligence and conclusiveness applied the lack of diligence on the part of the solicitor for the respondent company in not (after hearing Mr. *Shandley's* evidence in the witness box with reference to the Court records) pursuing enquiries in quarters plainly indicated, should be excused on the ground of surprise, as owing to the unique situation he could not reasonably be expected to take issue with a colleague acting in similar interests.

Per MCQUARRIE, J.A.: As the order was not drawn up the learned judge below could rehear the case and if there were material facts which were not brought to his attention at the trial, he should hear them.

APPEAL by plaintiffs from the order of FISHER, J. of the 19th of February, 1934, on a motion to submit and adduce fresh or further evidence with respect to the instructions and/or information given by Arthur E. Haynes, to *H. H. Shandley* in the month of January, 1919, with regard to the proposed appointment of the defendants Haynes and *Innes* as trustees of the estate of John Clayton, deceased; and for leave to submit and adduce fresh or further evidence with respect to representation by counsel on behalf of the beneficiaries generally and one of them in particular, on the hearing of the petition made to this Honourable Court on the 19th, 20th and 24th days of February, 1919, and as to who and what counsel represented the said beneficiaries and as to who and what counsel represented one of them in particular and as to who and what counsel represented the defendant British American Securities Limited (then known as British American Trust Company Limited) on the hearing of the said petition on the aforesaid dates. AND in that behalf to exhibit and read from the Chamber book of this Honourable Court (Victoria registry) covering the month of February, 1919; and to examine on oath *D. P. W. Maunsell*, barrister and solicitor of Victoria, and to exhibit and read the bill of costs of the said *Maunsell* dated and rendered on the 9th day of February, 1920; the bill of costs of Mr. *Mason* (now deceased) of Messrs. *Mason & Mann*, dated and rendered on the 9th day of February, 1920; the bill of costs of *A. S. Innes* (now deceased) dated and

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rendered on the 8th day of March, 1920; and the bill of costs of Messrs. *Elliott, Maclean & Shandley* rendered and dated the 25th day of June, 1919; and to further examine and re-examine or cross-examine on oath Mr. *H. H. Shandley*, barrister and solicitor of Victoria.

It was ordered that the trial should be reopened and the defendants be allowed to adduce further evidence as proposed, subject to admissibility, with liberty to the plaintiffs to adduce further evidence if they desire on the issue of fraudulent concealment.

The appeal was argued at Vancouver on the 22nd to the 29th of March, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

J. W. deB. Farris, K.C. (*Hall, K.C.*, with him), for appellants: John Clayton died in 1910 and his estate was administered by the British American Trust Company, of which the defendant Haynes was managing director, and the defendant *Innes* was solicitor, until 1919, when the company wished to abandon its trust powers and Haynes and *Innes* became joint trustees of the estate and the estate was administered by Haynes from that time up to the present. There was never an accounting by the British American Trust Company. The company pleaded the Statute of Limitations but it was found by the trial judge (1) that there was breach of trust, and (2) fraudulent concealment which took the case out of the statute. This is an appeal from the order reopening the case. They seek to introduce, (1) copy of bills of costs of the late Mr. *Innes* (there is an indication that *Shandley* acted for the children in it); (2) the Chamber list for February, 1919, in the Victoria registry; (3) bill of costs of *Elliott, Maclean & Shandley;* (4) oral evidence of Mr. *Maunsell.* The order was wrong as it violates the rule that the evidence cannot be allowed in after judgment, as it could have been obtained for use at the trial if due diligence had been exercised: see *Turnbull and Co.* v. *Duval* (1902), 71 L.J., P.C. 84; *Brown* v. *Dean* (1910), 79 L.J., K.B. 690; *Shedden* v. *Patrick and The Attorney-General* (1869), L.R. 1 H.L. (Sc.) 470; *The King* v. *The Minister of Lands* (1926), 37 B.C. 106; *Marino* v. *Sproat* (1902), 9 B.C. 335; *Stevenson* v. *Dandy* (1918), 43 D.L.R. 238 at p. 243; *Andrews* v. *Pacific*

Coast Coal Mines, Ltd. (1910), 15 B.C. 56; *Calder* v. *International Harvester Co. of America* (1918), 2 W.W.R. 905 at p. 909; *Riverside Lumber Co. Ltd.* v. *Calgary Water Power Co. Ltd.* (1916), 10 Alta. L.R. 128 at pp. 134 and 136. It must be a discretion as laid down by the rules of law: see *Young* v. *Keighly* (1809), 16 Ves. 348 at p. 351. In the *Brown* case, *supra,* it was held by the House of Lords that the county judge should not have ordered a new trial. The *Innes* bill of costs is inadmissible and the learned judge should not have looked at it until he decided it was admissible. As to a solicitor's duty to a client and whether the entries are admissible in evidence see *Rawlins* v. *Rickards* (1860), 28 Beav. 370; *Hope* v. *Hope* (1893), W.N. 20; *Mills* v. *Mills* (1920), 36 T.L.R. 772; *Massey* v. *Allen* (1879), 49 L.J., Ch. 76. This document was made thirteen months after the time material to this action: see *The Henry Coxon* (1878), 3 P.D. 156 at p. 158; Phipson on Evidence, 7th Ed., 279. They seek to introduce the Chamber record of February 19th, 1919: see *Dean* v. *Brown* (1909), 78 L.J., K.B. 840 at p. 847. The evidence should not be admitted unless conclusive. The Court should be satisfied that the evidence should be believed and if believed, that it is conclusive: see *Brown* v. *Dean* (1910), 79 L.J., K.B. 690 at p. 691; *Hip Foong Hong* v. *Neotia & Co.* (1918), 87 L.J., P.C. 144; *Anderson* v. *Titmas* (1877), 36 L.T. 711; *Guest* v. *Ibbotson* (1922), 91 L.J., K.B. 558 at p. 561. On the test of justice alone it would be unjust to reopen this case at this time.

Argument

Locke, for respondent: The learned judge has the same absolute and unfettered discretion to allow evidence as he has during the trial. That being so it is not necessary to shew there was the highest degree of diligence. In this case there was diligence in the conduct of the trial. Reasonable diligence is required and reasonable diligence was exercised. This is vastly different from ordering a new trial, and there has been the most careful safeguards for the plaintiffs in making this order. The order was made in the course of the trial and the only reason for interference would be in the case of an injustice being done. *Darling,* the defendant's solicitor, relied

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on the witness *Shandley* and did not look up the record until afterwards: see *Astor* v. *Barrett* (1920), 90 L.J., K.B. 177 at pp. 179 and 182. The learned judge below on seeing the record is entitled to make the order if he sees that *Shandley's* evidence is wrong. He wants to arrive at what is obviously the truth. The rights of the plaintiffs are carefully preserved: see *Marino* v. *Sproat* (1902), 9 B.C. 335. Until a judgment is entered the trial judge may withdraw his judgment, hear evidence and reverse it: see *In re St. Nazaire Company* (1879), 12 Ch. D. 88; *Miller's Case* (1876), 3 Ch. D. 661 at pp. 667-8; *Baden-Powell* v. *Wilson* (1894), W.N. 146; *In re Roberts. Evans* v. *Thomas* (1887), W.N. 231; *Stevenson* v. *Dandy* (1918), 3 W.W.R. 662 at p. 666; *In re Thomas* (1911), 80 L.J., Ch. 617; *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 186; Halsbury's Laws of England, Vol. 18, pp. 212-3; *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57; *Flower* v. *Lloyd* (1877), 6 Ch. D. 297. No Court of Appeal has ever directed a trial judge as to the conduct of the case.

Argument

What is asked here is a type of restraint: see *Neelon* v. *The City of Toronto* (1896), 25 S.C.R. 579; *Doe dem. Seeds* v. *Connoly* (1856), 8 N.B.R. 337; *Rogers* v. *Manley* (1880), 42 L.T. 584; *Nash* v. *Rochford Rural Council* (1917), 1 K.B. 384. If the Court thinks this is a matter of discretion there is no doubt of his powers until he is *functus*: see *Gardner* v. *Jay* (1885), 54 L.J., Ch. 762 at p. 764; *Royal Bank of Canada* v. *Whieldon* (1916), 23 B.C. 436 at 439; *American Securities Corporation* v. *Woldson* (1927), 39 B.C. 145 at p. 149; *Blygh* v. *Solloway, Mills & Co. Ltd.* (1930), 42 B.C. 531 at pp. 535-6; *Russell* v. *Stubbs, Limited (1908)* (1913), 2 K.B. 200 at p. 206; *Doe d. Nicoll* v. *Bower* (1851), 16 Q.B. 805. The principles that apply to applications for a new trial apply to a case such as this: see *In re The Neath Harbour Smelting and Rolling Works* (1885), 2 T.L.R. 94; *The Olympic and H.M.S. Hawke* (1913), 83 L.J., P. 113; *Nash* v. *Rochford Rural Council* (1916), 86 L.J., K.B. 370 at p. 374; *Rathbone* v. *Michael* (1910), 20 O.L.R. 503 at pp. 504 and 507. There is a vested right when judgment is signed: see *Guest* v. *Ibbotson* (1922), 91 L.J.,

K.B. 558. That the proposed evidence is conclusive is a matter for the trial judge to decide. When the evidence is produced the witness *Shandley* will admit his error and that is a determining factor. It is not necessary in a case of this kind that the evidence be conclusive: see *Guest* v. *Ibbotson* (1922), 91 L.J., K.B. 558; *Rex* v. *Copestake* (1926), 96 L.J., K.B. 65 at p. 69. In the case of *Brown* v. *Dean* (1910), 79 L.J., K.B. 690, Lord Shaw did not agree with Lord Loreburn that the evidence should be conclusive and Lord Mersey agreed. If it is material and relevant it should be admitted: see *Rex* v. *Robinson* (1917), 2 K.B. 108 at p. 110; *Sinanide* v. *La Maison Kasmeo* (1928), W.N. 164. The *Innes* bill, if taken from the original books is admissible in evidence, and this is for the trial judge to decide.

Farris, in reply: After judgment further evidence shall be admitted on special grounds only: see *Deighton* v. *Cockle* (1911), 81 L.J., K.B. 497; *Hambleton* v. *Brown* (1917), 86 L.J., K.B. 1223; *In re Bartlett* (1880), 50 L.J., Ch. 205; *Kelly* v. *Wade* (1890), 14 Pr. 66 at p. 69. The question of whether *Shandley* represented the beneficiaries is not a determining factor of the appeal. The determining factor is whether Haynes informed the beneficiaries of the true position of the estate.

Argument

Cur. adv. vult.

5th June, 1934.

MACDONALD, C.J.B.C.: The action is brought by the beneficiaries of John Clayton, deceased, against the defendant company as trustees thereof, for a declaration that plaintiffs are entitled to distribution of the estate and alleging breach of trust and loss resulting therefrom against defendant company and against the defendants Haynes and *Innes,* the latter now deceased.

MACDONALD, C.J.B.C.

In July, 1919, there was a change of trustees from the defendant company to the defendant Haynes, who had theretofore acted as manager of the defendant company and *A. S. Innes* who had acted as solicitor for the defendant company. The defendant company presented a petition on that date to a judge to change its constitution from that of a trust company to that of an

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ordinary one. Haynes, their manager, wrote a letter to the widow of Clayton, one of the plaintiffs herein, advising her of its intention and asking her to state her views with regard to it. She replied to this letter, as stated by Haynes:

> We would authorize you to have Mr. H. H. Shandley of the legal firm of Messrs. Elliott, Maclean & Shandley [the firm recommended by Haynes] to act on our behalf in this application.

In reply to this Haynes wrote:

> I have placed your interest in the hands of Messrs. Elliott, Maclean & Shandley.

The concealed fraud complained of by the plaintiffs consists in Haynes's failure to place the plaintiffs' interest in the hands of these solicitors and the want of notice of that failure and the fraudulent investment of the funds of the estate.

The petition was accordingly presented to a judge in Chambers by Mr. *Shandley* acting for the defendants, as he stated in evidence. That petition was afterwards abandoned on the advice of one *Maunsell* and the change of trustees was made pursuant to a statute in that behalf without notice to the plaintiffs. Mr. *Shandley* denied at the trial having received instructions to act for the plaintiffs. Mr. *Darling,* defendant's solicitor says he interviewed Mr. *Shandley* before the trial and was told that *Shandley's* memory was not clear as to what took place when the petition was before the Court, but that the note of the proceedings in Chambers of February, 1919, might shew what occurred there, but Mr. *Darling* appears to have been satisfied with Mr. *Shandley's* answer to his enquiries and did not inspect the said Chamber note, nor apparently make any further enquiries in any quarter.

MACDONALD, C.J.B.C.

The learned judge made an order after he had pronounced his judgment and delivered his reasons but before entry of the judgment, for a rehearing of the case, permitting the calling of Mr. *Shandley* and Mr. *Maunsell,* who was available at the trial but not called by the defendants, to be examined and cross-examined, and also allowing the introduction of a couple of bills of costs, which, I think, have no real bearing on the case. This rehearing was manifestly for the purposes of a new cross-examination of *Shandley* and the obtaining of *Maunsell's* evidence, neither of whom is shewn to have had knowledge of the defal-

cations of the defendant. The defendant did not apparently consult Mr. *Innes* in his lifetime, nor Mr. *Maunsell* regarding the Chamber proceedings or bills of costs, although Mr. *Innes* was a personal friend of Mr. Haynes. After the trial defendant became interested in finding out facts which might shew that the plaintiffs were represented by Mr. *Shandley* in the Chamber application. It then inspected for the first time the clerk's entry in his Chamber book which it was allowed to put in by the order appealed from and to introduce for the purpose of cross-examining *Shandley*. It also discovered that *Maunsell* had appeared in the case and that *Innes* had rendered to the plaintiffs a bill for his costs. The Chamber note is not conclusive on the point upon which it is desired to use it. It is of little value except for the purpose of cross-examination of *Shandley*.

Haynes swore at the trial that he had placed the plaintiffs' interest in the hands of Mr. *Shandley* and that Mr. *Shandley* appeared for the plaintiffs on the petition. *Shandley* on the other hand swore that he had not done so and that he did not appear for the plaintiffs on the petition; that he had presented the petition on behalf of the defendant company.

Judgment was pronounced in the plaintiffs' favour and the learned judge in his reasons for granting the rehearing said:

> I have come to the conclusion that I should reopen the trial and allow the defendant company to adduce further evidence as proposed with liberty to the plaintiffs to adduce further evidence if they so desire on the issue of fraudulent concealment. . . . My conclusion as above set out must not be understood as indicating any view whatsoever on my part as to the conclusiveness of the proposed evidence on the paramount issue of fraudulent concealment.

Under this order defendant proposes to call Mr. *Shandley* again and to call Mr. *Maunsell* and put in the clerk's said Chamber note and the bills of costs. The appeal is from that order.

Apart from the question of the learned trial judge's power to entertain a motion of the kind (which I do not need to question) at that stage of the proceedings the important question of the neglect of that reasonable diligence on the defendant's part required by the party asking for leave to adduce fresh evidence

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which was available at the trial although allegedly not discovered until after the trial and also the absence of its conclusiveness, arise. With every respect I do not think that the defendant has shewn any diligence whatever to procure the evidence which it now seeks to have admitted and I think also that the evidence sought is neither conclusive nor useful unless perhaps for supplementing or contradicting by cross-examination the evidence *Shandley* has already given.

It was argued on behalf of appellants that a trial judge, before his pronouncement has been formally entered, need not take into his consideration the question of due diligence in obtaining the evidence before trial or of its conclusiveness, in other words that he has an absolute discretion to admit further evidence and that therefore his order cannot be interfered with by an Appellate Court. If this contention were sound it would dispose of this appeal in respondent's favour but in my opinion it is not sound. I can find no difference in principle between the case of a County Court judge making an order for the admission of fresh evidence as to the necessity of following the decided cases and a trial judge making such an order. If a trial judge has jurisdiction to make such an order which I do not dispute he is just as much bound by the authorities affecting the terms upon which it ought to be made or refused as is a County Court judge who is authorized by the County Courts Act to rehear a case tried by him. I can see no distinction in this respect between the two or between either of them and the Court of Appeal, in respect of the law applicable. The reasons for precaution in all three Courts are the same.

MACDONALD, C.J.B.C.

Now in *Murtagh* v. *Barry* (1890), 59 L.J., Q.B. 388, Lord Coleridge, C.J. said:

> In this case the County Court judge granted, on application, a new trial, on the ground that the verdict was against the weight of evidence, and further stated that he considered that section 93 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), gave him absolute power to grant a new trial whenever he thought fit, and that, moreover, he was not in any way under the section in question bound by the decisions of superior Courts. This is not so; the section does not give County Court judges absolute power in any case, but only power to grant it for such reasons in law as a superior Court would grant it. Nor does the section absolve the County Court judge from being bound by the decision of superior Courts. In this case he is

clearly bound by the rules of law laid down by the House of Lords in the cases of *The Metropolitan Railway Company* v. *Wright* [(1886)], 55 L.J., Q.B. 401 and *The Commissioners of Railways* v. *Brown* [(1887)], 13 App. Cas. 133, and therefore this appeal must be allowed, with costs.

In *Brown* v. *Dean* (1910), A.C. 373, Lord Loreburn, L.C. said (p. 374):

When a litigant has obtained a judgment in a Court of justice, whether it be a County Court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.

And again in the same case (p. 375):

I agree with the judgment of Farwell, L.J., in which he says, referring to the earlier authorities, "In the present case the County Court judge has disregarded those principles, and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial—and that is clearly not enough."

And he added:

Those words [of the Act of 1888] do not give him an arbitrary discretion. "If he shall think just" means if he shall think just according to law. The rules to which I have referred are the law which he, like other judges, is bound to obey.

MACDONALD, C.J.B.C.

This is another denial of the absolute discretion of the County Court judge.

In the Court of Appeal—*Dean* v. *Brown* (1909), 78 L.J., K.B. 840, afterwards in the House of Lords, Lord Alverstone, C.J. said (p. 742):

It was contended before us that *Murtagh* v. *Barry* [(1890)], 59 L.J.Q.B. 388; 24 Q.B.D. 632 was wrongly decided, and that, at any rate in a case tried before a judge alone, the County Court judge had a greater power to order a new trial—in fact, a general discretion to order a new trial in any case which he thought just.

And added:

I think it impossible to contend that the learned County Court judge has an absolute discretion to order a new trial, and is not fettered by any of the rules upon which the High Court would act in a similar case.

It is common ground that a judge may reconsider his judgment before it is formally entered but it seems to me that reconsideration of evidence already before the judge is a different thing to permitting evidence to be given for the purpose of rehearing the case. I see no sound distinction between a new trial *in toto* and a rehearing of the case on new evidence involving as it does in this case examination and cross-examination of

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witnesses. At all events the fresh evidence ought only to be admitted under the rules adopted by the superior Courts. In considering the various County Court cases cited to us bearing on the subject it must be remembered that a County Court judge has power to grant a new trial, in other words to rehear the case and if the case be such as would justify the order on the principles adopted by the superior Courts there is no anomaly in the County Court judge admitting the new evidence for the purpose of rehearing it, but a Supreme Court judge has not power to grant a new trial and I am strongly of the opinion that he ought not in the exercise of judicial discretion, without the limitations aforesaid, do what is virtually the same thing. Therefore, I think the new evidence is not to be loosely admitted. There is I think a grave anomaly in a judge rehearing a case on fresh evidence when he has been given no power to order a new trial. Indeed I think that the inference to be drawn from the Judicature Act which was passed for the purpose of simplifying and elucidating the practice of our Courts is that the power of the superior Courts to admit new evidence was intended to be vested in the Court of Appeal only. Before the Judicature Act the judge might reconsider his judgment at any time whether entered or not, and although the Act does not deal with that fact the Courts since the passing of this Act have confined the right of the judge to reconsider his judgment to cases which have not been formally entered.

MACDONALD, C.J.B.C.

I think it is reserved to the Court of Appeal to rehear cases tried by the lower Courts when the circumstances, in their opinion, require a rehearing on the admission of new evidence. The intervention of a trial judge in a case of this kind comes very close to an invasion of the field of the Court of Appeal, if it does not invade it. There may be cases, as is suggested in at least one of the cases to which we were referred, where if during the trial a mistake has been made by the omission of some fact or document the judge may admit that fact or document if it be conclusive of the case, but he should see that reasonable diligence by those who failed in their duty to produce it at the proper time is required to be shewn and that evidence would be conclusive. The right of rehearing given by our Supreme Court Act

which in substance follows the Judicature Act in this respect is in general reserved to the Court of Appeal and to that Court alone, as Baggallay, L.J. said in *In re St. Nazaire Company* (1879), 12 Ch. D. 88 at p. 100:

> It appears to me that, with the particular exceptions which are to be found in different sections of the Act, the power of rehearing is vested in the Court of Appeal, and in that Court alone.

There is no doubt now that a judge may review or reconsider his judgment before it has been entered. He is not *functus officio* for all purposes. But such a review or reconsideration is, I think, to be regarded as distinct from rehearing on new evidence in general admitted for that purpose. There is only one case in the books which can be said to be contrary to what I have just said and, with great deference, I think that decision is wrong, *viz., Stevenson* v. *Dandy* (1918), 3 W.W.R. 662; 43 D.L.R. 238. The only authorities mentioned by Beck, J., who pronounced the principal judgment in that case, refer to the time within which reconsideration may take place, namely, before the entry of the judgment and he seems to assume that up to that time the judge has an absolute discretion to admit fresh evidence. It is true that in *Baden-Powell* v. *Wilson,* a decision of Kekewich, J. (1894), W.N. 146, is referred to, but that learned judge said that there was no opposition to the order for fresh evidence. It was done by tacit consent. *Rathbone* v. *Michael* (1909), 19 O.L.R. 428 was referred to but that case is not in point here since it was an order of the Divisional Court directing a referee to admit new evidence and to reconsider his finding in the light thereof. The Divisional Court had power to grant a rehearing. On the whole case I think the order ought not to have been made and should be set aside.

MARTIN, J.A.: This action is brought against the defendants as trustees for a declaration that they have and each of them has "committed wrongful breaches of trust in the administration of the estate of the late John Clayton" and for damages thereby suffered and for an account, and after a long trial of the case extending over many days in May, June, July and August of last year, *coram* Mr. Justice FISHER, that learned judge, on the 17th of August, reserved judgment upon the important questions in

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dispute and after about five months' time he, on 2nd January of this year, pronounced judgment in favour of the plaintiffs (appellants) in accordance with written reasons then handed down. The judgment so pronounced was not promptly entered, and on the 30th day of January the defendant respondent company launched a motion for "an order granting leave to the said defendant to submit and adduce fresh or further evidence with respect to the instructions given" by defendant Haynes to Mr. *H. H. Shandley,* a solicitor, as to the proposed appointment of defendants Haynes and *Innes* as trustees, and also "with respect to representation by counsel on behalf of "the beneficiaries generally on the hearing of the petition presented to this Court in February, 1919"—and also "as to who and what counsel represented said beneficiaries" and the said defendant company on that occasion.

The motion came on for hearing on the 7th of February and the learned judge reserved judgment thereupon till the 19th of that month when he pronounced judgment allowing the motion, for the following written reasons:

MARTIN, J.A.

I have come to the conclusion that I should reopen the trial and allow the defendant company to adduce further evidence as proposed, subject, of course to its admissibility, with liberty to the plaintiffs to adduce further evidence if they so desire on the issue of fraudulent concealment. As the matter will then be before me for reconsideration I refrain from saying anything further now except to make it perfectly clear, as I now endeavour to do, that my conclusion as above set out must not be understood as indicating any view whatsoever on my part as to the conclusiveness of the proposed evidence on the paramount issue of fraudulent concealment. I am only indicating that it would appear that it is material and so far as admissible should be before me for consideration.

A formal order was taken out implementing said judgment and reasons, by which it was declared that "the trial of this action be reopened," for that purpose, and that "further evidence" be received "subject to its admissibility," consisting of the evidence of a new witness, Mr. *D. P. W. Maunsell,* a barrister and solicitor, respecting the proceedings on said petition of 1919; of the Chamber book of the Court containing the entries relating to the hearing thereof; of the further examination of the said *H. H. Shandley* who had already given evidence at the trial as a witness called on behalf of the defendants Haynes and *Innes* respecting the change of trustees and said petition, and who had been cross-

examined by the plaintiffs, but not by the defendant company; and to "submit and tender as evidence" the bills of costs and book entries of the defendant *Innes* (deceased since the trial began), and also the bill of costs of Messrs. *Elliott, Maclean & Shandley* rendered to the British American Securities Limited, on the 25th of June, 1919, relating to said petition; and "liberty" was also given in general to the plaintiffs "if they so desire to adduce further evidence on the issue of fraudulent concealment," which, as the learned judge correctly said in his reasons, was "the paramount issue."

The plaintiffs appeal from this order upon several grounds, the principal one being that, assuming the learned judge had jurisdiction in the matter, it was improvidently exercised under the circumstances as being contrary to long-established principles safeguarding such applications, being, primarily, the necessity to shew due diligence to have the evidence at the trial, and the probability at least that it would have altered the judgment; and that all of the proposed evidence was in any event only merely corroborative at best, and much of it was wholly inadmissible and therefore immaterial; and also that the affidavit of the respondent's solicitor in support of the motion was defective and should have been rejected as to several statements because they were only based on "belief," without giving the grounds thereof as required by rule 523.

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It was submitted for the respondent company that so long as the judgment had not been entered the learned judge below had control over the action to the same extent as though the trial was still proceeding before him, and that he had an "absolute and unfettered discretion to set aside the judgment he had pronounced and reopen the trial" and to rehear it to any extent he thought proper, and that this Court has no jurisdiction to review his order to reopen the trial till after he has completed his rehearing thereof.

Many cases were cited in support of this sweeping submission (which would destroy all safeguards and commit a dangerous situation to the fate of a completely arbitrary discretion), but after that prolonged and careful examination of every one of them, and many more, which the perilous consequences of the

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submission require, I find that when they are properly understood and applied, not one of them is of real assistance to the respondent's position. Several of them relate only to the jurisdiction of the judge (which is not seriously questioned herein) and not to the safeguards which surround its exercise, and therefore the primary and crucial question of due diligence did not arise and was not even considered; and in others both the jurisdiction and the course proposed were expressly or tacitly agreed to; and in several the Courts concerned were appellate tribunals exercising "full discretionary powers" specially conferred by varying rules of Court, or otherwise, *vide, e.g., Rathbone* v. *Michael* (1909), 19 O.L.R. 428, 432; (1910), 20 O.L.R. 503, 507 (n.), 509-10; *Baden-Powell* v. *Wilson* (1894), W.N. 146; *In re Roberts. Evans* v. *Thomas* (1887), W.N. 231; and *Stevenson* v. *Dandy,* 14 Alta. L.R. 99; (1918), 3 W.W.R. 662. Much reliance was placed on certain observations of Beck, J., at p. 106 of the last case, to the effect that the rules which empower a Court of Appeal to hear further evidence "do not apply with the same force to the case merely of the same judge hearing further evidence," but the expression of that view was wholly *obiter dictum,* because the only question before the Court of Appeal was that of the jurisdiction of the judge below, and the other appellate judges therefore properly did not deal with the manner of its exercise; moreover Beck, J. cited no authority in support of his irrelevant view except his own prior dissenting judgment in *Riverside Lumber Co. Ltd.* v. *Calgary Water Power Co. Ltd.* (1916), 10 Alta. L.R. 128, and therefore, with all due respect, I feel bound to disregard his observations, though it is due to him to note that there is nothing in them to support the present submission that the judge has an absolute discretion, untrammelled by any safeguarding rules, but quite the reverse, because he goes no further than to "think" that they "do not apply with the same force" below as in appeal "whatever may be the exact rule in the latter case."

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Fortunately, however, we are not without decisions exactly upon the present situation and as this is a Chancery suit I have turned to that practice which, except as altered by the Judicature Acts, is still in force and is perpetuated by essentially identical, or analogous modern proceedings, both in England and Ontario,

and after careful investigation of that old Chancery practice (in which I may say my legal education began) upon the point, it is apparent that on the present motion (which properly took that form instead of the old petition) to the learned judge, in Court, who tried the case, the matter was in the same position as though an application after pronouncement of the decree but before enrolment thereof had been made to him by petition for leave to bring, not, be it remembered, a bill of review (which aims at the reversal of the decree and can only be brought after enrolment) but a supplemental bill, which in its frame nearly resembles a bill of review, praying that the cause may be further heard with respect to the new matter made the subject of the supplemental bill. This situation is well explained by Lord Chancellor Eldon in *Perry* v. *Phelips* (1810-11), 17 Ves. 173, at 178:

> Where the decree has been enrolled, there are two grounds of review: error apparent; and new facts; or facts, newly discovered. In the first case the plaintiff has a right to file a bill of review: in the two latter cases he must have the leave of the Court. Where the objection is upon matter of law apparent, or a mistake in law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is the subject of a rehearing; and there is no occasion for a bill in nature of a bill of review, unless a supplemental bill is also necessary to introduce new facts; in which case the cause will come on to be heard upon the matter of that supplemental bill together with a rehearing of the original cause (*Moore* v. *Moore* [(1755)], 2 Ves. Sen. 596): and the Court will vary the decree upon the rehearing; taking into consideration the new, or lately discovered, facts: . . .

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The whole practice is set out in that classic work of Lord Chancellor (of Ireland) Redesdale (Mitford) on Pleadings in Chancery, 5th Ed., pp. 101-12, particularly at pp. 102, 105, 108-10, and it is said at p. 110 respecting supplemental bills that the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review on discovery of new matter.

The requirements of the affidavit for that bill of review are given at p. 102:

> But if it is sought to reverse a decree signed and enrolled, upon discovery of some new matter, the leave of the Court must be first obtained; and this will not be granted but upon allegation upon oath that the new matter could not be produced, or used by the party claiming the benefit of it at the time when the decree was made. If the Court is satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination it will permit a bill of review to be filed.

Decisions innumerable fully bear out this statement and I

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shall only refer to a few of them, *viz.*, *Bingham* v. *Dawson* (1821), Jacob 243, wherein Lord Chancellor Eldon affirmed the judgment of the Vice-Chancellor in refusing the petition, saying at p. 245:

> If it is to be laid down that a party may go on to a decree without looking for a defence, and may then make applications of this kind, there will never be an end to them. It is not a case of a search made, and a miscarriage in that search, but it does not appear that there was any search at all.

This carries out the same Lord Chancellor's earlier decision in *Young* v. *Keighly* (1809), 16 Ves. 348, wherein he said, p. 351:

> This is an extremely important question. The evidence, the discovery of which is supposed to form a ground for this application, is very material; and I am persuaded, that by refusing the application I decide against the plaintiff in a case, in which he might, perhaps with confidence, have contended, that upon the evidence he was entitled to the whole money. On the other hand, it is most incumbent on the Court to take care, that the same subject shall not be put in a course of repeated litigation; and that, with a view to the termination of suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The Court must not therefore be induced by any persuasion as to the fact, that the plaintiff had originally a demand, which he could clearly have sustained, to break down rules, established to prevent general mischief at the expense even of particular injury.

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In *Ord* v. *Noel* (1821), 6 Madd. 127, the Vice-Chancellor refused a petition, saying, p. 130:

> In order to entitle a party to file a supplemental bill in the nature of a bill of review, it is necessary that the new matter should be discovered after the decree, or at least after the time when it could have been introduced into the cause. Because a party is not to be permitted to amend his case after the hearing, in respect of matter which was before in his power.

These decisions all carry out the ruling judgment of the House of Lords in *Ludlow* v. *Macartney* (1719), 2 Bro. P.C. 67, at p. 71:

> That the negligence or forgetfulness of persons under no sort of legal incapacity, and in matters lying within their own knowledge and power, was never deemed a sufficient foundation for a bill of review; it being an excuse which might serve at all times, and render suits endless.

Then we have the decision of the Privy Council in *Hosking* v. *Terry* (1862), 15 Moore, P.C. 493, wherein their Lordships thus stated the rule at pp. 503-4:

> We will consider, first, the rules established with respect to bills of review, and then deal with the difference which is suggested to exist between that course of proceeding and the review of a report.
>
> The rule which we collect from the cases cited in the argument is this: that the party who applies for permission to file a bill of review, on the

ground of having discovered new evidence, must shew that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment.

This, it will be noted, is in essentials an adoption of Lord Redesdale's rule above cited.

Their Lordships then proceeded to say, p. 505:

The question, then, is, whether the petitioners in the Court below brought themselves within the rules to which we have adverted as necessary conditions of their success; whether they shewed that the new evidence which they tendered was such as, if produced before, might probably have altered the judgment; and that such evidence could not, with reasonable diligence, have been produced on the original inquiry.

And they concluded thus, p. 515:

We were pressed, as in such cases judges always, of course, are pressed by counsel, with the argument, that if we reverse this order, we are putting a stop to proceedings which in the result might establish the rights of the respondents. It may be so. The same considerations were pressed upon Lord Eldon in *Young* v. *Keighly* (16 Ves. 351), and the answer which he gave was this:—

Then follows the quotation already given, and their Lordships went on to allow the appeal and restore the order of the judge below refusing the petition.

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It is needless to say that this decision is binding upon us to the fullest extent, and it is precisely applicable to and conclusive of the question and situation that we are now dealing with. It is not out of place, however, to note that in *Michael* v. *Fripp* (1870), 18 W.R. 423, Malins, V.-C., applied Lord Eldon's said rule, and also that in *Morrall* v. *Pritchard* (1865), 14 W.R. 172 at 173, Stuart, V.-C., did likewise, after that case had been cited, saying, in refusing the motion:

That in order to justify the Court in allowing such a bill as this to be filed, there must be an affidavit proving that new facts had been discovered, shewing a title to relief in the plaintiff, and also that the plaintiff could not have known these facts at the date of the decree.

The special application of this last case is that it was a motion to file a supplemental bill before the decree had been enrolled, as the Vice-Chancellor was quick to point out, and therefore not a bill of review, and so it is on all fours with the motion before us.

Another like case before enrolment is *Cresswell* v. *Jackson* (1865), 11 L.T. 530, wherein Romilly, M.R., dismissed a peti-

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tion for the same sort of supplemental bill, and many cases of the same nature are to be found in the Ontario reports and one of special importance is *Colonial Trusts* v. *Cameron* (1874), 21 Gr. 70, because it was a decision of the Full Court affirming the judgment of Blake, V.-C., refusing a "motion on petition . . . to open publication" (which means the formal opening—making public—to the parties of the depositions in the Master's office taken for the hearing—*Willan* v. *Willan* (1816), 19 Ves. 591) and set the case down to be again heard because (p. 74) of Lord Eldon's said rule, which he quotes and says, "I do not think . . . [it] has been, or should be, deviated from"; and then he further proceeds to quote with approval the passage from *Bingham* v. *Dawson* that I have cited *supra*.

The same Full Court in *Carradice* v. *Currie* (1872), 19 Gr. 108, had already dismissed a similar appeal from Strong, V.-C., who refused a petition to reopen his judgment for further evidence; and in *Dumble* v. *Cobourg and Peterborough R.W. Co.* (1881), 29 Gr. 121 (quoted with approval by Chancellor Boyd in *Armour* v. *Merchants Bank* (1896), 17 Pr. 108) there is a valuable contribution to the subject by Ferguson, J., and after applying the rules in *Hosking* v. *Terry* and *Young* v. *Keighly*, *supra*, he dismissed the petition saying, p. 133:

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> The authorities I think, are clear as to the necessity, in an application of this kind, of three things being shewn by reasonably strong evidence. 1st, That the newly discovered evidence is such that if it had been brought forward at the proper time in the suit or matter it might probably have changed the result; 2nd, That at the time when the applicant might have made use of it in the suit or matter neither he nor his agents had knowledge of such evidence: and 3rd, That it could not with reasonable diligence have been discovered in time to be so used. And another proposition is also clear upon the cases which is this, that the applicant must have used reasonable diligence after the discovery of the new evidence or his application will be refused.

And at pp. 134-5:

> The petitioners were, without doubt, I think, bound to shew affirmatively that at the time of and before the hearing of the cause, and at the time of the arbitration, the Cobourg Company had not any knowledge or notice of the fact upon which the petitioners now place reliance. . . . It appears to me that the authorities I have referred to shew that the petitioners' case, for relief is defective at the outset. This difficulty seems to lie at its very threshold. The burden was plainly on the petitioners to shew this, and, so far as I can perceive, they have wholly failed so to do: . . .

In *Synod* v. *DeBlaquiere* (1883), 10 Pr. 11, Proudfoot, J., in refusing a petition, said, p. 13:

> In giving leave to open a case upon the discovery of new evidence, an essential ingredient is that the evidence be not only newly discovered, and that it could not with reasonable diligence have been obtained earlier, but that it should be material.

It is clear from all these authorities that what was the old established practice, originating in the inherent jurisdiction of the Lord Chancellor (*In re St. Nazaire Company* (1879), 12 Ch. D. 88 at 97) derived from the Sovereign, and becoming moulded into definite principles by later formal rules and long practice in the course of time, has been carried into our modern practice and forms as an essential part thereof, and it is well said in *Bank of B. N. A.* v. *Western Assurance Co.* (1886), 11 Pr. 434 at 435, that

> there was no provision in the Judicature Act specifically applicable to the subject, and therefore the original practice of the Court remained.

And the Court of Appeal said, *per* Jessel, M.R., in *Flower* v. *Lloyd* (1877), 6 Ch. D. 297, at 299:

> In the first place it must be remembered that the old practice remains where not interfered with by the new rules, and secondly, it must be remembered that all the jurisdiction of the old Court of Chancery is transferred to the High Court of Justice.

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See also the judgment of Kay, J., in *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 35 W.R. 794, as explained in *Charles Bright & Co., Limited* v. *Sellar* (1904), 1 K.B. 6 at 12.

The way in which that jurisdiction has been distributed was considered by the same Court in *St. Nazaire's* case, *supra,* at p. 98, but not in relation to petitions for supplemental bills before enrolment of decree "up to which time," as the Court of Appeal said, *per* Cozens-Hardy, L.J., in *Charles Bright & Co. Limited* v. *Sellar's* case, *supra,* p. 11, "it was not considered to be, in the full sense of the term, a record of the Court," but it would be unprofitable and indeed irrelevant to pursue this matter of distribution, because the existence of the jurisdiction and the principles upon which it should be exercised herein have been made abundantly clear by said authorities, and the learned judge was in fact exercising it herein, and so I leave it, but noting that Cozens-Hardy, L.J., also said, p. 12:

> Actions of this nature do not invite the High Court to rehear upon the old materials. Fresh facts are brought forward, and the litigation may be

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well regarded as new and not appellate in its nature, because not involving any decision contrary to the previous decision of the High Court; which also appears from *Synod's* case, *supra,* p. 14.

In coming to a conclusion upon the principles which should guide us in deciding this matter I have, in citing cases, restricted myself to those which precisely relate to the particular jurisdiction that was exercised herein and refrained from alluding to those of a more or less different nature which meet appropriately, before the entry of judgment, other situations of a different kind, whereof many examples are to be found in the reports, *e.g., Miller's Case* (1876), 3 Ch. D. 661, 667 (explained in *St. Nazaire's* case, *supra,* 91) followed in *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141, at 144-5; *In re Suffield and Watts* (1888), 20 Q.B.D. 693, at 697; *Benor* v. *Canadian Mail Order Co.* (1907), 10 O.W.R. 1091; *Re Consolidated Gold Dredging and Power Co.* (1913), 5 O.W.N. 346; *Shepherd* v. *Robinson* (1919), 1 K.B. 474; nor for the same reasons, and to avoid confusion on this special practice, do I refer to cases under the "slip rule" or incorrect entry, etc., as in *Prevost* v. *Bedard* (1915), 51 S.C.R. 629; *Pearson* v. *Calder* (1916), 10 O.W.N. 93; *B. Wood & Son* v. *Sherman* (1917), 24 B.C. 376; *Standard Trusts Company* v. *Pulice* (1923), 32 B.C. 399; *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (1926), A.C. 761, 771; *Kinch* v. *Walcott* (1929), A.C. 482; and *Paper Machinery Ltd. et al.* v. *J. O. Ross Engineering Corp. et al.* (1934), S.C.R. 186, and Yearly Practice, 1934, p. 438 *et seq.;* nor to those on new trials in the County Courts on special statutes, as in *Brown* v. *Dean* (1910), A.C. 373; *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57; *Astor* v. *Barrett* (1920), 90 L.J., K.B. 177, 179, 183, and *Guest* v. *Ibbotson* (1922), 91 L.J., K.B. 558, or in District Courts as in *Sklar* v. *Borys* (1917), 10 Sask. L.R. 359; *Cleary et al.* v. *Hite* (1921), 14 Sask. L.R. 454; and *McLelland* v. *Carmichael* (1928), 1 W.W.R. 740; nor on fraud or surprise as in *Hip Foong Hong* v. *H. Neotia and Company* (1918), A.C. 888, 894; and *Flower* v. *Lloyd, supra,* pp. 301-2; and *Isaacs* v. *Hobhouse* (1918), 88 L.J., K.B. 668, 672; because such elements are absent here; nor on the reopening of arguments on questions of law in Appellate Courts which is at times

permitted, as in *Kimpton* v. *McKay* (1895), 4 B.C. 196; and at times refused, as in *Birmingham, &c. Land Co.* v. *London and North Western Rail. Co.* (1886), 56 L.J., Ch. 956, at 962, wherein also Cotton, L.J., draws a distinction between rehearing interlocutory and final orders.

It is also instructive to note that when the judges of the Divorce Court had the power to order a new trial before themselves alone or with a jury they enforced the due diligence rule as being beyond controversy—*vide, e.g.,* Sir Cresswell Cresswell's judgment in *Miller* v. *Miller and Hicks* (1862), 31 L.J., P. & M. 73, at 75.

In the application of said guiding principles to the facts of this case, I turn first to the first essential burden cast upon the defendant of shewing reasonable diligence in bringing all available evidence before the Court on the "paramount issue" of the fraudulent conduct of the defendant company in relation to its instructions to the firm of *Elliott, Maclean & Shandley* to act for and protect the interests of the plainiffs, which was specifically raised by paragraph 19 of the statement of claim, delivered on the 17th of September, 1932, and traversed by paragraph 19 of the defence, so from that delivery date the defendant company had full notice of the necessity of preparing itself to meet fully this most serious charge at the hearing which did not begin till the 22nd of May following, and also ample time to do so; and it is said in the affidavit of the company's solicitor, Mr. *Darling,* to found this application to reopen, that "previous to the trial" he went to Mr. *Shandley* and made enquiries from him respecting the retainer of his firm to act upon said petition of 1919 and his appearance in Chambers upon its presentation to CLEMENT, J., with the result:

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> That I was informed by Mr. *Shandley* that his own recollection was very meagre as to what occurred, but he remembered that all parties had consented to the change of trustees and that his firm had been instructed to make the application, and did so, and that when difficulties arose Mr. *Maunsell* came in and advised that the application should never have been made and the same was then dropped. I was also informed by Mr. *Shandley* that in his opinion Mr. *Maunsell* would not assist us; and that he, Mr. *Shandley* did not think Mr. *Maunsell* would be able to give any useful evidence with regard to the matters in question.

Now, to my mind, it is only possible to hold after he had been

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thus frankly told by Mr. *Shandley* that his "recollection was very meagre" (as might be expected) as to what occurred so long, fourteen years, ago, and that he had been superseded by another counsel, Mr. *Maunsell,* in the petition proceedings, that in the exercise of due diligence the unsatisfied enquirer should have done two obviously necessary things, *i.e.,* made enquiries from that counsel and also searched the Chamber book which would, or should, contain an official minute or record of the proceedings, but he admits that he did not do either of these necessary things. It is to be remembered that Mr. *Shandley's* firm was not acting in any way for the plaintiffs, but for defendants Haynes and *Innes,* so plaintiffs cannot be held responsible if the defendant company, which filed a separate defence, was "put off the scent," as it were, by enquiries from the solicitors of other defendants very largely in the same interest, because whatever may be the true relation of the defendants *qua* themselves they were all at arm's length *qua* the plaintiffs.

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Such was the dangerous situation for the company before trial, in the face of incomplete and insufficient information from *Maunsell* and the Chamber book, though both were then and thereafter always available in Victoria, and it was hazardously maintained up to and during the long trial, on the seventh day of which, on 7th June, *Shandley* was examined and gave his evidence to the best of his recollection, and in good faith, admittedly, in the course of which he admitted his lack of clear memory and said that he had endeavoured to supplement it by the said record of the Chamber book. He was examined by Mr. *Maclean, K.C.,* as a witness on behalf of the defendants Haynes and *Innes,* and cross-examined by the plaintiffs' counsel, but not by the defendant company's counsel, and during the course of that examination he said to the learned judge in reply to his very natural enquiry for "a transcript of what occurred" in Chambers, that he had a distinct recollection of instructions from Haynes, the manager of the company, to present the petition and

> After that I am taking the records of the Court, because I don't remember exactly what happened, until Mr. *Maunsell* was brought in. According to the records of the Court, which I have got and checked up there, I appeared on the return of the petition; you [Mr. *Maclean*] appeared after that—there was an adjournment, you personally appeared on the second, and Mr. *Maunsell* on the third. But the petition was adjourned— . . .

And he proceeded to give his recollection of what occurred when *Maunsell* came to see him about the matter and took charge of it and that

according to the records, he alone came into Court, and adjourned the hearing of the petition *sine die*.

THE COURT: Do not put it that way, please. Well, that is what I thought I saw.

THE COURT: It was adjourned? He made application to have it adjourned —well, it was on his appearance that the petition was adjourned *sine die* on the day he appeared. I was not there.

This petition was abandoned? That is what he said he was going to do.

And did you have anything further to do with the matter after that? Never heard anything about it again, and never thought about it until Mr. *Hall* [plaintiff's solicitor] started this inquiry. When he came and asked me what I knew about it—in fact I knew nothing about it.

On cross-examination by the plaintiffs' counsel, *Shandley* again was careful to base his evidence of the petition proceedings "according to the records," but he was quite definite that he had been retained by Haynes to act for the company and not for the beneficiaries, and had so continued to act until *Maunsell* superseded him.

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It is manifest, therefore, that the matter of the grave importance of the Court records and of *Maunsell's* evidence was not only made clear by counsel's examination but pointedly drawn out by the apt questions of the presiding judge himself, and yet no cross-examination was made by the company's counsel then present, Mr. *Darling*, nor any enquiry whatever thereafter from either source during the rest of the hearing which lasted for about nine days more during July and August and ended on the 17th of that month when judgment was reserved as aforesaid till the 2nd of January last, and it was only about three weeks after judgment had been pronounced that in consequence of something Mr. *Darling* had heard from Haynes about a bill of costs, dated 8th March, 1920, of Mr. *Innes*, then deceased, that he on the 24th of January went to *Maunsell* to make enquiries and to search the Court records about the matter, and also got presumably, and doubtless from his clients (because though it is not directly so stated in his affidavit yet that is the only and the obvious inference to be drawn) a bill of costs dated 25th of January, 1919, rendered by *Elliott, Maclean & Shandley* to the company. The only excuse offered for what it is submitted was a wholly inexcusable failure

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to investigate after such direct notice and exceptional opportunity (which completely exclude the element of surprise—*vide Isaacs* v. *Hobhouse* (1918), 88 L.J., K.B. 668, *per* Scrutton, L.J., at p. 673—and therefore it was not even advanced before us) is put forward in paragraph 6 of the said affidavit thus:

> That when the said *H. H. Shandley* was giving his evidence on the trial of this action I assumed that his statements in the witness box were in accordance with what a full investigation of all available records and facts would reasonably and truly disclose.

As to this I shall simply say that, in the discharge of my distasteful but unavoidable duty to pass upon the actions of professional gentlemen of good repute, I am compelled to hold that, under the circumstances this excuse is obviously not a justification, and therefore I must find that the burden of proving due diligence has not been discharged, and it follows that the motion should have been dismissed by the learned judge below and ought to be dismissed by this Court now as being the proper order that should have been made by him.

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In leaving the question of said affidavit, I do not overlook the objection taken, *supra*, that very important parts of it, *i.e.*, paragraph 11, containing a statement of the deponent's "belief" that Mr. *Shandley* would admit mistakes in his evidence, should have been wholly rejected as being contrary to rule 525 and the repeated decisions of this Court and other Appellate Courts, upholding that essential requirement, both reported and unreported, that such statements are "worthless and ought not to be received": *cf. In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274, 289; *The King* v. *Licence Commissioners of Point Grey* (1913), *ib.* 648; and *In re Fraser and Halpin* (1933), 1 W.W.R. 255 at 257-8, to which should be added as special decisions on the principle involved in this particular motion the ruling of Romilly, M.R., in *Thomas* v. *Rawlings* (1864), 34 Beav. 50, affirmed on appeal, p. 54, wherein he said, pp. 55-6:

> It is true that in the beginning of 1863, the present petitioner presented a petition, similar to the present, for leave to review the former decision, and rehear the former decree, alleging the same facts that he now alleges: but his petition was supported solely by his own affidavit of information and belief of the facts, to which the Court could not, of course, pay any attention. For if such were not the rule of the Court, it would, in every case, be in the power of a defeated defendant to stay the prosecution of proceedings under

a decree, and to occasion great expense as well as delay to the successful litigant, by the mere production of an affidavit of information and belief, which amounts to nothing, and which, if untrue, entails on him no risk and may be adduced with perfect impunity.

And this ruling was adopted by Ferguson, J., in *Dumble's* case, *supra,* p. 133. From all these authorities it is clear that this "worthless" statement should have been rejected by the learned judge below and particularly so because if it had been properly founded it was of a character to weigh heavily in favour of the application.

Then there is the further grave objection, that the learned judge, as his reasons shew, gave leave to adduce further evidence merely because it was "material and, so far as admissible, should be before me for consideration," thereby not applying his mind to, and disregarding the second essential rule that the evidence must not only be material but, as the Privy Council laid down in *Hosking's* case, *supra,* "of such a character that if it had been brought forward in the suit it might probably have altered the judgment," and it was submitted that the result of what he did was in effect to reopen the hearing to adduce new evidence of very doubtful import and before even passing on its admissibility, and then proceeding by this means of a sort of process of discovery after judgment to continue the hearing to ascertain the preponderance of testimony on disputed facts on which judgment had already been pronounced. This submission is, under the circumstances, in my opinion sound and should be upheld, because it is supported by abundant authority to the effect that no further evidence should be allowed to be introduced unless it is first shewn to be relevant and material as above defined in the cases cited—*vide* also Lord Chancellor Cottenham in *Hungate* v. *Gascoyne* (1846), 2 Ph. 25, wherein he on appeal reversed the Vice-Chancellor's order saying (p. 26):

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> The question on applications of this kind, was not merely whether the evidence was material, but whether looking at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the Court then came to; and being clearly of opinion that that was not the case in the present instance, he must discharge the Vice-Chancellor's order.

This ruling was followed by Vice-Chancellor Kindersley in *Wason* v. *The Westminster Improvement Commissioners* (1861),

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4 L.T. 80, wherein he dismissed the petition, and after quoting the language of Lord Cottenham who he says "was well versed in questions of this kind" went on to say, p. 81:

> Now that lays down the proposition very distinctly, and what appears to be the principle of it is this, that it is not sufficient to say it is material, it has some bearing on the matter; but the Court is bound to investigate the matter brought forward upon the application, to see if there be reasonable ground for thinking that upon a more full and complete discussion and investigation of the whole case, the Court might come to a different conclusion from that to which it had arrived.

And see also *Synod* v. *DeBlaquiere, supra,* p. 14.

There is also the further objection, flowing out of, and in addition to the preceding one, that the bill of costs of *Innes* should have been rejected because it could not be given in evidence against the plaintiffs, and several cases were cited in support of that submission, though it is so clearly inadmissible, to my mind, that no authority was needed to exclude it.

As to the bill of costs of *Elliott, Maclean & Shandley* it was submitted that it was not only not inconsistent with *Shandley's* testimony, but supported it, and undoubtedly it is ponderably open to that construction, but more than that, it was, and is not admissible at all because it came from the defendant company's own custody—*Turnbull & Co.* v. *Duval* (1902), A.C. 429, 436; *Ludlow's Case, supra,* and *Shedden* v. *Patrick and The Attorney-General* (1869), L.R. 1 H.L. (Sc.) 470 at 545.

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With respect to the entries in the Chamber book it is submitted that they are too meagre and indefinite to settle any doubtful point even if it can be deemed to be a "record" of the Court in the true sense, as to which it is not necessary to express any opinion, but the submission is substantially debatable: it is clear, however, that at best the bill and book can only be considered in the light laid down by Lord Hardwicke in the historic and oft-quoted case of *Norris* v. *Le Neve* (1743), 3 Atk. 25 (approved by the House of Lords, p. 79), wherein he said, p. 37:

> But suppose them to be new discoveries, and relevant to the case, they can amount to no more than corroboratives only of the former point in equity.

And at p. 35:

> The second question is, supposing it did come to the knowledge of the parties, after the cause has heard, whether it is relevant to the matters in question.

The only conclusion that I can come to, apart from and in

addition to the lack of due diligence, and with every respect to the learned judge, is that if he had applied his mind to the relevant material only before him in accordance with the said guiding principles and rules of evidence he should have come to the conclusion that it could not be said that the proposed further evidence "might probably have altered the judgment" (*Hosking's* case, *supra*) and therefore the motion to reopen it should have been dismissed: at the same time it is to be understood that if he had so applied his mind to that probability of alteration it would require a very exceptional case indeed to justify interference with his action because, as the judge already familiar with the witnesses and evidence, he would be in the best position to decide that nice question, and I only undertake that second essential decision because we are compelled to do so since he did not—Court of Appeal Rule 5, and *Flower* v. *Lloyd, supra,* 301.

There remains only one point to notice, *viz.*: it was submitted by the respondent company's counsel that this Court should not interfere with the said order because it was made during the course of the trial and therefore the judge was still seized of it and so he should be permitted to proceed with it, and that none of his rulings during the trial should be reviewed by this Court till after the formal entry of his judgment, and undoubtedly it is the fact that if that is the correct view of the situation, it is not the practice of this Court to interfere with interlocutory rulings during the course of the trial by entertaining appeals therefrom before the entry of the judgment.

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But that salutary practice only applies when the judge is still hearing the case and before he pronounces his judgment, for after he has done so the matter stands on an entirely different footing in principle, because the trial has been concluded and the party who has obtained a judgment in his favour has a right to appeal from an interlocutory order to reopen it made, as here, properly on a substantive motion (*Bank of B.N.A.* case, *supra,* 436) just as in the case of any other interlocutory order: and while it is true that the cause was and is still "pending" in the Court it is so only in the sense that a cause is always "pending" even after final judgment is entered till the rights of the parties are worked out—*cf. e.g., Ponnamma* v. *Arumogam* (1905), A.C. 383, 390

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(P.C.); *Blakey* v. *Latham* (1889), 43 Ch. D. 23; *Norton* v. *Norton* (1908), 99 L.T. 709; and *Ver Mehr* v. *Ver Mehr* (1921), P. 404.

By our rule 571 it is declared:

> Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the Court or judge shall otherwise order, and the judgment shall take effect from that date; provided that by special leave of the Court or a judge a judgment may be ante-dated or post-dated.

And by rule 572:

> In all cases not within the last two preceding Rules, the entry of judgment shall be dated as of the day on which the requisite documents are left with the registrar for the purpose of such entry, and the judgment shall take effect from that date.

And section 55 of the Supreme Court Act provides that:

> Any judge may reserve the giving of his decision on questions raised before him at any trial in civil causes, and his decision, whenever given, shall be considered as if given at the time of the trial.

This section and rule 572 apply to cases where the judge pronounces judgment after reserving it and, as here, hands down his judgment in writing to the registrar which is the primary "requisite document . . . for the purpose of such entry," and the long-established practice is set out in my judgment in *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312; 1 M.M.C. 408, to which, and the cases there cited, I refer and add thereto the statement from the judgment of Lord Esher, M.R., in *Holtby* v. *Hodgson* (1889), 24 Q.B.D. 103, at p. 106 that these new rules of the Judicature Act carry out the "very natural desire to make the procedure in the Queen's Bench and Chancery Divisions identical." And he goes on to point out, p. 107, that the clear intention of the rule is that,

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> from the moment when the judge has pronounced judgment, and entry of the judgment has been made, the judgment is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day when it is pronounced by the judge in Court.

And in following this case Lord Justice Buckley in *Deighton* v. *Cockle* (1911), 81 L.J., K.B. 497 said p. 502, "the actual signing of judgment was but the completion of something which had been done before."

This shews the great importance that is attached to the pronouncement of the judgment, which, as the same learned judge said (Lindley and Bowen, L.JJ., concurring) in a later case, is

the "decision obtained in the action"—*Onslow* v. *Commissioners of Inland Revenue* (1890), 25 Q.B.D. 465, 466, and hence it is well said in Daniell's Chancery Practice, 8th Ed., Vol. I., p. 683:

> A judgment is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final.

And at p. 696:

> When a judgment or order is pronounced by the Court, a note of it is taken down by the registrar in attendance. In simple cases he may settle and pass the order without notice to either party, but as a general rule minutes of the judgment or order are prepared from his note and copies issued to the solicitors of the parties. The party entitled to the carriage of the judgment or order should, immediately after it is pronounced, leave his papers with the assistant clerk to the registrar who was in Court on the day when it was made, to enable the registrar to draw up the judgment or order; and should duly proceed therein; otherwise, the registrar may draw it up at the instance of any other party, and deliver it to him.

And pp. 700-1:

> Unless the Court at the hearing, allows a cause to be afterwards spoken to on the minutes, the whole matter must be considered as concluded when the judgment or order is pronounced; and the parties must then go before the registrar, and it is his duty to prepare the judgment or order to the best of his ability; and until this has been done, the Court will not entertain any application to alter the minutes, unless in cases of difficulty, when the registrar himself requires the matter to be mentioned to the Court; when the minutes have been prepared by the registrar, if any party feels dissatisfied and wishes to bring the matter before the Court, he must, at his own peril, give a notice of motion, specifying the matters he complains of in the proposed judgment or order as settled by the registrar.

But the many cases already cited (to which I add *Moore* v. *Moore* (1755), 2 Ves. Sen. 596, 599, and *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, 495) which shew that an appeal lies from a discretionary interlocutory order of this description settle the question of the propriety of our entertaining this appeal, and this view of the long established and unquestioned practice is in entire accord with sections 51 and 53 of our Supreme Court Act which treats such interlocutory applications as not being "proceedings taken on rehearing" before this Court under our practice, because if they were then the learned judge had no jurisdiction at all in the matter and his order was a "thing of naught that could not be disobeyed"—*vide The Leonor* (1916), 3 P. Cas. 91, 104; (1917), 3 W.W.R. 861, and cases there cited.

In concluding my consideration of this unusual and difficult

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case, which raises for the first time in this Province a question of practice involving a principle of the gravest importance, I shall do so by citing the well known and oft-quoted statement of Lord Chelmsford in the House of Lords in *Shedden* v. *Patrick and The Attorney-General, supra,* at p. 545, on the general application of that fundamental principle to "all Courts," *viz.*:

> As to the suggestion of further evidence than that produced at the trial being, at the time of swearing the affidavits, in the possession of the appellants, and of other evidence being obtainable which was not then obtained, the judges were quite right in refusing a rehearing upon these grounds. It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case retried upon additional evidence, which was all the time within their power.

And that truly learned judge, Lord Justice Scrutton, in *Nash* v. *Rochford Rural Council* (1917), 1 K.B. 384, at 393, after citing Lord Chelmsford's statement went on to say:

> That is the principle which was acted upon by this Court in the first application in the case of *H.M.S. Hawke* [(1912)], 28 T.L.R. 319. I take the reason of it to be that in the interests of the State litigation should come to an end at some time or other; and if you are to allow parties who have been beaten in a case to come to the Court and say "Now let us have another try; we have found some more evidence," you will never finish litigation, and you will give great scope to the concoction of evidence.

It would, in my opinion, not be doing justice to the plaintiffs to depart from that principle in the present case and therefore I would allow the appeal and set aside the order complained of so that judgment may be entered as it was pronounced in favour of the appellants.

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MCPHILLIPS, J.A.: In this case a trial was had before Mr. Justice FISHER who gave a considered judgment but before the judgment was entered, the learned judge upon application made to him made an order for the reopening of the case. In my opinion this was a matter wholly within the jurisdiction of the learned trial judge and in my opinion with all respect to contrary opinion it is unassailable that the learned judge was and

still is seized of the case—he is not *functus officio*. Now the plaintiffs (appellants) appeal from the order made. I must confess that I fail to find any authority that would authorize this Court—the Court of Appeal—to introduce itself into the matter. There has been no judgment in the action and it is asking this Court to usurp the functions of the learned trial judge. This, in my opinion, is asking the impossible. For the Court of Appeal to reverse the order of the learned trial judge would be the usurpation of the functions and powers of the learned trial judge. It is only after judgment that the Court of Appeal has jurisdiction. In this connection I would refer to *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43. There it was held that the Court of Appeal "should not undertake the functions of a jury" and a new trial was ordered. Here the Court of Appeal is being asked in effect to interpose itself in the course of a trial—that is before judgment is entered—when the learned trial judge is still seized of the case and proposes to hear further evidence. Until final judgment and the due entry thereof, this Court is powerless.

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I would call particular attention to what Mr. Justice Anglin (later Chief Justice of Canada) said in the *McPhee* case, p. 57:

> Without undertaking the functions of the jury we cannot make such a finding.

Here this Court is being asked before judgment upon the trial to pass upon the relevancy of and admissibility of evidence and to really try the action and direct the learned trial judge what his judgment should be. I do not propose to go into the challenged matters of evidence already adduced or proposed to be adduced—that is the function of the learned trial judge. This Court will only have jurisdiction in that regard when the learned trial judge has completed the trial and given judgment followed by the due entry of the judgment. If an appeal therefrom to this Court be had or taken, then, and then only, will this Court be clothed with jurisdiction in the matter. This question of the power to reopen a judgment once same is delivered, but not followed by entry of the judgment, came up for consideration in British Columbia many years ago and the question was then decided founded upon the English and

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Ontario cases, and I will later point out that the decision of the Divisional Court was not only in conformity with the decisions then existent but conforms with the decisions of the present time. The case is *Kimpton* v. *McKay* (1895), 4 B.C. 196. It was a *capias* case. The Court held the defendant was entitled to be discharged and delivered a verbal judgment dismissing the appeal. The next day before the order was drawn up leave was asked for a reargument. It was held that it was in the discretion of the Court to vacate an order before it is drawn up and a reargument was had and the judgment first given was reversed. It is the unquestioned practice and one of very long standing as I understand it that until a judgment or order be entered it cannot be said to be beyond reconsideration or recall. It would certainly be an unprecedented situation that whilst the Court or a judge being still seized of the matter should be dictated to as to what the judgment or order should be. This would be plain usurpation of the powers of the Court below by the Court of Appeal. What is to be well borne in mind here is that the judgment of the learned trial judge has not been entered and the learned judge has made an order to reopen or rehear the case and that is the order here under appeal. I would refer to a recent case in the Privy Council—*Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (1926), A.C. 761 at pp. 763-772. Lord Atkinson delivered the judgment of their Lordships of the Privy Council and at pp. 771-2 said:

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> It is, of course, open to the plaintiffs, both attorney and principal, to bring an action to have the judgment entered up in suit No. 120 set aside. They do not take that course; they apparently want to have it set aside by motion. It is not necessary to cite on this point any authorities in addition to *Ainsworth* v. *Wilding* (1896), 1 Ch. 673, 676. Romer, J., in giving judgment in that case, said: "The Court has no jurisdiction, after the judgment at the trial has been passed and entered, to rehear the case. . . . . Formerly the Court of Chancery had power to rehear cases which had been tried before it even after the decree had been entered; but that is not so since the Judicature Acts. So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) Where there has been an accidental slip in the judgment as drawn up—in which case the Court has power to rectify it under Order XXVIII., r. 2; (2.) when the Court itself finds the judgment as drawn up does not correctly state what the Court actually decided and intended." He points out that he is not dealing with cases where the Court acts with the consent of the parties. Reference may be made also to *In re Swire* (1885), 30 Ch. D. 239.

Then we have the case of *Paper Machinery Ltd. et al.* v. *J. O. Ross Engineering Corp. et al.* (1934), S.C.R. 186. At p. 188 Rinfret, J. said:

> The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think,—and we see no reason why it should not also be the rule followed by this Court—that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) where there has been error in expressing the manifest intention of the Court (*In re Swire* (1885), 30 Ch. D. 239; *Preston Banking Company* v. *Allsup & Sons* (1895), 1 Ch. 141; *Ainsworth* v. *Wilding* (1896), 1 Ch. 673). In a very recent case (*MacCarthy* v. *Agard* (1933), 1 K.B. 417), the authorities were all reviewed and the principle was reasserted. In that case, although, indeed, all the judges expressed the view that the circumstances were particularly favourable to the applicant, but because neither of the conditions mentioned were present, the Court of Appeal came to the conclusion that it had no power to interfere. (The rule as stated was approved by the Privy Council in *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.* (1926), A.C. 761 at 771-2.)

Therefore we have the Supreme Court of Canada passing upon the point in conformity with the British Columbia decision as set forth in the *Kimpton* case at pp. 204-6. Here the judgment of Mr. Justice FISHER upon the trial has not been drawn up and entered. That being the case, in my opinion, the order made and here under appeal—that the trial be reopened and the case be reheard—was an order wholly within the jurisdiction of the learned trial judge and cannot be the subject of an appeal to this Court, he being still seized of the case. It will only be after the final judgment is drawn up and entered—if an appeal be brought therefrom—that any jurisdiction will reside in this Court to hear an appeal therefrom.

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I cannot part with the consideration of this appeal without making some observations relative to the appeal and the general effect upon the practice of the Courts if the appeal were acceded to, which, in my opinion, are fully warranted. Here we have a learned judge proceeding with a trial in a most important action in which concealed fraud is set up and after the close of the trial evidence is laid before the learned trial judge that leads him to think that his decision may be in error or at least that in the interests of justice further evidence should be received and at this time his proposed judgment has not been entered. He

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decides to reopen the case and admit of further evidence being given. He is in law still seized of the case, the judgment not being entered he is not *functus officio*: it is still *sub judicie,* as it has been stated, until the judgment is entered. There is still time for repentance. The learned trial judge, in effect, recalls his judgment and makes an order reopening the trial. It was not at all necessary and in my opinion wrong that any order should have been taken out. It was a ruling given by the learned trial judge after hearing counsel and was as all other rulings during a trial subject to the learned trial judge's consideration when he would come to give his final judgment. It would be intolerable that a trial judge should have his rulings during the course of a trial made the subject-matter of appeal to the Court of Appeal which is really what is being attempted here. Is it at all possible for counsel to be permitted to attend before this Court and invoke action by the Court of Appeal to stay the hand of the trial judge in the due and proper functions he exercises as one of His Majesty's judges sitting really for the King and have an Appellate Court *in terrorem* direct him as to what he might or might not do? It would be the destruction of the independence of the judiciary to countenance any such action and a Court of Appeal so holding would stultify itself in so doing. The trial judge is supreme—sitting in trials—and it is only when he has given his judgment, and it is duly entered, that an appeal may be taken to the Court of Appeal. There is no case in the books that will support that which is attempted here. Is the Court of Appeal to be allowed to impose its sense of justice upon the trial judge and tell him before he gives judgment that the Court of Appeal's sense of justice must be incorporated in the judgment, not the sense of justice of the trial judge, really setting aside the right of the trial judge to decide the facts after the evidence has been adduced? In truth, what is attempted here is that the Court of Appeal shall give the judgment which in first instance must be the judgment of the trial judge. I dismiss the matter from further consideration with saying that the appellants have the effrontery to ask this Court to usurp the functions of the learned trial judge and force him to give a judgment that may well revolt his conscience and

sense of justice when he is advising himself as to what his judgment should be on a review of all the facts brought before him. This would be the destruction of the fount of justice. The Court of Appeal's functions follow after judgment, and to well illustrate the extent and limitation upon the powers of the Court of Appeal, I would refer to what Lord Sumner said in his speech in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

Here we have a case of alleged concealed fraud. It is only necessary to state this to shew that the case is one peculiarly within the province of the trial judge—as to demeanour of witnesses—and how necessary it is that the trial judge should be left free and untrammelled and not have imposed upon him directions proceeding from the Court of Appeal or be hampered in any way as to the range and research that the trial should extend over. If the trial judge should fall into any error there is, of course, the Court of Appeal above, and most likely in this case the action will not halt before there is an appeal to the Supreme Court of Canada and possibly the Privy Council. That which is essential is this—that all relevant evidence must be allowed to be called otherwise it becomes nothing but a frustration of justice.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: Appeal from an order by Mr. Justice FISHER on the application of the defendant company reopening the trial of an action heard by him to admit new evidence after he delivered his written reasons but before entry of the formal order.

His Lordship found respondent company guilty of breaches of trust in the administration of appellants' estate (plaintiffs in the action) in respect to improvident investments and careless supervision of mortgage securities. The Statute of Limitations pleaded by the company constituted a good defence as to many at least of the breaches of trust alleged unless as appellants submitted incidents arising subsequently to the impugned transactions amounted to fraudulent concealment and prevented its operation. The trial judge found that the statute was

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ousted on this ground and it is to retry this branch of the case that he decided to reopen the trial of the action.

The alleged fraudulent concealment arose in connection with the transfer of the trusts from the company to Haynes and *Innes,* party defendants in the action, the former at all times manager of the company and the latter its solicitor. In 1919 a petition was launched for this purpose but upon a statement by the judge that Haynes and *Innes* would not be appointed as new trustees unless security was furnished the application was adjourned *sine die* and on the advice of Mr. *Maunsell* (who now comes forward with new evidence) acting for the company, the transfer of the trust property to Haynes and *Innes* was effected by deed under the Trustee Act.

A controversy arose at the trial as to whether or not the appellants were represented by solicitors on the application to change trustees by petition to the Court or by deed or appointment under the Trustee Act as aforesaid. If represented it is suggested that they could not now complain of ignorance of the alleged parlous condition of the estate after consenting (as they did) to a change of trusteeship from a company now said to be guilty of breaches of trust to its own manager and solicitor. Haynes advised appellant beneficiaries that the change would be effected by a petition to the Court and that if agreeable to them (and it was) Mr. *Shandley,* a reputable solicitor, would represent them on that application. If Haynes directly or through another instructed Mr. *Shandley* to act for the appellants he carried out his undertaking and it would, it is suggested, be the solicitor's duty to protect their interests by enquiry and passing of accounts. If, however, while advising appellants that he would do so he did not instruct Mr. *Shandley* to act for them but rather for the company they were to that extent deceived. The alleged fraudulent concealment ousting the statute arose therefore from the charge that Haynes prevented the appellants from obtaining knowledge of the true condition of the estate by leaving their interests unrepresented.

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The trial judge found that Mr. Haynes, manager of the company, did not instruct Mr. *Shandley* to act for the beneficiaries and that in fact, as Mr. *Shandley* testified, he acted on instruc-

tions for the company. It is now sought by the order under review to introduce new evidence to shew, if possible, that Mr. *Shandley* was mistaken in his recollection and that he did in fact appear for the appellants. If it should be found that Mr. *Shandley* was mistaken an alternative position arises, *viz.*, whether or not he was fully and properly instructed but we are not concerned with that at present.

The new evidence relates solely to this question of representation. Mr. *Maunsell* in an affidavit filed deposed that although Mr. *Shandley* prepared the petition he (*Maunsell*) acted for the respondent company while Mr. *Shandley* appeared in Chambers for the beneficiaries. A bill of costs of *Innes* (now deceased) and of the firm of *Elliott, Maclean & Shandley* were exhibited to support this contention; also Chamber Court records shewing appearances. Leave is asked to further cross-examine Mr. *Shandley* in the light of the suggested new evidence.

Mr. *Farris* submits that this order should be set aside because although until entry of the formal judgment the trial judge is seized of the cause the trial is no longer pending and after pronouncement of judgment by filing written reasons an order must be obtained (as here) before it can again become a pending action and then only upon compliance with well-established rules, *viz.*, that apart from fraud or surprise, due diligence in the discovery of the new evidence must be shewn; that it must at least be a determining factor in the result; that it will not result merely in placing oath against oath and generally the observance of rules familiar to us on applications to admit new evidence before a Court of Appeal. He submits that a judgment is effective from the day it is pronounced (*i.e.*, when reasons are delivered)—that entry is merely a formal record that it has been pronounced and there is no reason why if certain rules must be complied with after formal entry of the judgment (the trial judge being then *functus officio*) for the admission of new evidence before an Appellate Court they should not apply to a trial judge reopening the trial after the pronouncement by him of a judgment which without entry is so far effective that it may be the basis of garnishee proceedings. It is con-

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clusive he submits between the parties, subject to appeal, unless reopened on the terms referred to.

Mr. *Locke* submits that until judgment is formally entered the trial judge may exercise an unfettered discretion *ex mero motu* to hear further evidence. He may withdraw his judgment and substitute another one; insist that witnesses should be called or recalled; in short has sovereign powers over the conduct of the action of which he is still seized unhampered by any rules as to diligence, conclusiveness or otherwise. He is not—unlike an appellate tribunal—directing a new trial of the action but simply reopening or continuing the trial of a cause not quitted by him. If the trial judge may do so of his own motion he may do so, as here, on a formal application. An Appeal Court, he submits, should not interfere with this discretion until the cause is finally determined and except by way of appeal from the whole judgment. In the alternative he contends that if wrong in this submission the rules referred to were in fact complied with. As the order may be supported on any tenable ground we should assume that the trial judge found no lack of diligence, etc., and that in the exercise of his discretion we should not say he was clearly wrong. The first question however is important and should be decided, *viz.*, has the trial judge sovereign power before entry of judgment to resume the hearing of the cause unfettered by rules, save of course rules applicable in the general conduct of a trial?

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My view has always been that the trial judge might resume the hearing of an action apart from rules until entry of judgment, but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power how-

ever injustice might occur. If, *e.g.,* a document should be discovered after pronouncement of judgment, but before entry, shewing that the judgment was wrong and the trial judge was convinced of its authenticity no lack of diligence by a solicitor in not producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

There are reasons for rules governing the admission of evidence by an Appellate Court, not applicable to a trial judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary that at some arbitrary point the jurisdiction of the trial judge should end. A vested right to a judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial judge is in a better position to exercise discretion apart from rules than an Appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered. I may add that he might well be guided, although not bound by the rules referred to.

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In *In re St. Nazaire Company* (1879), 12 Ch. D. 88 at 91 Jessel, M.R. said during the argument:

> A judge can always reconsider his decision until the order has been drawn up.

In *Miller's Case* (1876), 3 Ch. D. 661 the same learned judge on an application by an official liquidator placed one Miller on the list of contributories and gave written reasons for doing so. Some weeks later, however, on learning that the attention of the Court was not called to a certain clause in the articles of association, he reheard the application and reversed his former order. There is no reference to lack of diligence. True it is not a case where it was sought to adduce new evidence.

In *Baden-Powell* v. *Wilson* (1894), W.N. 146 an action for rectification of a deed of settlement was dismissed by Kekewich, J. Before entry the plaintiff moved to have the action retried

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on the ground that material facts (possibly involving the introduction of new evidence) had not been drawn to the Court's attention. There is no reference to lack of diligence in failing to present the new facts at the first trial but it should be stated that no objection was taken to the motion. That should not however induce a judge to make an order bad in law. His Lordship said:

> As the order has not yet been drawn up, I have no doubt I may rehear the case. If there are material facts which were not brought to my attention at the trial, then I ought to hear them.

In *Bartley* v. *Thomas* (1911), 80 L.J., Ch. 617, Warrington, J. in respect to an order made by a Master in Chambers said at p. 622:

> What is it that renders an order finally effective so that there is no longer any possibility of going back from it? It seems to me that it is the passing and entering of the order. It is everyday practice that until an order is passed and entered the matter can be brought before the judge and if a mistake has been made it can be put right.

And I would add if new evidence is necessary to expose the mistake it may be adduced. I refer to *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141 where at p. 144, although the facts differ, as the order sought to be reopened was passed and entered, it is stated by all the judges *obiter*, particularly A. L. Smith, L.J. at p. 144, that an application to rehear could be entertained before the order was drawn up and perfected. That of course is conceded and I refer to it only to shew as of some value that the learned judges do not say that certain rules as to diligence, etc., must be complied with. He intimates that an application to rehear might be made before the order is drawn up. *In re St. Nazaire Company, supra,* and *In re Suffield and Watts* (1888), 20 Q.B.D. 693 were referred to with approval. In *In re Roberts. Evans* v. *Thomas* (1887), W.N. 231 on an interpleader summons heard in Chambers where Kay, J. barred the claimant under an erroneous impression of the facts on motion that the order be discharged said that:

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> He had no jurisdiction, on motion, to discharge the order made in Chambers, whether drawn up or not. But where an order had not been drawn up, whether it were an order made in Chambers or in Court, the judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making a final order.

He was not restricted by rules in deciding upon reconsideration. Mr. Justice FISHER undoubtedly could withdraw his judgment and write another if he thought that for any reason a point was insufficiently dealt with. It can only therefore be that rules are applicable, if at all, in the limited instance where it is sought to reopen to adduce further evidence. When it is conceded that a trial judge may do certain acts before entry of judgment it is impossible on principle to draw an arbitrary line marking what he may and may not do. He is either wholly seized of the cause or not at all.

In *Stevenson* v. *Dandy* (1918), 3 W.W.R. 662, a District Court judge in Alberta, after trial, gave written reasons for judgment. The case was later reargued and further reasons given for adhering to his first decision. Later, but before judgment was entered, an application was made to the trial judge by the defendant, based upon affidavits to be allowed to adduce further evidence. He held that he had no jurisdiction to entertain the application. On appeal to the Appellate Division Harvey, C.J. said at p. 662:

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> I agree with my brother Beck that the trial judge was in error in thinking that he had no jurisdiction to hear the new evidence. . . . The formal judgment should be set aside and the application renewed before the judge.

And with this Stuart, J. concurred. Beck, J. at p. 666, said:

> It is quite clear on the authorities and in full accordance with common sense and justice that a Court or judge is not bound by any decision until the judgment or order has actually been taken out and entered.

And at p. 667:

> The judge having undoubtedly jurisdiction to hear further evidence in the case ought to have considered the affidavits as to the further evidence suggested or proposed to be given and the circumstances under which and when it was discovered. He is the one in the best position to judge of its bearing upon the case in the light of the evidence already given. In considering such material I think a judge dealing with such an application is not bound by the same rule as is a Court of Appeal on an application to hear further evidence or to grant a new trial for the purpose of the further evidence being given upon a new trial, whatever may be the exact rule in the latter case. . . . The reasons for that rule do not apply with the same force to the case merely of the same judge hearing further evidence.

This is not a definite decision on the point under review. He states that the trial judge in respect to the new evidence offered should inquire into "the circumstances under which and when

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it was discovered," suggesting that he should be guided at least by rules of caution, adding that the rules governing admission of new evidence before a Court of Appeal do not apply to a trial judge hearing the same kind of application at least "with the same force." The submission at Bar is that while a trial judge would proceed with caution he is not restricted by any rules at all. He has the sovereign right to reopen before entry on any grounds that may appeal to his judgment. I think possibly from the statement that "he is the one in the best position to judge of its bearing upon the case" that the late Mr. Justice Beck held that view. He referred to *Riverside Lumber Co. Ltd.* v. *Calgary Water Power Co. Ltd.* (1916), 10 Alta. L.R. 128 but it is of no assistance. McCarthy, J. at pp. 136-7 does say however:

> It is unfortunate that the application for a new trial could not have been made to the trial judge who heard the evidence at the trial and would therefore be in a better position to decide whether the new evidence, if put in at the trial would have changed the result.

The significance of this statement (*obiter*) is that inferentially he indicates that the trial judge would not be restricted by rules as to diligence. The Court of Appeal found lack of diligence and if the trial judge was bound by that rule an application to him would be futile.

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The foregoing cases (except *Baden-Powell* v. *Wilson*) were concerned with orders in Chambers. I can conceive of no rational ground for applying different principles to applications to reopen the trial of an action. I think the discretion of the judge is untrammelled in either case.

Mr. *Farris* referred to *Young* v. *Keighly* (1809), 16 Ves. 348 as authority for the proposition that diligence had to be shewn and the rules already referred to complied with before a judgment would be reopened for review after publication and before enrolment according to the practice in Chancery prior to the Judicature Acts. This opens another field of inquiry. If it is true that the order in that case was not, after publication or delivery of reasons, enrolled (*i.e.*, perfected by entry) and if the old Chancery practice in respect to bills of review, by which such proceedings for a rehearing were commenced, still prevails the case would at first sight appear to support his contention. I have no doubt that the rules in Chancery and principles then

adhered to still apply. The point will arise, however, as to the proper distribution of these rules and principles after the reorganization of the Courts by Judicature Acts. Where must they now be given effect to—in the trial Court or the Court of Appeal?

In *Falcke* v. *Scottish Imperial Insurance Co.* (1887), 35 W.R. 794 where leave to bring an action in the nature of a bill of review was sought to vary a judgment of the Court of Appeal duly enrolled Kay, J. said:

> First of all it is said that the whole jurisdiction of the Court of Chancery to allow a bill of review is abolished. That is a startling proposition, for which I have heard no authority whatever. In my opinion that is not the law. The old jurisdiction to entertain such an application is not affected by the Judicature Acts. Now you can obtain leave on a summons instead of by a long petition, which was requisite under the old practice; but the grounds of obtaining relief are, as I understand it, precisely the same as before the Act. Leave can be obtained on any of the grounds mentioned in Lord Redesdale's well-known treatise on pleading, so that an action in the nature of a bill of review can be brought just the same as before the Judicature Act. Nothing has been called to my attention which in the least alters the former practice of the Court.

It was familiar practice in the Ontario Courts in early years. (*Dumble* v. *Cobourg and Peterborough R.W. Co.* (1881), 29 Gr. 121; *Colonial Trusts* v. *Cameron* (1874), 21 Gr. 70; *Carradice* v. *Currie* (1872), 19 Gr. 108; *Waters* v. *Shade* (1850), 2 Gr. 218; *Synod* v. *DeBlacquiere* (1883), 10 Pr. 11; *Bank of B.N.A.* v. *Western Assurance Co.* (1886), 11 Pr. 434.) MACDONALD, J.A.

Young v. *Keighly* is frequently referred to as an authority and the submission is that the old practice in Chancery in reference to a judge rehearing one of his own decisions and the rules followed still prevail. What must be borne in mind, however, is that the Chancery practice was by the Judicature Act transferred to two Courts, the trial Court and the Court of Appeal. In therefore considering Chancery practice and its application to modern practice one must have regard to the question propounded by Jessel, M.R. in *In re St. Nazaire Company, supra,* at p. 92, *viz.*:

> . . . The powers of the Court of Chancery have been transferred to the High Court and the Court of Appeal. To which of these is the jurisdiction of rehearing attached?

It should be borne in mind also that under Chancery practice where a judge reviewed either his own decision or that of

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another judge on a bill of review or a petition for rehearing he was really exercising appellate jurisdiction and if the rules as to diligence were laid down in the exercise of appellate rights that practice is transferred today not to the trial Court but to the Court of Appeal.

In *Charles Bright & Co., Limited* v. *Sellar* (1904), 1 K.B. 6 at p. 11, Cozens-Hardy, L.J. points out that:

> It is important to remember that in the Court of Chancery, until comparatively modern times—that is to say, until the reign of Charles II.—there was no appeal from the Lord Chancellor to any higher tribunal, but an opportunity was afforded of correcting decisions by means of a rehearing, which might be before the same or any other judge.

That is relief—now obtained by review on appeal—was then secured by a rehearing in the nature of an appeal whether the order was enrolled or not. Where the rehearing took place, as it often did, before another judge its appellate nature would be more marked. I refer to the judgment of Jessel, M.R. in *In re St. Nazaire Company, supra,* where he discusses how much of the old jurisdiction in Chancery was transferred to the High Court and how much to the Court of Appeal, at pp. 97 to 99 inclusive. In discussing the right of rehearing he asks at p. 98:

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> Now, what was that right of rehearing? Was it original jurisdiction, or was it appellate jurisdiction? There can, as it seems to me, be but one answer to that question—it was appellate jurisdiction.

It is obvious therefore that rules as to diligence, etc., in respect to new evidence applied on the hearing of bills of review in Chancery are now exercised by our Court of Appeal.

Elaborate rules in Chancery were framed in respect to bills of review, supplemental bills and petitions for rehearing, more appropriate for proceedings on appeal than for the ordinary resumption of the hearing, all now foreign to modern practice although the underlying principles remain distributed as aforesaid between two Courts in a manner most appropriate to the furtherance of justice. A bill of review would not be applicable to the case at Bar under the Chancery practice but rather a petition for rehearing. The Chancery practice (where the jurisdiction to grant a rehearing by a bill of review or supplemental bill was greater than at common law) to raise objections to a judgment was to launch an action of review to secure its reversal or variation based upon (1) error in law appearing on the face

of the judgment, (2) some new matter discovered after the judgment, (3) or on the ground that the judgment was obtained by fraud. At present redress may be obtained in the first instance after entry of the order only by appeal; in the second from the trial judge or Appellate Court while in the third instance an independent action is launched. I mention this to shew that in many cases at least relief—formerly obtainable by bills of review—is now procurable on appeal. In *Gould* v. *Tancred* (1742), 2 Atk. 533 in a foreclosure action a master's report was confirmed six years before the defendant petitioned for a bill of review on the ground of certain errors in the taking of the accounts by the master. It was treated in the same way as it would be treated by a Court of Appeal since the Judicature Act. Hardwicke, L.C. said, p. 533:

> Here the defendant's agents, attorney, clerk in Court, &c., attended the settling the account before the Master, which must bind the party, or there would be no end of controversies; and yet the whole tendency of this application is, that all may be set loose again; this makes me say it is a most unfavourable application; but however, if justice is with the defendant, it ought to prevail.

He states the rule at p. 534:

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> So that in effect, you cannot bring a bill of review, without having the leave of the Court in some shape; for if it is for matter apparent in the body of the decree, then upon the plea and demurrer of the defendant to the bill, the Court judges, whether there are any grounds for opening the enrolment, if it is for matter come to the plaintiff's knowledge after the pronouncing of the decree, then upon a petition for leave to bring a bill of review, the Court will judge if there is any foundation for such leave.

While therefore Chancery rules are not abolished, the *forum* for their application is changed. Since the Judicature Act the trial judge cannot entertain an application "for opening the enrolment." He is then *functus*. The Chancery judges were not *functus* even after enrolment. They might review their own decisions. Now a decision perfected by entry can only be reviewed by an Appellate Court corresponding to the Chancellor reviewing his own decision or that of another judge because of new evidence available or for other grounds.

I return now to *Young* v. *Keighly, supra,* relied upon as authority that to secure a rehearing before enrolment as in the case at Bar the rules as to diligence, etc., are binding. I would point out that the only distinction in practice before and after

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enrolment was in the form of the bill. In the former case a supplemental bill was filed. As already intimated the trial judge in Chancery was not *functus* in the sense now understood after entry of judgment by a trial judge. If therefore he was exercising virtually appellate jurisdiction on a bill filed after enrolment he was also doing so in entertaining a supplementary bill in the nature of a bill of review before enrolment. He might as already intimated hear a supplemental bill in respect to a cause heard by another judge where the judgment was not enrolled again emphasizing the appellate nature of the hearing. In any event it is not clear that the order dealt with was not enrolled. The Lord Chancellor merely states the practice where "it has not been enrolled," *viz.*, "the mode is by a supplemental bill in the nature of a bill of review." The original cause is reported in (1808), 15 Ves. 557, where on a bill praying for specific performance of a letter said to be a binding contract to execute an assignment of certain securities a decree therefor was pronounced but certain exceptions taken to the Master's report pursuant to the decree were given effect to and the bill dismissed. There was also a supplemental bill filed in the same cause arising out of an assignment for the benefit of creditors. A petition was then presented by the plaintiff for leave to file a bill of review on the ground of newly discovered evidence. It was founded on exceptions to a Master's report whether enrolled or not is not clear. The Lord Chancellor may be referring to the general practice only when he states at pp. 349-50 in 16 Ves.:

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> If the decree has been enrolled, a bill of review is necessary: if it has not been enrolled, the mode is by a supplemental bill in the nature of a bill of review.

No one would suggest that we have a similar practice today where "the decree has been enrolled" except as found in the Court of Appeal. The real point for decision was whether a new case might be presented; not additional evidence on a case already heard. Mitford on Pleading so treats it at p. 105 of the 5th edition. He says, referring to it as an authority:

> In this case the new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that on which the first decree was made.

Leaving the practice in Chancery we were referred to *Brown*

v. *Dean* (1910), 79 L.J., K.B. 690 to support appellants' submission. That, however, was a decision by the House of Lords on the right of a County Court judge to order a new trial pursuant to powers conferred by the County Courts Act of 1888. By the latter part of section 93 of that Act

> The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings.

This right to order a new trial was judicially interpreted to mean that the County Court judge could do so only on grounds that would justify the High Court in making the same order. We are not at all concerned with that point. If at the trial the County Court judge admitted illegal evidence and later perceived his error he could order a new trial in the same way as an Appellate Court might direct it on the same facts being brought before it. It is not an arbitrary discretion. Any rules of law binding upon the High Court in directing a new trial are binding upon the County Court judge (*Astor* v. *Barrett* (1920), 3 K.B. 633; *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57). It is therefore clear that in *Brown* v. *Dean* the Lord Chancellor at p. 691 is speaking of principles that govern an Appellate Court in granting a new trial holding that similar rules are applicable to the County Court under section 93. He says:

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> I agree with the judgment of Lord Justice Farwell, in which he says, referring to the earlier authorities, "In the present case the County Court judge has disregarded those principles and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which shew nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to shew that the information alleged could not with reasonable diligence have been obtained at the first trial." . . .
>
> But it is said we have no jurisdiction upon the ground that under the County Courts Act, 1888, a County Court judge is entitled to grant a new trial "if he shall think just." Those words do not give him an arbitrary discretion, but mean "if he shall think just according to law." The rules to which I have referred are the law, which he, like other judges, is bound to obey.

It was simply decided that a County Court judge was bound by the same rules as a Court of Appeal where on an application to it to admit new evidence it decided to order a new trial.

Principles governing the granting of new trials on fresh evidence available are not in issue. The law applicable in such

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cases is well settled. *Conrad* v. *Halifax Lumber Co.* (1918), 52 N.S.R. 250; *Friesen* v. *Braun* (1926), 20 Sask. L.R. 512; *Covlin* v. *Sprangler* (1923), 17 Sask. L.R. 254. The question is the power of the trial judge not to grant a new trial—unlike the County Court judge he has not that right—but to reopen it and hear further evidence while still seized of the cause. In a decision by a District Court judge in Saskatchewan, *McLelland* v. *Carmichael* (1928), 22 Sask. L.R. 281, affirmed on appeal by Embury, J., the underlying principles in *Brown* v. *Dean, supra,* and other cases discussed are correctly stated. I may add that the judgment of Beck, J. in *Stevenson* v. *Dandy, supra,* is quoted with approval.

My conclusion therefore is that before entry of judgment the trial judge has power to reopen the trial unfettered by the rules referred to and that the Appellate Court cannot review that discretion.

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While I am firm in that view I will, as the case might go further, deal with the alternative submission. If, as submitted contrary to my view, *Brown* v. *Dean, supra,* is applicable I would excuse the undoubted lack of diligence on the part of the solicitor for the respondent company in not (after hearing Mr. *Shandley's* evidence in the witness box, with its reference to Court records) pursuing enquiries in quarters plainly indicated, on the ground of surprise. The situation was unique. Mr. *Maclean* was counsel at the trial for Haynes and *Innes;* Mr. *Darling* for the respondent company, and the witness Mr. *Shandley* was and still is Mr. *Maclean's* partner. The two counsel, though acting for different parties, were engaged in the same interests advancing in the main at least similar defences. When Mr. Haynes, for whom Mr. *Maclean* was acting, gave evidence that, as he understood it, Mr. *Shandley* directly or indirectly was instructed to act for the appellants, a point strongly in his favour, Mr. *Maclean* believing that the facts were otherwise and being properly desirous that at whatever cost to his clients the defence should be based upon the true facts told the witness that he was mistaken and added that he would put Mr. *Shandley* in the box to prove it. Naturally all parties, including Mr. *Darling* would assume full knowledge of the facts on Mr. *Mac-*

lean's part before he would make a statement prejudicial to his client's interests. Mr. *Maclean,* a counsel of the highest reputation, had knowledge from Mr. *Shandley,* of equally good repute, that the latter acted for the company, or, at all events, was convinced that he did so and in that setting it is not surprising that Mr. *Darling* did not take issue with a colleague acting in interests similar to his own and fortified by the first hand knowledge of his partner. I think if the trial judge in making the order under review was influenced by this consideration, *viz.,* the element of surprise—and his order may be supported on any proper ground—I would not say that exercising his discretion we ought to interfere. A rule of law is a good servant but a bad master and should not be pressed unduly—I do not mean ignored—where the final objective is, as always, the interests of justice. Indeed an Appellate Court while recognizing the rules referred to will endeavour to find means in their application in a proper case to prevent injustice. That at least part of the new evidence is "gravely material and clearly relevant" I have no doubt. In the view I take I express no opinion as to the admissibility of part of it. That is a question for the trial judge. If the dangerous course is followed of introducing inadmissible evidence it may be dealt with on appeal.

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I would dismiss the appeal.

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

After delivery of his reasons for judgment herein, but before formal judgment was entered, the learned trial judge made the order of February 19th, 1934, for the reopening of the trial which had taken place before him. The said order set out the proceedings to be taken thereunder and stipulated the rights of the parties respectively as to submission of evidence and otherwise. From that order this appeal is taken. The formal judgment was never entered and the question raised by the appeal is whether under the circumstances the learned trial judge should have made the order for reopening of the trial. From the material contained in the appeal book and the arguments of counsel before us it would appear that a grave error may have been made, no doubt inadvertently, by one of the witnesses,

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H. H. Shandley, and that on the reopening of the trial that error if made will undoubtedly be rectified in view of the material and evidence which has come to light since the trial.

Counsel for the appellant argued with a good deal of force that there had been an absence of reasonable diligence on the part of the respondent in not having the evidence available and in order for submission before the trial but this was an unusual case. *Shandley* is a barrister of standing and I think Mr. *Darling* who appeared for the respondent at the trial may be excused for not having checked *Shandley's* statements in the same way he would no doubt have done in regard to an ordinary witness. I would therefore be against the appellants on this point.

As to the power of the learned trial judge to make the order complained of, I am of the opinion that the decision in *Baden-Powell* v. *Wilson* (1894), W.N. 146 should be followed although it appears there was in that case no opposition to the order for fresh evidence. In delivering the judgment Kekewich, J. made use of the following words which I think are applicable here:

> As the order has not yet been drawn up, I have no doubt I may rehear the case. If there are material facts which were not brought to my attention at the trial, then I ought to hear them.

I think the learned trial judge had a discretion in regard to the reopening of the trial, which he has properly exercised.

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

Solicitor for appellants: *H. C. Hall.*
Solicitor for respondent: *Clarence Darling.*

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IN RE ESTATE OF ELIZABETH SMITH, DECEASED

IN RE ESTATE OF ELIZABETH SMITH, DECEASED, AND THE TRUSTEE ACT.

Contract—Brother and sister—Sister living with brother without remuneration—Alleged understanding of remuneration by legacy—Petition—Costs.

Where services are rendered upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against her representatives to recover compensation for the services by way of damages for breach of the promise.

E. came from England to live with J. her brother in Vancouver in 1912, and with the exception of two or three years lived with him continually until her death in August, 1932. On petition by J. for a declaration that he is entitled to half her estate or remuneration at the rate of $20 per month for board, the petitioner swore that on his sister's arrival in Vancouver she stated she had made a will leaving half her estate to him, and that it was always understood between them that she was to be boarded and lodged free of charge in return for the share of her estate she said was devised to him. On E.'s decease no will was found and J. was appointed administrator of her estate.

Held, that neither the petitioner nor his wife is able to swear that any contract was entered into between the deceased and the petitioner whereby it was agreed that the petitioner should provide the deceased with board and lodging in consideration of her devising to him one-half of her estate. In the absence of evidence of any such agreement the petitioner cannot bring himself within the above rule and the prayer of the petition must be denied.

Walker v. *Boughner* (1889), 18 Ont. 448, applied.

PETITION by Joseph Smith to have it declared that he is entitled to either one-half of the estate of his sister Elizabeth Smith, who lived with him for about twenty years, or to remuneration at the rate of $20 per month for the period that she lived with him. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. at Vancouver on the 12th of September, 1934. Statement

Coburn, for petitioner.

Ghent Davis, for next of kin.

19th September, 1934.

MCDONALD, J.: The above named deceased died on the 14th of August, 1932, at Roberts Creek in British Columbia at the home of her brother, the petitioner, Joseph Smith, with whom and his wife she had made her home, with the exception of some Judgment

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two or three years, for a period of about twenty years preceding her death.

The petitioner alleges that when his sister came from England to live with him in November, 1912, she stated that she had made her will and left it in England whereby she had devised one-half of her estate to him and the remainder to two nieces. He further alleges in his petition and affidavit verifying same that it was always understood between his sister and himself that his sister was to be boarded and lodged by him free of charge in return for the share of her estate so said to have been devised to him.

When the deceased died no will of hers was to be found and the petitioner was appointed administrator of her estate.

The petitioner and his wife have been cross-examined upon their affidavits filed and upon a careful perusal of the evidence taken upon such cross-examinations I am unable to find anywhere that either the petitioner or his wife is able to swear that any contract was entered into between the deceased and the petitioner whereby it was agreed that the petitioner should provide the deceased with board and lodging in consideration of her devising to him one-half of her estate. In the absence of evidence of any such agreement the petitioner in my opinion cannot bring himself within the decisions which he relies upon, *e.g.*, *Walker* v. *Boughner* (1889), 18 Ont. 448; *Smith* v. *McGugan* (1892), 21 A.R. 542 and *Murdoch* v. *West* (1895), 24 S.C.R. 305 and similar cases. It is true that in their affidavits both petitioner and his wife do say that "it was always understood," etc., but as I say on cross-examination they are not able to give any evidence upon which any agreement can be found to have been made.

Judgment

I think therefore that the prayer of the petition to have it declared that the petitioner is entitled either to a one-half share in the estate or to remuneration at the rate of $20 per month must be denied. As a matter of record it perhaps should be noted that, although I questioned the propriety of having a question such as this come before the Court by way of petition, both parties agreed to have the matter dealt with in this summary way and I have dealt with it accordingly.

I think the costs of all parties as between solicitor and client should be paid out of the estate.

Petition refused.

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1934

March 6.

FORD v. FOOT

Practice—Striking out defence—Frivolous and vexatious—Abuse of process of the Court—Rules 223 and 284.

In a foreclosure action the defendant, in his statement of defence admitted giving the mortgage and denied the other allegations in the statement of claim, but set up no case of his own. On an application to set aside service of the writ, on the ground that it was issued without leave, the defendant's affidavit in support admitted the mortgage and the plaintiff's affidavit in reply proved the assignment to him of the mortgage with all rights and benefits thereunder, and the application was dismissed. On motion for an order that the defence be struck out under rules 223 and 284:—

Held, that in view of these facts the defence was a mere sham, framed with a view to gain time, and that the defendant had not set up any case of his own, and the statement of defence should be struck out with liberty to plead afresh within five days.

MOTION to strike out the defence under rules 223 and 284. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 1st of March, 1934. Statement

McIlree, for the motion.
Maclean, K.C., contra.

6th March, 1934.

ROBERTSON, J.: This is a motion for an order that the defence be struck out under rules 223 and 284, and also, under the inherent jurisdiction of the Court, on the grounds "that it discloses no reasonable answer, is unnecessary, frivolous, vexatious and a sham designed to embarrass or delay the plaintiff in the action," and for liberty to proceed forthwith with the plaintiff's pending application for a foreclosure order *nisi*. Judgment

The action is for foreclosure, by reason of the failure of the defendant to pay certain interest and taxes due in respect of a first mortgage, given by the defendant to one Joseph Henry Lee on the 20th of March, 1929, and by him assigned to the plaintiff.

In the defence the defendant admits giving the said mortgage to Lee. In addition to general denials therein, the only other defences pleaded, are (1) the denial of the assignment

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of the said mortgage by Lee to the plaintiff and the notice of such assignment by the plaintiff to the defendant; and (2) the denial that the plaintiff had paid taxes on the property in question; and (3) the giving of a second mortgage to the plaintiff in the circumstances set out in paragraph 7 of the statement of claim.

The defendant ended the defence by asking for a declaration (in view of the facts set out in said paragraph 7) that the plaintiff be declared a trustee of the mortgage in question for the defendant; and for an account of the amount paid by the plaintiff to Lee for the assignment of the mortgage by Lee to the plaintiff; and damages for the embarrassment and loss caused by the plaintiff in obtaining the said second mortgage and then failing to carry out an alleged "undertaking not to embarrass the plaintiff and misrepresenting to the defendant in that he would under no circumstances take over, meddle with, or acquire the said mortgage. He also claimed an account of the moneys in the hands of the receiver. On the hearing the defendant's counsel asked leave to plead these claims as a counterclaim and the plaintiff's counsel said he had no objection, but, as, for the reasons hereafter mentioned, I think they disclose no possible cause of action against the plaintiff, I can see no purpose in making such an amendment.

Judgment

The defence in paragraph 7 relates entirely to a second mortgage and has nothing to do with the claim herein. Further it alleges no contract between the plaintiff and the defendant with reference to the first mortgage nor is there anything alleged therein which shews any duty owing by the plaintiff to the defendant. As to the receiver, it is sufficient to say that the order appointing the receiver provided for his accounting. The plaintiff swears he paid taxes, as will hereafter appear, and the defendant does not deny this except in the defence. There only remains the first point as to the assignment of the mortgage and the notice thereof.

An appeal to the inherent jurisdiction of the Court is not concluded by what appears in the pleading, but all the facts can be gone into and affidavits as to the extraneous facts are admissible: see Annual Practice, 1934, p. 428. *Remmington* v.

Scoles (1897), 2 Ch. 1; *Cherry* v. *Canadian Bank of Commerce (No. 2)* (1932), 2 W.W.R. 501.

In *Remmington* v. *Scoles, supra,* the facts were that the defendant delivered a statement of defence in which he either denied, or refused to admit, each of the allegations of the statement of claim, but set up no case of his own. In previous proceedings in another action, he had admitted upon oath several of the statements, which he then denied, and had not denied any of the others. Romer, J. said at p. 5:

The facts in the statement of claim have substantially all been admitted by the defendant in prior proceedings. He clearly has no defence whatever to the action, and no substantial defence is shewn by the statement of defence; but obviously he wants to delay and hinder the plaintiffs, and for that reason and no other he puts in a statement of defence, denying or refusing to admit every substantial statement in the statement of claim. [His Lordship read the statement of defence.] I think under the circumstances this is not a real defence at all, but merely an abuse of the process of the Court, and I order it to be struck out.

This decision will in no way, as suggested on behalf of the defendant, render it possible in ordinary cases for a plaintiff to set aside a defence by trying by evidence on motion to shew the untruth of statements in the statement of defence. This is not a case of a plaintiff trying to shew by affidavits that the defendant's statements in his defence are untrue, and that the defence ought to be set aside. It is not really a case like that of *Hildige* v. *O'Farrell* [(1881)], 8 L.R. Ir. 158 and the cases there cited. This is, as I have pointed out, a case where the defendant throughout in his statement of defence simply refuses to admit statements in the statement of claim *en bloc,* obviously for some purpose of delay, and because he has no real defence whatever. This case is an exceptional one, and will not be in any case a precedent for such mischiefs as were guarded against in *Hildige* v. *O'Farrell* and the cases there cited.

Judgment

Lindley, L.J., said at pp. 6-7:

There is no doubt that what Romer, J. has done is very unusual. It cannot be said as a general proposition that a defendant is not at liberty to put in a defence confined to denying the allegations in the statement of claim. Of course, as a general rule he is entitled to do so. The learned judge is quite right in recognizing the rule which is referred to in and illustrated by *Hildige* v. *O'Farrell* [(1881)], 8 L.R. Ir. 158, that in a case of this kind the Court will not try whether the statement of defence is true or false. The ground on which the learned judge has proceeded is that this defence is a mere sham. Its character can be seen through and is stamped by the first three paragraphs, which deny what the defendant has stated on oath in former proceedings. Bearing that in mind, I think the learned judge has not gone wrong when he says, as he does, that this is a defence which never ought to have been put in, and that it is a mere sham defence —not an honest defence, but framed with a view to gain time. If the defendant has an honest defence—which probably he has not—he is at

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liberty to put it in. The order allows him to do so; but, as the learned judge has said, it will not do after what has passed for the defendant simply to deny everything in the statement of claim.

Lopes, L.J., said at p. 7:

I am of the same opinion. The learned judge observes that this is an exceptional case, and I think it is so. It is a case that can only be dealt with in the way in which he has dealt with it and we propose to deal with it. We are entitled thus to deal with it on account of the inherent jurisdiction in every Court of justice to prevent an abuse of its procedure, and I think that this defence, if it was permitted to remain on the file, would be an abuse of the procedure. But I desire to say that to induce the Court to exercise this jurisdiction it is not enough to satisfy the Court that the allegations of fact in the statement of defence or the statement of claim, as the case may be, are improbable or false, for to enter upon the question of their truth or falsehood would be trying the action prematurely. But the learned judge here thought—and in my opinion he was right in thinking—that, having regard to the character of this defence, bearing in mind what is known about the case beforehand and what is known about the previous proceedings in the case, this is a sham defence, and that it has been set up, not honestly and *bona fide* as a substantial defence, but for the purpose of delay.

The decision in the *Remmington* case is exceptional as the learned judges of the Court of Appeal point out, but, I think, only so, because, in that case the facts, in the statement of claim had, substantially, been admitted by the defendant in prior proceedings.

Judgment

As appears by the pleadings and proceedings herein the writ was issued on the 9th day of January, 1934, the statement of claim filed on the same day and both were served on the same day on the defendant. The statement of claim set up the mortgage, the assignment, duly registered, of the said mortgage to the plaintiff, and notice in writing of said assignment to the defendant. On the 10th of January, 1934, the defendant took out a motion to set aside the service of the writ of summons, on the ground that the plaintiff had not got leave to issue the writ, which motion came on before me. The defendant's affidavit in support of the motion admitted the mortgage to Lee. The plaintiff's affidavit in reply proved the assignment to him of the said mortgage together with all rights and benefits thereunder and all moneys secured thereby and the payment by him "as first mortgagee" on the 29th of September, 1933, of $140 for taxes and further that there was owing to him "as first mortgagee" in addition to the said sum of $140 the further sum of

$766.91 "paid out taxes to the end of 1932," and also for interest $1,540, and default by the defendant in paying said interest and taxes. The defendant made no reply to this affidavit. Further, the plaintiff filed an affidavit on this application proving that the defendant had received on or about the 7th of December, 1933, a letter advising him of the said assignment and his reply to plaintiff's solicitors, asking them to advise him of the consideration passed between Lee and Ford in respect of the assignment "because as an interested party he considered he was entitled to this information." I dealt with the motion to set aside the service of the writ on the basis that the plaintiff was the first mortgagee as appears by my reasons for judgment handed down 31st January, 1934, dismissing the motion.

Judgment

In view of the above facts, I find that the defence, as Lord Lindley says, *supra,* is a mere sham defence, framed with a view to gain time. The defendant has not set up any case of his own.

The statement of defence will be struck out, with liberty to the defendant to plead afresh within five days from the date hereof—see *Remmington* v. *Scoles, supra,* and *Critchell* v. *London and South Western Railway* (1907), 1 K.B. 860 at 864. I would draw attention ot the warning given by Lindley, L.J. in the *Remmington* case at p. 7.

The plaintiff is entitled to the costs of this application.

Motion granted.

ROBERTSON, J.

1934

June 8.

IN RE B.C. REALTY DEVELOPMENT CORPORATION, LTD.

IN RE B.C. REALTY DEVELOPMENT CORPORATION, LIMITED (A BANKRUPT).

Mortgage—Foreclosure—Judgment—Return of nulla bona—"Act of bankruptcy" — Mortgagors' and Purchasers' Relief Act, 1932, B.C. Stats. 1932, Cap. 35, Sec. 4 (1) (a) and (2) (a).

Under the Mortgagors' and Purchasers' Relief Act, 1932, only one order granting leave to commence or continue proceedings is contemplated, and an order to commence or continue proceedings includes all such steps as may be necessary to be taken either before or after judgment.

Statement

PETITION in bankruptcy against the B.C. Realty Development Corporation, Limited, the act of bankruptcy specified being the return by the sheriff of the writ of execution issued on a judgment against said corporation, and endorsed to the effect that the sheriff could find no goods whereupon to levy or seize. Heard by ROBERTSON, J. at Vancouver on the 3rd of June, 1934.

Hossie, K.C., for petitioning creditor.
L. St. M. Du Moulin, for debtor.

8th June, 1934.

Judgment

ROBERTSON, J.: On January 8th, 1934, an order was made under the provisions of the Mortgagors' and Purchasers' Relief Act, 1932, B.C. Stats. 1932, Cap. 35 (hereinafter called the said Act) giving the plaintiff herein liberty

to commence proceedings by way of foreclosure proceedings against the intended defendant B.C. Realty Development Corporation, Limited, trustee on behalf of the persons mentioned in a declaration of trust made by the trustee on the 7th day of August, A.D. 1929, and filed in the Land Registry office at Vancouver, B.C., as mortgagor—for the recovery of the principal money secured by a certain mortgage dated the 5th day of December, A.D. 1930, in which the intended defendant, B.C. Realty Development Corporation, Limited, mortgaged certain property more particularly therein set out to the intended plaintiff—including liberty to take proceedings against the said intended defendants on their covenants to pay contained in the said mortgage.

On the 16th of March, 1934, the plaintiff obtained judgment against the defendant corporation (hereinafter called the defendant) for a large sum and on March 26th, 1934, issued a

writ of execution which was returned by the sheriff on April 4th, 1934, endorsed to the effect, that the sheriff could find no goods whereupon to levy or to seize or take and the plaintiff now presents a petition in bankruptcy against the defendant in which petition the act of bankruptcy specified is the return, *supra*.

The first objection taken by counsel for the defendant is based upon section 4 (1) (*a*) of the said Act which reads as follows:

4. (1.) No person shall:—

(*a*.) Take or continue proceedings in any Court by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of a judgment or order of any Court, whether entered or made before or after the commencement of this Act, for the recovery of principal money secured by any instrument:

and is, that no leave to proceed to execution on the judgment herein was obtained, and that by virtue of section 12 of the said Act the execution proceedings were null and void and, therefore, there is no act of bankruptcy. The latter part of the subsection, *supra*, commencing "or proceed to execution" must, I think, apply only to a judgment or an order made upon a trial, or the hearing of an application, prior to the commencement of the Act and which judgment or order was not actually entered, until after the commencement of the Act, or to a judgment upon a trial or the hearing of an application where judgment was reserved and delivered after the Act: for, after the commencement of the Act, it would not be legally possible to proceed with the trial of an action or the hearing of an application or execution, unless an order was first made, under the first part of the subsection, "giving leave to continue proceedings," and there would, therefore, be no necessity for the balance of the section if the objection were to prevail.

Judgment

This view is strengthened by a consideration of subsection (2) (*a*) of section 4 of the said Act which reads as follows:

(2.) The application shall be upon motion in a summary manner, and shall be made:—

(*a*.) In every case in which it is sought to commence or continue proceedings in the Supreme Court, or to exercise some right or remedy or take any proceeding or do any act out of any Court in the Victoria or Vancouver Judicial District, to a judge of the Supreme Court sitting in Chambers, and in any other judicial district or part thereof to the local judge of the

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IN RE B.C. REALTY DEVELOPMENT CORPORATION, LTD.

Supreme Court having jurisdiction therein sitting in Chambers, or to a judge of the Supreme Court sitting in Chambers.

It will be noticed that subsection (2) (*a*) makes no provision for an application for "leave to proceed to execution," thereby indicating that leave to commence, or to continue proceedings would include the right to take all proceedings, as well after, as before, judgment.

I am of the opinion that only one order was contemplated under the Act, and, that an order to commence, or continue proceedings, includes all such steps as may be necessary to be taken, either before or after judgment.

The second objection is that while in fact the defendant is a trustee, the judgment is against it "personally" because it did not limit its liability "by proper language." Further that it is merely a holding company, that it pays no salaries, and has not declared any dividends, and its assets available for its creditors are negligible, and therefore, in the exercise of its discretion, the Court should not make a receiving order. Whatever the reason may have been, the defendant is liable under the said judgment just as if it had been recovered for moneys loaned to it for its own use and benefit.

Judgment

The material shews that the defendant is a trustee of the lands, covered by the said mortgage, for seven persons who requested the defendant to give the said mortgage, and, no doubt, the defendant has a right of indemnity against its *cestuis que trustent*. This is, or may be, a valuable right which a trustee in bankruptcy would be in a better position to enforce in the interests of the creditors, and I, therefore, think that this objection fails.

It is further objected that a receiving order would affect the right of redemption in the order *nisi* herein but I do not think the rights of the mortgagor would be at all affected in this regard.

The petition is granted and George Leonard Salter is constituted custodian of the estate, he to give security pursuant to the rules.

The petitioner is entitled to costs.

Petition granted.

IN RE B.C. EMPIRE SALMON CANNERS LIMITED (IN BANKRUPTCY), DEBTOR AND CHUNG DOT, SOMETIMES KNOWN AS CHONG DOT, CLAIMANT.

MCDONALD, J.

1934

Sept. 25.

IN RE B.C. EMPIRE SALMON CANNERS LTD. AND CHUNG DOT

Priority—Equitable assignment—Order for payment of money—Evidence of intention—Bankruptcy.

On April 25th, 1933, the debtor (called the canner) entered into a contract with D. (called the agent) whereby it was agreed that the agent should sell the canner's 1933 pack of salmon and account in due course for the proceeds. On the same day the canner contracted with C., the claimant, under which C. provided Chinese labour required to make the pack at a certain price per case. On the same day the canner gave C. an order on the agent as follows: "Within ten days of the close of our salmon-canning season of 1933, from any credit balance due us from the sale of our canned salmon, kindly pay to Chong Dot (C.) the balance of Chinese contract moneys due on a *pro rata* per case basis as such goods are sold and paid for." The season closed on November 21st, 1933, the order was presented to the agent on December 14th, 1933, after the whole of the season's pack had been in possession of the agent, and the canner became bankrupt on December 19th, 1933. C.'s claim as a secured creditor for the amount owing by the agent to the canner was rejected by the trustee in bankruptcy.

Held, on appeal, by MCDONALD, J., that the order which must be taken to have been given pursuant to the contract, constituted a valid equitable assignment, and the claimant is entitled to succeed.

APPEAL by claimant from the refusal of the trustee in bankruptcy of the B.C. Empire Salmon Canners Limited to allow his claim as a secured creditor upon the order of the canner directed to its agent to pay the claimant the balance of the moneys due as the goods are sold and paid for. The facts are set out in the reasons for judgment. Argued before MCDONALD, J. on the 18th of September, 1934. Statement

I. A. Shaw, for claimant.

Macnaghten, for trustee in bankruptcy.

25th September, 1934.

MCDONALD, J.: On or about the 25th of April, 1933, B.C. Empire Salmon Canners Limited, herein for convenience called the canner, entered into a contract with M. DesBrisay and Com- Judgment

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IN RE B.C. EMPIRE SALMON CANNERS LTD. AND CHUNG DOT

pany, herein called the agent, whereby it was agreed that the agent should sell the canner's 1933 pack of salmon and account in due course for the proceeds. On that date the canner entered into a contract with Chong Dot, the claimant, under which the claimant provided the Chinese labour required to make the pack, at the price of 52 cents per case for flats and 35 cents for talls. As events turned out (the pack not exceeding 10,000 cases), the canner agreed to reduce its indebtedness to the claimant within 12 days "after closing of cannery operations" to an amount not exceeding $2,000, and by way of security to the claimant, inasmuch as it was not expected that the agent would sell the whole of the pack before the Spring of 1934, the canner agreed to give to the claimant and did give him on said 25th of April, 1933, an order on the agent to pay all moneys owing (to the claimant) "when canned salmon is sold and paid for in full"—that is to say sold and paid for by the agent.

The form and use made of this order to pay gives rise to this litigation. It is addressed to the agent in the following form:

Judgment

Within ten days of the close of our salmon-canning season of 1933, from any credit balance due us from the sale of our canned salmon kindly pay to Chong Dot the balance of Chinese contract moneys due on a *pro rata* per case basis as such goods are sold and paid for.

The season closed 21st November, 1933, the order was duly and properly presented to the agent (as I hold) for the first time on 14th December, 1933, after the whole of the season's pack was or had been in the possession and control of the agent and the canner became bankrupt 19th December, 1933. I am not able to find on the evidence that the claimant had any knowledge of the impending bankruptcy. The question for decision is whether the order is a valid equitable assignment of the moneys due to the claimant up to the amount eventually owing by the agent to the canner, so as to make the claimant a secured creditor for that amount. The claim was rejected by the trustee and now comes up by way of appeal from that decision.

Admittedly the contract and order are awkwardly drawn, but I think notwithstanding the rather confused way in which the witness McMillan gave his evidence, the intention of the parties may be ascertained and that from its date, *viz.*, 25th April, 1933, the order, which must be taken to have been given pursuant to

the contract, constituted a valid, equitable assignment. In my opinion the date of presentation of the order is not material. Presentation would of course be necessary before the assignee could under the Laws Declaratory Act bring an action as assignee. But that is not the point here: the point is, was there a valid equitable assignment and if so, when? I think there was, on the date when the order was given, and that it is immaterial that when the order was presented, no moneys were presently due and payable by the agent to the canner. To my mind the intention of the parties, as stated above, is reasonably clear and that intention ought if possible to be carried out. As between the canner and the claimant the order became operative on its date. As against the agent it was not enforceable until after presentation nor until after the agent was in funds arising from the sale of salmon and (but for the order) due and payable to the canner. At any time after 1st December, 1933, and after presentation of the order, then so soon as and from time to time as the agent completed the sale of the season's pack, the order (or equitable assignment) became enforceable as against the agent and the intervening bankruptcy of the canner on 19th December, 1933, does not in my opinion affect the claimant's rights.

Judgment

There is no doubt of course that the order does not follow specifically the terms of the contract but after all we are dealing with a claim arising in equity and we must assume that to have been done which ought to have been done. If I have reached the right conclusion, as to the true construction of the documents, the law presents no great difficulty and the claimant is entitled to succeed. See *In re Maritime Radio Corporation, Ltd.* (1927), 8 C.B.R. 153; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Lane* v. *Dungannon Agricultural Association* (1892), 22 Ont. 272.

The appeal is allowed with costs.

Appeal allowed.

MCDONALD, J. (In Chambers)

1934

Sept. 28.

WIGHTMAN v. WIGHTMAN

WIGHTMAN v. WIGHTMAN.

Husband and wife—Divorce—Alimony—R.S.B.C. 1924, Cap. 70, Sec. 36.

On the application of a wife in a divorce action to enforce by way of equitable execution a decree for alimony, an order may be made for the appointment of a receiver to receive the husband's salary as a motorman under section 36 of the Divorce and Matrimonial Causes Act.

Statement

APPLICATION by a wife that a receiver be appointed to receive a husband's salary under section 36 of the Divorce and Matrimonial Causes Act. Heard by MCDONALD, J. in Chambers at Vancouver on the 24th of September, 1934.

J. A. Grimmett, for the application.
D. W. F. McDonald, contra.

28th September, 1934.

Judgment

MCDONALD, J.: Application by a wife in a divorce action to enforce by way of equitable execution a decree for alimony under which the respondent was ordered to pay $35 per month. What is asked is that a receiver be appointed to receive the husband's salary as a motorman.

It is objected that there is no jurisdiction to make the order. Upon consideration I think there is. By section 36 of the Divorce and Matrimonial Causes Act it is provided:

> 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.

An order such as asked for would have been made by the High Court of Chancery and I think therefore should be made here.

An order will go appointing a receiver to receive the respondent's salary up to the amount of $35 per month.

Application granted.

IN RE ESTATE OF ELIZABETH SARAH ROSEMERGEY, DECEASED.

MCDONALD, J. (In Chambers)

1934

Sept. 29.

IN RE ROSEMERGEY, DECEASED

Donatio mortis causa—Paper writing signed by donor—Delivery to donee prior to donor's death—Validity.

T. acted as housekeeper for R. for twenty-seven years prior to R.'s death in April, 1933, receiving a small wage for her services. In May, 1928, R. signed a paper writing as follows: "I Sarah Elizabeth Rosemergey hereby give to Sarah Turner for her own use and enjoyment absolutely all my furniture, household linen, jewelry & personal effects ~~and money~~ contained E. S. R. in my place of residence wheresoever I may be residing." R. suffered from illness for many years prior to her death. In September, 1928, R. made her will which was followed by codicils in none of which the above articles were mentioned, and about a year and a half prior to her death, her health becoming worse, she handed the above document to T. assuring her that upon the death of deceased it would give her the effects mentioned.

Held, upon the facts, that there was a valid *donatio mortis causa*.

PETITION by the executors and executrix of the deceased for directions as to the administration of her estate. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. in Chambers at Victoria on the 21st of September, 1934. Statement

Jackson, K.C., for petitioners.
Clearihue, for Sarah Turner.
Haldane, for Emma Newbegin.

29th September, 1934.

MCDONALD, J.: Mrs. Rosemergey was a widow who came to Victoria from England some twenty-three years prior to her death on 12th April, 1933. During all that period and for some four years prior thereto Miss Sarah Turner acted as her housekeeper receiving for her services a small wage. For many years prior to her death the deceased suffered from diabetes which gradually grew worse and finally caused blindness and death. Judgment

On 12th May, 1928, the deceased had prepared, and signed a paper writing in these words:

3367 Cook St. Saanich
Victoria, B.C.
12 May, 1928.

I Sarah Elizabeth Rosemergey hereby give to Sarah Turner for her own use and enjoyment absolutely all my furniture, household linen, jewelry & personal effects ~~and money~~ contained E. S. R. in my place of residence wheresoever I may be residing.

Eliz. S. Rosemergey.

MCDONALD, J. (In Chambers)

1934

Sept. 29.

IN RE ROSEMERGEY, DECEASED

This document was shewn to Miss Turner, and during the years that followed, the deceased on many occasions stated to Miss Turner and to various other persons that upon her death Miss Turner was to have all her furniture, household linen, jewelry and personal effects. Having regard to all the circumstances I read the above document not as a testamentary disposition or as evidence of a gift *inter vivos* but as an expression of the intention of deceased that Miss Turner should have the present possession but that the gift should not become effective until after the death of deceased.

On 20th September, 1928, deceased made her will, which was followed by various codicils in none of which testamentary documents are these articles mentioned, though they would of course be included in the residuary bequest in which Miss Turner shares.

Approximately a year and a half before her death, the condition of deceased becoming gradually more hopeless, knowing she could not recover, she handed the document above mentioned to Miss Turner assuring her in effect that it would give to her upon the death of deceased all the effects mentioned. At the same time Miss Turner was instructed to distribute various specified articles to various persons named by deceased in her memorandum book.

Judgment

Miss Turner is quite willing to carry out these instructions. Shortly before her death deceased gave to Miss Turner, who thereafter retained, the keys of her deposit box containing her jewelry except two rings as to which no claim is made. As to the furniture in the house while there was no actual physical change of possession nevertheless the deceased, I would hold on all the facts, did abandon to Miss Turner possession thereof and Miss Turner did for a considerable time after the deceased stood in the shadow of death maintain possession of same in so far as was possible or feasible under all the circumstances.

Upon the facts stated was there a valid *donatio mortis causa?* I think there was. Several cases were cited by counsel in their careful arguments but it seems to me the situation before us is really covered in the reasons for judgment of Davies, J. (as he then was) in *McDonald* v. *McDonald* (1903), 33 S.C.R. 145 at pp. 152 and 155 where his Lordship says:

There is really very little dispute between the parties as to the law govern-

ing a *donatio mortis causa*. The difficulty lies in its application to the facts of this case. . . . I think they shew the presence of every essential necessary to effect a valid *donatio mortis causa*. The gift was made in view of the donor's death and, from the circumstances under which it was made, and from what was said about his desire not to put it in his will, [as in the present case is shewn by the affidavit of John Baxter] it may fairly be implied that it was only to take effect on the donor's then expected death. It was a conditional gift to take effect only upon the death of the donor who, in the meantime, had the power of revocation and might at any time resume the property and annul the gift. The main dispute, as I have said, was as to delivery. I think that was complete.

True the Court was there dealing with the gift of a deposit receipt as to which it was held there was actual physical delivery.

As to the contents of the deposit box I have had no doubt in the matter—see *Walker* v. *Foster* (1900), 30 S.C.R. 299. The real difficulty is as to whether there was a delivery of the furniture and other chattels. All the other requisites are present as set out conveniently in *Cain* v. *Moon* (1896), 2 Q.B. 283 at p. 286. Upon search of the authorities I have not been able to find any decided case indicating that upon all the evidence before me I am wrong in holding as I do that delivery has been proven. On the other hand I think that such cases as *In re Wasserberg* (1915), 1 Ch. 195 support the view which I have taken. There will be judgment accordingly.

Judgment

Judgment accordingly.

HARPER, CO. J.

1934

Oct. 10.

REX v. McLEOD.

Medical Act—Unregistered person offering to treat disease for gain—Osteopathic physician—Liability.

REX v. McLEOD

Section 67 of the Medical Act provides that "It shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain, or hope of reward, whether promised, received, or accepted, either directly or indirectly."

K. called at accused's office, who described himself as an "Osteopathic Physician" and stated he was suffering from a running cold which accused diagnosed as hay fever. Accused offered to treat him, requesting a cash payment of $15 and balance at end of treatment. K. said he would think it over, and leaving the premises did not come back. A charge for unlawfully practising medicine under said section was dismissed.

Held, on appeal, that K.'s statement when the accused's offer was made fell short of being a reward promised, and the charge was properly dismissed.

Statement

APPEAL by the Crown from the dismissal of a charge for unlawfully practising medicine by alleging ability and willingness to treat a patent for hay fever for hope of reward, contrary to section 67 of the Medical Act. Argued before HARPER, Co. J. at Vancouver on the 19th of September, 1934.

Sigler, for appellant.

E. Meredith, for respondent.

10th October, 1934.

Judgment

HARPER, Co. J.: This is an appeal from the dismissal by deputy magistrate *McQueen*, of a charge against the respondent McLeod in that he

at the City of Vancouver on the 21st day of May, A.D. 1934, not being registered did unlawfully practise medicine by alleging ability and willingness to treat a human ill, to wit: hay fever, for hope of reward, contrary to section 67 of the Medical Act being chapter 157 of the Revised Statutes of British Columbia, 1924, and amendments thereto.

Section 67 reads as follows:

It shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain, or hope of reward, whether promised, received, or accepted, either directly or indirectly.

The evidence discloses that one Kingston, a private detective, in the employment of the Medical Association, called at the office

of the respondent McLeod who describes himself on the card handed Kingston as an "Osteopathic Physician." Kingston represented himself as having been suffering from a running cold for some time which McLeod diagnosed as hay fever. During the course of the conversation the respondent offered to give treatment for this complaint requesting a cash down payment of $15 and the balance to be paid at the end of the treatment.

Kingston's reply as given in his evidence is as follows:

I told him that I'd think the matter over and possibly come back for a treatment.

No money was ever offered or paid to the respondent. Kingston, after this conversation, left and never returned.

It is submitted on behalf of the appellant that the qualifying words "promised, received or accepted" should be read as applying only to "hire and gain" inasmuch as "received or accepted" would lead to an absurdity if read with "hope of reward." Such a submission ignores the fact that the use of the word "or," a disjunctive word, taken in its natural meaning implies an alternative. In other words, it presents a choice in assigning the words co-ordinated by it, to such preceding words taken in their natural meaning as would make proper grammatical sense.

Judgment

The case of *McDiarmid* v. *Elliott* (1934), 1 W.W.R. 504 cited on behalf of the appellant is based upon the Medical Act of Manitoba. The statute in that Province has not the qualifying phrase "whether promised, received or accepted" it being an offence to practise medicine simply "for hire, gain or hope of reward."

It may be noted that in the Province of Alberta the words "for hire, gain or hope of reward" have been deleted by an amendment to the Medical Act, whilst in the Province of Saskatchewan the "mere holding out" of practising medicine is sufficient to maintain a conviction.

The British Columbia Legislature has not considered that the public interest required that the same protection should be given the medical profession as in the other Western Provinces.

Construing the words according to their ordinary meaning and according to the grammatical construction of the sentence, I am of opinion this appeal must fail. There is here "no absolute

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intractability of the language used" which can justify a construction which defeats what is clearly one of the main objects of this statute.

It may be noted that in some of the earlier cases, the pecuniary benefit received by the surgeon is termed simply "reward." In *Shields* v. *Blackburne* (1789), 1 H. Bl. 158 Heath, J. at p. 161 said:

> If a man applies to a surgeon to attend him in a disorder, for a reward, ...

Furthermore, in our statute, sections 33 and 34 speak of "reward or gain." It is also fairly evident the words "promised, received or accepted" were not inserted by mistake as the same words are also used in section 78.

Judgment

In construing Acts of Parliament it is a general rule that words must be taken in their legal sense unless the contrary intention appears. *Melbourne and Metropolitan Boards of Works* v. *Adamson* (1928), 3 W.W.R. 615 at p. 618. A "reward promised" would be a fee promised by the patient.

Kingston's statement, when the respondent's offer was made, fell far short of being a reward promised.

There is not here any real difficulty in ascertaining the meaning of the words used. Applying the language of Sir James Colville in *Armytage* v. *Wilkinson* (1878), 3 App. Cas. 355 at p. 370:

> It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction need arise.

The appeal is dismissed.

Appeal dismissed.

LAWRENCE v. TURNER MEAKIN & CO. *ET AL.*

HARPER, CO. J.

1934

Oct. 10.

LAWRENCE v. TURNER MEAKIN & Co.

Distress—Second-hand store—Goods left for sale on commission—Distress for non-payment of rent—Privilege.

The plaintiff placed certain chattels with a tenant who ran a second-hand store, for sale for which the tenant was to receive a commission. The landlord seized the goods in distress for rent.

Held, that the goods were liable in distress as the tenant was not carrying on the "public trade" of a commission agent so as to exempt his principal's goods on his premises from distress.

ACTION for illegal seizure by a landlord distraining for rent. The plaintiff having placed certain chattels with the tenant who ran a second-hand store, for sale on a commission basis. Tried by HARPER, Co. J. at Vancouver on the 25th of September, 1934. Statement

Balleny, for plaintiff.
Swencisky, for defendants.

10th October, 1934.

HARPER, Co. J.: The only question in this case is, whether the property of the plaintiff, being on the tenant's premises, was properly seizable by distress for non-payment of rent.

The plaintiff, being the owner of certain chattels, had placed them with the tenant, who ran a second-hand store, for sale, and for which the tenant was to receive a commission.

The common law rule that all goods and chattels which are found upon the demised premises are liable to seizure is invoked as justification for the action taken by the defendants. On the other hand it is submitted these chattels came within the exception that things delivered to a person exercising a public trade to be carried, wrought, worked up or managed, in the way of his trade or employ, are absolutely exempt from distress. Judgment

The evidence of the landlords is to the effect that they had no knowledge that any of the goods seized were not the property of the tenant and it is admitted there was nothing in the store to indicate they were otherwise than the property of the tenant.

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1934

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LAWRENCE v. TURNER MEAKIN & Co.

It has been held (*Challoner* v. *Robinson* (1908), 1 Ch. 49) that "managed" is to be construed as "disposed of" but even taken in this wide sense, the further question arises, was the tenant carrying on the public trade of a commission agent?

It is apparent from the evidence that the plaintiff purchased these goods for purposes of resale so that the tenant in reality was not selling the goods of a private person on a commission basis but assisting another dealer to dispose of his wares.

The public trade was the public sale of second-hand goods. The landlord's remedy by way of distress cannot be curtailed because in this instance there were certain private arrangements between two dealers. The principle has been firmly established that exemption from distress is based on public convenience. Dallas, C.J. said in *Gilman* v. *Elton* (1821), 3 Br. & B. 75 at p. 80:

> The rule was evidently founded, not on natural, but artificial arrangements. It was a rule to prevent a particular species of inconvenience which would otherwise have arisen. But as it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favour of trade and commerce; and, as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected, in favour of trade and commerce.

Judgment

Although there was a commission to be payable to the tenant, the public business was that of retailer of second-hand chattels. The tenant was not to the public, a commission agent. The rule as to exemption of certain goods from distraint for rent was also stated by Lush, J. in *Lyons* v. *Elliott* (1876), 1 Q.B.D. 210 at p. 215 to be solely for the benefit of trade:

> But the privilege is attached to the premises for the benefit of trade and extends no further.

See also *Mitchell* v. *Coffee* (1880), 5 A.R. 525.

An observation of Cave, J. in *Tapling & Co.* v. *Weston* (1883), 1 Cab. & E. 99 at p. 101 is very much in point. He said:

> I must give judgment for the defendant. I think Gibbons was not carrying on any public trade—*i.e.*, a trade in which he invited the public to entrust him with their goods. Further the plaintiffs entrusted their goods to Gibbons as their agent and representative under the agreement, and not as a general agent.

In *Muspratt* v. *Gregory* (1836), 1 M. & W. 633 at p. 653, Parke, B. said:

The word "public" is to be understood to refer to every trade or employ, carried on generally for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals; although it be not "public" in the sense that all the King's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not.

Having regard to the principle that the exemption is given for the public convenience in a matter of trade and commerce, I cannot infer that a second-hand dealer is generally conducting an agency business. In my opinion the only invitation extended to the public is to purchase goods which have been previously in use and presumably purchased by the dealer for purposes of resale at higher prices. The fact that in this instance they were consigned on an agency basis by the plaintiff to the dealer does not prevent the application of the general rule. The employment here was in the nature of what Parke, B. in the *Muspratt* v. *Gregory* case calls a "special employment."

Action dismissed with costs.

Action dismissed.

COURT OF APPEAL

1934

Oct. 8.

GAGEN v. GAGEN.

Practice—Appeal to Supreme Court of Canada—Special leave—Magistrate's jurisdiction—Service of summons ex juris—R.S.C. 1927, Cap. 35, Sec. 41—R.S.B.C. 1924, Cap. 67.

GAGEN v. GAGEN

Upon the complaint of a wife living in North Vancouver against her husband living in New Zealand under the Deserted Wives' Maintenance Act,

Held, by the Court of Appeal, affirming the Court below, that the magistrate in North Vancouver had jurisdiction to issue a summons and order service in New Zealand.

An application for leave to appeal to the Supreme Court of Canada was refused.

Statement

MOTION to the Court of Appeal by appellant H. Gagen for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal ((1934), 48 B.C. 481).

Heard at Vancouver on the 8th of October, 1934, by MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Macrae, K.C., for the motion: The issues in this case involve an important question of law: see *Doane* v. *Thomas* (1922), 31 B.C. 457; *Lake Erie and Detroit River Rway. Co.* v. *Marsh* (1904), 35 S.C.R. 197; *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234.

Bray, contra, was not called upon.

Judgment

Per curiam: The motion was refused, the Court stating that their decision on the appeal was based on the inference from the evidence that the alleged desertion took place in British Columbia and therefore no important question of law arises, but if desertion took place outside the Province the magistrate would not have jurisdiction under the Deserted Wives' Maintenance Act.

Motion refused.

RADERMACHER v. RADERMACHER.

ROBERTSON, J.

1934

Oct. 18.

RADERMACHER v. RADERMACHER

Mortgagor and mortgagee—Practice—Foreclosure order nisi—Creditor added as defendant—Application to extend time for redemption.

In a foreclosure action the plaintiff obtained a foreclosure order *nisi* and accounts were then taken by the registrar whose certificate appointed six months after the date of the certificate as the last day for redemption. Some three months after the issue of the registrar's certificate W. applied for and obtained an order adding him as a defendant, and pursuant to the order pleadings were delivered. On the trial an order for foreclosure was made against W. who then asked that he be given the usual six months from the registrar's certificate within which to redeem.

Held, that as the receiver had got in certain moneys there would have to be further taking of accounts as against Radermacher, but the defendant W. is in the same position as if he had been originally a defendant, and the time for redemption was made one month after the registrar's certificate.

FORECLOSURE ACTION and application by the defendant *Woodworth* who was added as a party defendant after accounts were taken and the registrar's certificate was issued, that as further accounts have to be taken he be allowed the usual six months after the registrar's certificate within which to redeem. Tried by ROBERTSON, J. at Vancouver on the 16th of October, 1934. Statement

A. Alexander, for plaintiff.
Woodworth, in person.

18th October, 1934.

ROBERTSON, J.: On the 10th of November, 1933, when Radermacher was the only defendant, the plaintiff obtained the ordinary foreclosure order *nisi*. Thereafter the accounts were taken and the registrar's certificate, dated 28th November, 1933, appointed the 28th of May, 1934, as "the last day for payment into Court" by the defendant, etc. On the 12th of March, 1934, the defendant *Woodworth*, on his own application, was added as a party defendant and, pursuant to the order adding him, pleadings were delivered and the action came on for trial before me Judgment

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1934

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RADER-MACHER v. RADER-MACHER

when I made an order for foreclosure as against the defendant *Woodworth* whereupon the said defendant suggested that he should have the usual six months from the registrar's certificate within which to redeem.

The case of *In re Parbola, Limited. Blackburn* v. *Parbola, Limited* (1909), 2 Ch. 437 appears to be directly in point. That was a foreclosure action in which the mortgagee had obtained a foreclosure order *nisi* and, subsequently, a judgment creditor, in another action against the mortgagor company, who had obtained the appointment of a receiver by way of equitable execution of the property of the mortgagor, applied to be added as a defendant in the foreclosure action and that the period for redemption might be extended. Mr. Justice Warrington, at p. 439, said:

Judgment

> I think, on the authority of *Campbell* v. *Holyland* [(1877)], 7 Ch. D. 166, 168, it would be right to add the applicant as a defendant to the action, he being *pro tanto* an assignee of the equity of redemption; but he must be content to take his interest in the equity of redemption in the state in which he finds it, namely, as bound by the order of March 16, 1909, and he must redeem on September 16, 1909. It was contended on his behalf that he ought to be allowed a further time to redeem, but to make such an order would be entirely contrary to the practice of the Court. I think the proper order to make is that which was made in *Campbell* v. *Holyland*, namely, that the applicant be added as a defendant to the action, and that the proceedings in the action be carried on between the plaintiff and the original defendant and such new defendant as if he had been originally a defendant.

As the receiver has got in certain moneys there will have to be a further taking of accounts as against Radermacher and, in view of the above decision, defendant *Woodworth* is to be in the same position as if he had been originally a defendant.

I, therefore, order that a further account be taken and the time for redemption be one month from the date of the registrar's certificate.

Order accordingly.

ROSTEIN v. CANADIAN NATIONAL STEAMSHIP COMPANY, LIMITED AND DULUTH VIRGINIA REALTY COMPANY.

MORRISON, C.J.S.C.

1934

Oct. 19.

ROSTEIN v. CANADIAN NATIONAL STEAMSHIP CO., LTD.

Principal and agent—Contract—Waterfront property for lease—Procurement of lessee—Commission—Parties brought together—Falling through of negotiations.

In November, 1923, the plaintiff approached the Canadian National Steamship Company, Limited, the beneficial owners of a waterfront property in Seattle, with a view to obtaining a lease of the property, and after lengthy negotiations obtained an option to lease the property for twenty years upon certain terms. In the meantime and with the knowledge of the defendants the plaintiff was negotiating with the Seattle Port Commission with a view to disposing of the lease to them, and in March, 1928, having obtained from them the terms upon which they were ready and willing to lease the property he communicated with one Keeley, the representative of the National Steamship Company, Limited, in Vancouver who went to Seattle where he met the plaintiff and one Colonel Lamping, president of the Seattle Port Commission. Keeley then advised the plaintiff he would prefer to have the lease made direct to the port authorities, and asked him to withdraw, with the statement in Colonel Lamping's presence that "you have earned your commission." The plaintiff withdrew, but owing to the introduction of new terms further negotiations between the defendants and the port authorities fell through. In an action to recover $20,000 commission:—

Held, that the parties got together through the agency of the plaintiff, and in the culminating act of his association in the business in March, 1928, he stepped aside for valuable consideration. There was an implied undertaking by the defendants not to deprive the plaintiff of the fruits of his labour, and he is entitled to remuneration irrespective of what may have taken place subsequently between the parties he brought together.

ACTION to recover $20,000 as commission for introducing to the defendant a lessee who was ready and willing to lease a waterfront property in Seattle owned by the defendant the Canadian National Steamship Company, Limited. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 16th of May, 1934.

Statement

J. W. deB. Farris, K.C., and *E. B. Bull*, for plaintiff.

A. Alexander, and *A. R. MacLeod*, for defendants.

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ROSTEIN v. CANADIAN NATIONAL STEAMSHIP CO., LTD.

19th October, 1934.

MORRISON, C.J.S.C.: The defendant, Duluth and Virginia Realty Company, incorporated under the laws of the State of Minnesota, is an interlocking subsidiary or holding company of the defendant Canadian National Steamship Company, Limited, and was at the time material herein the beneficial owner of a waterfront property known as the Grand Trunk Pacific Dock at Seattle, in the State of Washington. Both defendants in turn form part of the Canadian National Railway system, the officials of which direct the operations of these two defendants. The defendant, Canadian National Steamship Company, used and operated this waterfront property. As far back as the early part of November, 1923, the plaintiff, acting independently of all the parties, approached the defendant, Canadian National Steamship Company, then controlling, as far as he knew, the dock and wharf, for the purpose of obtaining a lease of that property. Negotiations were carried on until May 14th, 1927, when the plaintiff secured from the defendant, Canadian National Steamship Company, an option to lease the said property for a period of twenty years upon apparently satisfactory terms, which terms were several times modified. During all this time the plaintiff was also negotiating with the proper officials of the Seattle Port Commission for the purpose of submitting to them this waterfront property, which the commission deemed a necessary adjunct to the completion of their scheme for getting control of the waterfront of that port. One of the objects of the port commission is, I take it, to acquire property along the waterfront either by purchase or lease in order to enable them the better to co-ordinate and control the several ferry and other transportation facilities of the port. Within the area thus sought to be acquired this frontage property of the defendants occupied a strategic position. The defendants were fully aware that the plaintiff was treating with the port commission. It seems to have suited their purpose that the plaintiff should so continue. Why the defendants themselves, who were always ready and willing to lease, had not begun negotiations with the port officials does not appear. Negotiations were carried on by the plaintiff with the port commission and with the defendants, the plaintiff devoting his time largely in Seattle

Judgment

in his efforts to bring the port officials and the defendants' officials together. In March, 1928, the plaintiff had progressed so far as to secure from the port commission an expression of the terms upon which they were ready and willing to take a lease of the property. Thereupon one, B. C. Keeley, representing the defendants throughout, came to Seattle for the purpose of meeting the plaintiff and the port officials and to complete the deal for a lease. Keeley upon his arrival in Seattle then informed the plaintiff that in accordance with instructions received in the meantime from his superior officers in the East they would prefer to have the lease made direct from the defendants to the port authorities. To this the plaintiff agreed upon the understanding that he would receive the sum of $20,000 for abandoning his option. This sum appears to be based upon the terms of the option. To this I find that Keeley, acting on behalf of his principals and within the scope of his authority, agreed. This was on March 1st, 1928. On the next day the plaintiff and Keeley, by appointment, went to the offices of the port commission and met Colonel Lamping, the president of the Seattle Port Commission, when the understanding arrived at on the previous day was disclosed to Colonel Lamping and upon further discussion Keeley requested Rostein to withdraw from the interview and informed him that from then on he would carry on direct with the port authorities, adding "You can fade out of the picture; you have earned your commission." This incident is corroborated by Colonel Lamping, a disinterested witness. The plaintiff then rested confident he would receive the fruits of his labours. Throughout the period of negotiations the defendant, Canadian National Steamship Company, appeared to act as the owners of the dock and wharf in question and the plaintiff dealt with that defendant on that footing. Owing to cross purposes between the defendants and the port authorities and the introduction of new terms the further negotiations fell through. The plaintiff now brings suit for the sum of $20,000.

Judgment

Mr. B. C. Keeley aforesaid, the Pacific Coast representative of the defendant, Canadian National Steamship Company, was in and about and keeping in energetic touch with the respective

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parties throughout. The material conflict turns on the evidence of the plaintiff and Keeley.

One's impression of a witness derived from reading the inanimate stenographic record of the evidence and that formed by seeing and hearing him in the box may be entirely different. This applies forcibly to the plaintiff Rostein and to Keeley—they both were examined on discovery previously to the trial. Rostein is an elderly man who impressed me as being far from well and often inaudible. I think his memory was at fault in some respects, particularly where he and the witnesses Beaumont and Baldwin conflict, a conflict which in my opinion was in respect of incidents not of a decisive materiality and not affecting his credibility as to the thread of the main facts upon which he bases his claim. The particular incident in the Savoy Hotel was one to which he well may not have attached any importance, and I gathered that he gave his answers more to get away from what he doubtless felt, erroneously of course, were importuning questions. He seemed after some years of negotiating to be tired of the whole thing. He was what lawyers would call a very poor witness. Courts of justice are to regard the substance of things and not mere words which might be inaccurately used by the parties in private dealings.

Judgment

> A lawsuit is not a scientific game to be won or lost by skilful or unskilful moves on the part of the players. It is neither the matching of wits nor a contest of intellectual powers. It is a simple inquiry as to where the truth lies in a controversy over legal rights involving persons or property. Neither technical rules nor refinement of reasoning should defeat substantial justice.

He spent time and money in a *bona fide* endeavour to bring the parties to terms. Colonel Lamping's evidence satisfies me as to what was Keeley's attitude on behalf of the defendants in the last interview between Keeley and the plaintiff upon which the plaintiff now relies. There were many interviews and conferences and also correspondence covering a long period of time, at certain junctures bearing some resemblance to a fencing-match; sometimes with or through subordinate representatives—representatives of the defendants and their subsidiaries and associates using Mr. Keeley as their agent on some occasions and on other occasions using him as their involuntary repository of information and knowledge respecting the subject-matter of negotiations.

There was no express contract in writing, a circumstance which is usually such a help in ascertaining the intention of the parties. This differentiates the present case from many of those to which reference was made and in which the contracts sued upon were closely framed. There is not much difficulty in the case of express contracts.

The plaintiff's claim must rest on ground apart from the solvency of the other parties or their power to perform their contract.

Keeley was at all times material to this action the duly authorized officer of the defendant, the Duluth and Virginia Realty Company, to enter into a contract of lease or sale of the Grand Trunk Pacific Dock at Seattle, Washington, on such terms and conditions as he might arrange subject only to the approval of R. B. Teakle in Montreal, who wrote the letter of March 26th, 1928 (Exhibit 49) in answer to one from Keeley of the 16th of March (Exhibit 45)—Keeley:

Our friend Rostein, who you know was negotiating with the port commission, has apparently answered his purpose and while it will be necessary for us to pay him certain commission for his assistance yet under the present arrangement we will make our deal direct with the port commission. The proposition which the port commission are working on at the present time and which we think the very best we possibly can obtain is that instead of renting to Rostein for $30,000 for the first five years and allowing him to sublet to the port commission that we lease direct to the port commission for the sum of $40,000 per year for the first five years, paying Rostein the difference which would be $20,000. Mr. Herr would of course draw up the necessary legal documents eliminating Mr. Rostein from all future commissions and interest in the transaction.

Judgment

Teakle—March 26th:

I take it from what you say it will be necessary that we pay Mr. Rostein a fee, but in view of everything that has transpired and the amount of work that we have had to do ourselves independent of the gentleman it is my opinion he is not entitled to such a fee as $20,000. It would be well as I have previously intimated to discuss the matter very thoroughly with Mr. Herr as in this we don't want to get across with Mr. Rostein.

The plaintiff secured a *status* in respect of the subject-matter of negotiations by what has been referred to as an option. The defendants allowed the plaintiff to expend time and money in his efforts to accomplish or to bring about or advance to a strategical stage a state of affairs regarding this dock property advantageous to them. I find that on March 1st, 1928, in the culminating act

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of his association in this business, the plaintiff stepped aside for valuable consideration. The act forborne was the exercise or enforcement of some legal equitable right which he honestly believed he had acquired. *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. (C.A.) 289. In my opinion this is the point which falls to be determined and I decide it in favour of the plaintiff. Mr. *Alexander* with marked ability takes direct issue with the plaintiff in a somewhat voluminous defence of a more or less technical sort, the Statute of Frauds being one of them, the only effect of which statute after all is to prevent the active prosecution of claims in the Law Courts which are not supported by written evidence at the trial. Bowen, L.J. in *Miles* v. *New Zealand Alford Estate Co., supra.* On the footing that there is no statutory obstacle (as defendants submit there is) to the plaintiff claiming a commission then the plaintiff is again entitled to judgment. In most cases from *Toulmin* v. *Millar* (1886), 3 T.L.R. 836 down there does not appear to have been any serious question of law involved. The decisions depend upon the view taken of the facts in each case. There were prolonged submissions on this aspect of the case with which I think I should deal in deference to counsel. The plaintiff has done everything which persons in this kind of work undertake to do, and he is not to be deprived of the fruits of his efforts by reason of the caprice or incompatibility of the parties so brought together or infirmity in title or statutory obstacles or things of that sort. Whatever were the ulterior motives, if any, of the defendants in seeking to get in touch with the port authorities through the plaintiff they ought not now be heard to repudiate him. The test is, were the parties got together through the agency or introduction of the plaintiff? If the parties, when they got together, chose to alter the terms of the subject-matter, or indeed to decline to deal further with each other, that is their own affair. You can bring a horse to water, but you cannot make him drink. On that aspect of the case I accept the evidence on behalf of the plaintiff as proof of facts which raise a right on his part to remuneration. On considering the nature of the negotiations in a reasonable and business manner an implication arises that the parties must have intended that the suggested stipulation exists. If the employ-

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ment is founded on an implied contract, *i.e.*, from the conduct of the parties or by implication of law or by custom the agent would be entitled to remuneration. *Beningfield* v. *Kynaston* (1887), 3 T.L.R. 279. As to the circumstances under which a contract can be implied and the basis of remuneration on such a contract the following cases may serve as a useful guide: *Kirk* v. *Evans* (1889), 6 T.L.R. 9; *Newman* v. *Richardson* (1885), 1 T.L.R. 348. An agent is entitled to reasonable remuneration over and above that payable under his contract of agency for services rendered as an agent outside the scope of such agreement. *Williamson* v. *Hine Brothers* (1890), 7 T.L.R. 130.

The plaintiff never expected that his exertions and services would pass without remuneration nor do I think that the defendants expected that he would display such simplicity. A term can be implied if it is obvious that the parties intended it—see Teakle's letter of March 26th (Exhibit 49), *supra; Hamlyn & Co.* v. *Wood & Co.* (1891), 2 Q.B. 488 at 491. There was at least an implied undertaking by the defendants not to deprive the plaintiff of the fruits of his labour. *Geo. Trollope & Sons* v. *Martyn Bros.* (1934), 77 L.J. 106, 120; 150 L.T. 376; 50 T.L.R. 228. The matter must therefore be construed in the light of the attendant circumstances surrounding the termination of the negotiations, such as the object to be accomplished; the situation of the parties, their relation and the evident intention in their continuing to be associated at all. The nature of the duty and the *status* of the parties must all be regarded as an explanation of the intention. Then again in the run of prolonged dealings information acquired is often half caught, confusedly recollected and sometimes completely misunderstood, so that Courts are perplexed in unravelling the narrative which again is elicited often in response to questions so framed that the thoughtless answer is one employed to fortify whatever case there may be against the person who invokes the aid of the Court. Even if the last agreement entered into between the plaintiff and Keeley differed from the position alleged to have been taken by the plaintiff from time to time during the negotiations, I do not think that that should displace the final definite understanding arrived at on March 1st, 1928, and

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confirmed in Lamping's office and which is to be taken in substitution for any agreement which the parties to this action may have originally made or contemplated executing formally.

In *Green* v. *Lucas* (1875), 33 L.T. 584 at p. 587 the words used by the plaintiff at the termination of negotiations were "Well, I suppose I have completed my part of the business," and the defendant's solicitor says "Yes"—the plaintiff accordingly did nothing more. What happened afterwards did not prejudice the plaintiff in his claim for his account. See also Erle, C.J. in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681.

If the object was to procure parties who were ready and willing to treat with each other as far as the plaintiff is concerned when he had done that the contract was completed and he would be entitled to remuneration irrespective of what may have taken place subsequently between the parties so brought together. As Lord Bramwell said in the course of his judgment in *Fisher* v. *Drewett* (1878), 48 L.J.Q.B. 32 at p. 34:

> It is reasonable that it should be so. Why should the right to be paid for work depend on what takes place between other parties outside the contract?

Judgment

The point not to be overlooked is: What is the contractual relationship? The rules applicable to implied contracts are just as rigid as those binding on express contracts. A commission is not earned regardless of the creation or existence of contractual relations notwithstanding the offhand, casual way in which many of these commissions are earned. In every case whether it takes one minute or one year's negotiations there must arise and exist a contract. Commission which may be defined to be the allowance made to an agent for transacting business does not in any way rest upon statute law or derive any force from legislation, but depends upon common law principles to be gathered from decided cases by the Courts. The contract of agency is substantially subject to the ordinary rules as to the formation of contract and the principles which govern claims for commission are the same whatever the nature of the agency may be. After all in this case the question is not so much as to what was the agreement but as to whether it was what the plaintiff alleges. There was admittedly some arrangement whereby the plaintiff was permitted to commence and continue the negotiations and in

accordance with which his services were terminated and dispensed with. Would he be likely to leave the matter of remuneration at the mercy, caprice or business urgency of the defendants? Would it be the act of a prudent man of any business experience to expose himself and his interest to such a contingency?

There will be judgment for the plaintiff for the sum claimed with costs.

Judgment for plaintiff.

FLETCHER, TURNEY & HANBURY LTD. v. COLQUHOUN DEWOLF & CO. LIMITED.

Contract—Mining stock—Sale of shares—Repudiation of contract—Action for damages—Verdict of jury—Misdirection—New trial.

After negotiations for the sale of 100,000 shares in a mine owned by the defendant, H., managing director of the plaintiff, agreed to go to Winnipeg to sell the shares. The defendant then wrote a letter to the plaintiff stating it was prepared to give plaintiff a call on 100,000 shares in the mine for stock distribution in Manitoba at 40 cents per share, call to be good to the 6th of September, 1933. On August 23rd defendant notified the plaintiff that it would not carry out the contract. On August 26th H. went to Winnipeg, made a sale of the shares, and on September 6th he, through his solicitors, asked the defendant to carry out the contract. This was refused on the grounds that H. failed to go to Winnipeg when he should have gone and that he sold certain shares in Vancouver contrary to the contract. In an action for damages the jury's verdict was in favour of the defendant and the action was dismissed.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (MACDONALD and MCQUARRIE, JJ.A. dissenting), that on the question as to whether the alleged offer by the defendant was supported by consideration in H. agreeing to go to Winnipeg at his own expense, the learned judge did not define the issue concerning consideration to the jury nor refer to the evidence in support of it, and the justification of the defendant in repudiating the contract owing to H. having sold stock in Vancouver was not sufficiently laid before the jury and defined in the charge. There should be a new trial on the ground of inadequacy of the charge.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 10th of April, 1934, following the verdict of a special jury

Statement

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dismissing an action for $14,000 as damages for breach of contract, dated August 10th, 1933, for the sale of certain shares in a corporation known as Taylor (Bridge River) Mines Limited. In July, 1933, George Hanbury, an officer and director of the plaintiff acting for the plaintiff, entered into negotiations with Tempest St. E. deWolf and Robert Colquhoun, acting for the defendant, and an oral agreement was arrived at about the 3rd of August, 1933, whereby it was agreed that Hanbury would go to Winnipeg at the expense of the plaintiff and endeavour to sell 100,000 shares of Taylor (Bridge River) Mines Limited, and the defendant agreed to give an option to purchase or "call" on 100,000 of said shares good until September 6th, 1933, at 40 cents per share. On August 10th, 1933, the defendant wrote a letter to the plaintiff as follows:

Statement

> With reference to the above, we are prepared to give you a call on 100,000 shares Taylor (Bridge River) Mines Limited stock for distribution in Manitoba. These shares are to be taken up by you at 40 cents per share, such call to be good until September 6th, 1933.

Hanbury made no arrangement to go to Winnipeg, and on August 23rd the defendant notified the plaintiff that for reasons given it did not intend to carry out the contract. Hanbury nevertheless proceeded to Winnipeg on August 26th and there claims to have arranged for the sale of the 100,000 shares to purchasers who were ready, willing and able to purchase the shares. On September 6th, 1933, the plaintiff's solicitor by letter asked the defendant to carry out the contract, and on the following day the defendant's solicitors replied by letter that the defendant was under no obligation to carry out the alleged contract, and that it would not do so.

The appeal was argued at Victoria on the 12th and 13th of July, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

G. L. Fraser, for appellant: The question is (1) Whether there was a contract for a valid consideration or merely an offer without consideration. (2) Did the defendant commit a breach of the contract? Had the defendant the right to cancel the contract? On September 6th, 1933, we had purchasers ready, willing and able to buy, and on that day the defendant committed a

breach when it refused to deliver the stock. The sole consideration was Hanbury's promise to go to Winnipeg: see *In re Casey's Patents* (1892), 1 Ch. 104 at p. 115. He sold about 4,000 shares in Vancouver but this was done pursuant to another contract. The measure of damages for the breach is the difference between the contract price and market price at the time they should have been delivered: see Mayne on Damages, 10th Ed., 167. The difference was 15 cents per share at the time: see *Jamal* v. *Moolla Dawood, Sons & Co.* (1916), 1 A.C. 175; *Williams Brothers* v. *Ed. T. Agius, Limited* (1914), A.C. 510 at p. 523; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; *Gold* v. *Stover* (1920), 60 S.C.R. 623; *In re Vic Mill, Limited* (1913), 1 Ch. 183. There was misdirection and there should be a new trial: see *Hadley* v. *Baxendale* (1854), 9 Ex. 341 at p. 353; *Parker* v. *Cathcart* (1866), 17 Ir. C.L.R. 778 at p. 782. The trial judge neglected to instruct the jury on relevant issues: see *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362 at p. 371; *Ristow* v. *Wetstein* (1934), S.C.R. 128 at p. 132; *Dallimore* v. *Williams and Jesson* (1914), 58 Sol. Jo. 470.

Argument

Bull, K.C., for respondent: The statement of claim was amended four times. The document of August 10th, 1933, is not a contract as there was no consideration. He relies on an oral agreement. There was no contract at all but a mere offer: see Leake on Contracts, 8th Ed., 96. The offer was good until the 6th of September but it can be revoked any time before acceptance. The oral contract is only in their imagination. There is only one way of accepting the offer and that is by paying the money. The offer was withdrawn. This was merely an offer without consideration, and what happened on the 25th of August, 1933, amounted to a withdrawal of the offer. Hanbury went to Winnipeg on the 26th of August. As to admissions in pleadings see Taylor on Evidence, 12th Ed., Vol. I., p. 519. There was nothing definite until August 10th, when Hanbury wanted a letter. Assuming there was a contract they did not take the proper steps to perform: see *Lord Ranelagh* v. *Melton* (1865), 34 L.J. Ch. 227; *British and Beningtons, Ld.* v. *N.W. Cachar Tea Co.* (1923), A.C. 48 at pp. 63 and 70. It is clear they could not pay on the 6th of September. The alleged sales in Winnipeg

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were not in accordance with the agreement, as he was to get distribution in Winnipeg and they claim to have sold all the stock to two firms. He says the learned judge did not properly deal with the question of damages. The jury did not deal with damages at all; no damages were found and they were properly charged.

Argument

Fraser, in reply: Non-direction on a material issue may amount to misdirection, and there are many objections to the charge. There was consideration: see *Vancouver Y.M.C.A.* v. *Rankin* (1916), 22 B.C. 588. On the question of tender see *Forrest* v. *Solloway* (1928), 3 D.L.R. 374. The alleged repudiation of the contract was not accepted: see Leake on Contracts, 8th Ed., 676; Salmond on Contracts, 273.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff's action is founded on an alleged agreement partly oral and partly evidenced by writing; the defence to this agreement is, *inter alia,* that it was a mere offer and was rescinded before acceptance. The writing includes all its terms except the consideration. It was a question for the jury to find as to this. The jury have found all issues left to them by a general verdict. The initial question here is was the said issue of consideration left to the jury on a proper charge by the learned judge. If it was the plaintiff's action has failed. If it was not, then other questions arise which must be disposed of.

Leaving the questions of the sufficiency of the charge for the present, I shall specify what I consider those other issues to be. The defendant claims that if there was a contract it was cancelled by it on or about the 23rd or 24th of August, 1933. There are two subordinate issues involved in this (a) Had plaintiff committed a breach of contract at this time? and (b) Did it consent to the rescission of it? As to the first of these defendant alleges a breach because Hanbury failed to go to Winnipeg when he should have gone, and, as to the second, because as alleged plaintiff sold certain shares in Vancouver contrary to the terms of the contract. The first is a question of law depending on the jury's finding of the facts. The latter is a question of fact to be deter-

mined by the jury, and their general verdict determines this issue, subject to the question of the adequacy of the charge.

Hanbury a member of the plaintiff firm went eventually to Winnipeg and claimed to have distributed the optioned shares within the time limited by the option, and on the 5th of September, through one Gatewood, a Vancouver broker, and on the instructions of one Bingham, but with plaintiff's authority, called on the defendant to ask how it wanted the alleged sale of the optioned shares "cleared" on sale to Bingham-McKay Limited, and to Anderson Greene & Co. Here occurred the second repudiation of the contract. The defendant replied to Gatewood that Hanbury had "no option," and refused to discuss the matter further. This second breach also was not agreed to by the plaintiff who by its solicitors wrote defendant on September the 6th requesting that the share certificates be deposited with the Imperial Bank in Vancouver, where they would be paid for before closing time on that day, being the last day for taking up the option. Defendant declined the request and the option, if it were one, expired by effluxion of time.

There is another issue involved in this case. The defendant says to the plaintiff "You made no tender of the purchase price of the shares," to which the plaintiff replied that a tender would have been idle since it was apparent on the admitted facts that no tender would have been accepted. Tender was denied by the statement of defence, and it was pleaded in the reply. It is referred to in the charge and raised by the notice of appeal. The facts with regard to the second repudiation and to the absence of a tender are not in dispute, and if a question for the jury at all the explanation of the law on the points was a very simple matter for the judge.

Now I shall endeavour to review the charge and with deference and state what in my opinion are its defects. I will first refer to section 60 of the Supreme Court Act of this Province, which provides, stated briefly, that nothing therein nor in any Act or Rules of Court shall prejudice the right of any party to have the issues for trial by jury left by the judge to them with a proper and complete direction upon the law and as to the evidence applicable to the said issues and that the said right may

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be enforced by appeal without any exception having been taken at the trial.

Now the first and all important issue was the sufficiency in law of the alleged option evidenced by parol and by Exhibit 1, the latter, the terms of which as far as they go are not in dispute. They are sufficient except that they are alleged to be unsupported by consideration, and as to this there is parol evidence that Hanbury a member of plaintiff firm agreed to go to Winnipeg at his own expense for the purpose of disposing there of the shares mentioned in the letter and was to have until the 6th of September, 1933, to "take up" his option. If he actually agreed to go to Winnipeg that agreement would, in my opinion, be good consideration, and if doubtful whether he agreed or not the jury ought to have been instructed that if they found the fact of agreement, the contract was good in law. The general verdict is against the plaintiff. Therefore the question of their instructions is important. The plaintiff Hanbury's evidence was that:

> They [the defendants] told me they were very anxious for this distribution, and if I would go to Winnipeg, at my own expense, they would give me a call on 100,000 shares of Taylor (Bridge River) stock at 40 cents a share for distribution in Manitoba, good until September 6th . . .

MACDONALD, C.J.B.C.

and that the final outcome was "I accepted their offer." He wanted something in writing to shew customers and got the letter (Exhibit 1). Later deWolf asked Hanbury when he was going to Winnipeg indicating that that question had been discussed between them, and in his evidence he said he (Hanbury) wanted something to shew that he could offer shares and he gave him the letter Exhibit 1.

The learned judge in his charge did not define this issue concerning consideration to the jury, nor did he refer to the evidence in support of it though it was one of the most vital issues in the case.

Then as to the alleged repudiation, in my opinion, the contract could not lawfully be repudiated for Hanbury's delay in going to Winnipeg. He had by the contract until the 6th of September to make his arrangements and take up the option. He could take his own time about going. As to the selling of the optioned shares in Vancouver, it appears there was a previous authorization to Hanbury to sell others of the same issue in Vancouver on

different terms to those governing the sale of the optioned shares. It might be held by a jury on a proper direction of the judge that it was about these shares that the said controversy and repudiation arose, and that no breach of the option was in fact made by reason thereof. The issues in that dispute were not sufficiently laid before the jury and defined in the charge, and the jury directed as to the appropriate finding which it was open to them to make on that issue.

That there was consent to the rescission or as it is called "cancellation" of the contract, it is plain from the evidence and from the conduct of the parties since the first attempted rescission that plaintiff regarded the cancellation as a breach on defendant's part and that Hanbury did not accept it as putting an end to the contract. The defendant, however, contends that since neither of these "cancellations" was treated as a breach that plaintiff cannot contend that tender of the purchase-money or a formal demand for delivery to it of the share certificates has been waived.

The question of whether or not the plaintiff fulfilled its part of the contract when its solicitor wrote defendant on the 6th of September (within the time limit) requesting the deposit of the share certificates at the Imperial Bank and stating that it would be then paid the purchase-money, has caused me some doubt as to its sufficiency. In a proper case the sufficiency of a tender may be left to the jury—*Eckstein* v. *Reynolds* (1837), 7 A. & E. 80; *Marsden* v. *Goode* (1845), 2 Car. & K. 133. But I think that in this case there was no necessity to do this since the facts of the repudiation by defendant are not disputed. There can be no doubt that if demand had been made and tender offered by the production of the money both would have been and were in fact indirectly refused by the denials of the contract by defendant —*Ex parte Danks* (1852), 2 De G. M. & G. 936.

MACDONALD, C.J.B.C.

I think, therefore, that the failure of plaintiff to demand delivery of the certificates and to tender its price were waived and form no defence of the action.

I think there must be a new trial on the ground of the inadequacy of the learned trial judge's charge.

MARTIN, J.A.: This is an appeal from a judgment of MOR-

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RISON, C.J.S.C., in favour of defendant based upon the general verdict of a special jury in an action for damages arising out of an alleged contract for the sale of mining shares.

Several objections were taken at the trial and renewed here against the charge to the jury, the result of which was, it is submitted, that the plaintiff's case was wrongly presented to them as regards the issues presented for their consideration, and also the evidence thereupon.

I have carefully reviewed the charge in the light of the pleadings and evidence and can only reach the conclusion that in several essential respects there was misdirection of a grave nature, and not a proper direction on any one of the main issues, which must have misled and confused the jury, and that, taking the whole charge together, there has been, to employ the appropriate legal phrase (Yearly Practice, 1934, p. 702) such a "substantial wrong and miscarriage" of justice as entitles the plaintiff to a new trial.

MARTIN, J.A.

In reaching this conclusion I have not overlooked the submission of respondent's counsel that on the plaintiff's own shewing he cannot, as a matter of law, recover damages under the circumstances, but I do not at this stage feel justified in adopting that view, and think it is better to await the clarification of the issues after a verdict founded upon a proper direction to the jury.

The costs of the former trial should abide the new one: the costs of this appeal will follow its event as usual, pursuant to the statute (section 28, Court of Appeal Act), which I mention in connexion with section 60 of the Supreme Court Act, because while all the objections taken here were not taken below it was owing to the fact that after unsuccessfully raising several valid objections and asking for further direction thereupon, and while properly proceeding to raise still more, the appellant's counsel was thus stopped by the learned judge, according to the official stenographer's report:

Fraser: Will your Lordship put the question?

THE COURT: I will leave it that way. These are all little speeches to the jury——

Fraser: No, my Lord, it is very important to me.

THE COURT: Do not say that. It may be to you. Is it important to your client?

Fraser: Will you permit the jury to retire while I quote these authorities, my Lord?

THE COURT: No, Mr. *Fraser*, I do not wish to hear any further. Now I cannot recall any other way of getting you to go on, and paying some attention to what I am saying. I am going to leave my charge as I gave it. Whether it is right or wrong it will be for you later on to advise on. A trial would be interminable if carried on in this way. Unless there is something that you are not clear upon and that you think I should have dealt with and I should clear up, gentlemen, it seems to me you should retire and consider your verdict. It is entirely for you.

[Jury retired].

After such an expression counsel could with forensic propriety and self-respect do no more than he did by refraining from addressing that Court any further, and by awaiting an opportunity to present in due course his complete submissions to this one.

MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that it is a proper case for the direction that a new trial should be had between the parties to the action.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant, plaintiff in the action unsuccessfully sought at the trial to recover damages from the defendant for breach of an oral contract of August 3rd, 1933, confirmed by a letter of August 10th, for the sale by appellant in Winnipeg of 100,000 shares of stock in Taylor (Bridge River) Mines Limited and now appeals for a new trial on the ground of misdirection in the charge to the jury. The letter following the agreement, addressed by respondent to appellant, reads in its material part as follows:

> We [respondent] are prepared to give you a call on 100,000 shares Taylor (Bridge River) Mines Limited stock for distribution in Manitoba.
>
> These shares are to be taken up by you at 40 cents per share, such call to be good until September 6th, 1933.

The appellant pleaded by paragraph 5 of its statement of claim that when one of its directors (Hanbury) was about to proceed to Winnipeg to distribute these shares pursuant to the agreement the respondent on or about August 23rd notified appellant "that it did not intend to carry out its part of the said contract and that it would treat the said contract as cancelled." This attempted repudiation it was pleaded was not accepted. An issue was thus

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raised which, if decided adversely to appellant on a fair presentation of the case to the jury, would justify the verdict.

Far from assenting to cancellation Hanbury proceeded to Winnipeg to arrange for the distribution of the whole block of shares in Manitoba. While doing so his prospective purchasers made enquiries as to his right or authority to "purchase" or to "call" for 100,000 shares and were notified by respondent that the option had been cancelled. Appellant however, according to Hanbury's evidence—and it was supported very materially by other witnesses—arranged through two brokers in Winnipeg (Bingham-McKay Limited and Anderson Greene & Co. Ltd.) for the sale of the shares to clients of the brokers referred to and on September 6th, 1933, the last day for the exercise of the option, notified respondent that a sale was consummated and at the same time demanded deposit of the shares in the Imperial Bank at Vancouver against payment therefor on the same day. This request was refused on the ground that appellant "had no call or option on any shares of Taylor (Bridge River) Mines Limited." That position was sound and cannot be assailed if the jury found on proper instructions that what occurred on August 23rd ended the relations between the parties and if this conclusion is reached it will be unnecessary to deal with the many other points raised.

MACDONALD, J.A.

It may be observed that the oral agreement of the 3rd of August was not an offer but a binding contract if the jury accepted the evidence before them in reference thereto and it was not seriously disputed. Respondent's directors said in effect to Hanbury "if you will go to Winnipeg at your expense we will give you a call on 100,000 shares of Taylor (Bridge River) stock at 40 cents a share for distribution in Manitoba good until September 6th." Hanbury accepted that offer. That is the foundation of appellant's case. The trial judge stated in his charge to the jury however that "the plaintiff starts by exhibiting what they call a contract: that letter of the 10th of August" and again he said "that is the basis of the whole thing." That, with respect, is an error and might mislead the jury. Appellant's case starts at an earlier date, *viz.*, when the oral arrangement was concluded. That oral contract as alleged was not without consideration. The

promise to render a service, *viz.*, to go to Winnipeg to distribute the shares constituted good consideration.

The letter of August 10th, if the jury found a prior oral contract as alleged, could not be regarded simply as an offer but rather as a written confirmation of the oral agreement. True where we have a written document one looks with distrust on an oral statement of a contract that differs from it. There is however no essential difference in the terms. The "promise" to go to Winnipeg, although not specifically mentioned in the letter, is implied. If however no oral contract should be established by a finding the letter of August 10th was an offer only capable of withdrawal before acceptance notwithstanding the fact that a definite time was given for distribution. It also would be effectually withdrawn (or the agreement would be ended) if, as alleged by respondent the negotiations on or about August the 23rd because of the assent of appellant amounted to cancellation or to the substitution of a new agreement arising out of the sale of stocks in Vancouver although we need not pursue the latter feature. This, as indicated, was made a main feature of the action and notwithstanding error in the charge and, with respect, failure to segregate and define the issues with an outline of the evidence applicable to each the jury were in fact properly instructed on this conclusive point. The trial judge put it to the jury in this way:

> Was the offer withdrawn, repudiated, cancelled? You can use any number of those words. Did the defendant indicate to the plaintiff "This arrangement ends now"?

That of course would not be enough if the jury found a contract. His Lordship would have to ask the jury to find if appellant assented to such withdrawal or cancellation. This was done in these words:

> Have you any doubt but what Mr. Hanbury was told specifically and understandingly, and in a friendly way "It is off; don't go down there." And was not Mr. Hanbury satisfied?

We must assume that the jury answered this question affirmatively.

It is of course strange that if Hanbury assented he should later go to Winnipeg. Did he change his mind and do so to found an action for damages, knowing the contract was ended? The jury

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would have been assisted if such considerations were placed before them. It was a case, too (as I find, after reading the record), that called for close scrutiny of the evidence. I do not, with respect, agree with the trial judge's treatment of the written statements made by Bingham before the trial as compared with his evidence at the trial differing therewith so materially. His Lordship might have told the jury that they could reject the essential features of his sworn evidence in its entirety. There was no justification for signing a statement (and telegram) which was at least grossly misleading. The jury too might have been asked to find if the sale of stock in Vancouver was made by Hanbury pursuant to a separate contract having nothing to do with the issues in the action or if on the other hand in its final phases it afforded evidence of a breach of the contract in question or the substitution for it of a new contract.

MACDONALD, J.A.

I am not however satisfied that a new trial should be directed or that if granted the result would be different. The conclusive finding already referred to makes it difficult to say particularly in view of the fact that the plea raised by appellant in paragraph 5 of its statement of claim raised an issue which when decided against appellant disposed of the action in whatever way it may be viewed that a miscarriage occurred or that misdirection in other aspects, not so vital, should lead us to interfere.

I would dismiss the appeal.

MCQUARRIE, J.A.

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

New trial ordered, Macdonald and McQuarrie, JJ.A. dissenting.

Solicitor for appellant: *G. L. Fraser.*

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

WEGENER v. MATOFF AND FUR SALES LIMITED.

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Negligence—Damages—Collision between motor-car and bicycle—Contributory negligence—Costs—B.C. Stats. 1925, Cap. 8.

In the morning the defendant was driving his automobile north on Main Street in Vancouver. He turned to the left on reaching 6th Avenue, and when nearly beyond the intersection the right rear of his car was struck by the plaintiff who was riding a bicycle north on Main Street. The plaintiff was coming down hill and had an uninterrupted view of the street in front. He was thrown from his bicycle and injured. It was held that the Contributory Negligence Act applied and the damages assessed were divided equally between them.

Held, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that it would appear in the circumstances that both parties were equally to blame and the appeal should be dismissed.

Per MARTIN, MACDONALD and MCQUARRIE, JJ.A.: That the joint total costs should be on the same footing of apportionment as the joint total damages.

Katz v. *Consolidated Motor Co.* (1930), 42 B.C. 214, followed.

APPEAL by defendants from a decision of FISHER, J. of the 15th of February, 1934, in an action for damages for injuries sustained by the plaintiff resulting from a collision between a bicycle ridden by the plaintiff and a motor-car driven by the defendant Matoff and owned by and being used in the business of the defendant Fur Sales Limited. On the 28th of September, 1933, at about 10 a.m., the plaintiff was riding his bicycle north on Main Street in Vancouver. He approached the intersection of 6th Avenue at a speed of about 15 miles per hour. The defendant Matoff was driving his automobile southerly on Main Street, and at the intersection of 6th Avenue he turned to the left to go east on 6th Avenue, and as he neared the east side of the intersection the plaintiff ran into the rear right side of his car. The plaintiff was thrown from his bicycle and suffered severe injuries. It was found on the trial that both parties were equally to blame and the special damages claimed and $1,000 general damages were allowed and divided equally between them.

Statement

The appeal was argued at Victoria on the 27th and 28th of

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June, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, J.J.A.

Bull, K.C., for appellants: The defendant Matoff put his car in second gear when he turned to go east on 6th Avenue, and was only going at 7 or 8 miles an hour. We were nearly across the intersection as the plaintiff ran into the back of our car. The damages were excessive as the boy suffered nothing more than an abrasion on the scalp. The accident was on the 29th of September and he had a job on the 3rd of October, following. The boy was coasting down the hill too fast to stop and he did not see the automobile, although he had a full view without obstruction. The parties were found equally at fault, and under the Contributory Negligence Act the costs should be apportioned in the same way as the damages. The costs should be added together and divided in the same way as the damages: see *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214 at p. 218. The order as to costs should only be varied where it would otherwise work an injustice. There was no ground for making the order as to costs: see *Ansel* v. *Buscombe* (1927), 3 W.W.R. 137; *Price* v. *Fraser Valley Milk Producers Association* (1932), 45 B.C. 285; *Harper* v. *McLean* (1928), 39 B.C. 480. As a general rule the plaintiff's costs are greater than that of the defendant: *Donald Campbell & Co.* v. *Pollak* (1927), A.C. 732; *Zinkann* v. *Fleming* (1920), 19 O.W.N. 371 at p. 373.

Argument

Wismer, for respondent: Matoff did not sound his horn, and when he saw the boy he should have taken precautions, as the boy had the right of way. The boy, who is 24 years old, was badly hurt. He had concussion and there was a doctor's bill of $90. As to costs, the statute has the words "unless the judge otherwise directs." He has the discretion to vary from the general rule. This Court did the same thing in *Price* v. *Fraser Valley Milk Producers Association* (1932), 45 B.C. 285. See also *The Ophelia* (1914), P. 46. The costs of the issues in our favour should be given us. If you find in our favour on the question of liability the costs should be in our favour.

Bull, in reply: On the question of right of way see Barron on Motor Vehicles, 438-9.

Cur adv. vult.

2nd October, 1934.

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MACDONALD, C.J.B.C.: The plaintiff riding a bicycle collided with the defendant's automobile driven by defendant Matoff, an employee of the defendant company, at the intersection of Main Street and 6th Avenue. The essential facts are not in dispute. The defendant Matoff made a left-hand turn on Main Street intending to get on to 6th Avenue. The said turn was not found by the learned judge to have been an improper or negligent one, although he was in some doubt as to whether the defendant passed wholly on the right of the centre point of the two streets, but looking at the plan of the *locus in quo* it is plain that that did not affect the cause of the collision. From where Matoff turned to the point of collision was a distance of about 40 feet. The plaintiff coasting north on Main Street, his bicycle descending on an easy grade was running by gravity and had been so running for a block before reaching 6th Avenue. He had less than 30 feet from the boundary of 6th Avenue to go before he reached the point of collision. He ran into the back end of the automobile and was injured. There was nothing to obscure the view of either party. The plaintiff did not see the automobile until about 4 or 5 feet from it. On these facts I am unable to agree with the judgment. The plaintiff was evidently paying no attention to his surroundings. He spoke to Matoff after the collision but cannot remember what he told him. His evidence on this point is as follows:

MACDONALD, C.J.B.C.

> You asked me if Matoff was talking to me about where I was looking, where I was going, and he asked me the question why I ran into him.
>
> Yes, and did you tell him that you were not looking, that you were looking in the other direction? I don't believe I did, sir.
>
> You don't believe you did. Do you remember him asking you why you didn't swerve out and go behind him? I don't remember that, sir.
>
> Do you remember saying you were afraid of slipping on the car rail? I don't remember really anything after . . . . .
>
> And you saw one or two constables there, didn't you—police constables? Where?
>
> At the hospital. Not that I can remember of, that I can recall.

And again:

> Did you tell him [the constable] you were going too fast to stop your bicycle in time to avoid a collision? I don't believe I remember making that statement.

It is inconceivable that a bicyclist going along on gravity and with a clear vision could help seeing the automobile in time to

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either get control of his wheel, stop, or swerve to avoid it. The physical facts are against him. The statement of the constable affirms the absurdity of the plaintiff's contention.

Traffic Constable John MacFarland said:

> I asked him [plaintiff] how it happened, and he stated that he was going so fast that he could not stop and could not avoid it [the accident].

The manner in which the action was brought is, I think, worthy of some passing comment, particularly concerning the "ambulance chasers" who prompted it. Such conduct ought to be reprobated. While it does not affect the result of the action, I think I ought to express the opinion that they came very close to a crime. It should not be passed over in silence.

MACDONALD, C.J.B.C.

The plaintiff was solely responsible for the accident. In saying this I am not infringing on the findings of a trial judge. The facts are really not in dispute and the inferences that may be drawn from the facts may be as well drawn by the Court of Appeal as by a trial judge—*Dominion Trust Co.* v. *New York Insurance Co.* (1918), 88 L.J.P.C. 30.

The appeal should be allowed.

MARTIN, J.A.: This is an appeal from the judgment of FISHER, J., in a collision case between a motor-car and a bicycle in which the learned judge found both parties concerned equally to blame, and after a careful consideration of the evidence I do not think we should be legally justified in disturbing that finding; nor am I prepared to interfere with the damages awarded because while they are undoubtedly liberal yet I cannot go the length of saying they are excessive.

MARTIN, J.A.

But as to the costs the judgment cannot in my opinion be sustained and the learned judge, during the full discussion of the matter, shewed clearly that he had, with every respect, misapplied the statute and misconceived the effect of our decision in *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214, neither of which warrants a departure from the general rule that the joint total costs are on the same footing of apportionment as the joint total damages, p. 218, and a special "direction" to take a case out of that rule must rest upon some good cause that, in the exercise of a sound judicial distinction, would justify such an exceptional and unusual departure. But nothing of the kind is present

herein; *e contrario* it is clear from his reasons that the learned judge was endeavouring to remove what he describes as "the apparent anomalous result" of the *Katz* case by, in effect, altering the statute on which it is founded.

Now while it is undoubtedly true that the change in our law brought about by the Contributory Negligence Act, 1925, Cap. 8, which is founded upon the main principles of the Maritime Conventions Act, 1911 (*cf.* Temperley's Merchant Shipping Acts, 4th Ed., p. 541 *et seq.*) which is an improvement in many cases upon the old Admiralty rule, which again was a great improvement upon the old common law rule, has not yet attained to perfection and consequently occasionally brings about "anomalous results," yet that special result of a general effect of the enactment, and which must inevitably have been foreseen in the light of the Admiralty jurisprudence upon which it was founded, affords no ground for not giving the statute that beneficial result which it was in general designed to attain.

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It follows, therefore, that the present order which removes the costs from the general operation of the statute and wholly deprives the defendant of them for no special cause, but simply upon the general conception that the result of its provisions "does not seem to me to be just," cannot be supported, and in that respect the appeal should be allowed and the judgment varied by inserting the usual order for costs in accordance with our said decision in *Katz's* case.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: If the trial judge had dismissed the action it would be difficult to interfere. He found, however, that the combined negligence of appellant and respondent brought about the accident and as there was evidence that appellant failed to appreciate the speed at which respondent was travelling on his bicycle with the corresponding necessity to govern himself accordingly we should not say that he was clearly wrong. He might properly regard appellant's evidence as unsatisfactory. His testimony in some respects was not consistent with the physical facts.

It was submitted that the amount awarded was excessive. No

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doubt the trial judge to justify an allowance of $1,000 as damages accepted the evidence given by the respondent coupled with the medical testimony. He was entitled to do so and assuming that evidence to be true I would not say that a judge or jury could not reasonably award the amount referred to. It is not so noticeably excessive as to call for interference.

In applying section 4 of the Contributory Negligence Act (B.C. Stats. 1925, Cap. 8) the trial judge held that he was entitled to award costs on a different basis to that outlined in *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214. I think,

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with respect, contrary to the view of the trial judge that "unless the judge otherwise directs" for good cause arising in the action, costs must be apportioned in accordance with that decision. In otherwise directing the trial judge must exercise a judicial discretion and not decline to follow the rule because he thinks unsatisfactory results may follow. If that is so it is for the Legislature to amend. Some element must be found in the case itself to justify a departure from the statutory rule somewhat equivalent to grounds followed in depriving a successful party of costs.

With this variation as to costs the appeal should be dismissed.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I would dismiss the appeal except as to the costs, in respect to which I think the judgment should be varied in accordance with the decision of this Court in *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214.

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

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

Solicitor for respondent: *H. W. Colgan.*

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Succession Duty Act—Bond delivered for due payment of duty—Payments made on account—Validity of Act—Action for declaration as to.

Upon the death of G. in July, 1926, the executors of his estate not being in funds when the duties were assessed, asked the department of finance to accept a bond. This was acceded to and a bond was duly executed and delivered. Later and from time to time payments were made by the executors on account of succession duties amounting to about $10,000. They also requested and procured extension of time for payment, and certain properties were released from the lien created by the statute with a view to disposing of them. In an action by the executors for a declaration that the Succession Duty Act is *ultra vires* and that the deceased's property is not liable for any further succession duties, to which the defendants counterclaimed for the balance of the succession duties payable, it was held that the property of the deceased is not liable as the Act imposing the duty is *ultra vires*.

Held, on appeal, affirming the decision of McDONALD, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that as the parties in entering into the agreement at all times acted under and pursuant to the statute, and the statute which alone creates the obligation to pay being *ultra vires*, there is no liability.

APPEAL by the Attorney-General of British Columbia from the decision of McDONALD, J. of the 28th of February, 1934, in an action by the executors and trustees under the will of the late Charles A. P. Godson for a declaration that no property of the said estate is liable under the Succession Duty Act for any further duties. The deceased made his will in July, 1921, and he died on July 13th, 1926. Probate was granted the executors on January 7th, 1927. Prior to probate being granted the executors received a statement from the deputy minister of finance as to the amount of the probate and succession duties to which the estate was liable, and as the executors were under obligation to pay certain moneys pursuant to the statement prior to the issuance of said letters probate, they entered into a bond

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with the United States Fidelity and Guaranty Company for the due payment of all duty for which the estate may be found liable. The plaintiffs upon demand, made certain payments on account of the succession duties alleged to be due, and since the last payment demands have been made for further payments. The plaintiffs' claim is for a declaration: (a) That the Succession Duty Act and amendments are *ultra vires* of the Legislature of British Columbia; (b) that the property of the said C. A. P. Godson, deceased, is not liable to further succession duties; (c) that any claim of the deputy minister of finance for payment of the balance of the succession duties is invalid. The Attorney-General counterclaimed for $14,758, being the balance of the succession duties payable by the executors of said estate. Judgment was given for the plaintiffs and the counterclaim was dismissed.

Statement

The appeal was argued at Victoria on the 26th and 27th of June, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

H. I. Bird, for appellant: The Godson estate was heavily encumbered; the assets, though substantial, being in a frozen condition and the executors were unable to find cash for payment of duties. Prior to probate being granted an agreement was made for settlement of the amount of succession duties and payment thereof by correspondence between the executors and the assessor, whereby the executors agreed to make periodic payments on account of duties as fund became available. In consequence of that agreement the minister accepted the bond of the executors and United States Fidelity and Guaranty Company. For a period of over six years after the grant of probate the executors made payments from time to time on account of the duties assessed and paid in all $10,180.19; the total duties having been assessed at $18,763. By agreement between the executors and the assessor releases were given from time to time in respect of various portions of the estate. The executors acquiesced in the statute, made an agreement to pay the duties assessed, and may not now be heard to say that the statute is *ultra vires.* They are estopped by their acquiescence from

alleging that the statute is invalid. Moreover the bond is a valid security for the amount of duties assessed and constitutes an agreement to pay the sum claimed and is enforceable whether or not the Act is invalid. It was open to the executors to question the validity of the Act prior to grant of probate in 1927, but after six years they renounced the agreement and attacked the validity of the Act. The amount of duty was duly ascertained and settled by the agreement and they are bound by it: see *United States Fidelity and Guaranty Co.* v. *Regem* (1923), 93 L.J.P.C. 26. In the cases of *The King* v. *London and Lancashire Guarantee and Accident Co.* (1926), 4 D.L.R. 874 at p. 878, and *Blackman* v. *Regem* (1924), S.C.R. 406, there was a definite finding. There was no agreement and they could invoke section 43 of the Succession Duty Act. A majority of the Court held that the Act was *ultra vires*. They are estopped from questioning the validity of the Act on the ground of acquiescence: see *Gregory* v. *Patchett* (1864), 33 Beav. 595 at p. 602; *Towers* v. *African Tug Company* (1904), 1 Ch. 558 at p. 566; Street on Ultra Vires, 436; *Attorney-General for Ontario* v. *Railway Passengers Assurance Co.* (1917), 41 O.L.R. 234, and on appeal (1918), 43 O.L.R. 108. The Attorney-General is suing for the balance of the duties that are owing: see *Montreal City* v. *Montreal Harbour Commissioners* (1925), 95 L.J.P.C. 60.

Argument

Bull, K.C., for respondents: The Act was declared *ultra vires* and the tax cannot be collected. We submit that an *ultra vires* Act cannot be validated by acquiescence. The Crown bases its claim on an alleged agreement between the executors and the Crown. No such agreement was pleaded and there was no argument as to any agreement in the Court below. The executors could not raise the money to pay the duties and the bond was accepted by the minister. This had to be done in order to obtain probate. They are only bound by the bond to pay such duties as they are legally liable to pay. There is no liability as the statute is *ultra vires*. There was no agreement binding the parties: see *Blackman* v. *Regem* (1924), S.C.R. 406 at pp. 413 and 422. The case of *City of Montreal* v. *Harbour Commissioners of Montreal* (1926), A.C. 299 at 313, is clearly distinguishable from this case; there the Province had sanctioned the

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works. That acquiescence does not validate an *ultra vires* Act see *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607. *Attorney-General for Ontario* v. *Railway Passengers Assurance Co.* (1918), 43 O.L.R. 108 has no application because in that case the validity of the bond did not depend on the statute under which it was given, being *intra vires* the Legislature. The condition of the bond here is that the executors shall pay such duty as the property may be found liable for under the Act. The Act being *intra vires* the property cannot be found liable for any duty.

Bird, replied.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.: I think it only necessary to deal with the Attorney-General's counterclaim. The obligation of the executors was to pay the succession duties as a condition precedent to obtaining probate; the Province might accept a bond of the executors secured by a bonding company in lieu of a cash payment and did so in this case. All the parties were proceeding on the assumption that the Succession Duty Act was *intra vires* and agreed on a bond which would bring about the result aimed at by the Act. Nothing was left to future agreement. The bond was in lieu of the cash payment and until 1933 the parties acted upon their agreement, the executors seeking and obtaining concessions granted on the faith thereof.

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The case does not depend upon estoppel but upon a contract. The parties solemnly agreed to contract upon terms clearly defined, binding upon both parties. The Crown agreed to forego their right to payment in cash under the Succession Duty Act and take instead the agreement of the executors guaranteed by the bonding company to pay in accordance with the bond sued on. They assumed a set of facts and obligations and executed the bond accordingly. The Attorney-General is suing on the bond and on that alone. He is not relying on the Act for anything except in so far as the provisions of the Act are incorporated in and form part of the bond either literally or by incorporation in it. The validity of the Act forms no issue in the suit. What the defendants are seeking is the right to repudiate the contract. They are

not resisting any provisions of the Act not included in the contract. It is absolute and contains no term of defeasance in the event of the Act being declared to be *ultra vires*. No statutory authority is needed to support the counterclaim.

In my opinion the cases distinguished by the learned trial judge are not opposed to my conclusion. In the *Attorney-General for Ontario* v. *Railway Passengers Assurance Co.* (1918), 43 O.L.R. 108 at p. 110, it was said:

> The action having been brought upon the bond, the defendants contended that the provisions of the Act under which the bond was demanded and given were *ultra vires* of this Province, so far as it was sought to apply them to a Dominion company. As the trust company applied for and obtained registry under the Provincial Act, and as a term of receiving its licence gave the bond now sought to be repudiated, neither the trust company nor its sureties can now be permitted to discuss the question sought to be argued. The Province demanded the bond as the price of the licence. The bond was given and the licence obtained. It is quite beside the mark to say now that the company might have done business in Ontario without a licence. Upon this branch of the case we agree with the trial judge.

And in *Montreal City* v. *Montreal Harbour Commissioners* (1926), A.C. 299, Lord Haldane delivering the judgment of the Judicial Committee of the Privy Council said at p. 314:

> Having regard to all these facts, their Lordships are satisfied that the Provincial authorities have waived any claim to interfere with the existing works, and that, so far as they are concerned, they are bound by what has been done.

These cases support rather than reject the conclusion to which I have come.

Judgment should therefore be entered for the appellant on his counterclaim for the amount there claimed and the action should be dismissed.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.: I am in agreement with the judgment of my learned brother, the Chief Justice, that the action as against the Attorney-General should be dismissed but that the counterclaim of the Attorney-General should succeed. No point is possible of being made in this appeal that the Succession Duty Act (R.S.B.C. 1924, Cap. 244) has been held to be *ultra vires*

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as we have the Succession Duty Act of 1934 (Cap. 61, Sec. 50) in which is contained a retrospective section, reading as follows:

(1.) This Act shall be retroactive, and shall apply in respect of persons who have died since the eleventh day of April, 1894, as well as in respect of persons who die after the commencement of this Act, and shall be deemed to be and to declare the law relating to the matter of the succession duty payable upon the death of any person so dying before the commencement of this Act, whether or not the matter is pending in or has been adjudicated upon by any Court, except as to any property in respect of which the duty heretofore payable or purporting to be payable under any Act of the Legislature then in force or purporting to be in force respecting succession duty has been fully paid and satisfied.

(2.) In the case of any property of a person so dying before the commencement of this Act, in respect of which the duty heretofore payable or purporting to be payable under any Act of the Legislature then in force or purporting to be in force respecting succession duty has not been fully paid and satisfied, the rates of duty and exemptions from duty set out in that Act shall be adopted and applied as the rates and exemptions for the purpose of the application of this Act in respect of that property, instead of the rates and exemptions set out in this Act; and credit shall be given under this Act for the amount (if any) heretofore paid on account of the duty so payable or purporting to be payable.

(3.) The giving or acceptance of any security heretofore given for the payment of succession duty pursuant to any Act of the Legislature or otherwise shall not, so long as any part of the duty purporting to be secured thereby remains unpaid, affect the application of this Act or constitute an exception within the meaning of subsection (1).

(4.) Where probate or letters of administration in respect of the estate of a deceased person have been issued or resealed before the commencement of this Act, a *caveat* may be filed for the purposes of section 25 at any time within six months from the date of the commencement of this Act, and when so filed the *caveat* shall be deemed to have and always to have had the same effect as if it had been filed pursuant to that section within six months from the date of the issuing or resealing of probate or letters of administration.

(5.) In order to give full and due effect to the provisions of subsections (1) and (2) in the case of persons who have died before the commencement of this Act, and for the more effectual carrying out of the provisions of this Act and the determination and collection of succession duty payable thereunder in respect of property and transmissions of beneficial interests in property passing on the death of those persons, the Lieutenant-Governor in Council may make such regulations as are considered necessary or expedient, including the providing for any proceeding, matter, or thing for which no express provision has been made by this Act or for which only partial or ineffectual provision has been made. Regulations under this section may be made generally as applicable to all cases, or specially as applicable to any particular case.

Therefore it is apparent that the liability upon the bond must

be considered as if the last-mentioned Act was in existence at the time of the execution of the bond and no question of the *ultra vires* nature of the Act existent at the time of the giving of the bond is tenable; that is, the liability upon the bond is complete and incapable of being contested upon any such ground.

I would allow the appeal of the Attorney-General.

MACDONALD, J.A.: The issues are outlined in the reasons for judgment of the learned trial judge. Appellant submitted that the respondent, as a result of negotiations between them, admitted liability and agreed to pay the amount assessed for succession duties and in part did so and that the bond given in the form prescribed by the Act was the outcome of that agreement. Were it not for the statute, it is submitted, the bond might have read "for the sum assessed" rather than for "any duty to which the property . . . may be found liable." He relies on this alleged agreement apart altogether from the statute. The statute deals with a sum "found liable," etc. As liability may be found in many ways a sum was ascertained as the amount due at the time of the negotiations referred to. The further point was submitted that because of all that occurred between the parties set out in appellant's pleadings the respondents were estopped from asserting that the amount claimed is not payable and cannot derive benefit from the fact that the Act, as found by the Courts, is *ultra vires*.

The answer to the first contention is that whether or not the parties might enter into an agreement *dehors* the statute they did not in fact do so but rather at all times acted under and pursuant thereto. I do not say that determinations as to value and amounts due could not be made by an agreement which afterwards could not be challenged unless permitted by statute except on the ground taken here, *viz.*, that although the amount is correct and cannot be disputed it is still not due and payable because the statute which alone creates the obligation to pay any amount however arrived at is *ultra vires*. (*United States Fidelity and Guaranty Co.* v. *Regem* (1923), 93 L.J.P.C. 26; *The King* v. *London and Lancashire Guarantee and Accident Co.* (1926), 22 Alta. L.R. 306; 4 D.L.R. 874; *Blackman* v. *Regem* (1924),

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S.C.R. 406). Appellant obtains no assistance from the terms of the bond. It is conditioned upon liability to pay.

On the question of estoppel by negotiations under an *ultra vires* statute we were referred (as analogous) to cases where the *ultra vires* acts of corporate bodies were considered in relation to its bearing on the conduct of shareholders aware of the illegal act. (*Gregory* v. *Patchett* (1864), 33 Beav. 595; *Towers* v. *African Tug Company* (1904), 1 Ch. 558.) I can see no analogy. If a statute is declared *ultra vires* it disappears; if the act of a company is illegal the corporate body remains.

Once it is determined that appellant cannot rely upon an agreement (and it was not specifically pleaded) liability can only rest, if at all, on the terms of the bond, the statute disappearing and, as already intimated, the bond standing alone is conditioned only for the due payment to His Majesty of any duty to which the property coming into the hands of the executor "may be found liable." That means liable under the Act.

The statement by Street in his work on "The Doctrine of Ultra Vires" at 436 that "a party who has acquiesced in an *ultra vires* statute may be estopped from complaining of it" and in which *Montreal City* v. *Montreal Harbour Commissioners* (1926), A.C. 299 is referred to does not help appellant. The author appears to recognize that "acquiescence" under a statute in the legal sense to prevent the assertion of a right is extremely unlikely. Every citizen not in revolt against constituted authority in a sense acquiesces to the operation of statutes. He continues to do so until it disappears and it is then of no further validity except that in respect to an *ultra vires* Act a presumption of power may be held to arise after long exercise of certain statutory authority. The gist of the judgment of the Judicial Committee is found at pp. 313-14. The bed and foreshore were vested in the Crown in the right of the Province. Could the Province complain of extensive works carried on by the Dominion Government on Provincial property? The answer was in the negative but not for a reason applicable to the case at Bar. The Province passed a statute which "referred to and impliedly sanctioned the operations of the Harbour Commissioners" and by that and other Acts waived (as it had the power to do) any claim to interfere with

existing works; in other words it sanctioned a trespass. The question of *ultra vires* did not arise on this aspect of the case. It was simply held that the Province had in fact exercised its undoubted right to permit the works to proceed.

Attorney-General for Ontario v. *Railway Passengers Assurance Co.* (1917), 41 O.L.R. 234; (1918), 43 O.L.R. 108 was also relied upon. I only add this to the statement of the trial judge that, in any event, whether or not required by statute, a bond or contract was in fact entered into. It was good as a contract and explicit in its terms. It may not have been necessary to give it inasmuch as the provisions of the Act under which the bond was demanded was said to be *ultra vires* but it was executed in effect gratuitously and served a useful purpose. I doubt if it was necessary to put it upon any other ground. I think Middleton, J. had this point in mind when he stated at p. 110:

> The bond was given and the licence obtained. It is quite beside the mark to say now that the company might have done business in Ontario without a licence.

MACDONALD, J.A.

I have already stated why the same considerations do not apply to the bond in the case at Bar.

Appellant really relied I think on the existence of an agreement made out by acts and by letters exchanged. Even if conceded that it was sufficiently pleaded it culminated in a bond and no action can be maintained upon it unless it is shewn that the condition under which it was given was broken and that is not now possible.

I would dismiss the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I would dismiss the appeal for the reasons stated by the learned trial judge.

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

Solicitors for appellant: *Wood & Bird.*

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

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WILLS v. SWARTZ BROS. LIMITED, AND HUDSON.

Negligence—Damages—Collision at Intersection—Right of way—Substantial prior entry on intersection—Contributory Negligence Act, B.C. Stats. 1925, Cap. 8.

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The plaintiff, who was driving his car north on Blenheim Street in Vancouver, on reaching 14th Avenue, looked to his right and saw the defendant's truck about 100 feet away from the intersection and coming towards it. He proceeded to cross the intersection and when nearing the opposite side the rear of his car was struck by the defendant's truck. The action was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (MARTIN, J.A. dissenting and MACDONALD, J.A. dissenting in part), that the plaintiff was some twenty feet on the intersection before the defendant reached it, and the rule applies that where one party is substantially in the intersection at the time the other reaches it the party in possession should be allowed to proceed without interference.

Per MACDONALD, J.A.: That the Contributory Negligence Act applies and the plaintiff should be assessed 60 per cent. of the damages.

Statement

APPEAL by plaintiff from the decision of FISHER, J. of the 10th of April, 1934, in an action for damages arising out of a collision between the plaintiff's motor-car and a truck belonging to Swartz Bros. Limited and driven by their employee the defendant Hudson. On the 2nd of January, 1934, the plaintiff was driving his car north on Blenheim Street in Vancouver, and on reaching 14th Avenue he proceeded to cross the intersection. When about two-thirds of the way across the intersection he was run into by a truck driven by the defendant Hudson, coming from the east on 14th Avenue. The truck struck slightly to the rear of the right side of the plaintiff's car. It was found on the trial that there was not excessive speed on the part of the defendant, that both parties entered the intersection about the same time, or at any rate that the plaintiff had not made a reasonable and substantial entry upon the intersection so as to displace the right of way that the driver on the right had, and the action was dismissed.

The appeal was argued at Victoria on the 5th and 6th of July, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

W. H. Campbell, for appellant: When the plaintiff reached the intersection he slowed down and looking to his right saw the defendant's truck about 100 feet away from the intersection. He then put on gas and proceeded to cross. The truck hit the rear portion of the right side of the plaintiff's car. The plaintiff proceeded to cross at about 15 miles an hour, and when hit was going at about 20 miles an hour. The lack of look-out on the part of the defendant was the cause of the accident. It was raining at the time. The defendant did not see the plaintiff until he was at the intersection. There was no excuse for this. He was going from 20 to 25 miles per hour, which is excessive in the circumstances. In any case there was contributory negligence: see *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512. Even when he saw the plaintiff the defendant did not apply his brakes. Argument

Craig, K.C., for respondent: There is very conflicting evidence in this case and the learned judge concluded that the case should be decided on the defendant's evidence. The trial judge should not be upset in a case like this where it is entirely a question of evidence unless the Court is convinced that he was clearly wrong.

Campbell, replied.

Cur adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.: This was a collision between an automobile of the plaintiff and a motor-truck of defendant at the intersection of Blenheim Street and 14th Avenue, in Vancouver. The appellant approached from the south on Blenheim Street and stopped or slowed up at the street line, the south boundary of 14th Avenue, and looked for other vehicles in the intersection. He saw defendant's truck 100 feet to the east of the east boundary of Blenheim Street and found the intersection clear of traffic. He proceeded to cross it at a speed of 15 to 18 miles per hour. He travelled on the intersection a distance of approximately 50 feet to the point C, the point identified on the map Exhibit 2, where he was struck on the back part of his car by defendant's truck. Now the distance from the boundary

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crossed by the appellant to point C was, as I have said, 50 feet. The distance from the boundary crossed by defendant (respondent) to point C was 30 feet. It is therefore demonstrated that the appellant was about 20 feet within the intersection when the respondent reached the boundary line. The vision of both parties was clear; there was no interference at all. The respondent says that the appellant was not in the intersection when he reached it. This is, of course, physically impossible, since he was in the intersection and within 30 feet of point C when the respondent reached the boundary. The respondent came on nevertheless and says he did not see the appellant until he was within a few feet of him.

It was argued by respondent's counsel that both cars were going at the same speed. This is practically so, but not quite since defendant was travelling at from 20 to 25 miles an hour while respondent was travelling 15 to 20. We, therefore, have this situation, that the appellant was within 30 feet of point C when the respondent was at the boundary line, and the respondent came on without paying any attention to his surroundings until he ran into the back of the appellant's car. Now the cases in our Courts are clear that where one party is substantially in the intersection at the time the other reaches it the party in possession is to be allowed to proceed without interference and if the other party then interferes he is guilty of sole negligence. That advantage is clearly demonstrated in the present case. There is no question of believing one party or the other. No question of credibility arises and therefore I have no hesitation in allowing the appeal without any division under the Contributory Negligence Act.

MACDONALD, C.J.B.C.

MARTIN, J.A.: In my opinion the learned judge has reached the right conclusion on the particular facts of this case, which present some unusual aspects, and therefore the appeal should be dismissed.

MARTIN, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my learned brother MCQUARRIE who has in his very careful and complete judgment, accompanied with quotations from the evidence adduced at the trial, made it abundantly clear that the plaintiff

MCPHILLIPS, J.A.

was entitled to succeed at the trial. It is true that according to our local law the right of way is accorded to the vehicle coming to the crossing or intersection of two roads from the right but that right can only be reasonably exacted and not as against one occupying the intersecting road that is appreciably in the intersection and proceeding forward. No right exists as was the case here of coming on, not looking and crashing into the motor-car already in occupation of the road and entitled to pass clear of the vehicle on the right. There must be some limitation upon this right, it cannot be one of *in terrorem*. This would mean stoppage of all traffic. Lord Sumner in *Rex* v. *Broad* (1915), A.C. 1110 at p. 1115, the leading case upon the point, said:

MCPHILLIPS, J.A.

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

I would allow the appeal, the damages to be as assessed by the learned trial judge to meet the event of a reversal of his judgment thus obviating any further assessment of damages. I would also dismiss the counterclaim.

MACDONALD, J.A.: Appeal by plaintiff from the judgment of FISHER, J. dismissing his action for damages for injuries received when his car collided with a truck driven by respondent Hudson, an employee of respondent Swartz Bros. Limited, at the intersection of Blenheim Street and 14th Avenue in Vancouver. The trial judge found that Hudson had the statutory right of way at the intersection. In testing the accuracy of this view we should accept his evidence. Appellant was proceeding north on Blenheim Street and Hudson was approaching the intersection from the right. He, therefore, had the right of way unless before he reached the intersection the appellant had substantially and reasonably entered upon it.

MACDONALD, J.A.

The intersection having regard to property lines was 66 feet in width each way, while the distance from curb to curb was 27 feet. The manhole on Exhibit 6 indicates the centre of the intersection and the collision took place a few feet north of that point. Respondent Hudson was travelling at from 20 to 25

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miles per hour and he estimated that appellant was travelling at the same rate of speed. Accepting these facts it does not follow that because the collision occurred a short distance north of the centre of the intersection, thus indicating that appellant nearly succeeded in crossing in safety having travelled 47 feet in the intersection while Hudson traversed a much shorter distance in that area, that the latter lost the right of way. Respondent's clear right in this respect must not be whittled away by too fine an estimate of distances. Assuming the collision occurred where indicated on Exhibit 6 if two cars approached that point from points equally distant at the same rate of speed, the driver to the right should be permitted to pass. The latter only loses his right of way when as already stated he finds on approaching the intersection that it is reasonably and substantially occupied by another car. All the circumstances must be considered. A driver might be substantially in the intersection without acquiring a right of way if for example he increased his speed to gain that position.

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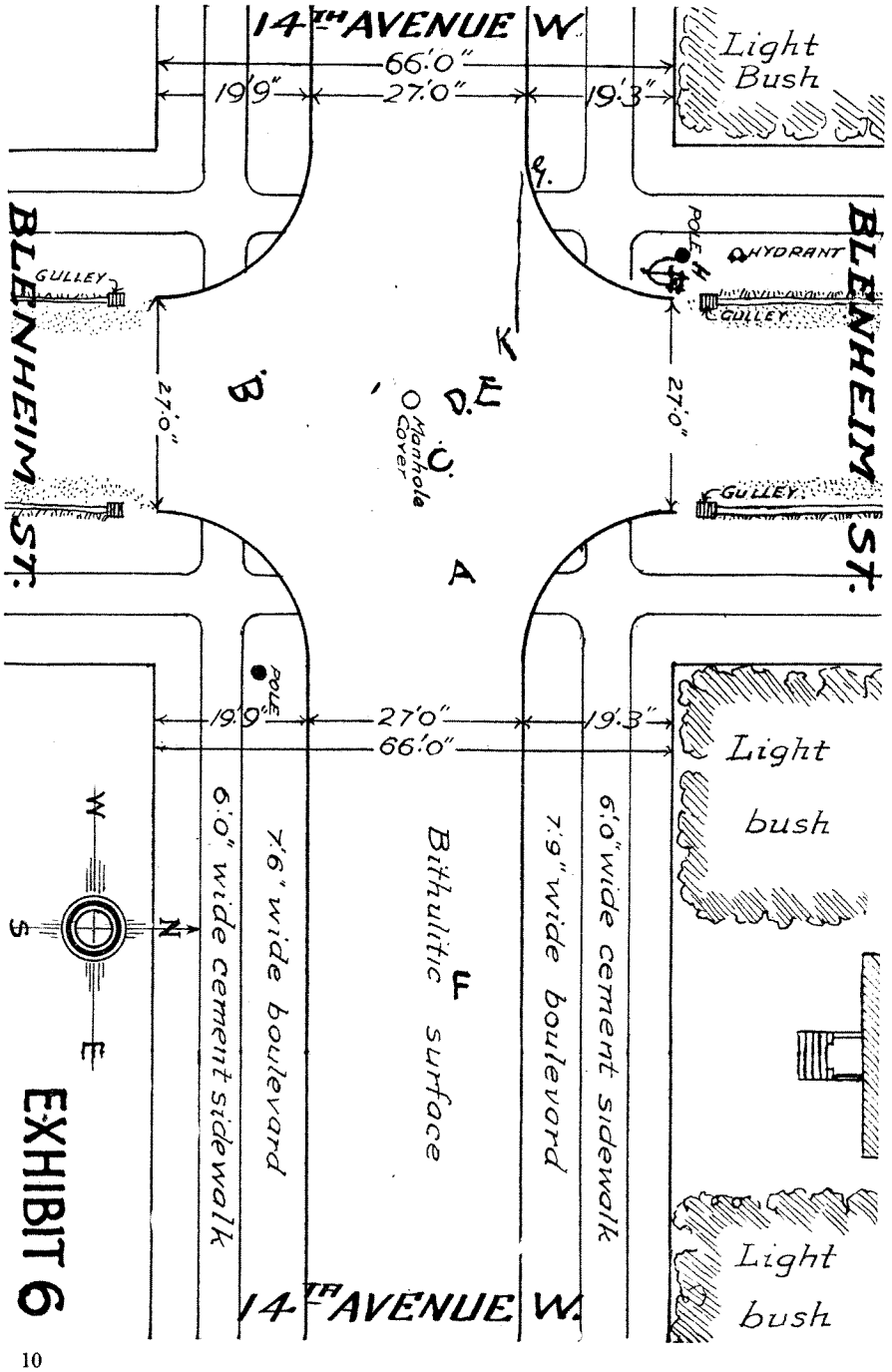
It should also be observed that by respondent Hudson's evidence when he arrived at a point marked A on Exhibit 6 appellant was at point B, both points being within the intersection having regard to property lines. It is clear that if this evidence is accepted as substantially correct, and we must assume that it was accepted with the qualification that one cannot speak of relative positions with complete accuracy, respondent Hudson did not lose his right of way. It is a question of fact and while it is conceivable that if appellant's evidence had been accepted the trial judge might have found that he did lose it, we cannot say that he was clearly wrong in reaching the opposite conclusion. It follows that appellant was negligent in asserting a right of way that he did not possess.

A further question arises. Was respondent Hudson guilty of negligence which jointly with the negligence of the appellant caused the accident? He says that when he arrived at the point F on Exhibit 6 on 14th Avenue, he looked to the left, his line of vision extending 50 feet southward from the intersection on Blenheim Street and that appellant's car was not in sight. I think it follows beyond doubt, having regard to relative speeds


14TH AVENUE W.
66'0"
19'9"
27'0"
19'3"
Light Bush
BLENHEIM ST.
GULLEY
HYDRANT
POLE
27'0"
B.
D.
C.
Manhole Cover
A
Bithulitic surface
7'6" wide boulevard
6'0" wide cement sidewalk
7'9" wide boulevard
6'0" wide cement sidewalk
Light bush
Light bush
N
S
E
W
EXHIBIT 6

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and the point of impact, that if he looked as stated at the point referred to he did not do so effectively. He said appellant was approaching the intersection at the same rate of speed as he was travelling at that time. If that is so he would be within his line of vision when he looked to the left from the point F. If, however, as Mr. *Craig* suggests we should not be guided by his mere estimate of speed and giving effect to that view assume that appellant was driving faster, it would still follow as shewn by the evidence that he should have seen appellant's car if within 150 feet of the intersection.

After looking to the left at the point F, Hudson did not look again in that direction until he reached the point A on Exhibit 6. It is true that in the interval he looked to the right as he was obliged to do to see if exposed to traffic from that direction. It is also true that some shrubbery on the north-east corner of 14th Avenue and Blenheim Street, obstructing the view in that direction, made it necessary to look carefully to the right. It does not follow, however, that he could not and should not look again to the left before reaching the point A. That oversight was fatal as it deprived him of ability to avert danger. If he had looked to the left at a point midway between points F and A or even sooner, as I think he should, he would have had time to apply his brakes effectively or to swerve behind appellant's car. He did not keep a proper look-out. It is true that the trial judge did not view his conduct in this light but this conclusion is based upon Hudson's evidence and necessary inferences from physical facts.

MACDONALD, J.A.

When Hudson reached the point A he tried to remedy his fault by applying the brakes while appellant on the other hand continued throughout on his course without making any effort by applying his brakes or otherwise to avoid the collision. In this situation a question of ultimate negligence might arise. It is difficult, however, to apply that doctrine or to segregate original and subsequent acts of negligence in collisions of this sort where events transpire so quickly and more particularly in view of the fact that at the point A where respondent Hudson seeks to obtain credit for applying his brakes it was of no avail to do so. He should have applied his brakes sooner and could have done so

had he been keeping a proper look-out. It is a proper case for the application of the Contributory Negligence Act. I think, however, that the greater blame is attributable to appellant. He asserted a right of way which he did not possess and in addition took no steps to avoid the collision. I would assign 60 per cent. of the blame to him.

The appeal should be allowed in part.

MCQUARRIE, J.A.: This case arose out of a collision between a motor-truck owned by the defendant Swartz Bros. Limited, driven by the defendant Hudson who was the servant or agent of the defendant Swartz Bros. Limited and was acting in the course of his employment, and a motor-car owned and operated by the plaintiff. The collision occurred on the 2nd day of January, 1934, at about 12.30 p.m. at the intersection of Blenheim Street and 14th Avenue West in the City of Vancouver. The plaintiff was seriously injured and his motor-car badly damaged. The defendant's truck was also damaged to the extent of $106.85 for which amount there is a counterclaim. The learned trial judge, while dismissing the action and allowing the counterclaim to provide for the contingency of his being wrong, assessed the plaintiff's general damages at $5,000 and the special damages as claimed, at $663.40. There is no dispute about the *quantum* of damages. Reference to the pleadings indicates that both parties to the action alleged against the other party almost every conceivable description of negligence but there is very little difference between them as to the facts which are not at all complicated. Both parties apparently very largely rested their cases on the extracts from the examination for discovery of the defendant Hudson filed by the plaintiff at the trial. That evidence therefore is most important and must be subjected to close scrutiny. It appears to be clear that the defendant's truck ran into the plaintiff's motor-car and that the real point in controversy is not whether the defendant's truck caused the injuries complained of, which may be taken to be admitted, but whether the negligence of the plaintiff or the defendant Hudson was responsible for the collision and possibly whether both were not to some extent to blame. There seems to be no question of

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unreasonable speed on the part of either vehicle in approaching the intersection. It is admitted that both were going at about the same speed or between 20 and 25 miles per hour when they came to the intersection. Both vehicles were apparently in their proper positions on the roads on which they were travelling. In the second last paragraph of his reasons for judgment the learned trial judge says:

> . . . I find that the plaintiff was not keeping a proper look-out, and that he should not have crossed that intersection, and that the accident was caused by the negligence of the plaintiff in not keeping a proper look-out and giving the defendant driver the right of way. . . .

I do not think that the evidence warrants any such finding and the plaintiff's evidence shews not only was he keeping a look-out but that he actually saw the defendant's truck in good time. In my opinion the plaintiff, if he made any mistake at all, which is not clear, it was purely an error of judgment in the agony of collision in thinking that he had sufficient time to get across the intersection in front of the truck. As a matter of fact it would appear manifest from the position of the injuries to the plaintiff's motor-car which were all at the rear of the front door thereof, and the admissions of the defendant Hudson on his discovery, that the plaintiff had practically succeeded in getting across the intersection and if the defendant had been keeping a proper look-out for the plaintiff's car he might easily have stopped and there would have been no collision. In that connection it should be noted that the plaintiff's car was well over on the right side of the intersecting street on which the truck was travelling when the plaintiff's car was struck. It appears to me that the defendant Hudson on his own admission confined his attention immediately prior to the collision to a suspected danger due to the presence of bush on his right side of the road which danger did not in fact exist and neglected to take proper precautions in regard to traffic approaching from his left. He admitted that between point F on Exhibit 6, where he says he looked to the left and did not see anything, and point A where he first saw the plaintiff's automobile, being a distance of about 50 feet, he did not look to the left at all but directed his attention exclusively to the supposed danger on his right side. If he had kept a proper look-out on his left side as well as on his right he would

MCQUARRIE, J.A.

necessarily have seen the plaintiff's car approaching sooner than he did and could have stopped before striking it without any difficulty. I therefore regard the defendant Hudson as being entirely responsible for the collision. I have mentioned the extracts from the examination for discovery of the defendant Hudson and would quote therefrom the following: [His Lordship set out the evidence at length and continued.]

The plan referred to was Exhibit 6. Immediately after the collision the defendant Hudson did not deny that he was responsible for it as will appear from the following extracts from his examination for discovery. [His Lordship read the evidence.]

Section 21 of the Highway Act provides as follows: [His Lordship read the section.]

The truck was bound to avoid running into the plaintiff's car if reasonably possible and the defendant Hudson displayed the utmost disregard of the duty and responsibility incumbent on the driver of such a heavy and dangerous vehicle in the circumstances.

I would allow the appeal and direct that judgment be entered in favour of the plaintiff for the amount tentatively assessed by the learned trial judge and that the counterclaim be dismissed.

Appeal allowed, Martin, J.A. dissenting, and Macdonald, J.A. dissenting in part.

Solicitor for appellant: *W. H. Campbell.*
Solicitor for respondents: *J. F. Downs.*

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BERTRAND v. NEILSON AND CITY OF VANCOUVER.

Negligence—Damages—Parking of cars on street—Accident to wayfarer—Nuisance—City authority—Liability—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320; 1928, Cap. 58, Sec. 38—City By-law 1874.

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Section 320 (1) of the Vancouver Incorporation Act provides that "Every public street, road, square, lane, bridge, and highway in the city shall, ... be kept in reasonable repair by the city" and city By-law 1874 provides that it shall be unlawful for any person in charge, control, or in possession of a vehicle to permit same "to stand or remain stationary for any period of time on the school side of any street fronting or immediately adjacent to any school grounds on school days during school hours."

Workmen engaged in building an addition to a school in the City of Vancouver parked their cars on the school side of a street adjoining the school grounds. The plaintiff (daughter) coming to the sidewalk from the school grounds proceeded along the sidewalk a short distance and passed between two of the parked cars to cross the street. On reaching the middle of the road she was struck by an automobile driven by the defendant Neilson and injured. The plaintiffs claim: (1) That the automobiles in the street constituted a nuisance at common law which the city permitted to be there; (2) that the parking of automobiles on the street put it in a state of disrepair and there was a breach of duty on the part of the city under section 320 of the Vancouver Incorporation Act, 1921; (3) that permitting a breach of By-law 1874 in allowing cars to stand on the school side of a street constituted negligence.

Held, that assuming the parked automobile did affect the girl's ability to see the on-coming car and created a nuisance the city would be entitled to a reasonable time within which to remove it and in the circumstances sufficient time had not elapsed in this case to render the city liable, and the presence of the automobiles on the street was not a failure on the part of the city to keep same in "reasonable repair" under said section 320.

Statement

ACTION by father and daughter for damages resulting from the daughter being run into by an automobile while crossing a road after coming out from between two automobiles which were parked at the curb. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 17th of October, 1934.

J. A. Russell, and *E. N. R. Elliott,* for plaintiff.

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

27th October, 1934.

ROBERTSON, J.

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BERTRAND v. NEILSON AND CITY OF VANCOUVER

ROBERTSON, J.: The plaintiff's father and daughter (by her next friend) sue the City of Vancouver (hereinafter called the city) for special and general damages, arising out of an accident which occurred on the 23rd of October, 1929. The plaintiff was then nine years old and a pupil at Bayview School, situated at the southwest corner of Collingwood Street and 6th Avenue in the said city. A large addition to the said school was being built on the south side thereof and workmen, who were engaged in the said work had parked their automobiles on Collingwood Street opposite the entrance to the said school. As shewn by Exhibit 1 there were five automobiles parked close together on the west side of the street, the most northerly one being almost at the intersection of 6th Avenue and Collingwood Street, and these automobiles, starting from the most southerly one are numbered on said Exhibit, from 1 to 5. There was also an automobile parked on the east side of Collingwood Street about opposite car No. 4 as shewn on Exhibit 1. Each of the said six automobiles was parked parallel with the curb. There was no fence around the school grounds. There was a pathway from the entrance to the school "in a perpendicular line to the sidewalk." There was a cement-mixer on the sidewalk, south of this pathway, where workmen were mixing cement. The plaintiff came out of the school entrance about 3.20 p.m. and because of the cement-mixer, and the men working there, turned north a short distance along Collingwood Street and then passed between cars 4 and 5 and, after so passing, looked to see "if any vehicles were coming along" and, as she did not see any, proceeded on her way across the street and when about the centre, was struck by an automobile, driven by one Neilson. She presumes that the automobile which struck her must have been coming east on 6th Avenue and turned south on Collingwood Street. She and her father now sue the city for special and general damages. Originally Neilson was a party to the action but later on proceedings against him were dropped. Upon these facts the plaintiff's counsel submits: (1) That the automobiles in the street constituted a nuisance at common law which the city permitted to be there; (2) that the parking of the automobiles on the street put it in a

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state of disrepair and therefore there was a breach of the duty to keep the street in reasonable repair as required by section 320 of the Vancouver Incorporation Act, 1921, Cap. 55, B.C. Stats., 1921 (Second Session), as amended by section 38 of Cap. 58 of 1928, reading as follows:

320. (1.) Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in reasonable repair by the city.

At the time of the accident in question there was in force in the city By-law 1874 Street Traffic and Parking By-law, passed pursuant to a section (section 163, subsection (135)) in the said Act which permitted the city's council to pass by-laws for "prohibiting, controlling, limiting, restricting, defining and allotting areas, parts or spaces of streets, lanes or public places for parking all varieties of vehicles. Subsection L, section 54 of the said by-law provided that it should be unlawful for any person in charge, control, or in possession of a vehicle (which includes automobiles), by virtue of section 4 (7) to permit the same

to stand or remain stationary for any period of time on the school side of any street fronting or immediately adjacent to any school grounds on school days during school hours.

Judgment

The plaintiff submits that permitting a breach of this by-law constitutes "negligence" on the part of the city. There is no evidence to shew what the school hours were and, presumably, when plaintiff was crossing the street in question, school was over; but apart from this, the breach of a permissive by-law, such as the one in question, does not render the city liable.

In *Sheppard* v. *Glossop Corporation* (1921), 3 K.B. 132 it was held that where an urban authority was given a discretion, but no obligation was imposed on it, to light the streets and it had begun to light the streets it was not bound to continue doing so and that having done nothing to make the streets dangerous, it was under no obligation to the plaintiff who was injured because the street lights were out. See also *Stevens-Willson* v. *City of Chatham* (1934), S.C.R. 353 at p. 363 where Duff, J. approved of the judgment of Davis, J.A. in the Court below which is to be found in (1933), O.R. 305 at p. 321 and particularly pp. 327-8 where the learned judge refers to the case of *Sheppard* v. *Glossop Corporation, supra.* See further *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400 referred to by Mr.

Justice Duff, as he then was, in the *Stevens-Willson* case, *supra*, where, at p. 411, Lord Watson, delivering their Lordships' judgment said:

> But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself which they negligently failed to perform.

In my opinion therefore the by-law has nothing to do with the question of the defendant's liability.

Assuming that the parking of automobile No. 5 created a nuisance, the question is, was it the *causa causans* of the accident? The girl does not say that if it had not been for the parked automobile she would have seen Neilson's automobile coming east on 6th Avenue. As a matter of fact the girl had passed the nuisance and was on the highway beyond the car and it is difficult to see how the car could have affected her ability to see Neilson's automobile. There was no evidence given as to the kind or size of automobile No. 5. I shall assume, however, without deciding, for the purpose of this judgment, that the parked car did affect her ability to see Neilson's automobile. Then did the parking of the automobiles constitute a nuisance or rather did the parking of automobile No. 5 constitute a nuisance for the parking of the other cars did not in any way affect the girl's ability to see an automobile approaching from 6th Avenue? No evidence was led to shew how long this automobile had been upon the street. The plaintiff's counsel submits that as it was a workman's car, who, usually, go to work at 8 o'clock in the morning, it was a fair inference that the car had been parked there from 8 a.m. I do not think it is a proper inference for no doubt various classes of work were being done upon the school building and workmen might be arriving to do their part of the work at various times during the day but I shall assume, for the purpose of my judgment, that automobile No. 5 was parked at 8 o'clock in the morning on the date of the accident and remained there all day.

Judgment

It seems clear, apart from any right to park given by a by-law pursuant to statutory authority, a parked automobile may constitute a nuisance. In *Rex* v. *Cross* (1812), 3 Camp. 224 the defendant was indicted for permitting coaches to stand for a

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long and unreasonable time on the highway in front of his place of business. Lord Ellenborough said (pp. 226-7):

> And is there any doubt that if coaches on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance . . . . Upon the evidence given, I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stable-yard.

The facts in *Wilkins* v. *Day* (1883), 12 Q.B.D. 110 were that the servants of a farmer, who farmed lands on both sides of a highway, removed a roller from one of his fields across the highway to the gate of the opposite field, and, taking away the horses, left the roller on the green-sward at the roadside with its shafts turned up but projecting a few inches over the metalled part of the highway intending it to remain there until it should suit their convenience to draw it away. Grove, J. said at pp. 113-4:

> I am of opinion that the plaintiff in this case is entitled to judgment. *Rex* v. *Cross* [(1812)], 3 Camp. 224, *Rex* v. *Jones* [(1812)], 3 Camp. 230, and *Harris* v. *Mobbs* [(1878)], 3 Ex. D. 268 are distinct authorities to shew that all the Queen's subjects are entitled to the free and unobstructed use of the highway, and that an action will lie for an injury resulting from "an occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which is unreasonable." Here was unquestionably a legal nuisance, and an undoubted injury resulting from that legal nuisance. How can we say that that is not actionable? If the accident had happened whilst the person in charge of the roller was opening the gate for the purpose of passing with it into the field, it might have been said that he was fairly and reasonably using the highway. But that was not so. The roller was left standing on a portion of the highway, because it was more convenient to leave it there until the harrowing in the field was done. The defendant was not using the highway for any lawful purpose; he was making it a standing ground for his machine to suit his own purposes.

Judgment

The right to park was also considered by Riddell, J.A. in *Brain* v. *Crinnian* (1930), 66 O.L.R. 223 at 226 as follows:

> The right of one with a vehicle upon a highway to stop temporarily for the legitimate purposes of his business is quite beyond question: Pratt & Mackenzie's Law of Highways, 17 Ed. (1923), p. 134 *et seq.* In *Rex* v. *Cross* (1812), 3 Camp. 224, Lord Ellenborough, C.J., said: "A stage-coach may set down or take up passengers in the street . . . but it must be done in a reasonable time . . ." *Cf. Robinson* v. *London General Omnibus Co. Ltd.* (1910), 74 J.P. 161. That the right exists to stop for a reasonable time upon a street for the purpose of loading and (or) unloading goods is clear;

and whether the user is excessive is a question of fact in each case: *Attorney-General* v. *W. H. Smith & Son* (1910), 74 J.P. 313. The recent case of *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (1900), 1 Ch. 276 (C.A.), makes this beyond controversy. In that case the defendants had a number of vans, which they kept coming and going throughout the day, stopping before their warehouse for a time sufficient to load, etc.—it was held that it would be absurd to consider the stopping of a cart opposite a grocer's for five minutes, to take up goods, a nuisance. "It is always a question of degree" (p. 282). And (p. 283) Vaughan Williams, L.J., says: "Now a highway is intended primarily for the purpose of the passage of Her Majesty's subjects, but it is also for the purpose that those who pass along it shall be able to stop at the houses which abut on the highway and either take up or discharge goods or persons there. The fact that in doing this you temporarily reduce the width of the roadway does not make the act unlawful, and does not make your obstruction unlawful . . ." And the language of Lord Ellenborough in *Rex* v. *Jones* (1812), 3 Camp. 230, 231, is adopted: "A cart or wagon may be unloaded at a gateway; but this must be done with promptness." The conclusion is reached that the question to be answered in each case is: Was a particular user necessary or reasonable?

One of the cases referred to by Riddell, J.A., *supra,* is that of *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (1900), 1 Ch. 276 (C.A.) where Romer, J.A., at p. 286, said:

. . . for I think that it practically amounts to an appropriation by them of at least half the highway for several hours in every day (except Sundays) exclusively for the purposes of their business, making it as it were a part of their business premises, a private yard of their own; . . .

Judgment

Assuming then that automobile No. 5 had been parked from 8 o'clock on the day of the accident I would find that it was a nuisance at common law and the person parking the same would be liable for damages resulting from such nuisance. The city, however, would only be liable at common law if it knew, or might have known, of the existence of the nuisance and permitted it to continue, and damages resulted therefrom. See *Rice* v. *Town of Whitby* (1898), 25 A.R. 191 where the facts were that a house which was being moved had been left on a highway during the night without a watchman or warning lights. The plaintiff was driving past the house during the night, his horse took fright and he was injured. Osler, J.A., pp. 197-8, said:

I understand the law of this Court in relation to such a claim as forms the subject of this action to be in accordance with what is laid down in the head-note to *Castor* v. *Corporation of Uxbridge* (1876), 39 U.C.Q.B. 113, *viz.*, that municipal corporations are responsible for damages caused to travellers by obstructions placed upon the highway by wrongdoers of which

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the corporation have or ought to have knowledge, and that the road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel. It is of course implied in this statement that a reasonable time has elapsed after such notice to enable the corporation to remove such obstructions or take proper measures to guard against accidents arising therefrom. I am aware that it was not necessary for the decision of that case to lay down this proposition, but it was subsequently expressly approved by this Court in *Maxwell* v. *Township of Clarke* (1879), 4 A.R. 460, where it is said that it established no new principle. It merely applied the well established doctrine in a case where the safety of travellers on the highway was endangered by obstacles placed on the road by a stranger just as it might have been endangered by an excavation made in a highway by a stranger, the effect in either case being to put the road out of repair.

In the same case, Moss, J.A., at p. 203, said:

> Until the building was brought to a standstill for the night, and it was made to appear that from its situation it was likely to become a dangerous obstruction upon the highway, there was no liability upon the corporation, and its subsequent liability, if any, depends upon whether it received notice of the matter and thereafter suffered more than a reasonable time to elapse without taking steps to remove the obstruction or to guard the public against it.

Judgment

Again, assuming that the automobile was parked at 8 a.m., it it impossible to say the city was liable. There is no proof of actual notice to the city. There are many thousands of automobiles parked daily in large cities like Vancouver, many of them but a reasonable time, for legitimate purposes of business, and, it may be that there are many which are parked for an unreasonable length of time, and therefore become nuisances. The city could not tell whether an automobile had become a nuisance by reason of its being parked without knowing when, and how long, the automobile had been parked, and, the purpose for which it had been parked. It can be easily seen that in a large city with hundreds of streets and thousands of automobiles it would be almost an impossibility. As determined in the *Town of Whitby* case, *supra,* apart from express notice, sufficient time must have elapsed from the creation of the nuisance so as to entitle the Court to hold that the city ought to have had knowledge thereof and thereafter the city would be entitled to a reasonable time within which to take steps to remove the nuisance. I am unable to say in this case that the city ought to have had notice.

Finally, assuming that the parked automobile was a nuisance, can it be said that its presence on the highway was a failure on

the part of the city to keep the same in "reasonable repair" and is it thereby liable under section 320, *supra?*

In *Maxwell* v. *Township of Clarke, supra,* it was held that the municipality had not committed a breach of its statutory duty "to keep in repair" where, although some wood was left upon the bed of the road, a portion thereof was free from obstruction. In *O'Neil* v. *Windham* (1897), 24 A.R. 341 at 349 Osler, J.A., after referring to *Maxwell* v. *Township of Clarke*, points out that in the latter case, *Castor* v. *Corporation of Uxbridge* (1876), 39 U.C.Q.B. [113] was approved but was distinguished from *Maxwell* v. *Township of Clarke* on the ground that in *Castor* v. *Corporation of Uxbridge* the road was encumbered by telegraph poles,

> one of which upset the vehicle in which the plaintiff was riding, whereas, in the latter, [*Maxwell* v. *Township of Clarke*] although the wood may have encroached a few feet on that part of the highway on which it was possible to ride, the plaintiff's horse did not come in contact with it, and would have passed it without difficulty or inconvenience if he had not been startled by its appearance.

He further says as follows:

> It was held in short that the obligation to keep in repair did not include the duty of keeping it free from objects, which, while they do not block the way of the traveller, may, nevertheless, be calculated to frighten horses.
>
> The decision, as I read it, assuming negligence or negligent ignorance on the part of the corporation to have been proved, would have been different had the plaintiff suffered in consequence of having come into actual collision with the wood, thus shewing that the way had been actually obstructed and damage sustained by reason thereof.

Judgment

In *Colquhoun* v. *Township of Fullerton* (1913), 28 O.L.R. 102 the Appellate Division in Ontario had to consider a case in which the facts were that the plaintiff's horse shied at a milk-stand standing upon a highway, at the side thereof and was so injured that it had to be destroyed and it was held that the defendants were not liable. In referring to the case of *Rice* v. *Town of Whitby, supra,* Mulock, C.J. at p. 104 said:

> It was not necessary for the Court to decide, and it did not decide by that judgment, that such an obstruction, where it merely frightens horses and thereby causes damage, creates a condition of non-repair, within the meaning of sec. 606 of the Consolidated Municipal Act.

Sutherland and Leitch, JJ. concurred: Riddell, J. stating, unless the Court were prepared to overrule *Maxwell* v. *Township of Clarke* and *O'Neil* v. *Windham* the Court could not give judgment for the plaintiff.

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Judgment

The principle of these decisions seems to me to be that where the accident is not caused by actual contact with a nuisance, such as in the case of *Castor* v. *Corporation of Uxbridge, supra,* the highway is not in a condition where it is not in a state of reasonable repair within the meaning of section 320. I am of opinion that the same principle applies to the facts of this case and assuming the accident was caused by the parked automobile, blocking the girl's vision so that she could not see the automobile proceeding east on 6th Avenue, this would not put the highway out of repair.

The action must be dismissed with costs.

Action dismissed.

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April 6.

BARKLEY v. PACIFIC STAGES LTD.

BARKLEY v. PACIFIC STAGES LIMITED.

Practice—Appeal—Benefit taken under judgment appealed from—Loss of right of appeal.

In an action for damages in the County Court the plaintiffs entered judgment in default of dispute note. The defendant then moved to set aside the judgment and the application was dismissed "with costs to be paid by the defendant to the plaintiffs in any event of the cause." The damages were assessed at $95, for which judgment was entered. The costs of the action were taxed and allowed by the registrar, but the costs of the special application were refused taxation by the registrar who thought he was bound by the County Court tariff limiting the costs to $20 and disbursements. Plaintiffs appealed to the County Court judge as to the item costs of the special application, who upheld the registrar's disallowance. Plaintiffs appealed to the Court of Appeal by special leave, but demanded and received the amount of judgment and costs, as to which there was no dispute. On preliminary objection by the defendant that the appeal should be dismissed as the plaintiffs had taken a benefit under the order appealed from:—

Held (MACDONALD, C.J.B.C. dissenting), that the objection is one which is consistent with prior rulings of this Court and therefore should be given effect to, and the appeal dismissed.

Statement

APPEAL by plaintiffs from the order of HARPER, Co. J. of the 7th of March, 1934, on review of the registrar's taxation of the plaintiff's costs of an action in which judgment was entered in default of dispute note and in which the defendant's application to set aside the judgment was dismissed with costs. The further facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 5th and 6th of

April, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Woodworth, for appellants.

Carmichael, for respondent, took the preliminary objection that the plaintiffs having demanded and received from the defendant the amount of the costs that were allowed by the order appealed from, they were precluded from proceeding with their appeal. They have taken a benefit under the order because the costs awarded were paid: see *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432; *Reid* v. *Galbraith* (1927), 38 B.C. 287; *Coleman* v. *Interior Tree Fruit & Vegetable Committee of Direction* (1930), 42 B.C. 499.

Argument

Woodworth, contra: The subject-matter of the appeal is solely confined to costs ordered to be paid on the dismissal of the defendant's application to set aside the interlocutory judgment. The general costs of the action were admittedly due and payable and had no bearing whatever on the costs payable under the above-mentioned order. The cases referred to by respondent's counsel do not apply as the benefit taken in those cases had some bearing on the subject-matter of the appeal.

MACDONALD, C.J.B.C.: I would overrule the objection for the reasons I have already given, that the only matter before the learned judge was the special items mentioned in the notice of motion. Those special items came before him for review, nothing else, and what was asked was that those special items be disallowed, which he did. He had no right—I do not say he had no right, but there was no necessity to review the balance of the bill; it was not disputed at all. What happened does not affect the substance of the case, and we ought not to give effect to the objection.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I am of the opinion, along the line of decisions of this Court which have been cited by Mr. *Carmichael*, and upon which he justifiably relies, that this appeal should not be entertained because the plaintiffs-appellants have taken a benefit from the order they now appeal from. The defendant-respondent on the taxation of costs before the registrar was not satisfied, and a motion to review the same was made by him which came before the learned judge below, who upon that motion reduced the taxation of the registrar at $43.25 to the sum of $32.20. What the learned judge thus did, rightly or wrongly, and

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whether he proceeded on a mistaken view or a correct view, is immaterial for the purposes of this objection, because he has stated (appeal book p. 8) what the result of his review of the taxation was, and it is this, that "the plaintiffs' costs of this action are hereby taxed at the sum of $32.20." That was the final pronouncement of the judge having jurisdiction over the matter of the costs that could be recovered, and assuming, as I said, that said judgment was wrong both in form and in substance, nevertheless what happened was this, that the plaintiffs-appellants asked for and were paid the full amount of the costs that were thus declared finally to be due, as the order then stated, and to be the only costs of this action. They thereby took every possible benefit, not partial benefit but the entire benefit, of the order in the form in which it stood, and after having done so, they now essay to appeal to us to get something more under the same judgment because of alleged error therein. But it is sufficient only to say that, under such circumstances, we cannot go behind the order to discover what errors, if any, the learned judge made in it, because the plaintiffs themselves by their conduct have debarred us from taking that course, and since the objection is, to my mind, one which is entirely consistent with the prior rulings of this Court, it should be given effect to, and so this appeal must be dismissed.

MARTIN, J.A.

McPHILLIPS, J.A.: I am of a like opinion. I look at this order on p. 8, and it would be and is no doubt the last order upon the file in the Court below. True, it was the revision of a taxation and the results of it are here, and it is naturally what one would look for. On searching the files of the office, and finding this order there, it must be deemed to be the last and final order until set aside by the Court of Appeal. Now an appeal has been taken from it, and unless this Court of Appeal changes the terms of this order, the appellants certainly cannot get any relief. I am of the opinion that, apart from there being the right to a review of the taxation under the practice in the County Court, His Honour Judge HARPER was not hedged in his jurisdiction to make this order, and having jurisdiction until set aside, it must be deemed to be the final and determining order. Now it is a truism that if you want to appeal from an order in its terms, you ought not to be handicapped, because it is a fatal handicap to have charged against you that you took a benefit under the order which is under appeal. Your skirts must be clean and free from any trammels of that kind.

MCPHILLIPS, J.A.

Now the appellants here are not in that position. The last order, and the order presented to this Court, and as I see right before me, now reads in these terms:

It is ordered that the taxation of the plaintiffs' costs of this action by the registrar of this Honourable Court on the 28th day of February, 1934, be and the same is hereby reviewed and that the items headed, "Costs allowed by special order" under the dates January 18th, 1934, and January 24th, 1934, other than the actual disbursements, which items total the sum of $11.05, be and the same are hereby disallowed, and the plaintiffs' costs of this action are hereby taxed at the sum of $32.20.

Now that order being made, the appellants' solicitor writes to the solicitor on the other side and demands in very peremptory terms the payment of the $32.20, which can only have relation to the last order made on a review of the taxation. Therefore, the appellants are in the position that they have taken a benefit under the order, and yet seek to appeal. The trouble is that the Court will not allow the appeal to be opened. Something may happen that ought not to have happened, but here is an order; a benefit has been taken under it; it is a good rule, a rule that has been adopted by the Courts over a long period of time, and I cannot see that I can arrive at any conclusion than that which is in consonance with the long line of decisions we have. Therefore, the appeal should be dismissed.

MARTIN, J.A.

Woodworth: I may be wrong—your Lordships will correct me—but may I be allowed to ask Mr. Justice MCPHILLIPS to consider one statement he has made, if it is allowable? I have never done it before at this stage. Would you consider that no appeal had ever been taken to Judge HARPER, and the matter was not before him as to anything but the $11.05? That is the point.

MCPHILLIPS, J.A.: That is your misfortune. Your trouble is that you cannot get the Court of Appeal to consider it, because your action precludes it. At least, that is my view.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The appeal is from an order where, although only $11.05 was in controversy, still the costs were taxed and taxed by the order at $32.20. Now it is sought to set aside that order, but in the meantime a benefit under the order was taken. I would quash the appeal.

MACDONALD, J.A.

MCQUARRIE, J.A.: I agree with the majority of the Court that the appeal be dismissed.

MCQUARRIE, J.A.

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

Solicitor for appellants: *C. M. Woodworth.*
Solicitor for respondent: *J. Fred Downs.*

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1934

Nov. 2.

TATROFF v. RAY.

Practice—Appeal—Change of hearing to sitting at another place—Effect of section 13 (2) of Court of Appeal Act, R.S.B.C. 1924, Cap. 52—Jurisdiction—Withdrawal of appeal by consent and notice for another sitting.

TATROFF v. RAY

Section 13 (2) of the Court of Appeal Act deprives that Court of jurisdiction to change the hearing of an appeal entered on the list in Vancouver to a sitting in Victoria (or *vice versa*), but by consent an order may be made giving leave to withdraw the appeal from the list and give another notice for a sitting in another place.

MOTION to postpone the hearing of an appeal, entered upon the present list, to the next January sitting of the Court in Victoria.

Statement

Heard at Vancouver on the 2nd of November, 1934, by MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

G. L. Fraser, for the motion.

Craig, K.C., contra, objected to any postponement, and wished the appeal to be heard at this sitting as entered.

Argument

[MARTIN, J.A. drew attention to section 13 (3) of the Court of Appeal Act, Cap. 52, R.S.B.C. 1924, which declares that "All appeals shall be heard in the city in which the same are entered for hearing."]

Per curiam: The motion cannot be granted because, as we have repeatedly decided, the effect of said section is to deprive this Court of any jurisdiction to direct that an appeal which has been entered for hearing either at the city of Victoria or Vancouver shall be heard at any other city. The most the Court has been able to do in that direction is, if there is consent, to give leave to withdraw the appeal from the list and give a notice of appeal for another sitting at Victoria or Vancouver, as the case may be; but since there is no consent here this motion must be dismissed with costs.

Judgment

Motion dismissed.

MACDONALD-BUCHANAN v. THE CORPORATION OF THE DISTRICT OF COLDSTREAM.

COURT OF APPEAL

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Oct. 2.

MACDONALD-BUCHANAN v. CORPORATION OF DISTRICT OF COLDSTREAM

Municipal law—Water system by-law—Provision for annual assessments on all rateable property—Land and improvements—Subsequent by-laws exempting improvements—Validity—B.C. Stats. 1906, Cap. 32, Secs. 68 and 139—R.S.B.C. 1924, Cap. 179, Secs. 201 and 231.

Three by-laws passed by the defendant municipality providing for water-works, two in 1910 and one in 1912, after reciting that to pay principal and interest it was necessary to raise a certain sum annually and that the whole rateable property of the municipality, according to the last assessment roll, was a certain sum which included land and improvements, provided that "a rate on the dollar shall be levied and shall be raised annually in addition to all other rates on all the rateable property of the said district . . . to pay interest," etc. In 1932 and 1933 by-laws were passed under section 201 of the Municipal Act exempting improvements from taxation, and in the same years instead of raising the respective sums required for sinking fund and interest by taxation on lands and improvements as indicated by the above by-laws, raised it by a rate on lands alone. The plaintiff's improvements being of a smaller proportionate value than the larger portion of the properties in the district, the exemption of improvements materially increased her taxes. An action for a declaration that the taxes and rates for the years 1932 and 1933, which the municipality purported to impose upon her lands were invalid and for an injunction, was dismissed.

Held, on appeal, affirming the decision of FISHER, J. (MARTIN, J.A. dissenting), that section 139 of the Municipal Clauses Act (B.C. Stats. 1906, Cap. 32), in force at the time the by-laws in question were passed, enabled the council in each year to pass a by-law for levying rates to meet obligations including those under the by-laws in question on both land and improvements (not more than 50 per cent. of the assessed value of the latter) or on land alone exempting improvements altogether, and the amounts required under said by-laws to meet payments of principal and interest may be provided for by a rate by-law passed pursuant to section 231 of the Municipal Act, under which the by-law may exempt improvements from taxation.

APPEAL by plaintiff from the decision of FISHER, J. of the 26th of January, 1934, dismissing an action for a declaration that the taxes and rates for the years 1932 and 1933 which the defendant purported to impose upon the plaintiff's lands within the Coldstream District are invalid and void in law, and for an injunction restraining the defendant from taking any measures

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for collecting same. The defendant through its reeve and council, by By-law No. 29 which received the assent of the electors and was passed on the 30th day of November, 1910, enacted that the defendant should have power to borrow $8,000 upon its debentures, bearing interest at 5 per cent. per annum, repayable on the 1st of December, 1940, and that until such date $400 and $142.64 respectively to pay interest and provide a sinking fund should be raised annually by a special rate on all the rateable land and improvements within the corporation, in addition to all other rates. By By-law No. 30, passed on the same day, similar provision was made to borrow $92,000. By By-law No. 34, passed on the 10th of April, 1912, similar provision was made to borrow $13,000. These by-laws were all submitted to and passed by the ratepayers and all contained recitals as to the value of the rateable property in the municipality, which values admittedly included the assessed value of all improvements in the municipality at the respective dates of passage. All imposed an annual rate on "all the rateable property in the municipality." The loans were raised for waterworks purposes and the defendant is still indebted for the whole amount of the loans. Said by-laws have not been repealed or amended and remain in full force. In the years 1932 and 1933 the defendant corporation by its annual general rate by-laws 162 and 166 attempted to raise the respective sums required by said by-laws for sinking funds and interest by a rate upon lands alone within said district, exempting the improvements thereon. The plaintiff's property has improvements of a smaller proportionate value than most of the other properties in the municipality, so this exemption of improvements increased her taxes by about 38 per cent.

The appeal was argued at Victoria on the 22nd and 25th of June, 1934, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, J.J.A.

Argument

Crease, K.C., for appellant: By-laws Nos. 29, 30 and 34 were passed to provide money for waterworks and under the by-laws the interest and sinking fund were to be levied annually by a special rate on all rateable land and improvements within the municipality. For the years 1932 and 1933 the defendant has

attempted to raise said sums by a rate upon the lands only and have exempted the improvements. This has worked a hardship upon the plaintiff owing to the smaller amount of improvements on the plaintiff's lands. The original by-laws are still in force and the question is whether during their life the municipality can tax the land only to raise these special rates. The original by-laws charge them on "all rateable land and improvements." On the construction of the word "rateable" see *The Queen* v. *Malden* (1869), L.R. 4 Q.B. 326. It means all property capable of being rated: see *Coventry Co.* v. *Assessors of Taxes* (1888), 14 Atl. 877. When the by-laws were passed the improvements were taxed. Certainly they are capable of being rated. We say the option given under section 231 of the Municipal Act to exempt improvements does not extend to special rates under loan by-laws because (a) a by-law under which an obligation has been incurred, the repeal of which would amount to a breach of faith, cannot be repealed; (b) under the Act properly construed when money by-laws were passed special rates were treated apart from the rates raised for general purposes and the option given to exempt improvements applied to rates for general purposes only; (c) the change in the terms of the basis of the taxation purported to be made by the annual rate by-laws is in effect, if valid, a repeal of the money by-laws, which were originally passed on a petition from the ratepayers and approved by a vote of a majority of the ratepayers, and such a change or repeal is *ultra vires* unless made with the consent of the Lieutenant-Governor in Council, which was never obtained. The municipality can only exempt under section 231 when it has not already tied its hands by its own acts. The annual rate by-laws in effect repeal the loan by-laws, which is a breach of faith with the debenture-holders and with the ratepayers who voted for the latter: see *Alexander* v. *Village of Huntsville* (1894), 24 Ont. 665 at p. 667; *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661; Biggar's Municipal Manual, 11th Ed., 338; Robson & Hugg's Municipal Manual, 738. As to the effect of the common law upon the validity of a by-law see *Regina* v. *Russell* (1883), 1 B.C. (Pt. 1) 256. Established rules for construing statutes require that vested rights must be preserved: see *Western*

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Counties Railway Co. v. *Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178 at p. 188; *Hough* v. *Windus* (1884), 12 Q.B.D. 224 at p. 234. Loan by-laws are protected by special sanction: see *Worthington* v. *Village of Forest Hill* (1934), O.R. 17; *In re Bell-Irving and Vancouver* (1893), 4 B.C. 228 at p. 235. We say it would be inconsistent unless lands and improvements are both taxed. The by-laws Nos. 100 and 165 passed in 1932 and 1933 exempting improvements from taxation are *ultra vires* without the assent of the Lieutenant-Governor in Council: see section 176 (2) of the Municipal Act, which shews that the curative sections in the Act do not apply: see *Traves* v. *City of Nelson* (1899), 7 B.C. 48 at p. 51. Section 183 of the Municipal Act only applies to actions for damages against the municipality. Curative sections only cure irregularities: see *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at pp. 436 and 461-2; *Rex ex rel. Donald* v. *Thompson* (1929), 2 W.W.R. 563 at p. 568; *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533; (1921), 2 A.C. 384. *Hales* v. *Township of Spallumcheen* (1921), 30 B.C. 87 is distinguishable in that the provisions disregarded were only directory.

Argument

Donaghy, K.C., for respondent: We rely on the reasons for judgment given by the learned trial judge. Sections 139 and 140 of the Municipal Clauses Act of 1906 were in force when the by-laws in question were passed. The definition of the term "rateable" depends upon the existing law at the time and must be understood as indicating something that may be different from time to time depending upon what is done by the Legislature or the council in the meantime. Under section 139 the council has power to say what shall be rateable or taxable property. There is also under section 231 of the present Act power to exempt improvements. The by-laws Nos. 162 and 166, passed in 1932 and 1933 under section 231 of the present Act, exempt improvements and there is no breach of faith in so doing as the loans in question were made when section 139 of the Act of 1906 was in force under which the council have power to exempt "improvements." Improvements are part of the land, so creditors are not prejudiced by the change in taxation: see *City of*

New Westminster v. *Kennedy* (1918), 1 W.W.R. 489. As to "rateable property" at the time of the passing of the by-law this meant whatever the council should from year to year decide to rate. Even if the council were wrong, they did not go outside the ambit of their jurisdiction: see *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533, and so the curative sections apply: *Hales* v. *Township of Spallumcheen* (1921), 30 B.C. 87; *Regina* v. *Overseers of the Poor of Hammersmith* (1859), 7 W.R. 524. In *Rex ex rel. Donald* v. *Thompson* (1929), 2 W.W.R. 563 there was a condition precedent unfulfilled. Section 229 makes the roll valid and binding notwithstanding any defect: see *City of Port Coquitlam* v. *Langan* (1917), 2 W.W.R. 208; *School Sec. No. 24* v. *Corporation of Burford* (1889), 18 Ont. 546. The principle running through the Act leaves it to the council each year to use its discretion as to what shall be exempt, and this is not prohibited by any old money by-laws though they have not expired. "Rateable property" may be land and improvements or part improvements and may be land alone. It is a flexible term whose meaning varies as the council annually decides upon its policy.

Crease, in reply: "Rateable" means able to be rated, *i.e.,* capable of being taxed. For the life of the loan by-laws the municipality in effect covenanted with debenture-holders and the ratepayers who voted on the loan by-laws that they would raise the special rate by taxing all "rateable property," *i.e.,* all property which they were able to tax. This involved a covenant not to exempt any taxable property from that rate for 30 years. A general power to exempt it is immaterial; because they have in effect covenanted not to exercise that power. They have attempted to break their covenant, and in effect have repealed the loan by-laws in part. If they can repudiate any term of the loans they could repudiate the loans themselves. Hence section 176 (2) requires the assent of the Lieutenant-Governor in Council, which the annual by-laws of 1932 and 1933 have not received. The curative sections do not apply to actions like this: see *Fleming* v. *Town of Sandwich* (1918), 44 O.L.R. 514; *City of Sarnia* v. *McMurphy* (1920), 47 O.L.R. 496.

Cur. adv. vult.

COURT OF APPEAL

1934

Oct. 2.

MACDONALD-BUCHANAN v. CORPORATION OF DISTRICT OF COLDSTREAM

MACDONALD, C.J.B.C.

2nd October, 1934.

MACDONALD, C.J.B.C.: The plaintiff complains that the respondent changed its system of taxation from that in force when the by-law in question was, with the assent of the ratepayers, passed by omitting part of the improvements from the tax thereby casting on the land, to the prejudice of the plaintiff, a burden theretofore shared by the improvements.

The defendant had legal authority to do this, and I think the facts destroy any merit in the plaintiff's claim which otherwise might have existed. The imposition of the tax spoke from the time it was imposed, not from the time the liability to pay the taxes was imposed. If it were otherwise the difficulties of the rate-fixing authorities would be very burdensome. Indeed, I think the taxpayers, when the law is such as to enable the taxing authority to change its practice of levying taxes, take the risk of a change and cannot get relief from the Courts.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant submitted that respondent municipality to provide sinking fund and interest under certain loan by-laws was obliged in law to tax land and improvements and because the latter were excluded the taxes and rates imposed upon appellant in 1932 and 1933 were invalid and illegal. It may be that a serious hardship was imposed on appellant by taxing the land alone: that consideration however is of no weight in determining the legal question.

Loan By-law No. 29 passed in 1910 to raise $8,000 to purchase a waterworks system from the Coldstream Estate Company Limited after setting out that to repay the principal and interest it was necessary to raise the sum of $542.64 annually, contains this recital:

> WHEREAS the whole rateable property of the said district municipality, according to the last revised assessment roll is $1,095,732.

This amount included land and improvements indicating that the total sum would be available for redemption purposes. It is also provided that:

> A rate on the dollar shall be levied and shall be raised annually in addition

to all other rates on all the rateable property of the said district . . . to pay interest . . .

This is repeated in various forms throughout the by-law. It was submitted that it was on the foregoing terms, *viz.*, that all rateable property (including land and improvements) would be assessed to repay principal and interest that the by-law was assented to by the ratepayers and finally approved.

Similar observations apply to By-law No. 30 passed in 1910 to provide for the expenditure of $92,000 in constructing a waterworks system and By-law 34 to raise $13,000 to complete it passed in 1912 in which it is again recited that the assessed value of "the whole rateable property"—and it meant land and improvements—was $1,238,615.

In the years 1932 and 1933 the respondent, still indebted for the whole amount of the loans authorized by the foregoing by-laws, instead of raising the respective sums required for sinking fund and interest by taxation of lands and improvements, as indicated in the by-laws, raised it by a rate upon land alone. A by-law was passed by the council under section 201 of the Municipal Act exempting improvements from taxation. It is in respect to these taxes imposed upon land only that the question of legality arises, the original by-laws under which the loans were secured indicating to ratepayers and debenture-holders alike that the basis of taxation would be both land and improvements. There is logic in the contention that these by-laws should not in effect be circumvented or amended in this way. A council need not exercise powers conferred if it interferes with a contract or a prior arrangement or undertaking.

What is the meaning of the words "rateable property" as used in the original by-laws? One must regard the provisions of the Act when the by-laws were passed. The section of the Municipal Clauses Act, *viz.*, 139 (Cap. 32 B.C. Stats. 1906) in force at that time enabled the council in each year to pass a by-law for levying rates to meet obligations including those under the by-laws in question on both land and improvements (not more than 50 per cent. of the assessed value of the latter) or on land alone exempting improvements altogether. By section 68 the council might pass by-laws for contracting debts by borrowing and levying rates

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for payment thereof "on the rateable lands or improvements, either or both, or the rateable real property of the municipality." That was the law when the by-laws were passed. It provided for levies for repayment inconsistent with the by-law unless the words "rateable property" is a flexible phrase.

Notwithstanding the misleading character of the by-laws in my opinion "the whole rateable property" in any year is, in the absence of a definition, property legally liable to taxation. The "rateable property" when the by-laws were passed might be the assessable value of the lands together with 50 per cent. of the value of the improvements (or any smaller percentage) or the assessed value of the lands alone if a by-law passed by the council for levying rates exempted improvements. The "rateable property" might vary from year to year. Authority was delegated to the council by statute to limit it to land alone.

In 1932 and 1933 when the rates on land alone were imposed respondent was governed by and had the benefit of section 231 of the Municipal Act, R.S.B.C. 1924, Cap. 179. After providing that the council on or before the 15th of May shall pass by-laws for imposing upon lands and improvements a rate as therein outlined it enacts by subsection (3) that:

MACDONALD, J.A.

> The rates authorized by this section to be imposed upon improvements shall not be upon more and may, in the discretion of the council, be upon less than seventy-five per cent. of the assessed value thereof, or improvements may be entirely exempted from taxation.

It is clear from the whole section that the amounts required under the by-laws in question to meet payments of interest and principal might be provided for by a rate by-law passed pursuant to section 231 and that by-law may exempt improvements. It is impossible to say that this section does not apply to the raising of moneys required under the old by-laws when the section in effect states that it does apply. It is a question, not of equity or fair dealing but of interpretation. By-laws 162 and 166 passed by respondent comply with this section. These rate by-laws therefore provided for a legal assessment. Discretion (section 231) is left with the council each year to exempt improvements, if deemed advisable and it is not prohibited from doing so by the term of any money by-laws. This discretion is given in other sections. To ascertain therefore what is "rateable property" one

must see what the municipality may do. It cannot be said that in the by-laws or elsewhere the municipality covenanted not to exercise its power to exempt nor is it estopped from so doing. The attack should be upon the passing of the statute prejudicially affecting possibly something in the nature of a vested right to have improvements taxed or for its successful attempt to make ineffective the real intention of the parties to the original by-law. The by-law and statute must be read together and once the term "rateable property" is defined and understood no question of alteration or repeal of by-laws without the consent of the Lieutenant-Governor in Council arises.

I would dismiss the appeal.

MACDONALD, J.A.

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

MCQUARRIE, J.A.

Appeal dismissed.

Solicitors for appellant: *Crease & Crease.*

Solicitors for respondent: *Donaghy & Young.*

ROBERTSON, J. (In Chambers)

IN RE ESTATE OF FREDERICK WILLIAM MORTON, DECEASED.

1934

Oct. 16.

Testator's Family Maintenance Act—Will—Husband and wife—Application for relief by wife—Discretion of the Court—R.S.B.C. 1924, Cap. 256.

IN RE MORTON, DECEASED

The testator by his last will after bequeathing to his wife all his household furniture and effects and $100 to each of his trustees, directed that his real and personal estate be converted into money, and after payment of debts be invested and the income paid to his wife during her lifetime, and after her decease that the estate be divided amongst his surviving brothers and sisters. The estate amounted to nearly $9,000, producing an income of about $600 per annum. The wife owned the house in which they lived and had an income of about $80 a year of her own. The brothers and sisters were fairly well provided for in their own right. On the application of the widow, who was 73 years of age, under the Testator's Family Maintenance Act, for an order that all the estate of deceased be transferred to her for her maintenance and support, an order was made that until further order the trustees do, each year, pay to the petitioner out of the capital of the estate such amount as may be necessary to make up the annual income from deceased's estate to $600, and that further consideration of the petition be adjourned.

Statement

APPLICATION by the widow of the late Frederick W. Morton, who died on April 11th, 1934, for an order that all the estate of deceased be transferred to her for her maintenance and support under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 25th of September, 1934.

F. C. Elliott, for the application.

A. D. Crease, for brothers and sisters of deceased.

16th October, 1934.

Judgment

ROBERTSON, J.: This is an application, under the Testator's Family Maintenance Act, by the widow of the late Frederick Wm. Morton (hereinafter called the deceased) who died on the 11th of April, 1934, for an order that "all of the estate of the said deceased be transferred to her for her maintenance and support."

By his last will, dated 21st April, 1928, the deceased appointed his wife and Earl Jefferson Davis executors and trustees thereof,

and, after bequeathing to his wife all his household furniture and effects, and, to each of his trustees, the sum of $100, directed that his real and personal estate should be converted into money and the proceeds, after payment of the debts, should be invested and the income therefrom paid to his widow during her lifetime and after her decease the existing securities and investments were directed to be converted into cash and the proceeds divided amongst his then surviving brothers and sisters in equal shares.

In applications of this sort, in exercising its discretion, as to what is adequate provision for the wife of the testator, the Court should enquire into four things, *viz.*, (1) the station in life of the parties; (2) the age, health and general circumstances of the wife; (3) the means possessed by the testator at the time of his death; (4) the property or means which the wife possesses in her own right. See *In re Livingston* (1922), 31 B.C. 468; also *In re Estate of Hugh Ferguson, Deceased* (1929), 41 B.C. 269. Further, the claims of others upon the testator must be taken into account, *per* Duff, J. in *Walker* v. *McDermott* (1931), S.C.R. 94 at p. 96. Accordingly I have made these enquiries and I find the facts to be as follows:

Judgment

The deceased was a carpenter. He had been unable to work at his trade for six or seven years prior to his death. He had built the house in which he and the petitioner lived, the supplies and material for which were paid for by the petitioner and the petitioner now owns this house clear of any encumbrances. The taxes on it are about $75 a year and the insurance $6.70 a year from which I would judge the value of this property to be at least $2,000. In addition, the petitioner has $1,195.85 in the savings account which bears interest at 2½ per cent. and also a $1,000 bond on which she receives 5 per cent., making her own income roughly $80 a year which is just about sufficient to pay the taxes and insurance on her home.

The deceased left an estate, amounting to just under $9,000 which produces an income of $600. The petitioner submits that, in one case, a security given to the deceased and now held by his trustees is larger than the value of the property upon which it is secured and, in other cases, that the amount of the security, held by the trustees, very nearly equals the value of the property upon

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Judgment

which it is secured, and she, therefore, fears that the income may be reduced, either by loss of capital, or by failure of the various mortgagors to pay interest.

The petitioner is 73 years of age, and on account of ill health, has been forced to engage a companion to care for her. Her companion is her sister who left a salary of $40 per month to come to her as she was too old and unwell to live alone. She states, further, that she has been unwell for some time but has refrained from consulting a physician for, she believed, if she did so, she would be informed that an operation would be necessary and she could not undertake the expense of physicians and hospital fees "with only my limited resources available." She further states that her house, hereinafter referred to, is badly in need of repairs, costing $400. She submits she should have an income of $1,064.20, made up (a) of the items amounting to $992.20, set out in paragraph 2 of her affidavit of the 13th of September and (b) $72 being the value of the yearly yield of vegetables grown by the deceased in his lifetime. As pointed out above she has an income of her own of $80 per year and she should receive from the estate $600 per year so that, according to her own calculations, she requires an additional income of about $400.

At the time of the deceased's death four brothers and sisters survived him, *viz.*, George Parker Morton, John Arthur Morton, Sarah Jane Jefferson and Ada Ann Jackson.

George Parker Morton is 61 years of age, earns a weekly net wage of £3 9s. 11d., also £40 per annum as the secretary of a club, owns a house valued at £175 upon which the rates are £5 12s. per annum and has a little money in the savings bank and invested. His total income now is $1,125.15 per annum; when he reaches the age of 65 years he will have to retire without pension; all his children are grown up and support themselves. It is apparent therefore that he is in good circumstances. I assume that he will be entitled to an old age pension.

John Arthur Morton was 65 years of age on the 15th of May, 1931. By reason of an attack of paralysis he is incapable of working. He lives with his sister Ada Jackson who looks after him and supports him. He has an old age pension of 10s. per

week and income from securities set out in his affidavit, amounting to about £17 10s. and, in addition, has slightly over £31 in the Post Office Savings Bank. His total income now is $220.50 per annum.

Sarah Jane Jefferson is 67 years of age. Her husband, who is 65 years of age, is retired and she and her husband own, jointly, the house in which they live, which they value at £310. The rates are £10 per annum. They each have an old age pension of 10s. per week and in addition her husband receives a pension of 10s. 2d. every week from his former employers. They have £80 on deposit in a bank on which they receive 2½ per cent. interest and a further £200 which, so far as the material shews, does not appear to bear interest. They have one child 30 years of age who lives with them and is a typist, with casual work only, but has been, and will be, employed from April to October, 1934, during which period she has and will contribute 15s. per week to the household but when not so employed she is supported by her father and mother. The total income of Sarah Jane Jefferson and her husband is $520.

Judgment

Ada Ann Jackson is 69 years of age. She owns the house in which she lives, the value of which is £325 and the rates thereon £12 10s. per annum. Her income is as follows:

An old age pension of 10s. per week, interest on various investments set out in her affidavit, amounting to $550.75 per year. Her brother John Arthur Morton lives with her and she looks after, and supports, him. She further says that during the whole of the deceased's lifetime she corresponded with him twice in every year and he also kept in touch with her brothers and sisters in England in like manner. In 1928 the deceased visited England and during the whole of his stay in that country resided with the said Ada Ann Jackson.

From the above it is apparent that the brothers and sisters of the deceased are fairly well provided for. Mr. *Arthur Crease*, on behalf of the brothers and sisters, says his clients do not wish the widow to be deprived of anything she is entitled to but they point out that the income of the estate is that which the deceased and his widow were living on, at the time of Morton's death although there is no direct evidence on this point. He further

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submits that the estate is in good shape and produces an income of at least $600 per annum; that it must be assumed the testator knew what he was doing and that effect should be given to the provisions of his will, if possible.

Now section 3 of the said Act provides that notwithstanding any law or statute to the contrary if a testator dies leaving a will and without making therein, in the opinion of a judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife the Court may, in its discretion, on the application by the wife, order that such provision as the Court thinks adequate, just and equitable in the circumstances shall be made out of the estate of the testator.

After making enquiries, as above mentioned, the duty of the Court is set out in the quotation from the case of *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959 which is set out at p. 470 of the *Livingston* case, *supra*, and is as follows:

It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will.

Judgment

The Court must also bear in mind "that the Act is not a statute to empower the Court to make a new will for the testator." *Allardice* v. *Allardice* (1911), A.C. 730 at 732 and the last four lines on p. 734.

What constitutes "proper maintenance and support," and the duty of the Court, if it is satisfied that "adequate provision" has not been made by the testator, is laid down in the judgment of Duff, J. in *Walker* v. *McDermott*, *supra*, at p. 96 where in delivering the judgment of the Court, he said:

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the Court on whom devolves the responsibility of giving effect

to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

It is a matter of common knowledge that, in 1928, when the deceased made his will, business conditions were good and therefore he might reasonably have thought then that any investments which he might have made in his lifetime, or his trustees, after his death, would continue to produce the interest payable in respect thereof; but at the time of his death there had been a great change in the prosperity of the world and, unhappily, many investments ceased to pay interest, either because of the inability of the borrower to discharge his liability or because of moratorium legislation and often there was a loss in capital value, by reason of depreciation, so that it was not possible then to count with certainty either on the income from investments or that the capital of such investments would not depreciate.

Judgment

Dealing with this situation, Reed, J. said in *In re Gibson (Deceased)* v. *Public Trustee* (1933), N.Z.L.R. s. 13 at s. 14:

> Now, although the evidence shews that the testator was a wise and shrewd investor, and that all the mortgages (of which a great part of the estate consist) are sound and all interest is paid up to date, experience has proved that mortgages nowadays are a very doubtful security, and that the income derived therefrom is subject to fluctuations dependent not only on the ability of the mortgagors to pay but on legislative action. This must not be overlooked when considering the adequacy of the provisions made for the widow. The Court is entitled to take into consideration the different conditions at the date of the death from those when the will was made, some years before.

The deceased left his wife the income from his entire estate which apparently was what they had been living on, with the exception of the $72, the value of the vegetables grown by the estate. The petitioner and her companion will have this same income to live on with the exception of the said $72 and while I think this income will be barely enough for them to live on, yet they will be enjoying practically the same income which the petitioner and the testator had. In view of these facts, and

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particularly of the petitioner's age, and the private means which the petitioner has, I should have found it difficult (had it not been for the uncertainty of the income which will be produced by the estate) in applying the rule in *Allardice* v. *Allardice*, *supra*, to say that the testator "[had] been guilty of a manifest breach of [his] moral duty" to his wife. The deceased might reasonably have expected her to use part of her estate so as to make, with the income derived from his estate, such amount as she might require from time to time for her support and maintenance. I can see no good reason why the petitioner should not use her capital in the first instance and then, when it is exhausted, fall back on the capital of the estate by virtue of an order under the Testator's Family Maintenance Act. If the deficiency in the first instance were to be obtained from the estate the result would be that at the death of the petitioner all, or a part of the testator's estate, would have been used, so that the beneficiaries after the life estate, under his will, would get nothing or part only of what had been left to them by the deceased while the petitioner's capital might be intact so that she could leave it to whom she wished.

Judgment

It must be borne in mind that the application under the said Act must be made within six months from probate of the will so that if no order is made now, and, subsequently, it turns out that the income from the estate is lower than the sum of $600 per annum, or disappears entirely, the applicant cannot then apply under the Act for relief.

In view of the foregoing I am of the opinion that the deceased did not make adequate provision for the proper maintenance and support of his wife in that, knowing that the income from his estate would be barely sufficient for her support, for the reasons hereinbefore given, and that it might from time to time decrease, he did not make provision in his will to cover such contingency.

I, therefore, order that, until further order, the trustees do, each year, pay to the petitioner out of the capital of the estate such amount as may be necessary to make up the annual income from the deceased's estate to $600. In order that the Court may have full power hereafter, to protect the petitioner, should such necessity arise, the further consideration is adjourned.

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It was suggested that no costs should be allowed to the executor Davis. As he was served with the petition herein, paragraph 16 whereof contained certain charges against him, I think he was entitled to be represented on this application. Costs of all parties, therefore, will come out of the estate.

Order accordingly.

ROBERTSON, J.

1934

Sept. 14.

IN RE JONES, DECEASED.

THE ROYAL TRUST CO. v. JONES

IN RE ESTATE OF STEPHEN JONES, DECEASED.

THE ROYAL TRUST COMPANY *ET AL.* v. JONES *ET AL.* (No. 1).

Husband and wife—Parent and child—Voluntary gift of stock—Dividends transferred to parent during his life—Effect on ownership—Evidence of intention.

Stephen Jones, who died in October, 1933, was survived by his wife and five children. In November, 1930, deceased and his wife had a joint lease of a safety deposit box in the plaintiff company, each having a key thereof. The lease provided that each should have access thereto and control of the contents, and in the event of the death of either all rights should be exercisable by the survivor. Shortly after the death of deceased stock certificates were found in the box as follows: Ten shares of B.C. Electric Power & Gas Co. preferred stock in the name of his wife, Eliza M. Jones; ten shares of the same stock in the name of a daughter, Frances E. Jones; ten shares of the same stock in the name of a son, Stephen Jones, Jr., which was endorsed in blank by Stephen Jones, the younger; fifty shares of preferred stock of B.C. Telephone Company in the name of said Eliza M. Jones, and fifty shares of the same stock in the name of said Frances E. Jones. All this stock was bought by deceased with his own money in the years 1926 and 1927. In addition to the above deceased bought fifty shares of B.C. Telephone stock in 1927 in the name of his son Howard Jones. The dividend cheques on all this stock were at the request of deceased endorsed by the payees and deposited in the bank to his credit up to the time of his death, and his income tax returns included the amounts so received as his own property. The son Stephen endorsed his stock in blank at his father's request, and the son Howard also at his father's request endorsed his stock over to his father. Both sons were attending college in the East at this time and the distance they were away was given by the father

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THE ROYAL TRUST CO. v. JONES

as a reason for endorsing the stock to provide for emergencies. During the time the dividends were taken over by deceased each member of the family was provided with more money by him than he received in dividends from the stock. The evidence of the wife and children and that of deceased's accountant was to the effect that deceased intended that the above stock should belong to his wife and children and that they did not hold it in trust for him. On an originating summons to determine the ownership of said stock:—

Held, that all the stock referred to belonged to the wife and children respectively and did not form part of deceased's estate.

Statement

ORIGINATING SUMMONS issued by the executors under the will of the late Stephen Jones who died on the 2nd of October, 1933, to determine the ownership of certain shares in the British Columbia Electric Power & Gas Company, Limited and the British Columbia Telephone Company. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 6th of September, 1934.

Shandley, for plaintiffs.

Lawson, K.C., for Eliza M. Jones, Stephen Jones, the younger, and Frances E. Jones.

C. G. White, for Mildred V. Jones and Margaret T. Jones.

Macfarlane, K.C., for Howard Jones.

14th September, 1934.

Judgment

ROBERTSON, J.: The late Stephen Jones (hereinafter called the deceased) died on the 2nd of October, 1933, and probate of his will was granted to the plaintiffs, the executors of his last will, on the 27th of February, 1934. He left, surviving him, his widow Eliza Margaret Jones and his children Stephen Jones, the younger, born 11th December, 1910, Howard Jones, born 1st May, 1912, Frances Elizabeth Jones, born 1st November, 1913, Mildred Victoria Jones, born 22nd September, 1916, and Margaret Thompson Jones, born 23rd April, 1918, all of whom are the defendants herein.

Since the 22nd of November, 1930, the said deceased and his wife had had a joint lease of a safety deposit box in the vaults of The Royal Trust Company, each having a key thereof. The said lease provided that each should have access thereto and control of the contents of the said box and the right to surrender

the box and to appoint a deputy and in the event of the death of either "all such rights shall be exercisable by any survivor of us or by the legal representatives of the deceased." Shortly after the death of the said deceased an inventory was made of the contents of the said box and the following documents were found therein:

1. Ten shares of 6 per cent. preferred stock in the British Columbia Electric Power and Gas Company, Limited in the name of the said Eliza M. Jones. 2. Ten shares of the said 6 per cent. preferred stock in the British Columbia Electric Power & Gas Company, Limited in the name of the said Frances E. Jones. 3. Ten share of the said 6 per cent. preferred stock in the British Columbia Electric Power & Gas Company, Limited in the name of the said Stephen Jones, the younger. This certificate was endorsed in blank by the said Stephen Jones, the younger, and witnessed by one Eileen Townsend, but not dated. 4. Fifty shares of 6 per cent. second preferred stock in the British Columbia Telephone Company, in the name of the said Eliza Margaret Jones. 5. Fifty shares of said 6 per cent. second preferred stock in the British Columbia Telephone Company in the name of the said Frances E. Jones.

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All the above shares were bought by the said deceased with his own moneys but in the names of the respective holders thereof; the British Columbia Electric shares being purchased at various times between 15th of March, 1926, and the 21st of June, 1926, and all the British Columbia Telephone shares on the 23rd of May, 1927. Also during the said period—15th of March, 1926, to 21st of June, 1926—the said deceased bought, in his own name, 121 B.C. Electric shares and on the 23rd of May, 1927, 50 British Columbia Telephone Co. shares.

In addition to the above shares the said deceased on the said 23rd of May, 1927, bought 50 shares of British Columbia Telephone Co. in the name of his son, Howard Jones.

Nina Dorothy Gray, who has been an accountant in the employ of the deceased for fifteen years prior to his death, and attended to all his private affairs, including his banking business, swears that the deceased told her that the dividend cheques payable in respect of all the above mentioned shares would be handed to her

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and that she was to get the "registered owners" to endorse them and that she was to deposit the proceeds in his (the deceased) savings account: that thereafter she received all of the dividend cheques, sometimes from the deceased and sometimes from the registered owners, endorsed by the respective payees, without any comment; that from time to time she deposited the dividend cheques in the deceased's savings account and never at any time handed to the payees any part of the cheques.

The deceased had a bank account but neither his wife, nor any one of his children, had one. The deceased included, in his Dominion and Provincial income tax returns, all amounts received from these dividend cheques as if they were his own property. The share certificates in the name of the wife and daughter Frances were never endorsed. The share certificates in the name of Stephen Jones had been endorsed, under the circumstances hereinafter mentioned, but not otherwise dealt with. The share certificate originally purchased in the name of Howard Jones had been endorsed by him for the reasons hereinafter referred to, and thereafter the deceased had had the shares transferred into his own name and dividend cheques in respect thereto were issued to the said deceased.

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While entries appeared in the books of the deceased with reference to these shares, there is nothing therein to shew that his wife or children had any interest in the same.

At the time of his death the deceased was worth over $900,000 and his widow is of the opinion that at the time of the purchase of the said shares above mentioned, the said deceased was worth at least that sum, so that the amount of the purchase sum of these shares formed a very small part of the deceased's estate.

With reference to the British Columbia Electric Power & Gas Company, Limited shares the widow states that in or about 1926 the deceased told her that he had, or was purchasing, for her and their daughter Frances and their son Stephen, ten shares each of B.C. Electric Power & Gas Company, Limited, and she is perfectly clear in her own mind that the deceased, at the same time, informed her that the said shares were being given to her and their said children respectively but she is unable to recollect the words he used at the time. She further states that she verily believes that there was no intention on his part that

the said shares should be held in trust by her, or by her said children, in trust for him, and that there was no intention on her part that she should hold the said shares in trust for him, and she also states that she always considered and believed that the deceased considered that the said shares belonged to her, and her said daughter and son respectively; that at the time the said shares were purchased she had other securities, that it had always been her practice when interest from these securities came in to turn the same over to the deceased and when she required money for her own purposes she would get it from the Dominion Hotel which belonged to her husband or from Miss Gray the accountant, that she never kept any account of moneys received by her and handed over by her to her husband or of moneys received from her husband but that she received from him at least as much as she paid to him.

The daughter Frances says she remembers her father telling her that he was purchasing or had purchased ten shares of B.C. Electric for her. She does not recollect the exact dates when he told her this, nor his words, but her understanding was that the shares were a gift to her and there was never any intention or agreement that she should hold them in trust for the deceased, and that when the dividend cheques were received by her, he instructed her to endorse them and deliver them to him, as he did not want her to open a bank account of her own: that she was only 12 years of age at the time of the purchase of these stocks, and that she received from the deceased a larger amount of money than the dividends on these shares; on one occasion, either in August or September, 1933, she was with the deceased when he went through his securities which were in the said safety deposit box and among these were the certificates of the shares in question and he then told her that the said certificates belonged to her mother, to herself, and to her brother Stephen, "as shewn on their face." She further says she verily believes that the said shares purchased in her name, belonged to her, absolutely, and she considers the deceased thought the same.

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The son Stephen says he remembers the deceased told him that he was purchasing ten shares of B.C. Electric for him, but he does not remember the date, that he was then about 15 or 16

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years of age and that when his first dividend cheque came in the deceased asked him to endorse it and deliver it to him; that there was never any agreement to pay the dividend cheques to the deceased; that his impression was that his father did not want him to receive the sum of $15 at one time (being, I assume, the quarterly dividend); that subsequently just before he was leaving to attend Upper Canada College, at Toronto, Ontario, namely, "in the Fall of the year 1928," the deceased asked him to endorse the certificate of the said shares, without giving any reason therefor, which he did; that there was no intention on his part to return these shares nor did the deceased suggest that he do so; that he always considered and believed that the deceased always considered that the shares were a gift and belonged to him.

With reference to the B.C. Telephone Co. shares the evidence of the widow and of Frances is practically the same as that which they gave in connection with the B.C. Electric shares. Stephen had no interest in these shares. Howard Jones swears that about 1927, as near as he can recollect the deceased informed him that he had purchased or was purchasing for him as a gift 50 shares of the B.C. Telephone Company, and that subsequently he called him to his office and stepped to the safe, which was open at the time, and took therefrom a certificate for 50 shares in the B.C. Telephone stock and handed it to Howard saying as nearly as he can recall "Here is your stock which you have been signing the dividend cheques for. After this I am going to keep them in my deposit box for safe-keeping." He received the dividend cheques from time to time and on instructions from the deceased he endorsed them and delivered them to the deceased or to the accountant at the hotel, the deceased stating, as the reason therefor, he did not want him to have so much money at one time, and that he would deposit them in his account and give him the money as he needed it and that from time to time, as he needed it, he received from him more money than the amount of the dividend cheques. In September, 1931, he went to Cornell University in the State of New York, where he remained until June, 1932, intending to return to Cornell the following September for another year. In August of 1932 the deceased requested him to

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come to his office in the Dominion Hotel and asked him "to endorse the stock to him," and stated because of the distance he was "located" away from him it would save a great deal of trouble if he would endorse the certificate and that he would continue to send him money for his necessary expenditure as he had in the past. At that time he asked the deceased if this meant that he was giving the stock back to him, and the deceased told him that the only reason for requesting his endorsement was "as a mode of convenience," as above stated. He further says that at the same time the deceased told him that "the stock would constitute some ready cash to provide for emergencies or enable me to take advantage of any opportunities that may arise." At that time the deceased told him that he was providing by his will an income for life for his mother, brother, sisters and himself. He further says that at no time did the deceased express the intention that "the stock was to be held in trust by me for him" nor was there any agreement between him and the deceased with reference to the dividend cheques other than above mentioned and that the deceased intended that the shares purchased in his name, as above stated, should belong to him absolutely and that when he endorsed the shares to his father there was no intention on his part to give the shares back to him nor to relinquish any rights therein. In addition Miss Gray says it was always her understanding that the above shares were a gift to the widow and the children because at different times when the deceased handed her the dividend cheques he would remark "Here is Mrs. Jones' cheque" or "Here is Howard's cheque" or "Steve's cheque." Further the deceased told her the shares had been purchased in the name of his wife and children, and he told her to enter in his books of account, in which he kept a record of the shares purchased, the initials of the wife and children opposite the shares purchased in their name. Further that the amount paid out to the wife and children respectively from time to time exceeded the amount that they were entitled to by reason of dividends.

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Counsel for the widow and the children Frances, Stephen and Howard respectively submit that these shares were gifts by way of advancement and counsel for Howard further submits that he had no intention of giving the shares to the deceased and that, in

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any event, endorsement by him of the B.C. Telephone Co. shares and the registration thereafter of these shares in the name of the deceased in no way affected his right as he was an infant, at the time.

Counsel on behalf of the infants Mildred Victoria Jones and Margaret Thompson Jones submits, with reference to all the above mentioned shares, that there never was a present intention to make a gift to, or to advance, the wife and children, as is shewn, *inter alia*, by the fact that the testator received the dividends, and alternatively there was no delivery of the said shares and therefore the gift was not carried out or perfected and further alternatively in the case of Stephen's shares, and the shares originally in the name of Howard, that the deceased, subsequently to purchasing the same, changed his intention of making a gift of the said shares.

It is clear that the question as to whether or not there was a gift by way of advancement must be determined by what took place at the time the shares were purchased. In *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447, at pp. 454-5, the following

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appears:

> Where property is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favour of the person who pays the purchase-money, and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee; and in this case, as in most others of the like kind, the only question is whether there is such other evidence.
>
> That contemporaneous acts or even contemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so; but generally speaking, we are to look at what was said and done at the time.

In *Forrest* v. *Forrest* (1865), 34 L.J. Ch. 428, Stuart, V.-C., said at p. 430:

> A purchase, in the name of another, in order to be an advancement, must be made with the intention that the property and beneficial interest should pass at the time of the purchase to the person in whose name the purchase was made. Without that intention it could be no advancement.

See also *Murless* v. *Franklin* (1818), 1 Swanst. 13 at p. 17.

The general rule is set out in Halsbury's Laws of England, Vol. 15, at pp. 414, 415, *viz.*, that where a person buys property and pays the purchase-money but takes the purchase in the name of another, who is neither his child, adopted child, nor wife, there is *prima facie* no gift but a resulting trust for the person paying such money. But where the person in whose name the purchase or transfer is taken is the wife, child, or adopted child of the man paying the purchase-money there is then a presumption that a gift is intended. The leading case in support of this proposition is *Dyer* v. *Dyer* (1788), 2 Cox 92.

In *Dunbar* v. *Dunbar* (1909), 2 Ch. 639, at p. 645, Warrington, J. said:

> The doctrine of advancement depends on this, that from the relationship of the parties the Court infers that the purchase is intended for the benefit of the wife, or it may be the child, in whose name the purchase is made. The Court makes that inference from the relationship of the parties, and the inference is that that was the intention of the donor at the time the gift was made.

Now, in this case, we have not only the presumption of law, arising from the purchase of these stocks in the names of the wife and children, but we have the evidence to which I have referred shewing the clear intention of the testator to make a gift by way of advancement to his wife and children. Further the circumstances would confirm this view. The amount which he was giving to his wife and children was only a small part of his estate. No reason has been suggested why these shares should have been bought in the names of the wife and children unless they were intended as a gift, and further it is significant that when the deceased was purchasing the shares in question he was at the same time purchasing the same kind of shares in his own name.

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I now have to consider the alternative submissions. Lord Justice Knight Bruce said in *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264 at p. 274:

> I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done every thing which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he

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transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift.

So far as the delivery of the share certificates to Mrs. Jones is concerned the fact is that the certificates in her name were in the joint safety deposit box, and in my opinion this would constitute delivery to her. As to the certificates in the names of the children who were all infants, the natural thing for the deceased to do would be to keep the stock certificates in a place of safety on their behalf and I think it is a fair assumption that these certificates were put in the safety deposit box, by the deceased for safe-keeping for his children. Further, if the deceased's intention was to advance his wife and children, the retention by him of the share certificates would make no difference as is shewn by *Eldridge* v. *Royal Trust Co., infra.*

It is then submitted that the receipt of the dividends by the deceased shewed there was no intention on his part to make a gift. In *Sidmouth* v. *Sidmouth, supra,* moneys were invested by a father in the name of his son, the dividends of which were received by the father during his life under a power of attorney from the son, and it was held, after the father's death, that this was an advancement and that the funds belonged to the son. In that case the son was dependent upon the father. The Master of the Rolls said at p. 458:

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> It seems to me to be, if not a necessary, yet an extremely probable inference from the circumstances, that the father intended to make the son, to the extent of these transfers, secure for the future; but at the same time intended to make the son, for the present, dependent upon himself for his support; that although he adopted a mode of proceeding which gave power to the son to revoke the letters of attorney and sell the stock, yet he relied, and reasonably, upon his own parental influence, upon the habitual deference of his son, and upon the conformity to his own will which he might expect in a son who had so much to expect from him, that no improper advantage would be taken of the power which the son obtained by the transfer; and so, in fact, they went on: the son was maintained by the father, who continued to receive the dividends.

In *Scawin* v. *Scawin* (1841), 1 Y. & C.C.C. 65, the Vice-Chancellor, said at p. 67:

> It is settled that a purchase by a father in the name of his son is *prima*

facie an advancement of the son. The presumption is so, but of course this presumption may be rebutted. The father may certainly, even in the cases where the doctrine of advancement is held to take place, receive the title-deeds, and the dividends; but although those circumstances may exist in such cases, yet they are circumstances in favour of the father, especially where the son is adult.

In *Commissioner of Stamp Duties* v. *Byrnes* (1911), A.C. 386, a father bought properties in the names of his sons who were living at home and were supplied by him with everything they wanted, but had no independent means or any fixed allowance. The father received the rents and paid for the rates and repairs, and it was held that these facts did not operate to create a presumptive advancement in favour of the sons into a trust in favour of the father. Lord Macnaghten who delivered the judgment of their Lordships said at pp. 392-3:

The principal argument on behalf of the appellant was of course devoted to the contention, on the part of the Commissioner of Stamps, that the admitted facts of the case point to an implied reservation for the father's benefit. It was so strange, it was said, that a father should convey property to a son, and that the son should then hand over the rents and profits of that property to the father! To their Lordships the transaction seems not unnatural. Long before death duties assumed their present proportions in taxation, or became an object of terror to mortal men, it was by no means unusual for a father, himself well to do, to transfer property to a son who was not fully advanced, and for the son to let the father take the rents and profits of that property during his lifetime without any previous arrangement or understanding to that effect. Such an advance on the part of the father would be a mark of confidence in the son, and would tend to give the son, who might be wholly dependent on his father's bounty, some sense of independence. In the present case, having regard to the state of the family and the relations subsisting between Mr. Byrnes and his two sons who were living at home, it seems very natural that the sons receiving advances should yet feel a delicacy in taking the fruits during their father's lifetime. They had everything they wanted as things were, and if they were unduly favoured it might possibly have created some feeling of jealousy among the rest. . . .

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. . . Long ago a famous Chancellor placed a more benignant and a more common-sense construction on similar transactions between father and son. He set down the son's acquiescence in his father taking the rents and profits to "good manners" and "reverence," that is, the respect which a child owes to his parent. In the case of *Grey* v. *Grey*, "a very short one but of a very nice and curious debate" decided in 1677, and reported from Lord Nottingham's MSS. in 2 Swanst. 594, Lord Nottingham had to consider in what cases a purchase by a father in the name of his son—a presumptive advancement—may import a trust in favour of the father. His Lordship observes "it is not reasonable that the father's preception of profit, or making leases, or doing such acts as these which the son in good manners does not contradict, should turn a presumptive advancement into a trust." And again, "If

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the son be not at all or but in part advanced, then if he suffer the father, who purchased in his name, to recover the profits, &c., this act of reverence and good manners will not contradict the nature of things and turn a presumptive advancement into a trust."

In *Lewis and Barder* v. *Piczenick* (1930), 74 Sol. Jo. 107, the facts were that a business was registered in the name of one of the sons of a man who, however, had apparent control of the business and had expended sums which were only consistent with his having taken the profits of the business, and although the report does not say so, it would appear that the business at one time had belonged to the father. The Vice-Chancellor said that he thought the proper conclusion to be drawn from the evidence was that the deceased had put the business in his son's name with the intention of advancing him, and that the receipt of the profits by the father did not prove that the son was merely a trustee and he referred to the judgment of the Privy Council in *Commissioner of Stamp Duties* v. *Byrnes, supra,* quoting the passage at p. 392.

A very strong case is that of *Eldridge* v. *Royal Trust Co.* (1922), 2 W.W.R. 1068, wherein the facts were that the plaintiff's father purchased land under an agreement for sale to himself, but on getting the transfer caused it to be made out to the plaintiff. He explained to the vendor that his son was "coming up from the States." The father retained the duplicate certificate of title and the transfer (unregistered) and they were found among his papers after his death, in a locked trunk. He never told the plaintiff (who did not come to Alberta) anything about this land and during the seven years between the purchase and his father's death the latter leased the land "on shares," took the profits, paid for the seed grain, paid for the breaking of the land and paid the taxes. Two tenants testified as to conversations in regard to selling the land in which the father said he had given the land to the plaintiff. The majority of the Court of Appeal held that there was a completed gift of the land to the plaintiff; there was a presumption that the gift was intended from the father to the son and this could not be said to be rebutted; and the plaintiff's interest arose on delivery of the transfer by the vendor and the plaintiff's right was to claim possession of the document in order to make himself the registered owner. The

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judgment of the majority of the Court was upheld by the Supreme Court of Canada—see (1923), 2 W.W.R. 67. Sir Lyman Duff, Chief Justice of Canada, who was then Duff, J., held that there was a legal presumption of advancement in which case the *onus* was upon the estate to shew that a trusteeship had been intended and he held that the presumption had not been rebutted.

In view of these cases and the evidence in this case, I hold that the receipt of the dividends by the deceased does not rebut the presumption of advancement. I find that all the shares in question were purchased by the deceased and put in the names of his wife and children as an advancement.

I shall now turn to the consideration of the shares purchased in the name of the sons Stephen and Howard. Stephen's shares were purchased in 1926 and nothing was done with the stock certificate until he went to Upper Canada College in 1928 when he was about 18 years of age, when he endorsed the certificate under the circumstances hereinbefore detailed. The deceased did not act upon the endorsation for he continued to hold the stock certificate as endorsed, and it may have been, that as the son was going to Toronto the deceased thought it might be advisable in the interest of his son to sell the shares, owing to future changes in the market price thereof, and so he got the son to endorse the certificate without any idea of changing the beneficial ownership therein. Further it appears as above mentioned, from the evidence of Frances, that in 1933 the deceased told her these shares belonged to Stephen and for this reason and in view of the law which I shall discuss when dealing with Howard's shares, I think these shares are the property of Stephen.

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It will be remembered that the shares originally purchased in the name of Howard were transferred into the names of the deceased as hereinbefore set forth. Now it is clear that when a gift is made by a father to his child, that child has the exclusive property in it. In *May* v. *May* (1863), 33 Beav. 81, at p. 87, the Master of the Rolls said:

> When a father parts with property in favour of his son, it becomes, as between them, the exclusive property of the son, as much as if it had been given to him for valuable consideration, in all cases, except where it rests *in fieri* and some act remains to be done by the father to make the gift complete, and which, as between volunteers, this Court will not interfere to compel; . . .

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A gift cannot be revoked without the infant's consent—Halsbury's Laws of England, Vol. 17, p. 77; *Smith* v. *Smith* (1836), 7 Car. & P. 401.

It is also clear that a child may make a gift to a parent—see Simpson on the Law of Infants, 4th Ed., p. 131, where a reference is made to the case of *Wright* v. *Vanderplank* (1856), 8 De G. M. & G. 133, wherein at pp. 146-7, Lord Justice Turner said:

> The law on the subject is well settled. A child may make a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by shewing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiassed intention on the part of the child to give to the parent.

In *Archer* v. *Hudson* (1844), 7 Beav. 551, the Master of the Rolls said at p. 560:

> Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete "emancipation," without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party, who endeavours to maintain such a transaction, to shew, that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control.

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Now the evidence shews that from the time Howard's shares were purchased, namely, 1927 down to 1932, the shares remained in his name and it was only in that year that he endorsed the certificate. The facts shew that he had no intention whatever of transferring the stock to his father but was told by his father that the reason for requiring his endorsement was "as a mode of convenience." It would appear from all the facts that there never was any "deliberate unbiassed intention" on the part of Howard to give the shares to the deceased. Assuming, however,

that one should disregard the evidence of Howard upon this point and deal with it upon the bare facts of the endorsement of the share certificate and the transfer of same into the name of the deceased, should the transaction stand? I think so, assuming that I am right in my view that the shares were originally given to him by way of advancement. As I have pointed out, once the shares became his property he had complete dominion over them and they could not be taken away from him. He would have had the right to give them to the deceased but in such case the *onus* would have been on the deceased's estate to shew that the gift was the spontaneous act of Howard, acting under circumstances which enabled him to exercise an independent will and which would justify the Court in holding that the gift was the result of a free exercise of his will.

In *Inche Noriah* v. *Shaik Allie Bin Omar* (1929), A.C. 127, in the Privy Council, it was sought to set aside a conveyance given by an old Malay woman, who was wholly illiterate, to her nephew by marriage, and their Lordships adopted as the principles, applicable to a case of that sort, those which had been laid down by Cotton, L.J. in *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 171. The Lord Chancellor said at pp. 132-3:

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> The question to be decided is stated in the judgment of Cotton, L.J. in the well known case of *Allcard* v. *Skinner*, as follows: "The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes: first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."
>
> In their Lordships' view the relations between the appellant and respond-

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ent are correctly summarized in the judgment of the trial judge, and they are amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will, and which justified the Court in holding that the gift was the result of the free exercise of her will.

As appears from the case of *Wright* v. *Vanderplank, supra,* parental influence is to be assumed as long as the parental authority and dominion last and the *onus* is on the parent to prove that the parental influence was not exercised. So far as the record shews, it would appear that the relations between the deceased and his wife and children were amicable; and the greater the love and affection and understanding between parents and children the greater would be the parental influence. The estate has not been able to offer any evidence to satisfy the *onus* cast upon it.

In conclusion, my opinions on the questions are as follows:

As to question 1, the B.C. Electric shares belong respectively to the defendants Eliza Margaret Jones, Frances Elizabeth Jones and Stephen Jones, the younger.

As to question 2, the B.C. Telephone Co. shares belong respectively to the defendants Eliza Margaret Jones and Frances Elizabeth Jones.

As to question 3, the B.C. Telephone Co. shares purchased in the name of the defendant Howard belong to him.

Costs of all parties out of the estate.

Order accordingly.

TOOKE BROS. LIMITED v. AL-WALTERS LIMITED, LEVIN AND MATOFF.

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Principal and surety—Sale of goods—Guarantee—Termination of by notice.

TOOKE BROS. LTD. v. AL-WALTERS LTD.

The plaintiff company had been selling goods to the defendant retail company and on January 7th, 1933, the defendant company owed the plaintiff $2,300. The plaintiff then refused to deliver any goods, unless a guarantee was given. The defendants W. J. Levin and A. Matoff then gave a written guarantee that in consideration of the plaintiff selling goods to the defendant company on such terms as the plaintiff saw fit they would guarantee payment of all moneys due the plaintiff up to $4,000. In October, 1933, when the debt was at $1,800 the plaintiff's local manager advised the cutting of overhead expenditures and an arrangement was made whereby one of the active members of the company should drop out, that $200 should be paid on account of the debt and that the balance be paid at $50 per month, four payments of which were made. The defendant Levin then gave notice of putting an end to the guarantee. Credits continued and on January 11th, 1934, the defendant company assigned, at which time the debt to the plaintiff amounted to $2,252.35. The plaintiff obtained judgment for this amount against the defendant company and the guarantors.

Held, on appeal, varying the decision of McDONALD, J., *per* MACDONALD, C.J.B.C. and McPHILLIPS, J.A., that the plaintiff was entitled to recover the amount due on the 7th of August, 1933, namely, $1,800, less the $400 that was paid thereon.

Per MARTIN, J.A.: That as there was a substantial breach of the primary condition upon which the guarantee was given in refusing to deliver a special order of $328 for spring goods in the spring of 1933, the appeal should be allowed.

Per McQUARRIE, J.A.: That the appeal should be dismissed.

APPEAL by defendants Levin and Matoff from the decision of McDONALD, J. of the 26th of April, 1934, in an action against Al-Walters Limited as principal and against the defendants W. J. Levin and A. Matoff as sureties for goods sold and delivered by the plaintiff to the defendant Al-Walters Limited. In August, 1932, Walter Matoff and one Al Dwire, opened a haberdashery store on Granville Street, Vancouver, and shortly after Al-Walters Limited was incorporated and took over the business which was carried on by Walter Matoff and Al Dwire. In order to secure advances of goods from the plaintiff to the defendant

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company the defendants W. J. Levin and A. Matoff signed the following guarantee:

In consideration of your selling goods from time to time to Al-Walters Limited, of Vancouver, B.C., on such terms of credit as you shall think fit, we guarantee to you the payment of all moneys which are now or which shall at any time hereafter be due to you by them up to the amount of Four Thousand Dollars ($4,000.00), and also due payment of all commercial paper which may at any time hereafter be due to you by them or held by you upon which they shall or may be liable.

You shall have the right at any time after the first shipment of goods to refuse further credit to the said Al-Walters Limited, to release any and all collateral or other securities and to extend the time for payment to the said Al-Walters Limited, or any person liable upon any collateral or other security which you may at any time hold and to compromise or compound with them, without notice to us, and without discharging or affecting our liability.

This guarantee to be a continuing guarantee.

Statement

In August, 1933, the manager of the plaintiff in Vancouver advised the cutting of expenses in the defendant company and that additional capital was required. Al Dwire's mother then invested $1,500 in the business and Walter Matoff stepped out of the management. Two hundred dollars was paid on the plaintiff's account and it was agreed that $50 per month be paid on the plaintiff's account which at that time was $1,800. W. J. Levin then wrote to plaintiff's manager in Vancouver advising him that he was putting an end to the guarantee and that he would only be responsible for the amount of the indebtedness at that time, namely, $1,800. In January, 1934, the defendant company made an authorized assignment. Judgment was given against the three defendants for the full amount claimed, namely, $2,252.35.

The appeal was argued at Victoria on the 9th, 10th and 11th of July, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Argument

Soskin, for appellant W. J. Levin: A large number of orders came direct from Montreal. Sim, the only witness for the plaintiff is manager in Vancouver and his evidence as to these orders is hearsay. The account must be strictly proven as against the guarantor and a judgment against the principal debtor is not binding on the surety: see *Ex parte Young. In re Kitchin* (1881), 17 Ch. D. 668 at p. 671; *Crown Life Insurance Co.* v.

Clark (1915), 9 W.W.R. 333 at p. 336. No indebtedness was proven. As to evidence of delivery see *Evans* v. *Beattie* (1803), 5 Esp. 26; *Bacon* v. *Chesney* (1816), 1 Stark. 192. The consideration for the guarantee was the giving of credit for at least the first shipment and this was not done: see Rowlatt on Principal and Surety, 2nd Ed., 21; *Westhead* v. *Sproson* (1861), 6 H. & N. 728; *Morrell* v. *Cowan* (1877), 7 Ch. D. 151 at pp. 155-6. There was failure of consideration as the spring goods were not delivered: see De Colyar on Guarantees, 3rd Ed., 29; *Johnston* v. *Nicholls* (1845), 1 C.B. 251; *Scandinavian American National Bank of Minneapolis* v. *Kneeland* (1913), 24 W.L.R. 587 at pp. 593 and 595; Rowlatt on Principal and Surety, pp. 101, 111-2; *Bolton* v. *Salmon* (1891), 2 Ch. 48 at p. 52. In any event the guarantee is limited to $1,800 as the defendant Levin terminated the guarantee on August 7th, 1933: see *Offord* v. *Davies* (1862), 31 L.J.C.P. 319; *Coulthart* v. *Clementson* (1879), 5 Q.B.D. 42.

Argument

Lando, for appellant Matoff: The liability is joint and the revocation of one joint guarantor is revocation of the other: see *White* v. *Tyndall* (1888), 13 App. Cas. 263 at p. 269; *North British Mercantile Ins. Co.* v. *Kean* (1888), 16 Ont. 117; *Ellesmere Brewery Company* v. *Cooper* (1896), 1 Q.B. 75 at p. 78; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290 at p. 314.

G. Roy Long, for respondent: The evidence of Sim, the local manager of the plaintiff company, proved delivery of the goods claimed to have been sold to Al-Walters Limited. This evidence was accepted by the learned trial judge. A *prima facie* case was made out and there was no attempt on the part of the defendants to shew that the goods were not received. Sim was merely local manager in Vancouver and the alleged arrangement between Sim and Levin on August 7th, 1933, was never accepted by the plaintiff.

Soskin, replied.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff's claim was against the defendants Al-Walters Limited (who are not appealing) and two guarantors of the debtor Al-Walters Limited, to the plaintiff.

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Judgment was given in the Court below against all three defendants for the sum of $2,252.35 on an account of the plaintiff against the principal debtor. The guarantors W. J. Levin and A. Matoff have appealed and it is their liability which is in question here. The claim is upon a guarantee (Exhibit 1) by which the appellant in consideration of the plaintiff selling goods from time to time to the defendant Al-Walters Limited (the debtor), on such terms of credit as the plaintiff should think fit, the appellants guaranteed the payment "of all moneys which are now or which shall at any time hereafter be due to you [the plaintiff] by them up to the amount of $4,000."

Goods were supplied on these terms and on the 7th of August, 1933, a change was made in the personnel of the management of Al-Walters Limited, by the retirement of W. Matoff of the debtor company. The indebtedness was stated to be $1,800 at that time. The retirement of Matoff was effected with the consent of all parties to the action. The appellant Levin at the suggestion of the plaintiff's manager for British Columbia, R. S. Sim, wrote a letter to Sim in which he stated that he wished to advise Mr. Sim that he was not guaranteeing anything more than the present debt. It was then agreed between himself and Sim that $200 of this amount should be paid in cash which was afterwards paid by appellant A. Matoff and the balance in monthly instalments of $50, four of which were duly paid. Default having been made in the balance action was commenced against the appellants. These payments reduced the $1,800 debt to $1,400. This arrangement appears never to have been accepted by the plaintiff. Indeed it was not submitted to it for some weeks afterwards by Sim. The action was commenced on the 17th of January, 1934. I do not think the guarantee, except as hereinafter stated, was affected by the said letter. Therefore, the plaintiff was entitled to recover from the appellants any sum he has succeeded in proving within the terms of the guarantee, and the amount claimed appears to be within these terms; but in my opinion the plaintiff has not proved his case and is entitled to judgment only for the sum conceded by the appellants, by their acceptance of the sum of $1,800 as being the amount due aforesaid, less the $400 paid on it, and to this amount only I would sustain the judgment. The

MACDONALD, C.J.B.C.

plaintiff failed to give substantive proof of its claim. It did not call the witnesses (if any) who were competent to prove its case. The only evidence it offered was that of its local manager Sim and the examination for discovery of the appellants, which proves nothing inconsistent with what I have already stated. The plaintiff maintained a warehouse in Vancouver. Some of the goods supplied to Al-Walters were supplied from this warehouse. The bulk of them, however, were supplied from their headquarters in Montreal. I shall refer in detail to some of Sim's evidence which convinces me that he had not sufficient knowledge of the account between the parties to enable him to prove it. He says he had no power to vary the guarantee (I accept that statement). He says "I was not a director of the company, just an employee," and when asked, "I understand you took all the orders of Al-Walters Limited, is that correct?" his answer was: "Not all the orders.

I also refer to the following evidence of Sim:

Well, would you tell me whether an order had to go to Montreal or whether it had to be supplied from the local place? Usually would be supplied—standard merchandise, like pattern merchandise, would come from Montreal.

Any individual orders would go through your hands? Yes.

And Montreal would ship directly to Al-Walters Limited? Sometimes, or sometimes care of the Vancouver warehouse.

And an invoice would accompany the shipment? Not always, they wouldn't accompany the shipment.

Then referring to payment of accounts he says:

Most of the payments were made through the Vancouver office.

Most of the payments were made through the Vancouver office. Any other payments were made to Montreal? Montreal. . . .

And that continued from the time the company was incorporated until this action was brought? Yes. . . .

You have got no records in Vancouver? Except statements that come out from Montreal each month.

Assuming an order was sent to Montreal and it was only partly filled, how would you get that? I wouldn't even attempt to check it up, to tell you the truth.

You wouldn't know? I wouldn't know. . . .

Well, do you know how much goods were supplied to Al-Walters Limited between January 7th, 1933, and August 7th, 1933? January 7th, 1933, is the date of the guarantee and August 7th is the date of the revocation [the alleged agreement *re* the $1,800] put in here? I would have no idea of the amount. . . .

August 7th, 1933? Our liabilities stood at approximately $1,600.

Well, can't you give me the exact amount? I just informed you it was

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impossible, because we don't keep a ledger account at Vancouver and all statements are furnished from head office.

Have you any record of this account at all? We have no exact record.

Then in the examination for discovery of Sim we have the following:

But I mean to say in the giving of the guarantee and things of that kind they dealt with you? Yes.

As their principal man? Yes.

And you were the principal as far as they were concerned? Yes. . . .

And to Mr. Matoff? Yes.

They apply equally? Yes.

Speaking of the amount due on the 7th of August, he said the approximate amount was $1,800 and they paid $200 on the 1st of August.

Mr. Matoff stated you wished to have $400 at the time and you finally agreed to $200? I agreed to submit the information to my head office.

And at the same time was there a suggestion made that $50 should be paid each month to reduce the amount? That was a definite arrangment. . . .

But I mean with the old account, that would leave a balance of $1,600 or $1,400? Approximately $1,450 of the old account.

But you are not certain? I say approximately $1,450 of the old account.

From this evidence I think the only inference to be drawn is that Mr. Sim was not in a position to prove his company's account. Therefore if the plaintiff was entitled to recover anything in this action, the amount would be $1,400 which I think is the amount accepted by the appellants as the amount due on the 7th of August and this amount stated and accepted to be $1,800 was reduced by the subsequent payments of $400.

When one turns to the documents put in as proof but not verified, one sees this—Exhibit 2 purports to be "Details taken of credit slips given by Tooke Bros. Limited to Al-Walters Limited," and also the second page of Exhibit 2 "Details taken from copies of Vancouver and Montreal invoices for Al-Walters Limited." On their face they do not purport to be original evidence.

I would, therefore, reduce the judgment to the sum of $1,400 as against the appellants. The judgment against Al-Walters Limited has not been appealed from and I leave this as it is.

The appeal is allowed in part.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, I think, be allowed on the first and main ground that, to put it briefly, the evidence shews conclusively that there was a very substantial breach of the

primary condition upon which the continuing guarantee was given in wrongfully refusing to deliver the special order of $328 for spring goods that was the prime consideration of the whole arrangement to enable the business in question to be carried on; and therefore the fact that there were two trifling shipments amounting only to $10 before that first substantial shipment is no justification, under the circumstances, for such refusal to carry out the true spirit and intention of the terms of the guarantee, and this is made clearly the fact that at the time of the refusal no such reason therefor was advanced (as would be obviously ridiculous in the case of such *"de minimis"* matters) but cash demanded before delivery contrary to the express terms of the guarantee.

MARTIN, J.A.

It follows that the judgment should, in my opinion, be set aside and the action dismissed.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I concur in the judgment of my learned brother, the Chief Justice, allowing the appeal in part.

MCQUARRIE, J.A.

McQUARRIE, J.A.: The learned trial judge, after having seen the witnesses called and heard the evidence adduced by the parties respectively, made a strong finding against the defendants and at the same time stated that he accepted without hesitation the evidence of Sim a witness for the plaintiff-respondent.

I have been unable to come to the conclusion that the learned trial judge was clearly wrong and would therefore dismiss the appeal.

It was urged on behalf of the defendants Levin and Matoff that plaintiff's claim had not been proved. As to this it appears that Sim's evidence verifies the plaintiff's claim and that the statements, invoices and receipts for deliveries produced by him made out a *prima facie* case as found by the trial judge. The defendants at the trial did not meet the plaintiff's case and in fact do not appear to have attacked the correctness of the statements filed on the plaintiff's behalf. My brother the Chief Justice refers to admissions made by the said defendants and on the strength of them would reduce the amount of the judgment to $1,400. At the trial also counsel for the defendant Levin filed a

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statutory declaration of R. Craig, secretary-treasurer of the plaintiff at Montreal, proving the plaintiff's claim at $2,373.47 which together with the accounts attached thereto were filed as Exhibit 5.

I think the plaintiff is entitled to judgment for the full amount of its claim.

Appeal allowed in part, McQuarrie, J.A. dissenting.

Solicitors for appellant Levin: *Soskin & Levin.*
Solicitor for appellant Matoff: *E. Lando.*
Solicitor for respondent: *G. Roy Long.*

MURPHY, J. (In Chambers)

1934

Oct. 9.

CANADA RICE MILLS LTD. v. MORGAN

CANADA RICE MILLS LIMITED v. MORGAN.

Practice—Costs—"Issue"—"Event"—Block tariff — Method of apportionment—Rule 977.

Where an action is dismissed but there is a finding on an issue in favour of the plaintiff, there is jurisdiction in the Court to apportion the costs. Where costs are apportioned 60 per cent. to the defendant and 40 per cent. to the plaintiff, the defendant's costs are taxed as a whole and he recovers from the plaintiff 60 per cent. of the amount so taxed.

Statement

APPLICATION to settle judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 8th of November, 1934.

Griffin, K.C., for plaintiff.
Macrae, K.C., for defendant.
E. A. Lucas, for third party.

9th November, 1934.

Judgment

MURPHY, J.: In my opinion the question of defective construction of the roof was an issue as "issue" is defined by Buckley, L.J. in *Howell* v. *Dering* (1914), 84 L.J.K.B. 198. His language is (p. 203):

An issue is that which, if decided in favour of the plaintiff, would in itself give a right to relief, or but for some other consideration would in itself give a right to relief.

Had it not been for the language of the contract as to the effect of final payment plaintiff would have obtained judgment. My finding on this issue in favour of plaintiff is I think an "event." *Slatford* v. *Erlebach* (1911), 81 L.J.K.B. 372. I therefore hold that under rule 977 plaintiff is entitled to the costs of this issue. The taxing officer has called my attention to the difficulty under our block tariff of taxing the costs of an issue to be set off against the general costs of the action. I think there is jurisdiction in the Court to apportion the costs. *Patching* v. *Barnett* (1881), 51 L.J. Ch. 74; *In re Pollard* (1902), W.N. 49. The greater part of the trial was occupied with the determination of the question of defective roof construction. I think justice will be done if I apportion the costs 60 per cent. to defendant and 40 per cent. to plaintiff. By that I mean defendant's costs are to be taxed as a whole as if no question of separate issues had arisen and then defendant is to recover from plaintiff 60 per cent. of the amount so taxed.

Order accordingly.

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IN RE ESTATE OF STEPHEN JONES, DECEASED.

THE ROYAL TRUST COMPANY *ET AL.* v. JONES *ET AL.* (No. 2).

IN RE JONES, DECEASED.

THE ROYAL TRUST CO. *v.* JONES

Will—Codicil—Construction—Whether contrary to public policy.

A testator made his will in December, 1928, and after providing for his wife during her life made bequests to each of his five children in equal amounts. Subsequently his second son H. contracted what the testator considered was an ill-advised marriage, and in June, 1933, he made a codicil providing that "All moneys in and by my said last will and testament bequeathed to or provided for or directed to be paid to or for the benefit of my said son Howard Jones shall fall back into and be accumulated with and form part of 'the said trust fund' directed by my said last will and testament to be created and accumulated and I will and direct that except as hereinafter in this codicil provided the executors and trustees of my said last will and testament shall deal with and distribute all my estate and also the said trust fund as though my said son Howard Jones had never been born subject however to the two following provisions namely first that my said trustees and executors shall pay to the said Howard Jones the sum of seventy dollars per month so long as he shall live computed from the first day of the month next following my decease and second that if and in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be re-instated so as to receive as on and from that day and as a new gift and without any right to claim back for intervening time All and singular such money, share of my said estate and provisions for his benefit as on attaining the said age he would have been entitled to under my said last will and testament if this codicil had not been made." On originating summons the codicil was held to be valid.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS and MCQUARRIE, JJ.A. dissenting), that on the proper construction of the codicil no offence against public policy is disclosed but it would appear to be designed rather to promote harmony, thrift and industry in the son's family.

Per MCPHILLIPS and MCQUARRIE, JJ.A.: That the condition in the codicil would have a tendency to drive the husband and wife apart and the codicil is void as against public policy.

Statement APPEAL by plaintiff Howard Jones from the decision of MURPHY, J. of the 28th of May, 1934, on an originating sum-

mons to determine whether Howard Jones, second son of the late Stephen Jones is entitled to receive the gifts and bequests made for him under the last will of the said Stephen Jones, deceased, dated the 18th of December, 1928, unaffected by the provisions and references to the said Howard Jones in the second codicil to the said will dated the 5th of June, 1933. The provision in said second codicil is as follows:

As regards and with reference to my second son Howard Jones who has contracted an ill-advised marriage and has become entangled in disputes and troubles with his wife I revoke all gifts and provisions made to or for him in my said last will and testament and in lieu thereof I give devise and bequeath as follows that is to say: All moneys in and by my said last will and testament bequeathed to or provided for or directed to be paid to or for the benefit of my said son Howard Jones shall fall back into and be accumulated with and form part of "the said trust fund" directed by my said last will and testament to be created and accumulated and I will and direct that except as hereinafter in this codicil provided the executors and trustees of my said last will and testament shall deal with and distribute all my estate and also the said trust fund as though my said son Howard Jones had never been born subject however to the following provisions namely first that my said trustees and executors shall pay to the said Howard Jones the sum of seventy dollars per month as long as he shall live computed from the first day of the month next following my decease and second that if and in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be re-instated so as to receive as on and from that day and as a new gift and without any right to claim back for intervening time All and singular such money, share of my said estate and provisions for his benefit as on attaining the said age he would have been entitled to under my said last will and testament if this codicil had not been made.

The question to be determined by the Court was whether the codicil is void on the ground of public policy.

The appeal was argued at Vancouver on the 5th of October, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, J.J.A.

Macfarlane, K.C., for appellant: What is set out in the codicil tends to invite separation between Howard Jones and his wife: see *Ward* v. *Van der Loeff* (1924), 93 L.J. Ch. 397 at p. 413. We say this case is in our favour. The codicil expressly says that when Howard is thirty-five years old he must be "under no liability to contribute and pay to her any money": see *Papa-*

Argument

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dopoulos v. *Papadopoulos* (1930), P. 55 at p. 67. The wording of the codicil indicates that it was the intention that the wife should get nothing at all, and this is contrary to public policy: see *Wren* v. *Bradley* (1848), 2 De G. & Sm. 49; *Wilkinson* v. *Wilkinson* (1871), L.R. 12 Eq. 604.

Maclean, K.C., for other plaintiffs: There is no case of relative revocation here. That the testator has not included anything illegal in the will is a presumption of law: see Halsbury's Laws of England, Vol. 28, p. 668, sec. 1279, and *Ward* v. *Van der Loeff* (1924), A.C. 653 at p. 671. If this is an express revocation that settles the case: see *In re Bernard's Settlement. Bernard* v. *Jones* (1916), 1 Ch. 552 at p. 558; *Onions* v. *Tyrer* (1716), 2 Vern. 741. The tendency now is to allow one to express his intention and give effect to it.

C. G. White, for respondents: The codicil is valid and the intention is to rectify an improvident marriage: see *In re Moore. Trafford* v. *Maconochie* (1888), 39 Ch. D. 116 at p. 118.

Cur. adv. vult.

9th October, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): In my opinion the appeal should be dismissed. Stephen Jones was a wealthy man. He made a will, making a very generous provision for his wife and children. Before his death he discovered that his son Howard had married, as he thought, unwisely. He therefore made a codicil to his will by which he revoked absolutely the provision in favour of Howard and provided that the trustees and executors should pay Howard the sum of $70 per month so long as he shall live, computed from the first day of the month next following his decease and further that if and in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from testator's estate then the said Howard Jones shall be reinstated so as to receive as on and from that day and as a new gift and without any right to claim back for intervening time all and singular

such money, share of testator's said estate and provisions for his benefit as on attaining the said age he would have been entitled to under testator's said will, that is to say if the parties are living amicably together then the boy is to be reinstated in his original right under the will which was rescinded by this codicil.

Now it was contended that the codicil was against public policy as interfering in a matter between husband and wife and would discourage their living together. I think it had the opposite tendency. The tendency was to produce harmony between husband and wife so that the husband might obtain the benefits of the will.

MARTIN, J.A. (oral): If it could be said that the object of this bequest was to promote separation, then the gift is bad as Lord Justice Bowen with his usual clarity said in *In re Moore* (1888), 39 Ch. D. 116 at 131, and is also to be extracted from the following cases: *In re Dickson's Settled Estates* (1921), 2 Ch. 108; *In re Hope Johnstone* (1904), 1 Ch. 470, and particularly *Shewell* v. *Dwarris* (1858), Johns. 172 and 174, and all the circumstances must be looked at to decide as to whether or no the intention was to foster separation or to foster the continuation of the marriage; and it is to be noted that in *Shewell* v. *Dwarris* it was said by Vice-Chancellor Page Wood, drawing a distinction between the ordinary case of separation by deed and gift by will, he points out there something which is very interesting in regard to the present case, that, if the will provides for either contingency of the husband and wife living together or separate when the will takes effect, that bequest cannot influence their conduct, which goes further than is necessary to go in this case. It is the most interesting decision I have been able to find to guide us; but fortunately, having regard to the provisions of this will and the circumstances, I find that instead of being able to say it was the intention of the testator to separate these young people, his obvious intention was to hold out an inducement to them to retain the marriage state and stand by one another. The dates are of interest. He made his will in 1928. The second son, who now complains, was married on the 6th of March, 1933, and it is that marriage which

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his father referred to as having been contracted in an ill-advised way, and that he had become entangled in disputes and troubles with his wife. The codicil was made, having regard to that marriage, three months afterward when his father had had some opportunity to see what the result of it was, and he made the provision which has just been read, and it is to be noted that it provides first, that in any event the son shall get $70 a month during his lifetime, and then it gives him an opportunity to "reinstate" himself within, having regard to his age then, about thirteen years, which means that when he attains the age of 35 a handsome fortune awaits him. Meanwhile, and also thereafter, he gets the $70 a month and $100,000 await him, and all he has to do to get that large fortune—something most men toil all their lives to get and never come within an approach of it—is to observe two conditions: one, that at the time he attains his 35th year he is "free of disputes and troubles with his present wife." He may quarrel, it is to be noted, as much or as little as may be during that time, but "on his attaining the full age of 35 years" if he is free from quarrels with his wife, then he has satisfied the first condition; and the other one is, he must be "under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be reinstated." That seems to me, having regard to all the circumstances, the provision of a wise and just father because it gives the son and daughter-in-law every chance to conduct themselves as they should; and it prevents him from incurring any liability to contribute out of the estate to her. That is to say, it would, *e.g.*, prevent them from coming to any arrangement whereby they were to separate or divorce and yet share this large sum which is to come to him alone. So, having regard to the whole document when you look at it in the light of the cases to which I have referred, it is to my mind abundantly clear not only that there can be no legal objection to it but it is a compliment to the draftsman who drew it because it accomplishes in a very nice way what one would have thought to be the object of a man who has shewn himself, from this document, to be a wise and just father. So strong do I feel on the point, that I can say with Mr. Justice Kekewich in *In re Hope Johnstone*

(1904), 1 Ch. 470 at p. 478, that to do otherwise would be doing what he thus condemns: "Policy of the law"—that is public policy "ought not . . . to be pressed into the service of highly improbable contingencies." Were we to give effect to this appeal we should be falling into that grave error. I would therefore dismiss it.

McPHILLIPS, J.A. (oral): With great respect to the judgments delivered by my brother the Chief Justice, and my brother MARTIN, I have arrived at an entirely contrary view. In my opinion the codicil is void *in toto* as being against public policy. It cannot be gainsaid, to my mind, but what the father was endeavouring to influence the son's conduct, after finding the son marrying, contrary to his wishes, a lady who did not meet with his approval.

It can be said without any fear of contradiction, that this whole codicil is directed to bringing about something which would result in there being a divorce or a separation or something of that kind. Evidently that was in the mind of the testator. He says:

> With reference to my second son Howard Jones who has contracted an ill-advised marriage and has become entangled in disputes and troubles with his wife I revoke all gifts and provisions made to or for him in my said last will and testament.

Is that a proper thing for a testator to do, and can he do it under the law? In my view of the cases and the statute bearing on the matter, he cannot do it. Then, to shew it is all interlocked, we come finally to the latter part of the codicil which is this, that there is $70 a month allowed, which is so insignificant, so impossible for the son to maintain a wife and child, $70 a month under the conditions in which people are now living. How can a family live or maintain a comfortable home on $70 a month? Then the question of the bequest comes up again:

> If and in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be reinstated.

Up to this time he would be in receipt of $70 a month. He has his parental duty, his legal duty, his moral duty to maintain

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the wife and child. How could he observe that provision "being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate" assuming that he had no other income but the $70 a month which came from the estate? Why, the family would starve except they utilize that money in that way. Then the father speaks of the trustees' position in the matter. They were to deal with Howard Jones, in a singular manner—"shall deal with and distribute all my estate and also the said trust fund as though my said son Howard Jones had never been born." Now, I must say, to me that is cruel, ruthless language, in truth, though it is meaningless in law. I never saw it before nor do I think it has ever been approved of in any English Court. A father can never disengage himself from his parental duty, his legal responsibility as well as his moral responsibility, and we have had that accentuated by the statute, the Testator's Family Maintenance Act, and the cases have always been distinct on that point. There has really been little time to consider this matter but I would like to refer to one or two authorities, and the first one I would refer to is *Wilkinson* v. *Wilkinson* (1871), L.R. 12 Eq. 604, where Sir John Stuart, V.-C., gave the judgment. Now, in this case the head-note reads:

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> Testatrix, by her will, in 1867, gave the residue of her property to her niece, the wife of W. W. (who was carrying on a large business as a corn miller at S.) for life, with gifts over; and by a codicil, in 1869, she directed that all interest given by her will to her niece should go over, should she not cease to reside in S. within eighteen months of testatrix's death:—
>
> *Held*, upon the authority of *Mitchel* v. *Reynolds* [(1711)], 1 P. Wms. 181, that, as this was a condition which would require the niece to omit the doing of something that was a duty, it was void.

Now, Howard Jones must maintain his wife, and if he has only got this money to come from the estate with which to maintain her, he must maintain her out of that. There is no denying that, and there is no telling whether he will have anything more. Vice-Chancellor Stuart said at p. 608:

> I think this condition is void. Upon the construction of the language, it is extremely difficult to say how the condition is to be performed. The testatrix knew that the plaintiff was married, and that her ceasing to reside at Skipton could not depend upon herself, but upon her husband.

How can Howard Jones get out of his responsibility to sup-

port his wife and child? That being so, what is the value of such a condition? What follows illustrates the principle:

It is a condition imposed upon a person who is not the person that must really perform it. What has occurred shews its worthlessness. The plaintiff —a married woman—considering that it was her duty to perform the condition so that there should be no forfeiture of the property, has been obliged to neglect another and more important duty in quitting her husband's house, and going to reside elsewhere. The authorities clearly shew that the condition is bad. Lord Macclesfield, . . . in the celebrated case of *Mitchel* v. *Reynolds* [(1711)], 1 P. Wms. 181, described very clearly what are conditions which shall be considered to be invalid; and (2) he said: "All the instances of conditions against law in a proper sense are reducible under one of these heads: 1st. Either to do something that is *malum in se*, or *malum prohibitum*. 2ndly. To omit the doing of something that is a duty. 3rdly. To encourage such crimes and omissions. Such conditions as these the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." This case comes exactly within the second definition. The condition is a vicious one; and that being so, I have no difficulty in declaring that it is void.

The condition here, in my opinion, is a vicious one. It is quite apparent the testator had a strong feeling against the marriage, and the lady his son married, and he is palpably attempting to break up that marriage by this codicil, and in my opinion the codicil is contrary to public policy.

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Then I would refer to the case of *In re Sandbrook. Noel* v. *Sandbrook* (1912), 2 Ch. 471 at p. 478:

It is open to the objection of being void because it is contrary to public policy, and it is also open to the objection of being void because it is so vague. I am prepared to declare that, according to the true construction of the will, the condition is altogether bad.

Now, what was the condition there? This is what the provision was:

In case either grandchild should die before [a certain date] . . . either one or both of the grandchildren should "live with or be or continue under the custody, guardianship or control of their father."

Here the wife and child must part practically from the father and have no relationship with him:

" . . . all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition."

In this case the only thing I could see would be Howard Jones not actuated by proper motives, but with a desire to obtain a substantial part of this great fortune, would put his wife away

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or make some disposal so that *he would neither directly nor contingently contribute to or pay her anything.* How could he under the law ever eschew that? His legal duty is to maintain his wife. His legal duty is to maintain his child. At p. 478 I find Mr. Justice Parker, who was afterward that distinguished judge, Lord Parker of Waddington, who sat in the Privy Council as well as the House of Lords, one of the most distinguished judges of our day, said this:

> The condition in the present case is that the forfeiture is to occur if the children or one of them be or continue under the custody, guardianship or control of their father. As a matter of law, the children always have been in the custody, control, and guardianship of their father, although he himself, having been absent abroad, has delegated the duty he owed to them at first to the grandmother, the testatrix in the case, and subsequently to Miss Sandbrook, who, under the will of the grandmother, is the person designated as the person with whom the grandmother would wish them to live. Having regard to the words used, it seems difficult to say whether the events which have happened have caused or what further degree of interference by the father may cause the forfeiture to happen, and, in a similar way, it is very difficult to interpret with any reasonable certainty what is meant by the children being directly under the father's control. That becomes the more difficult to ascertain from the fact that it is to be an essential condition that the children are to live free from the father's direct influence and control. Is it to be said that if a father writes to his child, he is not exercising direct influence over him? It appears to me that the father would by correspondence be directly influencing the child, as he would personally influence him by living with him. It appears to me almost impossible for a father who sees his child at all not to exercise direct personal influence.
>
> Having regard to all those circumstances, it appears to me that this condition is open to about every objection to which it could be open. It is open to the objection of being void because it is contrary to public policy, and it is also open to the objection of being void because it is so vague. I am prepared to declare that, according to the true construction of the will, the condition is altogether bad.

Then in *Ward* v. *Van der Loeff* (1924), A.C. 653, which was the authority on which Mr. Justice MURPHY supported the will in the Court below, I cannot agree with that learned judge's summing up of the effect of that decision, and I do not think it should weigh at all in the judgment I now pronounce. I would also refer to *In re Bell. Bell* v. *Agnew* (1931), 47 T.L.R. 401 in line with what I have already said. Now, the principle really is this. A condition in a will having the effect of turning a father from the performance of his parental duties is void because it is contrary to public policy against the provisions of the Testa-

tor's Family Maintenance Act which I have referred to. And in connection with that view I would refer to an Australian case *In re Ellis* (1929), 29 S.R.N.S.W. 470. Now, I cannot see any reason which makes it our duty to sustain this codicil and I can see every reason why, on the ground of public policy it should be held to be void. It is only an attempt by the testator, after his death, to control the actions of his son; he must fail in attempting anything of the kind, especially in view of the legislation we have in this country in the matter. I might say in passing, with respect to that legislation, that this Court is not to be unmindful of it, although it is true this application does not come under it at the moment, but there is the position with regard to the making of a will in this country and one must remember the Testator's Family Maintenance Act which is to be found in R.S.B.C. 1924, Cap. 256. There was also an appeal from this Court in a case which was recently decided by the Supreme Court of Canada on the point of the Testator's Family Maintenance Act. That was the case of *Walker* v. *McDermott* (1931), S.C.R. 94 and at p. 96, Mr. Justice Duff, now Chief Justice of Canada, said:

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> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence.

Take in this case $70 a month, just visualize that, a million dollar estate and only $70 a month to maintain himself, his wife and his child.

> For the purpose of arriving at a conclusion, the Court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

Now, as I say, here we have a million dollar estate. Under these circumstances this is to be some guide in regard to this action on the part of the testator. As a matter of fact, under the statute as it exists there is no question of doubt that an

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application might, in my opinion, be made under the Act by Howard Jones to get his proper portion out of this estate, and a sum equal to or greater perhaps than that provided for originally in the will and sought to be revoked later. And further it might have the effect of affecting the management of the estate. Certainly a father cannot now under the law tie up an estate for an indefinite period of time. Under this statute there must be an apportionment of the amount to which the children are entitled, not postponed for years. In this particular case of *Walker* v. *McDermott* the net value was $25,000. The application came before Chief Justice MORRISON. He ordered that the daughter (who was married and being maintained by her husband in receipt of a salary of $150 a month, and it was pressed very strongly on the other side, that she was not in any need) be given $6,000 out of this estate of $25,000, the balance being retained by the stepmother. The stepmother had voluntarily given the daughter before the proceedings were taken $1,000, and that was credited; but she really got $6,000 out of the whole $25,000. Now, if we visualize this great estate what would Howard Jones be entitled to? I only refer to these matters to indicate what, after all, must be the guiding principle in the Court. We cannot be unmindful of what the law of the land is. The law of the land here is different to what it is in England, by virtue of that statute, and if I should be in error in my opinion then there remains at any rate this further opportunity to deal with the matter and Howard Jones would be allowed and necessarily allowed his due proportion of the estate.

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Therefore, in my opinion the appeal should be allowed, being of the opinion the codicil is void on the ground of public policy, and it is void *in toto*. That being so, of course, Howard Jones is entitled to participate according to the original provision in the will.

MACDONALD, J.A. (oral): This matter as I view it presents no difficulty. No offence against public policy is disclosed on the proper construction of the clause in the codicil under consideration. It is clearly designed to promote harmony, thrift,

and industry in the son's family. It provides that the son shall not directly or contingently pledge moneys received by him from the estate in favour of his wife. That will direct his attention to the laudable necessity of supporting his wife in part at least from his own private earnings. It is intended to encourage him to do so and with his earnings, combined with $70 a month from the estate for the next 12 or 13 years, they should be able to live in reasonable comfort. If, too, they value the future they will live amicably and observe this provision, as the reward for doing so is very great. It is impossible to suggest that the clause is designed to separate husband and wife. It is intended to keep them together. On this view no other question arises for determination. I would dismiss the appeal.

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MCQUARRIE, J.A. (oral): I agree with my brother MCPHILLIPS that the appeal should be allowed. I would like to come to the opinion which the majority of the Court have come to in regard to the effect of the condition in the codicil. I would like to see from the document that it was the intention of the testator to keep husband and wife together, to promote harmony between them, which, of course, would be most commendable on his part, but there seems to be something in this case which is not altogether clear. We have no evidence of any difficulty between the husband and wife at all; and the affidavit filed by Howard Jones would indicate that they are, at least at the present time, living together in peace and harmony and that there is nothing wrong between them. What is the father in this condition trying to do? What is he trying to get at, and what is the meaning of the condition? Now, I am in some doubt as to what the condition does mean. If the testator had been anxious to help the wife, or had been anxious to promote harmony between the husband and wife, surely he would not have inserted in the condition such a provision as that which is to the effect that the husband shall not directly or contingently pay to his wife any money received from the testator's estate. I could imagine that there might be a lack of harmony on the part of the wife if she were to receive no money from her husband, and I take it that the only source from which the husband would have to get any money would be out of

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his father's estate. Now, I think the condition, viewed as my brother MCPHILLIPS and I see it, is a vicious one, and has a tendency I should think to drive husband and wife apart. I notice in this condition the testator speaks of his son's present wife, and everything depends upon her. What would happen in the case of the present wife becoming deceased or being divorced, and there being another wife installed in her place does not appear to have been provided for. I think the condition is contrary to public policy, and I would allow the appeal.

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

Solicitor for appellant: *A. D. Macfarlane.*
Solicitors for respondents: *White & Martin.*

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IN RE STEPHEN JONES, DECEASED AND THE TESTATOR'S FAMILY MAINTENANCE ACT. (No. 3).

Testator's Family Maintenance Act — Will — Codicil — Breach of duty by testator—Inadequate provision for son.

A testator, survived by his wife, two sons and three daughters, left a net estate of $770,000. His will, after making provision for his wife, provided that each child was to get $1,500 per year until 22 years of age, then $2,000 per year until each was 25, then $3,000 per year until each was 30, then $3,500 per year until they reached the age of 35, when each child was to get $100,000. After making his will the testator, considering that his son H. had contracted an ill-advised marriage, made a codicil revoking all gifts and provisions made for H. in the will and providing for a monthly payment of $70 until he had attained the age of 35 years, when under certain conditions he was to be reinstated so as to receive as a new gift such share of the estate as he would have been entitled to under the will if the codicil had not been made. On petition by H. (22 years old at the time of testator's death) under the Testator's Family Maintenance Act, that such provision be made out of the estate for him as is just and equitable, it was ordered that the allowance be increased to $200 per month.

Statement

PETITION by Howard Jones that further provision be made to him out of the estate of his father Stephen Jones, deceased,

under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 7th of November, 1934.

Macfarlane, K.C., for petitioner.

Maclean, K.C., for executors.

Lawson, K.C., for Eliza M. Jones, Stephen Jones the younger and Frances E. Jones.

C. G. White, for Mildred V. Jones and Margaret T. Jones.

30th November, 1934.

ROBERTSON, J.: This is a petition by Howard Jones, under the provisions of the Testator's Family Maintenance Act, that such provision be made out of the estate, as the Court thinks just and equitable, for the said petitioner. Stephen Jones (hereinafter called the father) died on the 2nd of October, 1933, and probate of his will was granted on the 27th of February, 1934. He left him surviving his wife; two sons Stephen Jones the younger and Howard Jones, the petitioner, who are, and were at the time of his death, of age; and three daughters, Frances Elizabeth Jones, who became of age on the 1st of November, 1934; Mildred Victoria Jones and Margaret Thompson Jones who are under age. The father, who was the proprietor of the well-known Dominion Hotel in the City of Victoria, left a net estate of $770,000, after payment of probate and succession duties. Since 1911 he and his family lived in his private house in Victoria where they enjoyed every reasonable comfort. The father did not spare any expense in the support and maintenance of his home and in the education of his children. The two sons were sent to first-class boys' schools and to college or university, and the eldest daughter was sent to a first-class girls' school and afterwards to college, and the cost of educating each of the sons and the daughter was $1,500 a year. It was the intention of the father that the younger daughters should be educated in the same way.

Judgment

The petitioner when at the University had taken a course in hotel management and after leaving the University was employed in his father's hotel, and while so engaged, was married on the 6th of March, 1933, at Olympia in the State of Washington.

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The marriage was displeasing to the father with the result that the petitioner went to Vancouver, and there resided temporarily in the hope that he might be permitted to resume his position in the Dominion Hotel but his father apparently did not forgive him, and the petitioner then went to Australia to remain there "until the displeasure of his father should abate or other arrangements be made." On the 7th of December, 1933, Mrs. Howard Jones gave birth to a daughter.

Now the father made his will and a codicil thereto on the 18th of December, 1928. So far as it is necessary to note its provisions with reference to this petition, it provided that each child was to get $1,500 per year until 22 years of age, and then $2,000 per year until each was 25, and then $3,000 until each was 30, and then $3,500 per year until each reached the age of 35, at which period each child was to get $100,000. These yearly sums were payable monthly from the date of his death.

On the 5th of June, 1933, the father made a second codicil to his will, which contains this provision:

Judgment

As regards and with reference to my second son Howard Jones who has contracted an ill-advised marriage and has become entangled in disputes and troubles with his wife I revoke all gifts and provisions made to or for him in my said last will and testament and in lieu thereof I give devise and bequeath as follows that is to say: All moneys in and by my said last will and testament bequeathed to or provided for or directed to be paid to or for the benefit of my said son Howard Jones shall fall back into and be accumulated with and form part of "the said trust fund" directed by my said last will and testament to be created and accumulated and I will and direct that except as hereinafter in this codicil provided the executors and trustees of my said last will and testament shall deal with and distribute all my estate and also the said trust fund as though my said son Howard Jones had never been born subject however to the two following provisions namely first that my said trustees and executors shall pay to the said Howard Jones the sum of seventy dollars per month as long as he shall live computed from the first day of the month next following my decease and second that if and in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be re-instated so as to receive as on and from that day and as a new gift and without any right to claim back for intervening time All and singular such money, share of my said estate and provisions for his benefit as on attaining the said age he would have been entitled to under my said last will and testament if this codicil had not been made.

The codicil was attacked but has been upheld by the Court of

Appeal [*In re Jones, Deceased. The Royal Trust Co.* v. *Jones, ante,* p. 204.] Speaking of this codicil, the Chief Justice of British Columbia said [at p. 207] that:

The tendency was to produce harmony between husband and wife so that the husband might obtain the benefits of the will.

And Mr. Justice MARTIN said [p. 208]:

The codicil was made, having regard to that marriage, three months afterward when his father had had some opportunity to see what the result of it was, and he made the provision which has just been read, and it is to be noted that it provides first, that in any event the son shall get $70 a month during his lifetime, and then it gives him an opportunity to reinstate himself within, having regard to his age then, about thirteen years, which means that when he attains the age of 35 a handsome fortune awaits him. Meanwhile and also thereafter, he gets the $70 a month and $100,000 await him, and all he has to do to get that large fortune—something most men toil all their lives to get and never come within an approach of it—is to observe two conditions: one, that at the time he attains his 35th year he is "free of disputes and troubles with his present wife." He may quarrel, it is to be noted, as much or as little as may be during that time, but "on his attaining the full age of 35 years" if he is free from quarrels with his wife, then he has satisfied the first condition; and the other one is, he must be "under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be re-instated." That seems to me, having regard to all the circumstances, the provision of a wise and just father because it gives the son and daughter-in-law every chance to conduct themselves as they should; and it prevents him from incurring any liability to contribute out of the estate to her. That is to say, it would, *e.g.*, prevent them from coming to any arrangement whereby they were to separate or divorce and yet share this large sum which is to come to him alone. So, having regard to the whole document when you look at it in the light of the cases to which I have referred, it is to my mind abundantly clear not only that there can be no legal objection to it but it is a compliment to the draftsman who drew it because it accomplishes in a very nice way what one would have thought to be the object of a man who has shewn himself, from this document, to be a wise and just father.

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And Mr. Justice M. A. MACDONALD, speaking of this codicil, said [pp. 214-5]:

It is clearly designed to promote harmony, thrift, and industry in the son's family. It provides that the son shall not directly or contingently pledge moneys received by him from the estate in favour of his wife. That will direct his attention to the laudable necessity of supporting his wife in part at least from his own private earnings. It is intended to encourage him to do so and with his earnings, combined with $70 a month from the estate for the next 12 or 13 years, they should be able to live in reasonable comfort. If, too, they value the future they will live amicably and observe this provision, as the reward for doing so is very great. It is impossible to suggest

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that the clause is designed to separate husband and wife. It is intended to keep them together.

It is urged that this judgment shewed that their Lordships must have thought the provision of $70 per month was "wise and just" and therefore it should not be increased; but the question the Court of Appeal was considering was, not the adequacy of the gift to Howard, but whether or not the codicil was designed to separate him from his wife and I should think no consideration was given to the rights of Howard under the Act in question. Those who are of age, and are beneficially entitled under the will, are willing that an order should be made by the Court, placing the petitioner in the same position as his brother Stephen, under his father's will, so that he should be entitled to share under the will of his father, in the same manner and to the same extent, as his said brother; but as there are children under age, this consent does not assist. Then again it is stated by the widow that if the petitioner is not placed in the same position as his said brother Stephen it will only lead to dissension and unhappiness in her family. I do not think I can give effect to any such ground as this.

Judgment

In my reasons for judgment handed down on the 16th of October, 1934, in *In re Morton, Deceased* [*ante*, p. 172] I referred to the decisions which, in my opinion, laid down the principles upon which an application under this Act, should be considered, and I quoted there from a New Zealand case (*Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959) as follows:

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will.

In *Walker* v. *McDermott* (1931), S.C.R. 94, to which I also referred, the facts were that the deceased died on the 12th of May, 1928, leaving a will made in 1924, whereby he left his

entire estate consisting of about $25,000 to his wife. His daughter, by a prior marriage, at the age of 21, was married in 1927, to H. C. Walker, then aged 23. At the time of the application he was employed as a clerk in a large company at a salary of $150 a month. Both he and his wife were in good health. The company with which he was employed was firmly established and his chances of advancement and larger salary were excellent. Walker was able to support his wife but they were not able to save anything. After the application under the Testator's Family Maintenance Act was launched the daughter gave birth to twins. The Chief Justice of the Supreme Court of British Columbia gave her a lump sum of $6,000. The Court of Appeal by a majority reversed this, holding that the daughter had not proved that she was in need of maintenance and support, having regard to all the circumstances. The Supreme Court of Canada reversed the decision of the Court of Appeal and restored the judgment of the learned Chief Justice of the Supreme Court. Duff, J., as he then was, now Sir Lyman Duff, Chief Justice of Canada, said at p. 96:

Judgment

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the Court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

It would seem to me from this decision that the Court, in determining whether or not a testator has discharged his duty as hereinbefore set forth, will consider among other things the obligations and necessities of the child, arising from the fact that the said child has, and may have, more children, for on p. 98 Sir Lyman Duff said:

> . . . nor do I think that a father in the position of the testator, and justly appreciating the situation of his daughter, a young married woman, and the possibilities attaching to her situation, would, in the circumstances

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which I have outlined above, have considered that adequate provision existed for her "proper maintenance and support"; . . .

Further I am of the opinion that in an application under section 3 of the Act, the period of time which is to be considered, when determining whether the applicant has been left without adequate provision, is the date on which the Court is dealing with the matter, and not the date of the testator's death. It appears to me that this was the "period" which was considered in the *McDermott* case, *supra*. See also *Re Forsaith* (1926), 26 S.R.N.S.W. 613; 44 English & Empire Digest, p. 1290.

Can I, under all the circumstances, say that the testator has been guilty of a breach of the duty owing to Howard? Now I have no information as to what the disputes and troubles with the petitioner's wife were. They may have been of a very serious nature. They may have been, entirely, of a financial nature. The father may have thought that Howard would be a very much better man if he had to make his own way in the world assisted by the said monthly payments of $70 per month, and, inspired by the hope of receiving $100,000 when he attained the age of 35 years, provided the above-mentioned conditions in the codicil were complied with, than if he were to be dependent on what he should receive from his father's estate. In view of this uncertainty I must accept as the reasons, actuating the father, those given in the codicil, *viz.*, that Howard had contracted an ill-advised marriage and had become entangled in disputes and troubles with his wife. It would appear to me under these circumstances that that would be the very time when Howard would require the assistance of his father. The marriage would much more likely be successful and happy if Howard were to have sufficient money on which to support his family; and it seems to me therefore that there was a failure of that "parental duty" which a "judicious father" would have exercised and this is therefore one of the cases when the Act should be applied.

Judgment

It is quite evident that even if the petitioner had only himself to support he could not live as he has been accustomed to live, prior to his marriage, on $70 per month. Then, if I am correct in my view of what was said in *McDermott's* case, *supra*, the Court should consider Howard's present circumstances which

are that he now has a wife and child to keep. It is said that his father has given him a good education, that he has $5,000 of his own, and a training in the hotel business and he ought to be able to earn something, which, together with the $70 a month would ensure a good living for him and his family; but this type of argument was no doubt made in the *McDermott* case, and was not given effect to. Further it appears at the present time Howard with the said $5,000 is trying to establish himself in business in the State of California and he may be unsuccessful and lose all that he has. If I were to refuse the present application, he could not make a second one. If I grant the present application and Howard is successful in business life then, if necessary, the provision which I am about to order can be cut down, as provided in section 15 of the Act. After very careful consideration of this whole case and in accordance with what I deem to be the principles laid down in the cases *supra,* I think it is a proper case for ordering further provision for Howard which should be adequate, just and equitable in the circumstances. At the same time I propose to adjourn the further consideration so that in the future, if need be, the allowance may be increased.

Judgment

I think the allowance should be increased to $200 per month until further order. Further consideration is adjourned, costs of all parties out of the estate.

Order accordingly.

THE KING (AT THE PROSECUTION OF JOSEPHINE ANDLER, *et al.*) v. THE MINISTER OF FINANCE.

Land Registry Act — Transfer of land — Placed in escrow — Fraudulently released to transferee — Registration — Lands mortgaged—Action to recover lands and damages—Judgment—Lands and damages—Assessment—Action for payment from Assurance Fund—Mandamus—R.S.B.C. 1924, Cap. 127, Sec. 218.

A. executed a deed transferring certain property in Victoria to D. which he deposited in escrow with a company in California upon certain terms. D. obtained possession of the deed fraudulently without complying with the terms of the escrow agreement and registered it in the Land Registry office at Victoria. He then executed a transfer to his wife who encumbered the property by a mortgage for a large sum. In an action by A.

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judgment was given vesting the lands in A. subject to the mortgage, and on a reference the registrar fixed the amount received under the mortgage at $34,730.95, for which judgment was entered for the plaintiff. As the judgment remained unsatisfied a demand was made upon the Minister of Finance under section 218 of the Land Registry Act to pay this amount from the Assurance Fund. Upon his refusal the plaintiff applied for and obtained an order for a peremptory writ of *mandamus* commanding him to pay said amount.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the plaintiff was wrongfully deprived of an "interest in land" in consequence of fraud in the registration or in connection therewith. As judgment for damages was obtained and entered and the sheriff was unable to realize the minister must pay under said section.

Per MACDONALD, J.A.: That the Assurance Fund, made up, replenished and maintained as provided by the Act, is not moneys of the Crown. A servant of the Crown is selected as custodian, but in this connection he is not acting for the Crown and *mandamus* lies.

APPEAL by the Minister of Finance of British Columbia from the order of MCDONALD, J. of the 3rd of May, 1934, whereby it was ordered that the order *nisi* for *mandamus* pronounced on the 19th of April, 1934, be made absolute, and that a peremptory writ of *mandamus* directed to the said Minister of Finance do issue herein. Prior to September 25th, 1925, Josephine Andler, Augusta Col, Sophia Promis, Mary Gillespie and Oscar Promis were the owners, free from encumbrance, of lots 3 and 4 in block 75, plan 219, Victoria City, and lots 11 and 12 in block 75, plan 219, Victoria City. On the 25th of September, 1925, one G. E. Duke entered into an agreement with the owners to purchase the Victoria property for $55,000, payable on certain terms. In pursuance thereof the owners placed in escrow with the Alameda County Titles Insurance Company a deed vesting the Victoria property in G. E. Duke to be delivered to G. E. Duke upon his compliance with the terms of the agreement for sale. Shortly after G. E. Duke fraudulently obtained possession of said deed without compliance with the escrow agreement, and on the 13th of October following he obtained registration of the title to the Victoria property in his name in the Land Registry office at Victoria. On the 6th of November, 1925, he mortgaged the property to J. H. Todd & Sons, Limited to secure an advance of $20,000. On the 9th of April, 1926, he conveyed the property to his wife Margaret Duke, and on the 13th of May, 1926, she

Statement

mortgaged the property to one Charles Hartley to secure an advance of $30,000, when the Todd mortgage was paid off. On April 8th, 1927, the former owners brought action against G. E. Duke, Margaret Duke and Standard Realty Company for a declaration that registration of the deed by G. E. Duke was obtained by fraud, for rescission of the contract of September 25th, 1925, for a transfer of the Victoria property to the plaintiff, for an accounting and for an injunction restraining the defendants from selling or encumbering the property. The action was tried in September, 1933, and judgment was delivered on the 27th of October, 1933, whereby it was declared that G. E. Duke obtained possession of the conveyance and registration of title to the property by fraud, and that the conveyance and registration thereof be set aside and cancelled; that the agreement for sale to G. E. Duke be rescinded and the conveyance from G. E. Duke to Margaret Duke was made without consideration and the registration thereof was obtained for the purpose of defrauding the plaintiffs and the conveyance and registration thereof were set aside and cancelled. It was further ordered that the said lands be vested in plaintiffs free from encumbrances save only the mortgage for $30,000 with interest from Margaret Duke to Charles Hartley, and a lease of the premises from G. E. Duke to Angus Campbell & Co. for ten years from March 1st, 1926. It was further ordered that there be a reference to the registrar to take an account of moneys received by the defendants and that the plaintiffs recover from the defendants the sum found due on the taking of such account. Pursuant thereto the district registrar found there was owing by the defendant to the plaintiff $34,730.95 and $381.95 costs, and on the 30th of December, 1933, judgment was entered for said sums by the registrar without reference to the Court. Two writs of *fi. fa.* were issued, one to the sheriff in Victoria and the other to the sheriff in Vancouver, and both were returned *nulla bona*. The judgment was registered in the Land Registry office at Victoria. The Victoria property is now in the names of the plaintiffs subject to the $30,000 mortgage given by Margaret Duke to Charles Hartley. The owners, as prosecutors, applied for an order *nisi* directing that a writ of *mandamus* do issue directed to the Minister of Finance, com-

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manding him to pay them the amount of damages and costs, namely, $34,730.95 damages and $381.95 costs, awarded in the previously mentioned action, as appears by the certificate of the said Court pursuant to section 218 of the Land Registry Act, and charge the same to the account of the Assurance Fund as required by said Act. The order *nisi* was granted and was subsequently made absolute and a peremptory writ of *mandamus* issued.

Statement

The appeal was argued at Victoria on the 3rd, 4th and 5th of July, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, J.J.A.

Argument

Craig, K.C. (*Pepler,* with him), for appellant, proposed to argue grounds of appeal in addition to those argued in the Court below, and in addition to those set forth in the notice of appeal. Notice in writing of additional grounds of appeal had been given to the respondent. The new grounds of appeal are all matters of law arising on the material filed by the respondent in support of his application for a *mandamus,* and in effect are a submission that the applicant did not make out a case below for the relief claimed. For instance, it is proposed to argue that the judgment, which is the foundation of the respondent's claim, is not a judgment for damages, and hence is not a judgment which can be the foundation of an application under sections 216 and 218 of the Land Registry Act. Also, it is contended that the judgment entered by the registrar is a nullity, as the registrar had no power to enter such a judgment, which should have been entered by the judge. The respondent could not have given any evidence to improve their position if these objections had been taken below. In these circumstances, the uniform practice of the Courts is to allow new points of law to be raised on appeal, even if such points had been expressly abandoned by counsel below: see *Kates* v. *Jeffery* (1914), 3 K.B. 160; *The Quebec Liquor Commission* v. *Moore* (1924), S.C.R. 540 at 550; *Rex* v. *Minister of Health* (1930), 2 K.B. 98 at 137; (1931), A.C. 494 at 501; *Canadian National Ry. Co.* v. *Saint John Motor Line Ltd.* (1930), S.C.R. 482; *Bell* v. *Lever Brothers, Ld.* (1932), A.C. 161 at 192.

Bull, K.C., for respondent: The grounds are by no means matters of law. The custodian of the fund after judgment took

only one ground, namely, the question of the remedy, and he is bound by it. The new grounds are inconsistent with the ground already taken: see *Gandy* v. *Gandy* (1885), 30 Ch. D. 57 at p. 81; *Manley* v. *O'Brien* (1901), 8 B.C. 280 at p. 287. He is asking to introduce definite new grounds: see *Royal Bank of Canada* v. *McLeod* (1919), 27 B.C. 376 at 381; *Wensky* v. *Canadian Development Co.* (1901), 8 B.C. 190; *Victoria Corporation* v. *Patterson* (1899), A.C. 615. The Court must be satisfied that no evidence could be given that would affect the decision on the new points raised: see *Stone* v. *Rossland Ice and Fuel Co.* (1906), 12 B.C. 66; *Fordham* v. *Hall* (1914), 19 B.C. 80; *Tai Sing Co.* v. *Chim Cam* (1916), 23 B.C. 8; *Browne* v. *Dunn* (1893), 6 R. 67.

Argument

MACDONALD, C.J.B.C.: We think the application to allow the appellant to raise the additional reasons for appeal should be granted. *Application granted.*

Judgment

Craig, on the merits: The applicants for *mandamus* have not a judgment for any sum of money; and alternatively, they have not a judgment for damages as described in section 216 of the Land Registry Act, and therefore the whole basis for an application for *mandamus* fails. The trial of the action of *Andler* v. *Duke,* which forms the basis of the claims of the applicants for *mandamus* resulted in a judgment declaring the plaintiffs' rights to recover from Duke the proceeds of a loan raised by Duke on the property in question, but the judgment does not declare that the recovery is made as damages. For all that appears, Duke may have raised the money on the property at Andler's request, and in such case, the recovery would be as moneys had and received to Andler's use, and not as damages. Section 216 of the Land Registry Act applies only to a judgment for damages, and without proof of such a judgment the present proceedings must fail. Further, the judgment in *Andler* v. *Duke* was merely a judgment declaring the plaintiffs' rights, ordering a reference to assess the amount, and directing that the plaintiffs do recover the amounts to be so ascertained. On this report being made, the registrar, without any motion for judgment before the Court or a judge, entered judgment for the amount shewn by his report. He had no jurisdiction to do so, and the judgment so entered is a

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nullity: section 61 of the Supreme Court Act, and Supreme Court Rules 481, 827. There should have been a motion to the Court to enter judgment on the registrar's report, but no such proceeding was taken. *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386 is distinguishable. The only point the Court considered there was whether the judgment was a final judgment, which is not material here.

The original judgment amounts only to a declaration of the plaintiffs' rights. No execution could properly be executed on it. A final judgment of this description must be a judgment for the present recovery of a fixed sum of money. A judgment that the plaintiff do recover a sum to be hereinafter ascertained is nothing more than a declaration of right, and not a judgment for money until the amount is ascertained and an order is made that the plaintiff do recover that amount. The result is that the applicants here have no judgment for any sum, but only a declaration of their rights. This is not a judgment which can be the subject of an application under sections 216 and 218 of the Land Registry Act. *Mandamus* should also be refused because the applicants have another sufficient remedy. They could, by petition of right against the Crown, recover the money claimed, if they are entitled to it: *In re Nathan* (1884), 12 Q.B.D. 461 at 470, 473 and 478.

Argument

There is nothing to shew the applicants have been deprived of property by fraud. They have assumed that the mortgagee, who advanced the money to Duke, has obtained priority over the plaintiff, but the judgment does not so declare. If the mortgagee had notice of Duke's fraud, he would not have obtained priority. The judgment does not decide that point, and it is only on presentation of a judgment so declaring that the minister is required to pay.

Assuming that the plaintiffs were deprived of land by fraud of Duke, such fraud was not fraud in the registration of Duke's title, but was his subsequent fraud in mortgaging the property.

This is in effect a proceeding against the Crown to require payment by the Crown out of Crown revenues, and therefore *mandamus* will not lie. The Assurance Fund is Crown revenues: see Land Registry Act, sections 220, 228 and 254.

Bull, for respondent: We ask that damages be paid out of

moneys in the custody of a public officer. The indefeasible title in this case started in 1906. You need not join the registrar as a party: see *In re Shotbolt* (1888), 1 B.C. (Pt. 2) 337. The reason for insurance is that when an indefeasible title is given you may deprive an innocent person of his right: see Thom's Canadian Torrens System, pp. 202-4; *In re Trimble* (1885), 1 B.C. (Pt. 2) 321. There are three kinds of actions: (a) A statutory right to sue a wrongdoer, who by fraud obtains title. (b) When you cannot find the wrongdoer you can sue the registrar as nominal defendant. (c) You may proceed under section 219 of the Land Registry Act: see Hogg's Torrens System, p. 220. Generally as to mistake, see *ibid* p. 856, which includes cases not confined to mistakes by the registrar. There was gross fraud on the part of Duke and the plaintiffs could only recover the land subject to the $30,000 mortgage. Section 217 prohibits an action against the innocent holder: see *Vorley* v. *Cooke* (1857), 27 L.J. Ch. 185. As we have no case against the mortgagee we are driven to the Assurance Fund. As to the certificate of the registrar not being brought before the Court and section 61 of the Supreme Court Act see *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386 at p. 388; Supreme Court Rules, 1925, Form 9, Appendix F, p. 163. He says it is not a judgment for damages but for money had and received, but see *Finucane* v. *Registrar of Titles* (1902), S.R. Qd. 75 at pp. 94-5; *Cox* v. *Bourne* (1897), 8 Q.L.J. 66 at p. 69. When a wrongdoer obtains title to a property by fraud the rightful owner is entitled to get the amount he is deprived of from the fund. In the case of a remedial statute you are not tied down to the letter of the enactment: see *Lord Huntingtower* v. *Gardiner* (1823), 1 B. & C. 297 at p. 299; *Goodfellow* v. *Robings* (1836), 3 Bing. (N.C.) 1; *Doe d. Wyatt* v. *Byron* (1845), 1 C.B. 623; *Stowel* v. *Lord Zouch* (1797), 1 Plow. 353. You do not have to shew any fraud in the actual registration of the mortgage. He was clothed with a statutory title through which he was able to get rid of part of the property to our pecuniary loss. The mortgage was put on after registration of the indefeasible fee. Section 227 of the Act does not apply here. A petition of right cannot be brought in respect of the Assurance Fund, which is not moneys of the

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Argument

Crown. Section 254 of the Act should be read with section 228. On the proper construction of a special enactment having regard to a general enactment see *Pretty* v. *Solly* (1859), 26 Beav. 606 at p. 610; *De Winton* v. *The Mayor, &c., of Brecon* (1859), *ib.* 533 at p. 543; *Canada National Fire Insurance Company* v. *Hutchings* (1918), A.C. 451. That *mandamus* will lie see *In re Nathan* (1884), 12 Q.B.D. 461 at 469; *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313 at p. 317. The General Lighthouse Fund under the Merchant Shipping Acts is a similar fund and as to that see Robertson on Civil Proceedings by and against the Crown, 344.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: An action was commenced in British Columbia on the 8th of April, 1927, by the injured parties, the prosecutors, against the Dukes, the wrongdoers in this case, claiming damages, *inter alia,* for fraud and other relief. This action was disposed of by FISHER, J., on the 27th of October, 1933, who decided against the said Dukes on the ground of fraud in obtaining the deed of the property in question which had been placed in escrow, registering the same in their names, and imposing upon the property a mortgage, which damages were assessed at $34,730.95 and costs against the Dukes. Having obtained such damages the prosecutors became entitled to payment of the said claim for damages out of the Assurance Fund provided for under the B.C. Land Registry Act, and payment having been refused by the Minister of Finance they applied for and obtained an order for a writ of *mandamus* to compel him to pay the said sum. At the time this order was obtained an application by the Attorney-General to the Court of Appeal was pending for leave to intervene in an appeal which had been taken from the said judgment. The application failed and the prosecutors have demanded a writ of *mandamus* for the purpose of enforcing their said claim against the Minister of Finance. It was contended that other remedies were available to the prosecutors, but even if that were so that submission cannot prevail in this case because by sections 216 and 218 of the Land Registry Act, Cap. 127, R.S.B.C. 1924, the Finance Minister must pay the damages

awarded against the wrongdoer out of said Assurance Fund. In this case the action was brought and proceeded to judgment in the Courts of British Columbia and the prosecutors were awarded judgment for the said amount against the wrongdoers. In that event no action would lie against the registrar as nominal defendant or against the Crown by petition of right. Section 216 provides:

> Any person wrongfully deprived of land, or any estate or interest in land, in consequence of fraud or misrepresentation in the registration of any other person as owner of such land, estate, or interest, or in consequence of any error, omission, or misdescription in any certificate of title, or in any entry in the register, may bring and prosecute an action at law for the recovery of damages against the person by whose fraud, error, omission, misrepresentation, misdescription, or wrongful act such person has been deprived of his land, or of his estate or interest therein. The bringing or prosecuting of an action as aforesaid shall not prevent proceedings being taken against the registrar in respect of any loss or damage not recovered in such action: Provided that no action shall in such case be brought against the registrar without first proceeding as above provided, unless authorized by the *fiat* of the Attorney-General.

Section 218 reads as follows:

> In case the person against whom such action for damages may be brought as aforesaid shall be dead, or cannot be found within the Province, then in such case it shall be lawful to bring such action for damages against the registrar as nominal defendant for the purpose of recovering the amount of the said damages and costs against the Assurance Fund; and in any such case, if final judgment be recovered, and also in any case in which damages may be awarded in any action as foresaid, and the sheriff shall make a return *nulla bona*, or shall certify that the full amount, with costs awarded, cannot be recovered from such person, the Minister of Finance, upon receipt of a certificate of the Court, shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof, as the case may be, and charge the same to the account of the Assurance Fund.

MACDONALD, C.J.B.C.

The prosecutors therefore have a judgment against the wrongdoers; therefore an action against the registrar for damages for the purpose of recovering the amount of the same and costs against the Assurance Fund would lead only to the same result, *viz.*, a judgment that the Minister of Finance shall pay the amount of such damages and costs out of the Assurance Fund. In this case the opening words of section 218 are not fatal, I think, to the prosecutors. True the defendants in the action for damages, the wrongdoers, resided abroad but they came either actually or by their solicitors or agents into the Province to defend the action, and, in my opinion, that would justify the finding

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that they were found in the Province. In any case the action went on and the damages were finally recovered. I think the prosecutors have complied with all essentials to entitle them to payment out of the Assurance Fund and no other action could do more.

It therefore appears to me that an action against the registrar or by petition of right against the Crown if permissible could accomplish no more than recover all damages which have already been recovered. Therefore neither one would accomplish anything not now in existence and the Court ought not to entertain idle or futile proceedings.

I would, therefore, dismiss the appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one from the order of Mr. Justice MCDONALD made on the 3rd of May, 1934. The operative part of the order reads as follows:

> THIS COURT DOTH ORDER that the order *nisi* for *mandamus* pronounced herein the 19th day of April, 1934, be made absolute, and that a peremptory writ of *mandamus* do issue out of this Honourable Court forthwith directed to the Minister of Finance of the Province of British Columbia, commanding him to pay to the above-named prosecutors the amount of damages and costs, namely, $34,730.95 damages and $381.95 costs, awarded by the judgment of the Supreme Court of British Columbia in an action numbered 450 of 1927 between the prosecutors as plaintiffs, and George Edwin Duke, Margaret Duke and Standard Realty Company as defendants, as appears by the certificate of the said Court made pursuant to the Land Registry Act, R.S.B.C. 1924, chapter 127, section 218, and to charge the same to the account of the Assurance Fund as required by the said Act and section so to do.

The relevant sections of the Land Registry Act (Cap. 127, R.S.B.C. 1924) read as follows: [His Lordship set out sections 216-28 and continued.]

The situation here is that the Minister of Finance is called upon to forthwith pay to the prosecutors $34,730.95 alleged damages and $381.95 costs awarded by a judgment of the Supreme Court of British Columbia without the Minister of Finance, the Attorney-General or the Registrar of Titles being heard or parties to the proceedings which culminated in that judgment. However the question now is, should the order absolute for a *mandamus* stand and is the Minister of Finance com-

pelled to comply therewith? I have no hesitation in coming to the conclusion—for the reasons hereinafter set forth—that the *mandamus* was wrongly issued and should be set aside. In the litigation had between the parties—the Minister of Finance, the Attorney-General and the Registrar of Titles were not parties—the judgment, set out below, is the judgment of Mr. Justice FISHER: [After setting out the judgment His Lordship continued.]

To indicate what the contract was as between the parties to the action and the escrow agreement, I think this may well be gleaned by setting forth certain paragraphs of the statement of claim. They read as follows: [After setting out paragraphs 6-17 his Lordship continued.]

A natural query arises: how was the conveyance of the land got from the escrow holder without due compliance with the terms of the escrow agreement? In my opinion the right of action for the wrongful—if it was wrongful—delivery up of the conveyance was against the Alameda County Title and Insurance Company, but we hear nothing of this. It is rather unthinkable that the Alameda County Title and Insurance Company delivered out the conveyance contrary to the terms of the escrow agreement. Companies of the corporate nature of the Alameda County Title and Insurance Company have a reputation of such standing in the United States of America that the Court might rightly take judicial notice of. If the error was that of the company, why is it that it is not looked to for indemnification? Now the result of the litigation is that the title to the land in question is vested in the plaintiffs in the action free and clear of all encumbrances save a mortgage for $30,000 and a lease for ten years from the 1st of March, 1926. Now there has been no deprivation of land as matters now stand nor has there been any recovery of judgment for damages. Then can it be said that there is any right to have any payment of these claimed moneys out of the Assurance Fund, *i.e.*, has a case been made out under the terms of the statute? I would deny the contention. The case is not one which comes within the purview of the statute. The validity of the registration of title is demonstrated when it is found impossible to deny the legal validity of the registration of the mortgage and

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lease. That means, that there was no fraud in the registration. It will be observed that section 216 of the Land Registry Act in its opening words reads:

> Any person wrongfully deprived of land or any estate or interest in land in consequence of fraud or misrepresentation in the registration of any other person as owner of such land estate or interest . . .

Now where was the fraud in this case or the misrepresentation in the registration? The conveyance duly executed and acknowledged was produced to the registrar of titles by the grantee therein. No notice of fraud was given to the registrar of titles; nothing to put him upon enquiry. The registrar was in the position of being required to register or run the gauntlet of a *mandamus* upon him. He registers. He does that which the law required him to do: he follows the law and registers. How can it be said in this case that there was fraud in the registration? I fail to perceive how this can be successfully contended and at best it is only when there has been fraud in the registration that there can be any liability calling upon the Minister of Finance paying the amount of damages sustained and here it can be said technically at least that the judgment recovered is not one for damages within the purview of the statute. In truth, if the Crown here is to be held liable, as contended for, it means this: A person can sign a deed complete in form, put it in escrow in some blundering way that the escrow holder hands it out to the grantee with the terms of the escrow not complied with; it is presented to the registrar of titles; he takes it in good faith and registers it; that later the grantor is to be admitted to come into a Court of law and compel the Minister of Finance to pay thousands of dollars—it is conceivable that it might be millions even —and that that is the meaning of the statute. I refuse to so construe the enactment. It offends against common sense and is against a proper legal construction of the language used. If this should be held to be the law I can visualize myriads of frauds that will be worked upon the Land Registry office, a department of the Government, and see a vanishing Treasury. That really is the case we have before us. That is, a person may be as careless as he wishes, sign deeds of conveyance, leave them about in escrow or not, and if the grantee registers the conveyance, that such a case is fraud in the registration and within the language

of the statute, and the revenues of the Crown are to be depleted to the extent that the grantor has suffered damage. Why has he suffered damage? Not by the action of the servant of the Crown but by his own crass carelessness. Such conduct in law, in my opinion, puts the grantor in the pillory of negligence upon his part and creates an estoppel against him. Such is my view of the law and I do not think that I overstrain or fail to give a true meaning to the statute law. It is unthinkable that the language or intention of the Legislature extended to cover such a case as we have before us. If it be so held the law-making authority would be rightly entitled in my opinion to pass retrospective legislation even affecting matters in litigation which would render it impossible to successfully call upon the Crown to take from the Treasury or the Assurance Fund moneys to defray so inequitable a claim as we have here. Upon the point of negligence creating an estoppel, I would refer to *Nash* v. *De Freville* (1900), 2 Q.B. (C.A.) 72 at p. 88. Here the course adopted by the grantors of the deed facilitated the fraud which was carried out by the grantee possessing himself of the deed and it being possible for him to get the deed. The grantors of the deed upon the facts of this case made it possible for the fraud to be committed; they contributed to the loss sustained by executing the deed and should be held to be estopped from the recovery of any indemnity from the Crown. I would refer to the following further cases upon the point: *Rimmer* v. *Webster* (1902), 2 Ch. 163 at p. 173; *Commonwealth Trust* v. *Akotey* (1926), A.C. 72 at p. 76. Lord Halsbury (see *Farquharson Brothers & Co.* v. *King & Co.* (1902), A.C. 325 at p. 332; *Henderson & Co.* v. *Williams* (1895), 1 Q.B. 521 (C.A.) at p. 529) preferred the expression of Savage, C.J. in *Root* v. *French* (1835), 13 Wen. 570 at p. 572:

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> When one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud.

(Also see Parke, B. in *Freeman* v. *Cooke* (1848), 2 Ex. 654 and Blackburn, J. in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175.) Here we have the apparent carelessness of the grantors of the deed and they should be prevented from setting up their own negligent act to the prejudice of the Crown—*Schol-*

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field v. *Earl of Londesborough* (1896), A.C. 514, *per* Lord Halsbury, L.C. at pp. 523-524, *per* Lord Watson at p. 537; *Greenwood* v. *Martins Bank* (1933), A.C. 51. This case in its facts shews that the negligence of the grantors of the deed was in the transaction itself and had the misleading effect—when the grantee produced it—of requiring the registrar of titles to register the title in the grantee and it was the proximate and the real cause of the registration being made. The registrar of titles had no option in the matter—his duty was a statutory duty to register. The case of the *Attorney-General* v. *Odell* (1906), 2 Ch. 47 is somewhat instructive in this appeal although of course was a judgment having reference to English statutes: the Land Transfer Act, 1875 (38 & 39 Vict. c. 87) and the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). There no compensation was allowed. *Fawkes* v. *Attorney-General* (1903), 6 O.L.R. 490 is much in point. The Ontario statute may be said to be in all essential features the same as the British Columbia Act. To get an instant grasp of the effect of that decision, which is one of that very distinguished judge in the judicial annals of Canada—Chancellor Boyd—we have the head-note reading as follows:

> Plaintiff being the owner of land registered under the Land Titles Act R.S.O. 1897, ch. 138 was by the fraud of two persons G. and H. induced to transfer her land to one D. Subsequently a transfer to McD. purporting to be signed by D. was registered but D.'s signature was forged. McD. then transferred to O'M. and O'M. to B. both being parties to the fraud with G. and H. B. then transferred to C. an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible an action was brought by the plaintiff for compensation for the loss of the land out of the Assurance Fund under sections 130 and 132 of the Act:—*Held*, that the plaintiff had not been "wrongfully deprived" under sec. 132 and that she could not recover.

I think that the learned Chancellor's whole reasoning should be looked at and it will be seen, according to my view, that it supports the appellant's contention in this appeal.

It is submitted that if the respondents in this appeal are entitled to be heard at all that the proper procedure would be an application under the Crown Procedure Act (Cap. 63, R.S.B.C. 1924). No doubt that course could have been followed. Here we have a *mandamus* upon the Minister of Finance, as a first proceeding in the matter as against him, the Crown never having been a party to any of the proceedings that have gone before.

This, in my opinion, offends against the principle of natural justice. I do not deny that where there is an unmistakable statutory duty, with inhibition by statute of any right to litigate the matter, then, and then only, is a *mandamus* permissible. In *In re Nathan* (1884), 12 Q.B.D. 461 the Court of Appeal held that a writ of *mandamus* ought not to be granted if there is any other reasonable remedy—see at pp. 461, 470, 473, 475, 478. Here we have the case of the grantors executing a conveyance and through negligence admitting of the grantee obtaining registration thereof, the registration has been caused or contributed to by that negligence. The grantors must be held to have accepted that risk and cannot now complain and in my opinion the Assurance Fund is not liable. It would be an enormity if that is not the legal position of the matter, otherwise the Assurance Fund could be raided and exhausted by calculated methods such as we find here. If the owner of land is reckless enough, as here, to execute a conveyance thereof and part with it, even if placed in escrow, the escrow is a risk he accepts; that is, that it will not be delivered out improperly. The loss has been caused by his negligence. To prevent such a happening the owner should file a *caveat* so as to maintain the *status quo* and the grantors in this case not having done so the loss occasioned to the respondents in this appeal has been caused by the grantors' (the respondents) negligence and they must bear the loss and the Assurance Fund is not liable. That is the result at which I have arrived. I would therefore allow the appeal, the *mandamus* to be set aside.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Appeal from an order directing the Minister of Finance to pay respondents $34,730.95 (and $381.95 for costs) awarded respondent in an action against George Duke, Margaret Duke and the Standard Realty Company in which it was declared that certain conveyances and registration of title in respect thereto were obtained by fraud. By this judgment the lands were vested in respondents subject to a charge by way of mortgage for $30,000. The Dukes were enabled to secure this advance on mortgage by registering as their own property held to be fraudulently obtained.

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The judgment by one of its clauses provided for a reference

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to the registrar to ascertain the amount received under the mortgage (also rents and profits) and directed

that the plaintiffs recover from the defendant G. E. Duke and Margaret Duke the sum found due on the taking of such account.

The district registrar by his certificate fixed the amount, as stated, at $34,730.95 and in the terms of the formal judgment and pursuant thereto without a further application to the Court for confirmation or otherwise entered judgment accordingly.

As the judgment remained unsatisfied steps were taken to obtain payment under the Land Registry Act. A certificate by the registrar, filed, recited the facts referred to; also that writs of *fieri facias* were issued out of the proper registries resulting in *"nulla bona"* returns, whereupon demand was made upon the minister pursuant to section 218 of the Land Registry Act (R.S.B.C. 1924, Cap. 127) to pay the amount out of the Assurance Fund. Upon his refusal an order for a peremptory writ of *mandamus* was issued commanding him to pay and from that order made by Mr. Justice MCDONALD this appeal is brought. It was submitted that the order was properly made under sections 216 and 218 of the Land Registry Act and with that contention I agree.

MACDONALD, J.A.

Mr. *Craig* attacks it on several grounds. Leaving aside for the moment his reference to section 227 he concedes that the latter part of section 218, taken by itself, would justify the order if a judgment for damages against the Dukes had been obtained in the action referred to. That judgment he submitted was not for damages but for the return of moneys "had and received" as the proceeds of a mortgage. The minister therefore must be assured that a judgment for damages within the meaning of the Act was obtained before he could properly make a disbursement from the Assurance Fund. The word "damages" however is not used in a narrow and technical sense. It necessarily contemplates established claims for compensation out of the Assurance Fund in cases arising under the Act. There is in fact a judgment for a "loss sustained" or for "compensation." As it is impossible to restore the land unencumbered (the *bona fide* mortgagee is protected by section 217) the respondents in this appeal were recompensed in the action by a judgment for a "pecuniary amount" sufficient to procure the redemption of the mortgage placing them

in the same position as if the wrong had not been committed. That is "damages" within the meaning of the Act. Respondents were damnified and the judgment by a pecuniary award made good the loss or damage sustained.

It was further submitted that a judgment for damages within the meaning of section 216 was not obtained because respondents were not

> wrongfully deprived of land, or any estate or interest in land in consequence of fraud or misrepresentation in the registration of any other person as owner of such land, estate, or interest, . . .

There was no fraud in the registration (by the mortgagee) of the mortgage. The intent however, as stated, is to indemnify for loss or damage accruing "in consequence of" or as a result of registration in this case made possible by a wrongdoer fraudulently procuring title to property. It follows too that respondents in the words of section 216 were through registration deprived of an estate or interest in land.

Again it was urged that no final or any judgment was recovered as a prerequisite inasmuch as it was only signed by the deputy district registrar after the taking of accounts pursuant to the terms of the judgment of the Court. The formal judgment, as intimated, directed that the respondent should recover from the Dukes the sum found due on the taking of accounts and after accounting without motion to the Court for judgment based upon the reference to the registrar, he without, it was submitted, power to do so signed and entered the judgment. This is the only judgment (as it fixes the amount) upon which execution could issue and Mr. *Craig* argued that it is irregular and void. I am not satisfied that the point is material in view of the fact that "a final judgment" was actually recovered whether properly entered or not but I do not rest on that view. Section 61 of the Supreme Court Act (R.S.B.C. 1924, Cap. 51) after providing for references under order of the Court enacts by subsection (2) that:

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> The report of any district registrar . . . may be adopted, wholly or partially, by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

from which it is deduced that the registrar cannot without a motion for adoption enter a final judgment even where, as in this case, he is directed by the Court to do so, *i.e.*, enter judgment for such sum as may be found due by him. No doubt in the language

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of the statute this course "may" and in a proper case ought to be pursued. By subsection (3) it is provided however that:

> The proceedings before the district registrar or referee upon such reference, the report of the district registrar or referee, and the powers of the Court or a judge with respect to the report shall as nearly as possible conform to, and be exercised in accordance with, the practice governing the matters referred to in Order 35 and in Rules 65 to 70, inclusive, of Order 55 of the "Supreme Court Rules, 1906," or any amendments thereto.

It is clear by rule 65 that "unless an order to discharge or vary the same is made the certificate shall be deemed to be approved and adopted by the judge." Under rule 70 the certificate is binding unless discharged or varied by application within eight days; while rule 71 provides further facilities to procure variation or discharge of a certificate "if the special circumstances of the case require it." Such an application might have been successfully made in this case if proper grounds were shewn. No such application being made the registrar's certificate by rule 65 must be read as approved and adopted by the judge as effectively as if signed by him. Where therefore the Court directs that judgment shall be entered for an amount to be ascertained by its registrar the latter, unless intercepted by a motion to discharge or vary, carries out the direction, signing the final judgment and affixing the seal of the Court. If, as intimated, variation or discharge is sought on grounds of law or fact the right of parties to intervene is preserved by the rules referred to. It follows that all prerequisites to payment by the minister under sections 216 and 218 have been complied with. Respondents were "wrongfully deprived" of an "interest in land" in consequence of fraud in the registration or in connection therewith (*i.e.,* making it possible by fraud for an innocent third party to procure registration); a judgment for "damages" properly entered was obtained; the sheriff was unable to realize; a certificate was issued and the minister must pay unless it is not a proper case for a *mandamus.*

MACDONALD, J.A.

On this point it was submitted that the Court in its discretion will not issue a mandatory order where, as provided by the Act, an action might have been brought against the registrar as nominal defendant on behalf of the Assurance Fund in which defences outlined in section 227 (knowledge of registration) might be raised. Under the present order the minister must pay without any chance to defend. If, however, the statute permits

the proceedings taken herein based upon an action against the wrongdoer the minister cannot complain because another course under the same Act possibly more favourable to him might have been followed. Respondents did not follow a course which, it is suggested, might (I do not think it would) enable the minister to raise a good defence because the Legislature provided that the Assurance Fund may be reached by the proceedings taken herein. Whatever course might be followed no judgment could be obtained against the minister and *mandamus* would lie in either event. He could if judgment were obtained against the registrar be ordered by a writ of *mandamus* to comply with section 220. It is not therefore a case of another adequate remedy: it is a case of alternative remedies enforceable in the same way.

It was said too that as respondents might proceed by petition of right under the Crown Procedure Act the Court should not grant a *mandamus*. The prerogative writ of *mandamus* is only resorted to where there is no other effective way of securing justice. Its object was to supply defects in the law and should not be resorted to where redress could be obtained by ordinary legal processes. In *In re Nathan* (1884), 12 Q.B.D. 461 where the question of whether or not a petition of right, in view of the necessity of securing a *fiat,* was a specific and adequate remedy it was pointed out by Brett, M.R. at p. 474 that:

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> There cannot be the least possible difficulty in the way of this prosecutor obtaining the *fiat* of the Crown,

because, as pointed out by Bowen, L.J., at p. 479, the Attorney-General who appeared stated that a *fiat* would be granted. However whether or not, where a *fiat* might arbitrarily be withheld, a petition of right must in law be regarded as an adequate remedy it would not lie at all in the case at Bar. This is not a claim to recover money or property of the Crown. It is a claim against a special fund accumulated, not as Crown revenue or to provide revenue for the Crown but to meet by way of insurance exigencies arising in the transfer and registration of titles. The fact that it is under the control of a minister does not change the character of the fund. It is provided by a system of fees based upon the value of property imposed on registration in addition to ordinary fees and it is ear-marked and disbursed for a specific purpose quite foreign to the ordinary uses of Crown revenue. The fact

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that all fees received by the registrar are paid into the Provincial Treasury (thus making it, for convenience, the receptacle) and are accounted for as part of the Consolidated Revenue Fund (R.S.B.C. 1924, Cap. 127, Sec. 254) or the further provision that it may be replenished from time to time from ordinary revenue does not change the essential character of the fund. To place for convenience a fund in consolidated revenue does not make it part of it. This Assurance Fund therefore made up, replenished and maintained, as provided in the Act, is not moneys of the Crown and relief by petition of right could not be obtained.

I think too that *mandamus* lies against the minister. The special fund is held by him and invested as directed but not as a servant of the Crown. A servant of the Crown is selected as custodian but he is not in this connection acting for the Crown. A duty to respondents, a third person, is imposed upon him by statute not a duty to the Crown to "pay the amount of such damages" (see section 218) "upon receipt of a certificate of the Court." It is not an application to compel the Crown to pay but to enforce payment by a designated official under a statutory obligation to do so and without such an order payment from the fund cannot be secured. (*The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313).

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Mr. *Craig* relied on section 225 of the Land Registry Act on the ground that as loss was occasioned by "the breach by a registered owner of any trust" the fund is not liable. I do not agree. The intention of the section is obvious but I am unable to apprehend that the loss in question may properly be regarded as resulting from a breach by a registered owner of a trust. No trust or confidence was imposed in the registered owner.

I would dismiss the appeal.

MCQUARRIE, J.A.

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

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

Solicitor for appellant: *Eric Pepler.*
Solicitor for respondent: *Alfred Bull.*

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MARTIN, J.A. (In Chambers)

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Nov. 29.

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Practice—Appeal to Supreme Court of Canada—Motion to add material to "case"—Not included in appeal case in Court below—Refused—R.S.C. 1927, Cap. 35, Sec. 68.

On appeal from the Court of Appeal of British Columbia to the Supreme Court of Canada, section 68 of the Supreme Court Act does not authorize the inclusion of any material in the appeal "case" for the Supreme Court which was not before the Court below.

MOTION to settle the case on appeal to the Supreme Court of Canada. Heard by MARTIN, J.A. in Chambers at Vancouver on the 26th and 28th of November, 1934. Statement

J. W. deB. Farris, K.C., for the motion.
Bull, K.C., contra.

29th November, 1934.

MARTIN, J.A.: Upon further consideration of the authorities cited, and others, particularly *Montreal Loan and Mortgage Co.* v. *Fauteux* (1879), 3 S.C.R. 411, 433; *Lionais* v. *Molson's Bank* (1883), 10 S.C.R. 526, 541-2; *The Exchange Bank of Canada* v. *Gilman* (1889), 17 S.C.R. 108, 116; *Red Mountain Ry. Co.* v. *Blue* (1907), 39 S.C.R. 390 at 391; *Roberts* v. *Piper* (1910), Cameron's Supreme Court Practice, 3rd Ed., 339; *Dufresne* v. *Desforges* (1912), *ib.* 338; and the statement of the "uniform jurisprudence" in Cameron at p. 341, I find myself unable to come to any other conclusion than that the power conferred upon this Court or a judge thereof by section 68 (formerly 73) of the Supreme Court Act, R.S.C. 1927, Cap. 35, does not authorize the inclusion of any material in the appeal "case" for the Supreme Court which was not before this Court. The result of this view is that Mr. Justice FISHER's reasons for the judgment he gave in the action of *Andler* v. *Duke* cannot be included in the said appeal "case" because they were not before us when we heard and disposed of this appeal and therefore in this one respect the motion to settle the case is refused, but it is allowed respecting the inclusion of the other heads of material therein specified. Judgment

ROBERTSON, J.

1934

Nov. 24.

LEONG SOW NOM v. CHIN YEE YOU *ET AL.*

Families' Compensation Act—Death of husband—Through acts of defendants—Wife and children—Action by administrator on behalf of—Proof of marriage—Presumption—R.S.B.C. 1924, Cap. 85.

LEONG SOW NOM *v.* CHEN YEE YOU

In an action by the administrator of the estate of L. W., deceased, under the Families' Compensation Act on behalf of L. W.'s wife and children, for damages arising from his death alleged to have been caused by the unlawful act of the defendants, the defendants admitted liability subject to the proper proof of, *inter alia*, the alleged marriage of deceased to the woman for whom action is brought. At the time of their alleged marriage they were both domiciled in China and there was sufficient evidence to shew that L. W. and his alleged wife cohabited together in China after the alleged marriage and were there regarded as man and wife. Evidence was given of their intention to marry and of a betrothal contract, but no expert on Chinese law was called to prove the requirements in China of a valid marriage and there was no proof of the marriage by record or by anyone present on that occasion.

Held, that in the absence of proper proof of Chinese law as to what, if any, presumption would be drawn in China from such cohabitation, the Court is not in a position to presume from such evidence that a valid marriage took place, and the action should be dismissed.

Statement

ACTION by the administrator of the estate of Leong Woo, deceased, under the Families' Compensation Act, for the benefit of the alleged wife and children of Leong Woo for damages owing to his death alleged to have been caused by the wrongful act of the defendants. Tried by ROBERTSON, J. at Vancouver on the 26th of October, 1934.

Owen, for plaintiff.
van Roggen, for defendants.

24th November, 1934.

Judgment

ROBERTSON, J.: The plaintiff, as the administrator of the estate of the late Leong Woo, sues under the provisions of the Families' Compensation Act, R.S.B.C. 1924, Cap. 85, for the benefit of the alleged wife and children of the said Leong Woo, for damages arising from his death, alleged to have been caused by the wrongful act, neglect or default of the defendants. The defendants admit liability subject to (a) proper proof of the

alleged marriage; (b) proof of the issue of the alleged marriage; (c) proof that the plaintiff is entitled to sue and that the alleged widow and children are entitled to relief under the said Act; and (d) proof of the amount of damages.

The deceased and his wife are alleged to have been married in China where, apparently, at the time of their marriage, they were both domiciled. Evidence was given as to the intention of these two to marry and of a betrothal contract. No expert on Chinese law was called to prove the requirements in China of a valid marriage. There was no proof of the marriage by record, or by anyone present on that occasion. However, in my opinion, there is sufficient evidence to shew that Leong Woo and his alleged wife cohabited together, in China, after the alleged marriage and were there regarded by their friends, neighbours, and relatives as man and wife.

The plaintiff's counsel, to prove the marriage, relies upon the presumption which he submits arises from said cohabitation. Counsel for the defendants submits, that in the absence of any proper proof, as a fact, of Chinese law as to what, if any, presumption would be drawn in China from such cohabitation, the Court is not in a position to presume from such evidence that a valid marriage took place.

Judgment

There is no doubt that if the cohabitation had taken place in British Columbia, the presumption could have been made—see *In re Shephard. George* v. *Thyer* (1904), 1 Ch. 456. Further as Leong Woo and his wife were domiciled in China, at the time of their marriage, and such marriage had been proved, it would have been considered valid in this Province, notwithstanding the fact that in that country a man may have more than one wife. See *In re Lee Cheong, Deceased* (1923), 33 B.C. 109.

I think that the submission of the defendants' counsel is correct, and I am unable to say what presumption according to Chinese law would be drawn, in China, from the cohabitation.

The plaintiff's counsel relies on the decision of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1881), 6 App. Cas. 364. That was an appeal to the Privy Council from a decision of the Ceylon Courts. The head-note in that case reads as follows:

> According to the Roman-Dutch law there is a presumption in favour of marriage rather than of concubinage.

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LEONG SOW NOM v. CHEN YEE YOU

According to the law of Ceylon, as in England, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

Where it is proved that they have gone through a form of marriage, and thereby shewn an intention to be married, *held*, that those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed.

Judgment

It is submitted that, in that case, there was no proof, as a fact, of the Roman-Dutch law, which I think is correct, but, there was no necessity for it, for, as laid down in *Sumboo Chunder Chowdry* v. *Naraini Dibeh and Ramkishor* (1835), 3 Knapp 55, the Judicial Committee is bound to take notice of the law of the country from which an appeal, pending before it, comes, just as the House of Lords "as the '*commune forum* of the three countries,' takes judicial notice of the law of each so far as it is material to the issues raised by the record in all cases that come before it." See Halsbury's Laws of England, Vol. 13, 2nd Ed., p. 610, sec. 680, and note (*k*). So in Canada, our Supreme Court takes judicial notice of statutory or other laws prevailing in every Province or Territory of Canada without the necessity of any proof in the Courts below—see *Logan* v. *Lee* (1907), 39 S.C.R. 311.

Accordingly the action is dismissed with costs.

Action dismissed.

REX v. LOCKERBY.

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Jan. 23.

REX v. LOCKERBY

Criminal law—Statement to police—Lack of warning—Theatening witness with charge of perjury — Ejecting counsel from Court room — Miscarriage of justice.

Where, on a charge of stealing an automobile, the magistrate intimidates a witness for the Crown by stating that he does not believe the witness and that the witness is perjuring himself and liable to fourteen years' imprisonment for perjury, and then gives the witness time to think it over and return to the witness stand and tell the truth and then threatens to have a charge laid against him for perjury and orders that counsel for the accused be ejected from the Court room for insisting on objecting to irrelevant evidence and has counsel ejected:—

Held, that there had been a miscarriage of justice and the conviction should be quashed.

APPEAL by accused from his conviction by Police Magistrate Edmonds at New Westminster on the 10th of January, 1933, on a charge of stealing a motor-vehicle from Clarkson Street in New Westminster, the property of one S. Bristow on the 13th of July, 1932. On the morning of the 13th of July Bristow left his car on Clarkson Street in New Westminster and when he went back for it, it was gone. It was found at about 5.30 p.m. the same day in a gravel-pit near Queen's Park, stripped of the tyres, the battery, radiator cap, windshield deflectors and hangers. Shortly after two of the tyres and the windshield deflectors were found on the car of one Hurd. Hurd had bought the tyres and the windshield deflectors from the accused. The accused gave evidence on his own behalf and swore he purchased the tyres and windshield deflectors from one Meluchuk. At the time of the trial Meluchuk was serving a sentence in Oakalla, having been convicted of being in possession of stolen goods. Meluchuk was called as a witness and denied that he had sold the tyres to the accused. Accused's evidence as to buying the articles from Meluchuk was corroborated by one Fostry who stated he was with accused when he bought the tyres from Meluchuk. Accused was sentenced to two years in the penitentiary.

Statement

The appeal was argued at Victoria on the 23rd of January,

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Jan. 23.

REX v. LOCKERBY

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

C. L. McAlpine, for appellant: Accused was charged with stealing a motor-car and the only evidence submitted by the Crown was with relation to two tyres that the complainant said were on his car when stolen. Accused said he bought the tyres from one Meluchuk who was in gaol for having stolen goods in his possession, at the time of the trial. Meluchuk denied he sold them to accused, but one Wesylenchuk who was also taken from gaol by the Crown to give evidence said he had been questioned by police officers at the gaol as to whether accused had stolen the car but what he told the officers on that occasion was not true. The magistrate then threatened the witness with prosecution for perjury and told him he did not believe anything he said, and subjected him to a browbeating that amounted to intimidation. He then adjourned the hearing of his evidence and recalled him for further cross-examination. Statements made by the accused were admitted without proper proof that he was warned. (a) The accused was refused the right to call witnesses before the rebuttal evidence was given. (b) The magistrate intimidated Wesylenchuk; (c) counsel for accused was improperly ejected from the Court; (d) evidence was improperly admitted and there was improper cross-examination of the accused and his witnesses. As to warning not being given accused see *Rex* v. *De Mesquito* (1915), 21 B.C. 524; *Sankey* v. *Regem* (1927), S.C.R. 436; *Rex* v. *Seabrooke* (1932), O.R. 575; *Rex* v. *Bellos* (1927), S.C.R. 258. There was no evidence of a voluntary statement and all the officers must be called. In this case the officer alleged to have given a warning was not called. Counsel for accused on objecting to certain evidence was ejected from the Court room and the trial proceeded without accused having the benefit of counsel: see *Rex* v. *Romer et al.* (1914), 23 Can. C.C. 235; *Rex* v. *Roch* (1914), *ib.* 28; *Rex* v. *Chow Chin* (1921), 29 B.C. 445; *Painter* v. *McCabe* (1927), 39 B.C. 249 at p. 258; *Rex* v. *Hallchuk* (1928), 1 D.L.R. 731; *Rex* v. *Farrell* (1907), 12 Can. C.C. 524 at pp. 532-3; *Rex* v. *Hogan* (1920), 47 O.L.R. 243 at pp. 247-8; *The King* v. *Sussex Justices. Ex parte McCarthy* (1924), 1 K.B. 256.

Argument

Johnson, K.C., for the Crown: The Court may change the charge now, if it saw fit, to that of receiving stolen goods.

McAlpine, replied.

MACDONALD, C.J.B.C.: I think there must be an allowance of the appeal and that the conviction must be quashed.

I must say that in 23 years on the Bench I do not think I have ever known a case of such gross misconduct on the part of a magistrate as was shewn in this case. I think I am justified in saying that; if I did not, I would not say it. But there has been a gross miscarriage of justice here—to tell the witness in the box: "I do not believe you, you are perjuring yourself, and liable to fourteen years for perjury," are very strong statements. And he gives him time to think it over and to come and "tell the truth," and when he returns to the box, tells him again he is perjuring himself and he does not believe a word he is saying, and adjourns until the next morning to think it over. Under the strongest kinds of threats the magistrate tries to browbeat this witness to give evidence contrary to what he has done. That shews his animus in the case. Evidence was allowed in from time to time which was not admissible. Counsel was treated with the greatest want of courtesy, finally told to sit down and ordered out of Court in the custody of a police officer, because he had taken objections which were quite proper and should have been given effect to.

MACDONALD, C.J.B.C.

Under these circumstances how can it be said that this prisoner had a fair trial, that he had any chance of succeeding in the end when the evidence came to be considered?

I am putting my judgment entirely upon the conduct of the magistrate and the treatment which the witnesses for the accused and the accused himself received in his hands. I am satisfied there has been no trial here in the true sense of the word, and therefore the conviction must be quashed. I would not grant a new trial.

MARTIN, J.A.: This case is simplified in view of what counsel for the Crown has submitted to us. That is to say, in discharge of his duty it is incumbent upon him to admit that the charge as laid is not supported by the evidence. That is to say, that the

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charge being one of theft, should really have been one for receiving stolen goods. This is important, because it would be open to us in an ordinary case to substitute the charge which should have been made, that is to say for receiving, for the one which was made, that is to say, theft. And were this case one of ordinary complexion I should have no hesitation in applying the powers we possess to attain that end, and approving any proceeding in this matter upon the charge there still is against this accused of receiving. But having regard to the unusual circumstances of the case, and it appearing—I say so with reluctance and with all moderation—that in view of certain circumstances, which are uncontradicted, I think it can be said, in the words of the statute, that the accused has suffered a substantial wrong and that a miscarriage of justice has actually occurred, by reason of the circumstances which Mr. *McAlpine* has relied on. And such being the case, the only course open to us in these unusual circumstances is to allow this appeal and quash the conviction.

MARTIN, J.A.

I wish to add that in view of the interesting discussion we have had in regard to (the practice on the admission of) a statement of this kind, the reference I had in mind to the English practice is the leading case in the House of Lords of *Rex* v. *Christie* (1914), A.C. 545 at 555, wherein Lord Atkinson said that while it was "not a rule of law, . . . it is, . . . a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice."

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I also would allow the appeal and quash the conviction.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for the Crown: *Oscar C. Bass.*

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RITCHIE v. GALE AND BOARD OF SCHOOL TRUSTEES OF VANCOUVER.

Negligence — Contributory negligence — Damages — Driveway on school grounds—Boy emerging from school door backwards—Backs into passing car—Injury—Notice of action to School Board — Liability—B.C. Stats. 1929, Cap. 55, Sec. 131A.

Gale junior, who was fifteen years old, drove his father's car with a boy companion sitting beside him, on to the driveway of a school where they had previously been pupils to visit one of the teachers. They passed a school door, from which pupils were emerging, at a speed of about ten miles an hour. Cars were parked close to the building on each side of the door. The plaintiff, a pupil, came out of this door backwards and was engaged in throwing a ball back and forth with a boy who was following him. He backed into the right forward corner of the car, was thrown forward, and a wheel ran over his foot from which he suffered severe injury. In an action for damages the jury found that Gale junior was guilty of negligence and that he had permission to take the car when available without asking permission, that the plaintiff was not guilty of contributory negligence, and the School Board was guilty of negligence because "(1) Boys compelled to leave school by doorway on to dangerous driveway when other doors were available leading on to playgrounds; (2) Allowing of cars to park on either side of doors, obstructing view of pupils coming out of door; (3) Lack of supervision of traffic on driveway." Judgment was entered accordingly.

Held, on appeal, varying the decision of MURPHY, J. (*per* MACDONALD, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.), that the School Board were not negligent but assuming they were there was no proper notice of action as required by section 131A of the Public Schools Act.

Per MACDONALD, C.J.B.C.: The submission that Gale junior was guilty of negligence fails, but assuming he were, if the plaintiff had been paying attention to where he was going he would have avoided his injury. He was guilty of what is commonly called ultimate negligence, and suffered injury by reason of his own wrong.

Per MARTIN, J.A.: That there was ample evidence to justify the jury's finding of negligence against the board, but the action against it must, on the authorities cited, be dismissed because of lack of notice required by section 131A of the Public Schools Act.

Per MARTIN, MACDONALD and MCQUARRIE, JJ.A.: That the jury rightly found Gale junior was guilty of negligence but the plaintiff was also guilty of negligence which contributed to the accident, and the liability should be apportioned equally. The damages against the Gales should be reduced from $8,000 to $4,000.

Statement

APPEAL by defendants from the decision of MURPHY, J. and

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Statement

the verdict of a jury in an action for damages for injuries sustained by being run into by an automobile driven by the son of the defendant R. H. Gale. At about the noon hour on the 21st of June, 1933, the plaintiff R. H. Gale's son, who was fifteen years old, and holder of a minor's driving licence, was driving his father's car with another boy sitting beside him in the front seat. They decided to go to the Point Grey Junior High School in Vancouver where they had both previously been pupils, to see the woodwork teacher. They entered the school grounds just as certain classes were dismissed at the noon hour, and as they passed a door from which pupils were coming out the plaintiff came out of the door backwards with his back to the car and was engaged in throwing a ball back and forth with a companion who was following him. He backed into the defendant's car which was going at about ten miles an hour at the time. He was thrown to the ground and a wheel of the car ran over his foot. The jury found that Gale junior could take the car whenever available without permission from his parents and that he was guilty of negligence in not taking proper care with his knowledge of the grounds, that the plaintiff Ritchie was not guilty of contributory negligence, and that the School Board was guilty of negligence for the reasons "(1) Boys compelled to leave school by doorway on to dangerous driveway when other doors available leading on to playgrounds; (2) Allowing of cars to park on either side of doors, obstructing view of pupils coming out of door; (3) Lack of supervision of traffic on driveway." The damages as against the defendants Gale and the School Board were assessed at $8,000.

The appeal was argued at Victoria on the 15th to the 20th of June, 1934, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Argument

W. B. Farris, K.C., for appellant Gale: There is no evidence from which a reasonable inference of negligence on the part of Gale junior can be drawn. Gale was moving at ten miles an hour, he sounded his horn continually and Ritchie backed into the car without looking when he knew he was on a driveway used by cars. In this case (a) there must be negligence; (b) it must be shewn the car was entrusted by the father to the son. The

evidence shews clearly the father did not entrust the car to his son. He was instructed not to take the car without permission and he did not get it. He was not "entrusted" with the car: see *Moshier* v. *Keenan* (1900), 31 Ont. 658; *Fuentes* v. *Montis* (1868), 38 L.J.C.P. 95 at p. 96; *Phillips* v. *Huth* (1840), 6 M. & W. 572 at p. 497; *Lake* v. *Simmons* (1927), 96 L.J.K.B. 621 at 625; *Nelson* v. *Dennis* (1929), 4 D.L.R. 282 at p. 288; *Wainio* v. *Beaudreault* (1927), 4 D.L.R. 1131; *LeBar* v. *Barber and Clarke* (1923), 3 D.L.R. 1147 at p. 1150. The evidence shews clearly the plaintiff was guilty of contributory negligence, he having backed into the car without looking and the finding of the jury was perverse in this regard.

McCrossan, K.C., for appellant School Board: The action against the School Board was premature as no right of action accrued to the plaintiff at the issue of the writ. The accident was on the 21st of June, 1933, an alleged notice was given on the 30th of June, and the writ was issued on the 13th of July. By section 32 of the 1929 amendment to the Public Schools Act the notice must be given at least one month before the issue of the writ. We say that in fact no notice of action was given at all: see *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at p. 227; *The Home Life Association of Canada* v. *Randall* (1899), 30 S.C.R. 97 at p. 104; Annual Practice, 1934, p. 359; *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154; *Carlton* v. *Municipality of Sherwood* (1915), 9 W.W.R. 611; *Dempsey* v. *Dougherty* (1850), 7 U.C.Q.B. 313; *Zachariassen* v. *The Commonwealth* (1917), 24 C.L.R. 166 at p. 180. The alleged notice given was not a proper notice: see *Christie* v. *The City of Portland* (1890), 29 N.B.R. 311 at p. 313; *The City of Saint John* v. *Christie* (1892), 21 S.C.R. 1 at pp. 7 and 10. A solicitor's letter is not a notice of action: see *Mason* v. *The Birkenhead Improvement Commissioners* (1860), 29 L.J. Ex. 407; *Barker* v. *Palmer* (1881), 51 L.J.Q.B. 110. They claim we waived absence of notice but the letter referred to has no suggestion of waiver and the parties were at arm's length: see Halsbury's Laws of England, Vol. 19, p. 182, sec. 376; *Hewlett* v. *London County Council* (1908), 24 T.L.R. 331. That there was no waiver see *Jones* v. *Township of Stephenson* (1900), 32

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Ont. 226; *Rendall* v. *Hill's Dry Docks and Engineering Company* (1900), 2 Q.B. 245. Where a period is fixed the person to have the benefit must have the full period: see Halsbury's Laws of England, Vol. 27, p. 448, sec. 886. The board could not waive this right to protection under the statute: see Spencer Bower on Estoppel, 186; *Norwell* v. *City of Toronto* (1925), 28 O.W.N. 224; *Merritt* v. *Niagara Mutual Insurance Co.* (1859), 18 U.C.Q.B. 529 at p. 532. Waiver must be pleaded: see *Allen* v. *The Merchants Marine Ins. Co.* (1888), 15 S.C.R. 488 at p. 492; *The Knights of the Macabees of the World* v. *Hilliker* (1899), 29 S.C.R. 397 at p. 401.

Ginn, for respondent: Gale junior knew of the dangerous conditions and his companion Stewart saw the boy injured. He should have been doubly cautious on the school grounds. As to his receiving his parents' consent to drive the car and the meaning of the word "entrusted" see Oxford Dictionary, Vol. 3, p. 225. Gale senior did not deny that he gave general permission to his son to drive the car, obtained minor's driving licence, and allowed the use of car to son. There was evidence upon which the jury could find there was not contributory negligence: see *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380 at pp. 386-7. As to notice, there are only certain causes of action to which section 32 of the 1929 amendment to the Public Schools Act applies. This is a common law action: see *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159 at p. 167. The section does not apply to common law actions: see *Patterson* v. *Board of School Trustees of District of North Vancouver* (1929), 41 B.C. 123 at p. 130; *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154. The letter written by the solicitors was a substantial compliance with the section requiring notice, also that of the principal of the school to the superintendent of schools. The Courts lean against construing words as mandatory where common law rights are infringed upon: see Halsbury's Laws of England, Vol. 27, p. 172, sec. 327; *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535; *Re Thick, Ex parte Buckland* (1818), Buck 214. On the question of notice see *Traders Trust Co.* v. *Village of Krydon* (1920), 3 W.W.R. 344; *Traves* v. *City of Nelson* (1899), 7 B.C. 48 at p. 52;

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Kennedy v. *The "Surrey"* (1905), 11 B.C. 499; *Crane* v. *Public Prosecutor* (1921), 2 A.C. 299 at p. 324; *Temple* v. *North Vancouver* (1914), 6 W.W.R. 70. That the board waived reliance upon the statute as to notice by letter to the plaintiff's solicitor see Craies's Statute Law, 3rd Ed., 73; *Wilson* v. *McIntosh* (1894), A.C. 129 at p. 133; Halsbury's Laws of England, Vol. 27, p. 196, sec. 389; Vol. 23, p. 350, sec. 709. That a statutory right may be waived see *Hall* v. *Mayor of Batley* (1877), 42 J.P. 151; *Bristol Corporation* v. *Sinnott* (1917), 2 Ch. 340; *Crawford* v. *Municipality of Franklin* (1924), 2 W.W.R. 1073 at p. 1079; *Hickman* v. *City of Moose Jaw* (1924), 3 W.W.R. 839 at p. 840; Maxwell on Statutes, 7th Ed., 329; *Longbottom* v. *Toronto* (1896), 27 Ont. 198. On the question of the sufficiency of the notice see Denton on Municipal Negligence, p. 254; *Mason* v. *Bertram* (1889), 18 Ont. 1; *Curle* v. *City of Brandon* (1904), 24 Occ. N. 279; *Clarkson* v. *Musgrave* (1882), 9 Q.B.D. 386. As to the agency of McCorkindale who advised the superintendent of schools of the accident see *Howes* v. *City of Vancouver* (1934), 48 B.C. 195; *Bailey* v. *Culverwell* (1828), 8 B. & C. 448 at p. 453.

Argument

McCrossan, in reply, referred to *Jolliffe* v. *Wallasey Local Board* (1873), L.R. 9 C.P. 62 at pp. 66-7; *Wilson* v. *Mayor and Corporation of Halifax* (1868), L.R. 3 Ex. 114; *Webster* v. *Leard* (1912), 7 D.L.R. 429 at pp. 432-3; *Carmichael* v. *City of Edmonton* (1933), S.C.R. 650. Mere knowledge of the accident by the municipality is not sufficient: see *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529; *Keen* v. *Millwall Dock Co.* (1882), 8 Q.B.D. 482.

Farris, replied.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The infant plaintiff, a boy about fourteen years of age, a pupil of a junior high school in Vancouver, was injured while in attendance at that school under the following circumstances. He was leaving the building to go upon the playgrounds (I do not regard the contention that he should have left by another exit as of importance). In front of the entrance there was a driveway used by motor-cars. It was a

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usual and proper driveway. The infant plaintiff and a companion were throwing a ball back and forth between them in play as they emerged from the building. The said plaintiff either went out of the door backwards or turned when he got through it and walked backwards into the said driveway and against the defendant's car which was passing the entrance at a reasonable rate of speed. He has recovered damages for negligence against the defendants. On the fact that he backed into defendant's car without looking where he was going with his knowledge of the premises, I am at a loss to find justification for the verdict.

Lord Halsbury, L.C. in *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41 at pp. 46-7 said:

> It has been argued before your Lordships that we must take the facts as found by the jury. I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendants' negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

And again at p. 45:

> One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to shew that the train ran over the man rather than that the man ran against the train?

MACDONALD, C.J.B.C.

The School Board was not negligent in having the driveway where it was. It was in the proper place for a driveway and was not dangerous to pupils paying ordinary attention to their acts when about the school. The defendants were using the driveway properly and with ordinary care and were proceeding reasonably and not negligently when the said infant plaintiff's body struck their car. It was argued by the plaintiff's counsel that defendant Gale was negligent in allowing his son to drive his car, but I think this submission fails but even if it were sound the answer is that notwithstanding such negligence if the said plaintiff had been paying attention to where he was going he could have avoided his injury. He was guilty of what is commonly called ultimate negligence. What excuse is there for a boy of normal faculties playing ball with a companion while backing out of the building knowing of the driveway and the use vehicles made of it in utter disregard of a known danger? As Lord FitzGerald said in the *Wakelin* case, *supra*, at p. 51:

. . . if by the use of ordinary caution he might have avoided the injury, and did not, he is not entitled to recover damages.

Without proof of some negligence on the driver's part, and I can find none here, I should think it is self-evident that the plaintiff suffered the injury by reason of his own wrong. He, therefore, cannot recover all the damages or have them divided in pursuance of the Contributory Negligence Act.

In *British Columbia Electric Railway Company Limited* v. *Loach* (1916), 1 A.C. 719, the judicial committee referred to the phrases "original," "contributory," and "ultimate" negligence as descriptions not adequate to the subject of negligence and the case was held to depend on the cause "legally responsible for the accident."

Here the boy's grossly careless act was responsible for the accident.

It is unnecessary to consider the School Board's defence of want of notice of accident. The School Board were not negligent or if they were there was no proper notice of action.

I would allow the appeal.

MACDONALD, C.J.B.C.

On the 29th of November, 1934, the case came on for further consideration at which time I gave the following reasons in dissent from the majority of the Court:

In this case the Court is unanimous in allowing the appeal of the School Board. With regard to the other appeal, that of the appellants Gale, there has been some difficulty about it, but it has been fixed up. You will remember that the jury found $8,000 in favour of Ritchie, the plaintiff, and of course, we have to deal with that and the apportionment of the fault. Two members of the Court have held that under the Contributory Negligence Act there should be an equal division of fault. Originally my brother McQUARRIE and I held that there should be no division, that the appeal should be allowed *in toto,* but my brother McQUARRIE has now come to the conclusion that the two members who would make a division of the damages, are now sustained by him, so that there are now three members who think that a new judgment —I will not put it that way, but that the judgment should be reduced from $8,000 to $4,000. I am of the opposite opinion. I think it was the province of the jury to decide the amount of

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the damages and to apportion the fault, and not of this Court. If a majority came to the conclusion that the judgment below was wrong in any particular, then we might set that judgment aside and grant a new trial, if there was a majority in favour of a new trial. In this case that is not what is proposed at all. It is proposed that the Court itself really tries the issue of damages and fault and decides those issues without reference to the verdict. I think that is wrong. At the same time I must deliver the judgment of the Court, which is that the fault should be distributed equally and the damages be reduced from $8,000 to $4,000, and that judgment be given accordingly.

29th November, 1934.

MARTIN, J.A.

MARTIN, J.A.: Upon further consideration of this appeal in the light of the discussion on the 27th instant, when we had the benefit of the views of counsel to assist us in arriving at a final judgment, I have come to the firm conclusion that while Gale junior was, in my opinion, rightly found guilty of negligence by the jury, for reasons that I then expressed, yet the infant plaintiff (then thirteen years of age) was also guilty of "synchronous negligence" (within the case of *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129, 137) which contributed to the accident, and the finding of the jury (in answer to question No. 4) which found him not guilty thereof, was not supported by any evidence and therefore could not reasonably be found, and consequently must be set aside.

Such being the case, we have under the present circumstances, the power conferred by our rule 5 (as the authorities I cited on the 27th instant abundantly establish, *viz.*, *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; *Winterbotham, Gurney & Co.* v. *Sibthorp and Co.* (1918), 1 K.B. 625; *Banbury* v. *Bank of Montreal* (1918), A.C. 626; *Croker* v. *Croker* (1932), 48 T.L.R. 597; and *Thompson & Alix Ltd.* v. *Smith* (1933), S.C.R. 172) to do "complete justice," on this appeal, and it has been declared to be our duty to do it (*cf. e.g., Banbury's* case, *supra,* at pp. 676-9, 706, 716 on the corresponding English Rule 868, the same as ours in present essentials) by entering the proper judgment despite the said improper answer respecting contributory negligence, because we are on the principle in the

exact position defined by Mr. Justice (now Chief Justice) Duff in *McPhee's* case, *supra,* at p. 53, *viz.*:

> In the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

And the "only construction [that the facts herein] will reasonably bear," p. 55, is that there was contributory negligence. This is the leading Canadian case on the subject, and the later decisions I have cited give effect to the principle thereby enunciated, though without mentioning it, even, strange to say, in the very recent consideration of the question in *Thompson & Alix Ltd.* v. *Smith* in the same Court.

Upon the facts properly found herein no question, as I view them, could formerly have arisen about what our judgment should be, but our Contributory Negligence Act, B.C. Stats. 1925, Cap. 8 (without which the plaintiff's action would fail), Sec. 3 declares that:

> 3. In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

At first sight that provision might appear to require that the jury alone could apportion the degree of fault, but on further consideration thereof I have no doubt that we are not prevented from apportioning that degree and we are not compelled to send the case back to the jury for that limited purpose, in this case at least, wherein the jury has improperly excluded the entire element of contributory negligence from its consideration under said Act. To my mind, once they have done so, this Court has power to correct, and should correct, that error in its entirety, and as an indivisible unit of error, without being compelled, after finding that there was contributory negligence, and that judgment must be given against the plaintiff on that question as a whole, to send it back to the jury to be reconsidered in part only, *i.e.,* on the degree of its fault, after they have wrongfully rejected it in its entirety. Quite apart from the inconsistency and incongruity of such a course, the expense thereby occasioned would inevitably impose a grievous and unnecessary burden, because a new jury, before arriving at a just conclusion upon the degree of fault, would be compelled to hear all the evidence upon the whole question of negligence; in other words, retry almost

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the whole case, in order merely to determine one part of one question thereof. Now I cannot bring myself to the conclusion that our general power under said rule 5 can be restricted to bring about such "incomplete justice." Moreover, it would be a strange result indeed that though we have unquestionably the power in such a case as the present to correct errors in "the fault (if any)" (section 3), which includes the whole question of the negligence of both parties, yet we are prevented from correcting that part of the error only which relates to apportioning the "degree" of that same fault: to so hold would deny this Court the power to "supplement the findings of a jury," which Anglin, J. said in *McPhee's* case, *supra,* p. 57, was "conferred" upon us by our said rule.

It should be noted that when the question of our powers under said rule 5 was under tentative consideration on the 27th instant, appellant's counsel, Mr. *Farris,* took the position, in brief, that, failing the allowance of the appeal *in toto* we could only order a new trial; respondent's counsel, Mr. *Ginn,* however, did not question our power to deal with the whole subject-matter of contributory negligence including the degree of fault, but because of the poverty of his clients he was prepared to accept from us an equal apportionment of that degree rather than be put to the expense of a new trial, which they were quite unable to bear, if we were of opinion that we were compelled to order it. But seeing that I have now reached the firm conclusion that we can finally deal with the whole matter, it is not necessary to resort to Mr. *Ginn's* offer, and therefore I proceed, entirely apart from it, to discharge my duty in that respect and as, in my opinion, the case comes within subsection (*a*) of section 2, *viz.*:

MARTIN, J.A.

> If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

I, therefore, make that equal apportionment, which accords with the justice of the case.

In coming to this conclusion, I recognize that having regard, *e.g.,* to the tender years of the infant plaintiff there is something, indeed not a little, to be said in support of an apportionment more in his favour, especially from a jury, but my view of the justice of the case will not permit me to go further, and if I am

in error in this respect it will, of course, be open to a higher Court to correct that error. But one thing, to my mind, is beyond doubt, *i.e.*, that it would not be possible in reason for the appellants to expect an apportionment more in their favour than an equal one; on the contrary, they could only expect something more unfavourable, and therefore they are really getting the benefit of the doubt.

With respect to the liability of the defendant School Board, I am of opinion that though there was ample evidence to justify the jury's finding of negligence against it, yet I agree with my brother M. A. MACDONALD, that, with every respect to the contrary view of the learned judge below, the action against it must, on the authorities cited, be dismissed because of lack of the notice required by added section 131A of section 32, Cap. 55 of the Public Schools Act Amendment Act, 1929, though I am free to say that I have only reached this conclusion after some hesitation.

MARTIN, J.A.

The result is that, in my opinion, the judgment now entered for $8,000 should stand for $4,000 only, and against the defendant Gale alone, and the appeal to that extent only should be allowed.

2nd October, 1934.

MACDONALD, J.A.: Appeal by both defendants from a verdict of a jury awarding $8,000 to the infant respondent (suing by his father) for injuries sustained by him when he collided with a motor-car driven by the fifteen-year-old son of the appellant Gale senior on a roadway (about 16 feet wide) laid through the grounds and circling up to within approximately eight feet of a doorway through which pupils pass in and out of the school building controlled by appellant the Board of School Trustees for the City of Vancouver.

MACDONALD, J.A.

The injured respondent (13 years old) was dismissed from school with other pupils at 11.45 a.m. He passed through the door close to the driveway along which the motor-car was then travelling, walking backwards and throwing a baseball back and forth to another pupil following him. While so engaged he backed up on to the driveway coming into contact, as stated, with the passing car and receiving severe injuries. He was, as the other boy testified, "kind of backing out to get a distance between

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us when he was hit" (and of course absorbed in that pastime) by the motor-car travelling as we should assume from the evidence in the light of the jury's verdict from 15 to 20 miles an hour. It is clear (there is no dispute about it) that while his mind was concentrated on the game and with knowledge that "there was a roadway there" and that "many cars used it" he backed four or five feet across the roadway and into the car hitting it behind the front mud guard. It is self-evident too that some impact would have taken place, with of course less serious damage or perhaps no damage at all, if the Gale car was stationary at that point. Gale junior, the driver of the car, testified that he did not notice the boy until after the impact and there is no evidence to the contrary. I may add that as the building is, properly enough, at or near the centre of large grounds it is necessary, and not improper, that facilities should be afforded for the passage of vehicles in and out of the grounds. On the other hand it was a serious fault to construct the roadway so close to the doorway referred to unless (as was not the case) its width was greatly increased at that point to allow cars to avoid dangerous proximity to a door from which pupils might suddenly and quickly emerge.

Dealing first with the appellant Gale it was strongly urged that there was no evidence before the jury from which a reasonable inference of negligence on the part of the driver of the car could be drawn. His duty (assuming as I do, that he was properly there) particularly when about a dozen pupils were adjacent to the roadway was two-fold, *viz.*, to drive slowly and carefully and to keep a sharp look-out. His speed should be regulated and the car so controlled as to enable him with the aid of the horn to attract attention, to stop in time to prevent contact with any child who thoughtlessly or otherwise might step up on the driveway. It should also be further reduced if (as was the case) cars were so parked beside the roadway that they interfered with the driver's clear view of pupils who might appear on the scene. I do not regard other alleged acts of negligence as material, *e.g.*, "in driving or operating an automobile on the school grounds" charging that he should not have been there at all. Driveways are a necessary and reasonable adjunct to school grounds. If

school buildings abutted on public highways the danger would be greater: if surrounded by playgrounds it is reasonable and proper, particularly in a wet winter climate, that parents with school children (and others) should be permitted to drive to the building in motor-cars exercising reasonable care according to circumstances in so doing. Children are always exposed to danger on driveways, in city streets or in school grounds and must be taught to approach and to cross them with care. Gale junior therefore was not a trespasser: he was properly on the driveway and the criticism as to its construction only affected him to the degree that it called for greater care on his part. I confine myself, therefore, solely to the inquiry as to whether or not there was evidence of careless driving or failure to keep a proper look-out. Sounding or not sounding the horn, as conditions called for it, is an element in careful driving.

These material allegations of negligence were pleaded, *viz.*, (1) Proceeding at an excessive and reckless rate of speed. (2) Failure to keep a proper look-out. (3) Failure to give warning of the approach of the automobile. The jury in answer to the question "Was Gale junior guilty of negligence which was the proximate cause of the accident?" answered "Yes." Asked "If so in what did such negligence consist?" they answered "As he a former pupil of the school, did not take proper care with his knowledge of the grounds." This answer is far from satisfactory. I think the jury should have been asked to retire and to state the specific acts of negligence found. They stress his knowledge of the grounds. Any driver knowing it was a school building would obtain enough knowledge of the situation from ordinary observation. That part of the answer however does not detract from the definite finding that he "did not take proper care" but in what respect? I do not think the jury meant that he shewed lack of care in venturing on the driveway. They meant lack of care while driving over it. I mention this because it may be suggested that the jury were misled by a statement of the trial judge which with respect I think was erroneous, *viz.*, that they might consider whether or not "Gale should not have driven by that driveway at all until all the students likely to come out of it were out of it." In my view a fair analysis of the answer does not shew that the

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jury thought he should not have passed over the roadway at that particular time. It is true that conditions might arise where from the presence of many pupils emerging from the school to the driveway one should not enter upon it with a car but that was not the situation. Is it then a finding of excessive speed under the circumstances including possibly failure to sound the horn or failure to keep a proper look-out or both? It was only on these grounds that a finding of negligence could properly be based and if the finding of the jury can be so interpreted the only question is—have we reasonable evidence to support it? If it is not a finding of negligence in these aspects the verdict cannot stand.

In my opinion the alleged act of negligence, *viz.*, failure to keep a look-out must be eliminated. Although it was pleaded it was not mentioned in the charge to the jury nor was evidence adduced to shew that Gale junior was not keeping a proper look-out while approaching the point where the accident occurred. This also applies to alleged failure to sound the horn. There was positive evidence that it was sounded and only negative evidence from respondent's witnesses that they "did not hear it."

MACDONALD, J.A.

On the question of excessive speed John Ritchie gave evidence. His opportunity for judging was limited. He was tossing the ball to the injured boy and doubtless had his attention directed, at least in part, to that exercise. He said: "I saw the car when it was about on Hugh" and "I must have seen it about ten feet away from him I suppose and diagonally about 20 feet from him." From a limited observation over that area he said Gale "was going quite a good rate—I should say about—between 15 and 20 miles an hour" and "it [the car] went on for about 15 or 20 feet after it hit him and stopped." On cross-examination he said "I didn't know much about speed." The principal of the school stated that this witness told him after the accident upon being questioned that the speed of the car was "slow." The injured boy did not see the car at all. Defence witnesses testified that he was driving slowly but we are concerned with the respondent's case.

I have outlined this evidence with its infirmities and possible contradictions to ascertain if it can fairly be regarded as sufficient. I am satisfied, in view of the students in sight, the parked

cars partially obscuring the view and the dangerous proximity of the narrow roadway to the door, that from 15 to 20 miles an hour (say 18 miles) was under those circumstances an excessive rate of speed. Might the jury so find? Ritchie could judge speed from a hurried glance and coupled with the evidence that the driver, although aware of the impact, travelled 15 or 20 feet before stopping, I cannot say that they were clearly wrong if they chose to accept it in finding excessive speed or that there was no reasonable evidence to support such a finding. It is not an answer to say that if he were driving slowly the impact would nevertheless occur. That may be, but the jolt would not likely be severe and the car could be quickly stopped. The jury could reasonably find that a rapidly moving car would on contact throw the boy violently to the ground causing the injuries complained of. I think therefore we cannot interfere with this finding of negligence.

The jury, however, when asked if the infant respondent who backed into the car was guilty of negligence, answered "No." This finding is perverse. I need not repeat the facts already outlined, about which there was no dispute. I do not apply to him the standard of care required of adults but have regard to the care that one of his age might reasonably be expected to shew with his knowledge of the roadway and the fact that motor-cars passed over it. It is clear that he was negligent. Children, we may assume, are taught to display care, particularly in respect to highways and to traffic, at an early age. I think, too, we are justified in making such a finding of fact on uncontradicted evidence without a further reference to the jury. I am also—without discussing it in detail—satisfied that it was the combined negligence of both, I would say in equal degree, that brought about the accident within the meaning of the Contributory Negligence Act.

The appellant Gale however is not liable unless there is evidence to support the answer of the jury to the following question:

> Did Gale junior require to obtain specific permission from his father or mother each time he drove the car or could he to the knowledge of his father use the car when available whenever he wished without obtaining such specific permission from either his father or mother? We the jury sincerely

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believe that Gale junior could take the car whenever available without permission.

The answer again is not very satisfactory. It appears to suggest that this was their honest belief in spite of the evidence. It may be taken to mean however that Gale junior had permission to drive the car when available. If he could take it without permission there was at least implied consent. I think too it may reasonably be interpreted as a finding that on the day in question, apart from all other occasions Gale junior had permission to drive the car and that it was "entrusted" to him (1929, B.C. Stats., Cap. 44, Sec. 7). That fact, as the trial judge stated to the jury, had to be established by the respondent. Is there evidence to support it? It was submitted that the jury were justified in drawing that conclusion as a fair inference from the evidence. An inference may be drawn if there is evidence pointing in that direction. It cannot be drawn from evidence pointing the other way. The jury too might reject the evidence offered but in that event without other evidence to replace it there would be no evidence from which an inference might be drawn. The evidence should be examined in the light of reasonable conduct by parents in similar circumstances. A minor cannot become a competent driver without a gradual approach to a reasonable degree of perfection through practice, first by driving where there is little danger and gradually under supervision and with parental permission taking greater risks. He may have a minor's licence while engaged in this intermittent driving. During this stage of a driver's education a parent might "entrust" a car to a minor to drive on roads where there was little danger and refuse permission for other more hazardous journeys. The usual method with a boy of 15 years doubtless is to insist upon permission for each occasion. The other course, more likely to lead to trouble but which might be resorted to if sufficient skill is attained is to grant general permission (and that is "entrustment") to drive the car at all times when available in and about the city. If it is a fair inference from the evidence that this general permission was given the finding of "entrustment" on the day in question cannot be disturbed. Again it must be confessed that the evidence pointing in this direction is slender but I think that inference might be drawn by the jury. Without going into details

there was evidence of permission to the son to drive the car constantly in and around Vancouver. He would sometimes (though very rarely, probably due to proximity) drive the car to school with, it must be assumed from the evidence, permission to do so. If permitted to drive the car to his own school it is a fair inference that he could, if available, drive it to the school in question. It is not necessary that there should be evidence that the request was verbally made and granted on the day in question. Consent to drive or "entrustment" on a particular occasion may be inferred from a course of conduct. "He learned" Gale senior testified "to drive the car at Crescent Beach, running from my home down to the Point for swimming purposes," etc. He did not mechanically request permission for each trip nor does the witness say so. It appears from the evidence clear that at least within a limited area including the vicinity in question it was not necessary on each occasion to obtain specific permission. I am not free from doubt on the point but if, to use a common expression, the jury chose to "size up the situation" in that way I do not feel justified in saying that they were again clearly wrong or that such an inference could not reasonably be drawn from the evidence. I have not overlooked cases cited. I think if Mr. Gale gave permission impliedly to Gale junior to drive the car on the day in question it was "entrusted" to him within the meaning of the Act.

MACDONALD, J.A.

The only point taken by counsel for the School Board before us was that the action as against it was barred for want of a statutory notice. An amendment to the original Act—section 32, B.C. Stats. 1929, Cap. 55 (section 131A added)—reads in part as follows:

> No action shall be brought against a trustee of any school district individually or against the Board of School Trustees in its corporate capacity, or against the secretary of the Board, for anything done by virtue of the office of trustee or secretary, unless within three months after the act committed, and upon one month's previous notice thereof in writing.

The accident occurred on June 21st, 1933—writ issued July 15th following. The only document relied upon as notice was a letter written by the principal of the school where the accident occurred to the late J. S. Gordon, then superintendent of schools, giving the details of the accident (Exhibit 2). It was submitted that the principal was the agent of the respondent in giving that

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notice. That is not so. He was performing an ordinary routine duty on his own initiative. A letter too from respondent's solicitor dated June 30th, 1933, addressed to the secretary of the School Board, giving details of the accident, was relied on. It stated briefly the ground or some of the grounds upon which it was suggested liability rested on the board coupled with a demand for damages and an expression of willingness to discuss the matter with them or their solicitors but without any reference to an intention to sue within three months and at the termination of one month from receipt of a formal notice. Even if we make the at least doubtful assumption that this letter was sufficient as a notice under the statute the action was commenced prematurely as the writ as stated was issued on July 15th, 1933, before the expiration of the month permitted to the board to consider its position.

MACDONALD, J.A.

I am unable, with the greatest respect, to agree with the reasons of the learned trial judge in his short detailed analysis of the section. If, as he states, the word "thereof" refers to the act done by virtue of the office and not to the word "action," then particularly having regard to the word "previous" the notice would have to be given a month before the act was committed. I think the section clearly provides that "No action shall be brought" against the board "for anything done in its corporate capacity" unless "[it is brought] within three months after the act committed, and upon [giving] one month's previous notice thereof in writing." That to me is the plain meaning of the section. If this is a condition precedent to the right to sue the objection must be sustained unless notice was waived as the trial judge believed by a letter of July 12th, 1933 (Exhibit 4), wherein the board's secretary, replying to the letter from the solicitor of June 30th, stated after consulting their solicitors and obtaining advice that liability was disputed. The suggestion is that the board secured all the benefits which the section was intended to confer and thereby waived strict compliance with its terms. It was also submitted that the requirement as to notice has no application inasmuch as the board is not sued "for anything done by virtue of the office of trustee." I do not agree. The powers and duties of the board are outlined in

section 50 of Cap. 226, R.S.B.C. 1924 and include attention to and supervision of the matters in respect to which negligence is alleged. It was part of their duty to keep the premises in a safe condition. *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159 does not support Mr. *Ginn's* submission. There the section considered meant that the board had to simply "maintain and keep it efficient as an institution" (p. 167); not to maintain and repair it in the structural sense.

We have therefore only to decide (1) whether or not a month's notice is a condition precedent and, if so, was it waived? This Court decided in *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154 on the consideration of a similar section in the Public Schools Act that the fact that no action was brought within three months was fatal. This view at all events was expressed by the Chief Justice and GALLIHER, J.A. (and I agree with it), MARTIN and MCPHILLIPS, JJ.A. dismissing the appeal without expressing an opinion on that point. If it is requisite that the action should be brought within three months it is equally essential that a month's previous notice should be given. Both requirements are intended to serve specific purposes; one to avoid delay in suing with possibly loss of evidence; the other to give time to investigate. Each requirement too is equally arbitrary.

MACDONALD, J.A.

The decision of the Appeal Court of Saskatchewan in *Carlton* v. *Municipality of Sherwood* (1915), 9 W.W.R. 611 is of similar import. The fact that the requirement as to notice in practically the same terms appears in a municipal rather than a School Act is immaterial. *Dempsey* v. *Dougherty* (1850), 7 U.C.Q.B. 313; *Zachariassen* v. *The Commonwealth* (1917), 24 C.L.R. 166 at p. 190; *Barker* v. *Palmer* (1881), 51 L.J.Q.B. 110 may also be referred to. I see no escape from strict compliance with the Act. The word "shall" is used—"no action shall be brought" and although the reason for such a provision is apparent we are not concerned with speculation as to why Parliament thought fit to enact it. We have only to avoid an attempt to repeal it. Some statutes allow want of notice to be excused if grounds are shewn; this does not. We were also referred to cases to support the submission that the attorney's letter was not in any event a valid

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notice. Assuming, however, without deciding it, that it, or the other letter referred to or both combined were sufficient as a statutory notice the action could not be brought at the time the writ was issued.

On the question of waiver even if we overlook the fact that although failure to give notice was raised as a defence and waiver was not pleaded in reply and cannot now be raised (*The Knights of the Macabees of the World* v. *Hilliker* (1899), 29 S.C.R. 397; *Allen* v. *The Merchants Marine Ins. Co.* (1888), 15 S.C.R. 488) I do not, with respect, agree that the exchange of correspondence particularly where no reference is made to intention to sue and where liability is denied, thus intimating to respondent that it would be necessary to take action (quite different to negotiations for a settlement where there is an agreement or what is tantamount to an agreement that there is liability) amounts to waiver. It is rather a question of estoppel. Were there any representations made to respondent or his solicitor leading him to believe that appellants would not rely upon statutory rights? Clearly not. I agree with the views expressed by Mr. Justice Bray in a much stronger case than this, *viz.*, *Hewlett* v. *London County Council* (1908), 24 T.L.R. 331. It is referred to in Halsbury's Laws of England, Vol. 19, at p. 182 as authority for the statement that negotiations, even if they lead to delay and cause the claimant not to sue in time, do not prevent the defendant from relying upon want of notice. In *Jones* v. *Township of Stephenson* (1900), 32 Ont. 226 it was held by a Divisional Court that all that occurred suggestive of dispensing with the necessary notice "was not . . . a waiver of the requirements of the Act" (p. 230). *Wright* v. *John Bagnall & Sons, Limited* (1900), 2 Q.B. 210 is an example of estoppel but as pointed out in *Rendall* v. *Hill's Dry Docks and Engineering Company, ib.* 245 at p. 249 the parties agreed that there was a statutory liability to pay compensation. We are not concerned with a contract between individuals where one by conduct may be estopped from taking certain positions but, as pointed out by Riddell, J. in *Norwell* v. *City of Toronto* (1925), 28 O.W.N. 224 a public general statute containing provisions of this sort are passed for the benefit, not of the trustees who administer the Act,

MACDONALD, J.A.

but for the benefit of all the public affected by it. They cannot dispense with what the Act in the public interest and in the interest of ratepayers requires before anyone is permitted to launch an action against a public body.

It follows that the appeal of the School Board should be allowed and the appeal of the appellant Gale in part.

Since writing the foregoing we have had further discussion by counsel as to our right to dispose of all matters in issue finally without directing a new trial. I was and still remain of opinion that we might do so. Particularly on the question of finding the degree of fault it is conceivable, unless directions were given to confine the evidence by repetition to that given at the first trial, new witnesses might appear and change the whole complexion of the case. I do not think the cases shew that the right conferred by our rule is so whittled away that it is not possible to do in such case as this, without resort to a new trial, substantial justice between the parties. I shall only add that I have considered—and fully agree with—the reasons given by my brother MARTIN on this point.

MACDONALD, J.A.

29th November, 1934.

MCQUARRIE, J.A.: I agree that the appeal of the Vancouver School Board should be allowed and I also agree that the amount of the judgment against the defendant Gale should be reduced from $8,000 to $4,000.

MCQUARRIE, J.A.

Appeal allowed in part; Macdonald, C.J.B.C. would allow appeal in toto.

Solicitors for appellant Gale: *Farris, Farris, Stultz & Bull.*
Solicitor for appellant School Board: *J. B. Williams.*
Solicitor for respondent: *R. W. Ginn.*

MCDONALD, J.

1934

Dec. 17.

GROH AND JEFFREY v. RITTER.

Negligence — Damages — Automobile collision at intersection—Care to be taken as to cars coming on left side.

GROH AND JEFFREY v. RITTER

The plaintiffs were passengers in the defendant's motor-car as they neared the intersection of Hornby and Smythe Streets in Vancouver at about 4 o'clock in the morning of June 16th, 1934. All three were sitting in the front seat. The defendant was going from fifteen to twenty miles an hour and when he was about fifteen feet from the intersection he saw a car to his left about 100 to 125 feet away, coming at a speed of from 30 to 35 miles an hour. He proceeded to cross the intersection, and the other car struck his left front corner, turning him right over. The other car proceeded a short distance and was abandoned by the driver, who had stolen the car. The evidence disclosed that the plaintiffs made statements shortly after the accident to a witness that the defendant crossed the intersection at from fifteen to twenty miles an hour, that they did not see the other car until immediately before the collision and that the defendant was not to blame. In an action for damages for negligence:—

Held, that under the circumstances the defendant should have stopped when he saw the other driver and allowed him to pass, as in deciding not to do so he "took a chance" which he ought not to have taken, and must therefore be held liable.

Statement

ACTION for damages resulting from a collision of two automobiles at an intersection. The facts are set out in the head-note and reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 13th of December, 1934.

Wismer, and *Colgan*, for plaintiffs.
Locke, and *Yule*, for defendant.

17th December, 1934.

Judgment

MCDONALD, J.: Plaintiffs were passengers in a motor-car owned and driven by the defendant when a collision occurred at the intersection of Hornby and Smythe Streets with another motor-car coming from defendant's left. All three were sitting in the driver's seat, Miss Groh being in the centre. The three had been driving and visiting about the city during the night and the accident occurred about 4 o'clock on the morning of June 16th last. Plaintiffs' contention is that defendant was proceeding at too high a rate of speed and not keeping a proper

look-out. Unfortunately for both plaintiffs they made statements shortly after the accident to one Mulhern to the effect that defendant was crossing the intersection at a speed of about fifteen to twenty miles per hour, that they did not see the other car until immediately before the collision and that the defendant was not to blame for the accident.

One might speculate as to why the plaintiffs tell a story now which is different to that which they told Mulhern, but such speculation would be useless. Suffice it to say that I can reach no other conclusion than that they did make the alleged statements. I find therefore on the defendant's own evidence that when he was about fifteen feet from the intersection he saw the other car about 100 to 125 feet away, coming from his left at a high rate of speed (on the trial he put it at 30 to 35 miles an hour). He could at that time have stopped, as he was travelling at only fifteen to twenty miles an hour; but being of opinion that he had the right of way and that he would be across before the other car reached him, he proceeded on his way and the collision took place about the centre of the intersection. His judgment as to the speed of the other car was probably about right for his car was struck on its left front corner and completely turned over while the other car proceeded for some distance past the corner where it was abandoned by its driver (a thief who immediately decamped).

Judgment

Under these circumstances was the defendant guilty of any negligence causing the accident? That is the sole question I have to decide, not being troubled with the degree (if any) to which the other driver was to blame. If the defendant was guilty of negligence at all it can only be upon the ground that he failed to stop and to allow the other driver to pursue his mad career. After a good deal of hesitation I have reached the decision that under the circumstances as he saw them he ought to have stopped, and that in deciding not to do so he "took a chance" which he ought not to have taken and must therefore be held liable.

I have of course not overlooked the "rule of the road" nor the decisions thereon; nor am I unmindful of the law as laid down in *Toronto Railway* v. *King* (1908), A.C. 260 and *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582 and similar cases to the effect that every driver is entitled to assume that

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others will observe the law. I base my decision upon the ground that the defendant had full warning of the danger of proceeding and yet chose to proceed, thereby failing in the duty which he owed his passengers to take due care.

The plaintiff Albert Christian Groh will recover $604.10 special damages; the plaintiff Violet Groh $1,200 general damages; the plaintiff Violet Jeffrey $30 special damages and $100 general damages.

Judgment for plaintiffs.

LUCAS, J. (In Chambers)

1934

Dec. 18.

BARTLEY & CO. *ET AL.* v. RUSSELL.

Securities Act—Delegation of authority for investigation—Scope of powers—Injunction—B.C. Stats. 1930, Cap. 64, Secs. 10 and 29.

BARTLEY & CO. v. RUSSELL

Authority was delegated by the Attorney-General of British Columbia to the defendant to conduct an investigation under section 10 of the Securities Act in order to ascertain whether any fraudulent act or any offence against that Act or the regulations has been, is being or is about to be committed by Nicola Mines & Metals Limited (Non-Personal Liability), and for that purpose to examine any person, company or thing whatsoever.

The plaintiffs were not directors or officers of said company, but had been engaged in transactions on a large scale with shares of stock of the company. These shares were purchased outright and the company had no control over the manner in which the plaintiffs dealt with them. Upon the defendant proceeding to enquire into all the dealings of the plaintiffs with said shares, the plaintiffs obtained an *ex parte* injunction restraining him from proceeding further with the investigation in so far as it related to the conduct of the plaintiffs. Upon motion to dissolve the injunction:—

Held, that the investigation carried on by the defendant was within the authority delegated to him by the Attorney-General, and that he could investigate people dealing with shares in the company other than the company and its officials.

Held, further, that when such investigation is within the scope of the authority given by the Attorney-General under the Act, that access to the Courts by persons deeming themselves aggrieved, is denied.

LUCAS, J. (In Chambers)

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BARTLEY & Co. v. RUSSELL

MOTION to dissolve an *ex parte* injunction. The facts are set out in the reasons for judgment. Heard by LUCAS, J. in Chambers at Vancouver on the 14th of December, 1934.

Craig, K.C., for plaintiffs.

A. B. Macdonald, K.C., and *Prenter*, for defendant.

18th December, 1934.

LUCAS, J.: This is a motion to dissolve an injunction made *ex parte* by MCDONALD, J. on December 7th last at the instance of the plaintiffs wherein the defendant was

enjoined and restrained from proceeding further in connection with the investigation being held by him into the affairs of the Nicola Mines & Metals Limited (N.P.L.) pursuant to the authority delegated to him under provisions of the Securities Act in so far as the same either directly or indirectly relates to the conduct or actions of the plaintiffs, or any of them.

Authority had been delegated by the Attorney-General of British Columbia to the defendant *J. A. Russell*, a barrister of Vancouver, to conduct an investigation under the Securities Act (B.C. Stats. 1930, Cap. 64) into the affairs of the above-mentioned company. As the terms of such authority are material I quote same herewith:

Judgment

Pursuant to section 10 of the Securities Act I, *Gordon McGregor Sloan*, Attorney-General for the Province of British Columbia, hereby delegate authority to *J. A. Russell*, barrister, of the City of Vancouver, as my representative to conduct an investigation under that Act in order to ascertain whether any fraudulent act or any offence against that Act or the regulations has been, is being, or is about to be committed by Nicola Mines & Metals Limited (Non-Personal Liability) and for that purpose to examine any person, company, property or thing whatsoever.

DATED this 31st day of October, 1934.

GORDON M. G. SLOAN,
Attorney-General.

Counsel stated, upon the opening of motion, that neither the validity of the said Act nor the regularity of the said appointment were being questioned.

The material portion of said section 10 of the said Act under which said authority was given reads as follows:

10. (1.) The Attorney-General, or any person or persons to whom as his representative or representatives he may in writing delegate authority, may examine any person, company, property, or thing whatsoever at any time in order to ascertain whether any fraudulent act, or any offence against this Act or the regulations, has been, is being, or is about to be committed, and

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for such purpose shall have the same power to summon and enforce the attendance of witnesses.

The person so authorized has no judicial powers, his duties only going to the making of the enquiry and then reporting thereon to the Attorney-General.

The plaintiffs are not directors or officers of the said company but have been engaged in transactions on a large scale with shares of stock in the company. These shares were purchased outright and the company had no control over the manner in which the plaintiffs dealt with same.

The defendant was proceeding to enquire into all the dealings of the plaintiffs with said shares.

It was submitted by counsel for the plaintiffs that in investigating these plaintiffs and not the company that the defendant had exceeded his powers.

It was also submitted that the defendant had conducted the enquiry in a manner unfair to the plaintiffs in that, *inter alia,* he had heard witnesses without the knowledge of the plaintiffs and without giving the plaintiffs an opportunity to cross-examine such witnesses or to submit evidence in reply thereto if deemed necessary.

It was submitted by counsel for the defendant that the defendant intended to give to the plaintiffs further opportunity of being heard and of submitting such argument as they might desire but that this was a matter in the defendant's discretion, and that as he was an enquirer and not sitting in any judicial capacity that he was not required to give the plaintiffs access to information obtained by him, or a right of cross-examination of witnesses so called, from whom he had acquired information. In the view I take of this case however it will not be necessary to give consideration to these matters.

In my opinion the authority to investigate which may be delegated by the Attorney-General to his investigator under the Securities Act is very broad, in fact almost unlimited, and certainly is more than broad enough to cover the investigation being carried on by the defendant as appears from the material filed: I point particularly to the words in section 10 of the Act, line 3, which read:

May examine any person, company, property, or thing whatsoever at any time. . . .

Also, in my opinion, in the authority signed by the Attorney-General to the defendant the powers of the defendant are little, if any, abridged from the powers possible to be given under the Act, and include the power to investigate the plaintiffs' transactions in the shares and stock of the Nicola Mines & Metals Limited (N.P.L.). I point particularly to the last two lines reading: and for that purpose to examine any person, company, property or thing whatsoever.

Having come to the above conclusion then I have to find that section 29 of the Act applies to this whole proceeding and that therefore access to the Courts for relief is denied. This section reads as follows:

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29. No action whatever, and no proceedings by way of injunction, *mandamus*, prohibition, or other extraordinary remedy, shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying-out of the provisions of this Act or the regulations where such person is the Attorney-General or his representative, or the registrar, or where such person or company was proceeding under the written or verbal direction or consent of any one of them, or under an order of the Supreme Court or a judge thereof made under the provisions of this Act.

I therefore dissolve the injunction with costs.

Injunction dissolved.

RE MARRIAGE ACT AND APPLICATION VICTORIA CITY TEMPLE FOR REGISTRATION OF W. J. THOMPSON AS AUTHORIZED TO SOLEMNIZE MARRIAGE.

Marriage—Authority to solemnize—Victoria City Temple—Application to register their pastor under Marriage Act—B.C. Stats. 1930, Cap. 41, Secs. 2, 3, 4, 6 and 8.

The application of the Victoria City Temple under the Marriage Act to register their pastor "as authorized to solemnize marriage" was refused by the registrar on the ground that the applicant must be the governing authority of the religious body by which the minister was ordained, which in this case is the Congregational Church, having jurisdiction in British Columbia, and that such application had to be made in connec-

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tion with a pastoral charge of that church in this Province, also that the Temple was not sufficiently well established as to continuity of existence as required by section 4 (*d*) of said Act to warrant registration of its minister as authorized to solemnize marriage.

On application by way of appeal to a judge of the Supreme Court:—

Held, that it is not necessary that the person for whom an application is made should be ordained. If there be a religious body, as defined by the Act, with a governing authority having jurisdiction in this Province, such governing body may apply under the Act on behalf of a minister or clergyman, as defined by the Act, belonging to it, and on the evidence the Temple is sufficiently well established both as to continuity of existence and as to recognized rights and usages respecting the solemnization of marriage to warrant the registration of its minister or clergyman as authorized to solemnize marriage.

Held, further, that the application complies with the remaining requirements of the Act and the registrar was directed to grant the application for registration.

APPLICATION by way of appeal from the registrar who refused an application of the Victoria City Temple to register their pastor "as authorized to solemnize marriage" under the Marriage Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 22nd of November, 1934.

Statement

Davey, for the application.
H. Alan Maclean, contra.

19th December, 1934.

ROBERTSON, J.: This is an appeal from the refusal of the registrar to grant the application of the Victoria City Temple, made under the Marriage Act, B.C. Stats. 1930, Cap. 41, to register their pastor, Rev. W. J. Thompson, "as authorized to solemnize marriage." Prior to the passage of the above Act, there was no requirement for the registration of persons desiring to perform marriage services in British Columbia. Subsection (3) of section 8 of the said Act provides that no person shall solemnize any marriage unless he is at the time a minister or clergyman registered under the Act as authorized to solemnize marriage.

Judgment

Section 2, of the said Act, expands the ordinary meaning of the words "minister or clergyman" by providing that unless the context otherwise requires these words shall include:

. . . any priest, rabbi, elder, evangelist, catechist, missionary, teacher,

theological student, or officer recognized by the religious body to which he belongs as authorized to solemnize marriage according to its rites and usages; and includes females as well as males:

"Religious body" is defined by the said section 2 to mean:

. . . any church, or any religious denomination, sect, congregation, or society.

Subsections (1) and (2) of section 3, in part, and section 4, in part, of the said Act, read as follows:

3. (1.) Upon application, in Form 1, the registrar may register any minister or clergyman as authorized to solemnize marriage.

(2.) The application on behalf of a minister or clergyman shall be made by the governing authority having jurisdiction in this Province of the religious body to which he belongs; and the wording of Form 1 may be varied according to the facts, so as to set out other qualifications for registration recognized by this Act.

4. No application on behalf of any person for registration under this Act as a minister or clergyman authorized to solemnize marriage shall be granted, nor shall registration be effected, unless it appears to the satisfaction of the registrar:—

(*a.*) That the person is a minister or clergyman duly ordained or appointed according to the rites and usages of the religious body to which he belongs, or is by the rules of that religious body deemed a duly ordained or appointed minister or clergyman by virtue of some prior ordination or appointment; and

(*b.*) That the person is, as such minister or clergyman, in charge of or officiating in connection with a congregation, branch, or local unit in the Province of the religious body to which he belongs, . . .

Judgment

(*c.*) That the person is, as such minister or clergyman, duly recognized by the religious body to which he belongs as authorized to solemnize marriage according to its rites and usages; and

(*d.*) That the religious body to which the person belongs is sufficiently well established, both as to continuity of existence and as to recognized rites and usages respecting the solemnization of marriage, to warrant, in the opinion of the registrar, the registration of its ministers and clergymen as authorized to solemnize marriage: . . .

The Victoria City Temple was incorporated in 1924 under the Societies Act and the declaration leading to its incorporation, and its by-laws, shew it to be a religious body within the meaning of these words, in the Marriage Act.

Mr. Thompson was duly ordained as a minister of the Congregational Church at Sheffield, England, on the 15th of October, 1906. The by-laws of the Temple provide:

The minister or pastor of the Victoria City Temple shall be a continuing office and the minister or pastor shall be a clergyman or minister hereinbefore ordained or a clergyman or minister hereinafter ordained or a person appointed by and set apart and ordained by the laying on of hands by the board of management of the Victoria City Temple. . . .

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On the 15th of July, 1934, Mr. Thompson was appointed pastor of the Temple pursuant to the by-laws "by virtue of his ordination as a minister of the Congregational Church aforesaid."

The Temple's by-laws authorize its pastor to carry out the offices of the religious body as follows:

> This congregation and religious body authorizes its minister or pastor to conduct and use the ordinances of baptism, the burial of the dead, Holy Communion, and the solemnization of Holy Matrimony in conformity with the laws of the Province of British Columbia; and the ritual of such ordinances shall be based on the rites and usages of the Church of England as laid down in the Book of Common Prayer.

On the 23rd of July, 1934, the Temple applied for registration of Mr. Thompson, as one authorized to solemnize marriage, in the form set out in the schedule to the said Act. The application was refused by the registrar on the 18th of October, 1934. He held that the Temple could not apply under the Act; that the applicant must be the governing authority of the religious body by which the minister was ordained, which in this case is the Congregational Church, having jurisdiction in British Columbia, and that such application had to be made in "connection with a pastoral charge of that church [*i.e.*, the Congregational Church] in this Province." He also held that the Temple was not sufficiently well established as to continuity of existence as required by subsection (*d*) of section 4, *supra*, to warrant registration of its minister as authorized to solemnize marriage.

Judgment

Dealing with the first point I am of the opinion that the governing body mentioned in section 3 is not the governing body of the religious body by which the minister or clergyman has been ordained, but means the governing body of a religious body as defined by section 2, namely, "any church, or any religious denomination, sect, congregation, or society," having jurisdiction in the Province. It is not necessary at all that, the person for whom an application is made, should be ordained, as is shewn by the expanded meaning of the words "minister or clergyman," *supra*, for it is clear from this section, that a person may be registered under the Act who is a "theological student" or "officer recognized by the religious body to which he belongs as authorized to solemnize marriage according to its rites and usages." In this view, then, if there be a religious body, as defined by the Act, with a governing authority, having jurisdic-

tion in the Province, such governing body may apply under the Act on behalf of a minister or clergyman, as defined under the Act, belonging to it. As above pointed out this may include an officer of the body provided that he is recognized by that body as authorized to solemnize marriage.

In my opinion, the facts hereinbefore set forth, shew that the application complies with these requirements.

Then, is the Temple sufficiently well established both as to continuity of existence and as to recognized rites and usages respecting the solemnization of marriage, to warrant the registration of its minister or clergyman as authorized to solemnize marriage? On this point I admitted evidence which was not before the registrar. Since its incorporation it is sworn that the Temple has had a continuous active existence and has carried on throughout the whole of such period, Christian and religious work in Victoria; that at all times since its formation it has conducted, and still conducts, religious services on each Sunday morning and evening and in addition thereto carries on the usual Sunday school work, Young People's Society work, and the other usual activities of religious organizations. It owns, subject to a mortgage of $13,500 its own church premises, which together with the furniture are valued at approximately $21,700. Next year the Temple will be able to pay off about $4,000 of this mortgage from moneys derivable from the cash surrender value of certain insurance policies on the lives of some of its members which insurance policies were taken out for the benefit of the Temple, thereby reducing the mortgage to roughly $9,600. In the meantime the Temple has arranged with the mortgagee to accept monthly payments on the said mortgage, on account of principal and interest, and the said monthly payments have been duly made up to and inclusive of the month of November, 1934. It appears that the initial membership of the Temple was about 400, which increased to 1,000 in the year 1930, and is now only 200. It is also shewn that the Temple has gone behind financially the last two years ending 31st May, 1934. It is submitted because of these two facts there is not that "continuity of existence" required by the Act. As against this it appears that the present members of the Temple have all expressed their decision to remain with the congregation and support it; that the costs of

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operation "have been scaled down to fit the available income" and that Mr. Thompson is popular with the people and "willing to build slowly and steadily."

During the last five years many organizations, both religious and secular, have no doubt suffered many vicissitudes because of the depression. The Temple has steadily carried on its work for ten years, the last five during the depression, has an active membership of 200, and has so arranged its finances that it will probably be able to carry on in the future. It seems to me that this shews the necessary "continuity of existence."

Returning then to section 4, *supra*, I have to decide whether the application complies with its remaining requirements. I have already shewn that Mr. Thompson was appointed according to the rites and usages of the religious body to which he belongs. He is in charge of a congregation of the religious body to which he belongs and he is duly recognized by the said body "as authorized to solemnize marriage according to its rites and usages" thereby complying with said subsections (*a*), (*b*), and (*c*), of section 4. I have also held that the religious body is sufficiently well established as to "continuity of existence" in accordance with the first part of subsection (*d*) of section 4. The last point is whether the religious body is sufficiently well established as to recognized rites and usages respecting the solemnization of marriage, so as to warrant the registration of its minister as authorized to solemnize marriage. The by-laws above quoted shew that the Temple's ritual of marriage is based on the rites and usages of the Church of England, as laid down in the Book of Common Prayer. It is also shewn, as a fact, that the former pastor of this church who was registered under the Marriage Act on the 13th of May, 1930, and resigned sometime in April, 1934, constantly officiated at and solemnized marriages "to many hundreds in number" under the provisions of the former Marriage Act, all of which marriages must have been solemnized in accordance with the Church of England ritual.

Judgment

It seems to me therefore that the last requirement has been satisfied. I therefore direct the registrar to grant the application for registration.

Application granted.

OWENS v. DOBSON, LOWRIE AND OWENS.

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

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Lunatic—Mental Hospitals Act—Action for malicious prosecution—Protection to persons putting the Act into force—No ground for alleging want of reasonable care — Staying proceedings — R.S.B.C. 1924, Cap. 158, Sec. 45.

Section 45 of the Mental Hospitals Act provides, *inter alia*, that "duly qualified medical practitioners who sign the medical certificates under any section of this Act, shall not be liable to any civil proceedings on the ground of want of jurisdiction, or on any other ground, if they have acted in good faith and with reasonable care; and if any such proceedings are commenced, they may be stayed upon summary application to the Supreme Court or to a judge thereof . . . if the Court or judge is satisfied that no reasonable ground exists for alleging want of good faith or reasonable care;" etc.

On September 6th, 1933, the defendant Dr. Lowrie called in the defendant Dr. Dobson who specializes in psychiatry to examine the plaintiff, and on the following day they each gave the plaintiff's husband a certificate under the Mental Hospitals Act in which they expressed the opinion that the plaintiff was then a case suffering from a mental disorder that rendered her potentially dangerous and which required treatment. The plaintiff was not confined in a mental hospital under the Act as the husband failed to further apply to a justice of the peace under the provisions of the Act, but on October 3rd, 1933, the husband laid an information before a justice of the peace alleging that his wife was insane and dangerous to be at large. A warrant was issued and she was arrested and held in custody until the charge was heard by a magistrate. Prior to the hearing Dr. Dobson made a further examination of the plaintiff in the police cells, and on the hearing he testified that he was not prepared to say that the plaintiff was dangerous. The charge was dismissed and the plaintiff was released. The plaintiff brought action against the two doctors and her husband for conspiracy and malicious prosecution. On an application by Dr. Dobson for an order that proceedings be stayed under section 45 of said Act:—

Held, that as the applicant acted to the best of his ability, knowledge and skill and without any ulterior motive whatever, it is a case in which it is proper to invoke the relevant provisions of the Mental Hospitals Act and the action should be stayed as against him.

Williams v. *Beaumont and Duke* (1894), 10 T.L.R. 543, applied.

Statement

APPLICATION by the defendant Dr. Dobson under section 45 of the Mental Hospitals Act for an order that proceedings be stayed as against him in an action for damages for conspiracy and malicious prosecution against him with Dr. Lowrie and

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

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Statement

Argument

Edward S. Owens (the plaintiff's former husband) as co-defendants. On the 6th of September, 1933, the defendant Dr. Lowrie called in Dr. Dobson, who specializes in psychiatry, to make an examination of the plaintiff at her home at Marpole. After an hour's examination Dr. Dobson gave the husband Edward S. Owens a certificate under the Mental Hospitals Act in which he expressed the opinion that the plaintiff was then a case suffering from a mental disorder that rendered her potentially dangerous and which required treatment. On or about the same day the other defendant, Dr. Lowrie, also gave a certificate to the husband under said Act certifying to the like effect. The plaintiff was not confined in a mental hospital under the provisions of the said Act for the reason that the husband neglected and failed to further apply to a justice of the peace under the provisions of the Act, but on the 3rd of October, 1933, the husband laid an information before *W. W. Crompton,* J.P., alleging that his wife was insane and dangerous to be at large pursuant to the provisions of said Act, and a warrant was issued for the apprehension and arrest of the plaintiff and the plaintiff was arrested under said warrant and held in custody until the charge was heard by Deputy Magistrate Findlay on October 13th, 1933. Prior to the hearing Dr. Dobson made a further examination of the plaintiff in the police cells, and on his examination before the magistrate he stated he was not prepared to say that the plaintiff was dangerous, and acting on this opinion the magistrate dismissed the charge and ordered the release of the plaintiff. On the 1st of September, 1934, she brought this action. The application was heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 1st of November, 1934.

Marsden, for the application, relied on the case of *Williams* v. *Beaumont and Duke* (1894), 10 T.L.R. 489, and on appeal at p. 543. This was a decision under section 330 of the Lunacy Act, 1890 (53 Vict. c. 5), said section being substantially the same as section 45 of our Mental Hospitals Act. See also *Everett* v. *Griffiths* (1921), 1 A.C. 631 at p. 644 and *Durand* v. *Prejet* (1932), 2 W.W.R. 545 at pp. 550 and 553. Doctor Dobson acted in good faith and with reasonable care and under the provisions of the Mental Hospitals Act, and only certified the

plaintiff after using reasonable diligence and professional skill and his certificate was an honest expression of the said defendant's opinion as a psychiatrist. Doctor Dobson under these circumstances should not be called upon to enter into a contest in which a jury would determine whether the opinion he had formed was right or wrong.

Bray (*H. E. M. Bradshaw,* with him), for plaintiff: The basis of the action is conspiracy and malicious prosecution and the action should proceed to trial. The defendant Dobson has not made out a *prima facie* case of having exercised due and reasonable care and acted in good faith to bring him within section 45 of the Act.

Argument

18th December, 1934.

MORRISON, C.J.S.C.: The Owens family were living under very sordid conditions. The defendant Dobson, who is a duly qualified physician specializing in mental diseases, in conjunction with another doctor, also a brain or mental specialist, was called to examine the plaintiff and in due course certified her insane under the provisions of the Mental Hospitals Act, Cap. 158, R.S.B.C. 1924. This certificate was given to the husband. The plaintiff was not confined under the provisions of the Act following the issuance of the certificate as he neglected to further apply as required by the said Act, but later he laid an information before a magistrate alleging his wife's insanity. The plaintiff was apprehended under warrant and she was incarcerated. Doctor Dobson was not a party to this. Whilst she was in custody Dr. Dobson made a further examination, and upon her case coming on for hearing before the magistrate he gave evidence stating that he was not then prepared to say that the plaintiff was dangerous. The magistrate therefore ordered the release of the plaintiff. This was over a year ago. The plaintiff now sues the defendant Dr. Dobson for damages for malicious prosecution and conspiracy. The pleadings having been closed the matter comes before me in the form of an application on behalf of Dr. Dobson invoking section 45 of the Mental Hospitals Act, Cap. 158, R.S.B.C. 1924, for an order that the proceedings against him be stayed:

Judgment

45. Judges, registrars, district or deputy registrars, or stipendiary magis-

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trates, or police magistrates, or justices of the peace, who sign the order, or any persons who sign the statement, or duly qualified medical practitioners who sign the medical certificates under any section of this Act, shall not be liable to any civil proceedings on the ground of want of jurisdiction, or on any other ground, if they have acted in good faith and with reasonable care; and if any such proceedings are commenced, they may be stayed upon summary application to the Supreme Court or to a judge thereof upon such terms as to costs and otherwise as the Court or judge may think fit, if the Court or judge is satisfied that no reasonable ground exists for alleging want of good faith or reasonable care; and no action shall be brought against such judge, registrar, district registrar, deputy registrar, stipendiary or police magistrate, justice of the peace, or duly qualified medical practitioner, except within twelve months next after the release of the party bringing the action, and any such action shall be laid or brought in the county where the cause of action arose, and not elsewhere.

Judgment

After hearing counsel and perusing the material filed I am of opinion that Dr. Dobson acted to the best of his ability, knowledge and skill and without any ulterior motive whatever. Mr. *Marsden* on behalf of Dr. Dobson has drawn my attention to the material similarity between the English Lunacy Act (53 Vict. Cap. 5, Sec. 330) and section 45 of the B.C. Act. He cites *Williams* v. *Beaumont and Duke* (1894), 10 T.L.R. 543 where in the course of his judgment Esher, M.R. makes use of these words which are apposite (p. 544):

> An action was not to be maintained against a medical man for giving a lunacy certificate on the mere assertion that he had come to a wrong opinion. He was not, under such circumstances, to be called upon to enter into a contest, in which a jury would have to determine whether the opinion he had formed was right or wrong. Unless it could be shewn that he had not acted in good faith or with reasonable care, he was not liable to an action. The effect of this would be that if an action were brought against a medical man for signing a lunacy certificate, he would have to plead that he had acted in good faith and with reasonable care. But the Act went further than this, and in subsection 2 gave such a defendant a second protection. He might apply in a summary manner at Chambers, and if he could satisfy the judge or the Court that there was no reasonable ground for alleging a want of good faith or reasonable care on his part, he might obtain an order that the action should be stayed.

This is a case in which it is proper to invoke the relevant provisions of the Mental Hospitals Act. The action is stayed as against him.

Action stayed.

MORRISON v. MULRY.

MCDONALD, J. (In Chambers)

1934

Dec. 11.

MORRISON v. MULRY

Practice—Arrest and Imprisonment for Debt Act—Ex parte order to examine judgment debtor—Application to set aside—Granted—R.S.B.C. 1924, Cap. 15, Sec. 19.

An order for the examination of a judgment debtor under section 19 of the Arrest and Imprisonment for Debt Act was set aside on the ground that it should not have been made on an *ex parte* application.

Statement

APPLICATION to set aside an order for the examination of the defendant as a judgment debtor under section 19 of the Arrest and Imprisonment for Debt Act. Heard by McDONALD, J. in Chambers at Vancouver on the 11th of December, 1934.

Argument

Paul Murphy, for the application, referred to *Re Sovereign Bank of Canada. Wallis's Case* (1916), 11 O.W.N. 160; *Blakeley* v. *Blaase* (1888), 12 Pr. 565; *Ferguson* v. *Chambre* (1884), 2 Man. L.R. 184; Rules 610 and 1041.

McFarlane, contra, referred to *Bank of Montreal* v. *Major et al.* (1896), 5 B.C. 156; *Jackson* v. *Drake, Jackson & Helmcken* (1907), 13 B.C. 62; Rules 696, 698 and 944.

Murphy, replied.

Judgment

McDONALD, J.: The order of the 23rd of November last should be set aside as it should be made only on notice. No order as to costs.

Application granted.

MCDONALD, J. (In Chambers)

1934

Dec. 29.

SIMPSON v. SIMPSON.

Practice—Execution — Receiver — Appointment of — Future earnings of judgment debtor.

The Court has no jurisdiction to enforce payment of a judgment debt by appointing a receiver of the future earnings of the judgment debtor. *Holmes* v. *Millage* (1893), 1 Q.B. 551 followed. *Wightman* v. *Wightman* (1934), *ante*, p. 92 overruled.

SIMPSON v. SIMPSON

Statement

APPLICATION for the appointment of a receiver to receive the future earnings of a judgment debtor. Heard by MCDONALD, J. in Chambers at New Westminster on the 29th of December, 1934.

C. F. MacLean, for the application.

Judgment

MCDONALD, J.: In this case an application is made for the appointment of a receiver to receive the future earnings of the judgment debtor. My decision in *Wightman* v. *Wightman* (1934), [*ante*, p. 92] was relied upon by counsel for the applicant. It has just been brought to my attention that that decision was wrong, having regard to the law as laid down in *Holmes* v. *Millage* (1893), 1 Q.B. 551, which unfortunately was not cited to me in the former case.

There is no jurisdiction to make the order asked for and the present application is dismissed.

Application dismissed.

HAUSER v. McGUINNESS *ET AL.*

FISHER, J.

1934

June 23.

HAUSER v. McGUINNESS

Negligence — Damages — Fall from stairs — Defective railing — Concealed danger—Death of owner prior to accident—Agent continuing to act—Ratification by executors—Evidence of.

On the 12th of June, 1933, the plaintiff, a nurse, while lawfully using a rear staircase on the defendant's premises, fell from a landing owing to the railing giving way, and was severely injured. The former owner of the premises, Sarah J. McGuinness, died in Australia on the 17th of May, 1933, and for about 20 years previous to her death she employed one Bennett as her agent in connection with the premises. On receiving notice of her death in the latter part of May Bennett continued of his own accord to collect the rents and make necessary repairs until late in June and after the accident, when he heard from the executors who received the rents collected, and paid for the repairs that were ordered by him. In an action for damages for the injuries sustained by the plaintiff:—

Held, that the railing which appeared to be safely in position constituted a trap or concealed danger, that the danger had existed for some months prior to the accident, that there had been no real hiatus in the agency and in any case the defendants were liable for negligence as they ought to have known of the danger.

ACTION for damages for injuries sustained through falling from a landing of the rear staircase in the defendant's building, the fall being due to the giving way of the railing at the landing. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 16th of June, 1934. Statement

Donnenworth, for plaintiff.
Bull, K.C., and *Ray,* for defendants.

23rd June, 1934.

FISHER, J.: In this matter it is contended on behalf of the defendants that the plaintiff fell on the staircase and not from the landing as the plaintiff says she did on June 12th, 1933. Counsel for the defendants argue that it would be impossible, or at least improbable, that the plaintiff should fall from the landing a distance of about fifteen feet and not be more seriously hurt. It is or must be admitted that one would have expected more serious injuries from such a fall but nevertheless I think Judgment

FISHER, J.

1934

June 23.

HAUSER v. MCGUINNESS

it is a fair inference from the evidence of Dr. R. A. McLennan that the plaintiff could have fallen as she says and sustained only the injuries she did. Counsel for the defendants, however, also rely on the evidence of the witness James Steele who says he saw the plaintiff fall while on the stairs. This evidence is contradicted by the plaintiff as already indicated and also by the witness Mrs. Brooks who says that the plaintiff fell from the landing. I think it must also be noted that the witness, Mr. W. J. Murdoch, contradicts the evidence of Mr. Steele with respect to what has been called the westerly railing—Exhibit 3. Mr. Steele says it was there in place until the truck incident he speaks of as happening on June 15th, 1933, while Mr. Murdoch says he had it in his possession elsewhere after June 13th, 1933. Consideration of the evidence of Mr. Steele also, as to the condition of the original vertical post or support at the south-west corner of the landing before the said June 12th, 1933, shews that it is contradicted at least somewhat by the evidence of the witness Mr. Wright whom I looked upon as a credible and reliable witness. It is also apparent that the evidence of Mr. Steele would mean that the plaintiff moved or was moved after the accident from near the foot of the stairway to a place below the landing which seems unlikely. Having in mind the whole of the evidence I would say there is a preponderance of evidence in favour of the account of the accident as given by the plaintiff. I cannot say that there was anything in her demeanour that would make me discredit her testimony and I accept her evidence corroborated as it is by that of Mrs. Brooks and find that she fell from the landing and thereby sustained the injuries she complains of. I also find that to the plaintiff, ignorant of the premises, the railing would look safely in position and constituted a trap or concealed danger: see *Willoughby* v. *Horridge* (1852), 12 C.B. 742; 22 L.J.C.P. 90. I find therefore that there was no negligence on the part of the plaintiff causing the accident and the issue is whether or not there was any negligence on the part of the defendants for which they would be liable to the plaintiff who, it is admitted, was a mere licensee. With respect to the duty of the defendants here to a licensee, counsel for both parties seem to rely on the case of *Fairman* v. *Perpetual Investment Building*

Judgment

Society (1922), 92 L.J.K.B. 50; (1923), A.C. 74. In this connection reference might be made to the recent case of *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358; 98 L.J.P.C. 119, in which the duty of a licensor to a bare licensee was canvassed and it may be noted that this case and also the *Fairman* case, *supra,* are referred to in *Gordon* v. *The Canadian Bank of Commerce,* 44 B.C. 213; (1931), 3 W.W.R. 185, 373. In the *Addie* case Lord Chancellor Hailsham said, at p. 121 (L.J.):

> The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

From this passage declaring the duties respectively according to the category into which the visitor falls I would say that the defendants in the present case were bound not to create a trap or allow a concealed danger to exist upon the premises which was not apparent to the visitor but which was known—or ought to have been known—to the defendants. As to the facts I find that the said westerly railing and support were in a decayed condition and the said support out of plumb. As already indicated, I am satisfied that the condition of the said railing and support constituted a trap or concealed danger. The defendants, however, are sued as executors of the estate of Sarah Jane McGuinness, deceased, who died in Australia on or about May 17th, 1933, and it is contended on their behalf that, in any event, the defective and unsafe condition of the said railing and support was neither known nor should have been known to the defendants. The question therefore arises whether the dangerous condition had existed so long that the defendants should have known of it: see *O'Keefe* v. *Edinburgh Corporation* (1911), S.C. 18, and *Shepperd* v. *Midland Railway Co.* (1872), 20 W.R. 705; 25 L.T. 879. It would appear that letters probate were not granted out of the Supreme Court of British Columbia to the defendants until

Judgment

FISHER, J.

1934

June 23.

HAUSER v. MCGUINNESS

January 4th, 1934, and, even assuming that the title of an executor relates back to the time of the death of the deceased, it is argued on behalf of the defendants that the agency of the witness, Mr. John Bennett, who had been the agent of the deceased or her husband in connection with the premises in question herein for 20 years, expired on the death of the deceased and that after his receipt of notice of the death of the deceased on or about May 17th, 1933, Mr. Bennett acted on his own initiative, he receiving no instructions from the executors until late in June, *i.e.*, some time after the accident. The evidence shews however that Mr. Bennett in the meantime collected the rents and ordered repairs to be done and that later on the executors received the rents collected and paid for the repairs so ordered. Counsel on behalf of the plaintiff argue therefore that what occurred constituted ratification and refers especially to Bowstead on Agency, 8th Ed., 56. In reply counsel for the defendants cite several authorities and rely especially upon the case of *Phosphate of Lime Co.* v. *Green* (1871), L.R. 7 C.P. 43 at 56-7; 25 L.T. 636, where Willes, J. says:

Judgment

> Now, the law with respect to ratification is clear, and applies equally to cases of contract and of tort. The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition: in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances.

In this connection reference might be made to the case of *Foster* v. *Bates* (1843), 12 M. & W. 226; 13 L.J. Ex. 88; 67 R.R. 311, where the Court said at pp. 317-18:

> . . . and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent.

In the present case I would find that the evidence justifies the inference that Mr. Bennett, between the time he received notice of the death of the said deceased and the time he received instructions from the executors, intended to act as agent for them or for the persons who might legally represent the estate. I woud also find that the evidence justifies the inference that when the defendants, as executors, gave instructions to Mr. Bennett, received the rents from him and paid for the repairs ordered by

him, they intended to recognize and adopt him as their agent in the same manner as he had been agent for the deceased or her husband for 20 years before her death. Under such circumstances I hold that the defendants must be deemed to have adopted and ratified the agency of Mr. Bennett since the death of the said deceased and that there was no real hiatus therefore in his agency as apparently is now suggested on behalf of the defendants. If I should be wrong in this view then I would say that there was quite sufficient time before the accident for the appointment of an agent and inspection of the premises and it might be noted that the defendants expressly instructed Mr. Bennett long before they obtained the said letters probate, which, as already intimated, were granted here on January 4th, 1934. I have also to say that I find in view of the evidence of Mr. Wright that the defective condition of the railing and support had existed for some months before the accident and should have been observed upon a proper inspection or supervision of the premises. My conclusion on this phase of the matter therefore would be that in any event the defendants should have known of such defective condition and following what was said in the judgment, as above set out, in the *Addie* case, I would hold that the defendants were guilty of negligence in creating a trap or allowing a concealed danger to exist upon the premises which was not apparent to the plaintiff but which was known—or ought to have been known—to the defendants. Upon my view of the case the defendants are liable to the plaintiff for the damages suffered by her. The special damages should be allowed, as claimed, at $438.55 and I assess general damages at $1,800.

Judgment

Judgment accordingly in favour of the plaintiff against the defendants.

Judgment for plaintiff.

ROBERTSON, J. (In Chambers)

1934

June 25.

IN RE MERCER ESTATE

IN RE MERCER ESTATE.

Succession duty — Interest — Former Act declared ultra vires — Death of testator more than six months prior to new Act coming into force— Extension of date from which interest runs—Costs—B.C. Stats. 1934, Cap. 61, Sec. 38 (1).

The testator herein died on August 16th, 1933. By a judgment of the 29th of November, 1933, affirmed by the Court of Appeal on the 20th of February, 1934, the Succession Duty Act was declared *ultra vires*. On March 29th, 1934, the new Succession Duty Act came into force. Section 50 of said Act provided that it should be retroactive and should apply in respect of persons who had died since April 11th, 1894, and further provided that the Act should be deemed to be and to declare the law relating to the matter of succession duty payable upon the death of any person dying before the commencement of the Act, whether or not the matter was pending or has been adjudicated on by any Court, etc. Section 11 of said Act reads as follows: "The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, and if the same are paid within six months no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum shall be charged and collected from the death of the deceased." The succession duties in question were not fixed and determined until May 31st, 1934. An application was made under section 38 (1) for an order that interest should be payable from May 31st, 1934, as payment within the time prescribed by the Act was impossible owing to a cause beyond the control of the executors.

Held, that as an *ultra vires* Act is one which never had any legal being, this application must be dealt with as if there had been no Succession Duty Act prior to the present one, and as the present Act was not passed until more than six months after the death of the testator, the applicant comes within said section 38 (1) and interest should be chargeable from May 31st, 1934.

In re Estate of John Henry Oldfield, Deceased (1927), 39 B.C. 119, followed.

Statement

APPLICATION by the executors of the Mercer estate under section 38 (1) of the Succession Duty Act, for an order that interest be payable from the 31st of May, 1934, upon the succession duty payable on the estate. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vancouver on the 23rd of June, 1934.

McMaster, for petitioner.

J. A. Grimmett, for the Crown.

25th June, 1934.

ROBERTSON, J. (In Chambers)

1934

June 25.

IN RE MERCER ESTATE

ROBERTSON, J.: John Murdock Mercer died on April 11th, 1933, and probate of his will was issued, in this Province, on August 16th, 1933, pursuant to the provisions of the then Succession Duty Act, R.S.B.C. 1924, Cap. 244. An affidavit of value and relationship was filed in August, 1933, and two supplementary affidavits of value and relationship were filed in September, 1933. The assessor of succession duties for the Province took the position that part of the realty and personalty belonging to the estate was valued too low in these affidavits, and, from September 26th, 1933, until November 8th, 1933, some correspondence took place between the said assessor and the solicitors for the estate with reference to this point and thereafter ceased, because the said Succession Duty Act was declared to be *ultra vires* by a judgment delivered by MCDONALD, J. on November 29th, 1933, which was affirmed by the Court of Appeal on February 20th, 1934. See *Attorney-General for British Columbia* v. *Col,* 48 B.C. 171; (1934), 2 W.W.R. 481. On March 29th, 1934, the new Succession Duty Act, being Cap. 61, B.C. Stats. 1934, came into force, and section 50 of that Act provided that it should be retroactive and should apply in respect of persons who had died since April 11th, 1894, and further provided that that Act should be deemed to be, and to declare, the law relating to the matter of succession duty payable upon the death of any person dying before the commencement of the Act, whether or not the matter was pending or has been adjudicated on by any Court, etc. So, it is clear, that the Act applies to this estate.

Judgment

Section 11 of the said Act reads as follows:

> The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, and if the same are paid within six months no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum shall be charged and collected from the death of the deceased.

On April 9th, 1934, correspondence was resumed between the assessor of succession duties and the solicitors for the estate, with reference to the same question, *viz.,* the value of the estate for succession duty purposes, and finally, at the request of the said solicitors, the succession duties were fixed and determined and a note thereof was received by the said solicitors on May 31st, 1934.

ROBERTSON, J. (In Chambers)

1934

June 25.

IN RE MERCER ESTATE

The present application is under section 38 (1) for an order that interest shall be payable from the said 31st of May, 1934, on the ground that payment within the time prescribed by the Act was impossible owing to a cause beyond the control of the executors.

Section 38 (1) is as follows:

> A judge of the Supreme Court may make an order, upon the application of any person liable for the payment of duty, extending the time fixed by law for payment thereof, and also the date when interest shall be chargeable, where it appears to the judge that payment within the time prescribed by this Act is impossible, owing to some cause over which the person liable has no control.

After the said decision of the Court of Appeal I said in my judgment delivered on February 27th, 1934, in *In re Jones Estate and Succession Duty Act* (not reported) that "our Courts have held that the whole Act is *ultra vires*," and, if I was correct in this, section 52 in the present Act, repealing the previous Succession Duty Act was not necessary, but, it was no doubt wise to insert it, *ex abundanti cautela*. Obviously an *ultra vires* Act is one which never had any legal being and therefore the present application must be dealt with as if there had been no Succession Duty Act prior to the present one. The present Act was not passed until more than six months after the death of the testator, and so it is clear to me that payment within the time prescribed by the present Act was impossible owing to a cause over which the person liable had no control and therefore the applicant has brought himself within said section 38 (1). I cannot distinguish this case from that of *In re Estate of John Henry Oldfield, Deceased*, 39 B.C. 119; (1927), 3 W.W.R. 361. At that time sections 20 (1) and 35 of the then Act were, respectively, the same as section 11 and section 38 (1) of the present Act. In that case the facts were as follow:

Judgment

The testator died on the 15th of October, 1924, and the executors filed the affidavit of value and relationship on the 17th of February, 1925. The Minister of Finance, being dissatisfied wtih certain valuations, had an inquiry and after some delay the valuations were increased, and a statement of the duties as determined by him were furnished the executors on the 28th of January, 1926, and interest was claimed from the date of the testator's death. The executors refused to pay and applied for

relief under said section 35 of the Succession Duty Act when it was held that interest should be payable only from the 28th of January, 1926.

Following that decision I order that interest shall be chargeable from May 31st, 1934.

As the estate would not have been liable, except for the retroactive legislation, contained in section 50 of the present Act, and as the applicant was compelled to come to this Court for relief, I think he is entitled to costs.

Application granted.

ROBERTSON, J. (In Chambers)

1934

June 25.

IN RE MERCER ESTATE

Judgment

IN RE McINTOSH ESTATE.

ROBERTSON, J. (In Chambers)

1934

June 30.

IN RE McINTOSH ESTATE

Executors—Remuneration—Management fee—No power to allow—R.S.B.C. 1924, Cap. 262, Sec. 80.

Section 80 of the Trustee Act does not confer any power on the Court to allow a management fee to executors.

APPLICATION to vary the report of the deputy district registrar on the passing of the interim account of the executors of the estate. Heard by ROBERTSON, J. in Chambers at Vancouver on the 23rd of June, 1934.

Statement

Maitland, K.C., for the application.
Gilley, for Bessie McIntosh.

30th June, 1934.

ROBERTSON, J.: In this estate the executors moved for confirmation of paragraphs 1 to 8 of the report of the deputy district registrar, dated May 7th, 1934, on the passing of the interim account of the executors and for an order varying paragraph 10 of the said report, whereby the deputy district registrar recommended that an interim remuneration be allowed to them in the sum of $6,000, by allowing a remuneration of $8,640.03, based upon a percentage of the capital and revenue receipts, and capital disbursements which, as is said in *Re Hughes* (1918), 43 O.L.R. 594 at 599-600,

Judgment

ROBERTSON, J. (In Chambers)

1934

June 30.

IN RE McINTOSH ESTATE

is one of the means very often, perhaps usually, adopted of fixing a trustee's compensation . . . and perhaps in the majority of cases it is the best means; but neither the trustee nor the *cestuis que trust* have the right to insist upon its adoption; what the tribunal before which the matter comes has to do is to ascertain as best it may what would be a fair and reasonable allowance for the trustee's care, . . .

There is nothing in the registrar's report which indicated how he arrived at the figure of $6,000 but where an interim remuneration is being fixed, it is the practice to fix a sum less than that which, it is thought, the executors may be entitled to, on the final determination of the remuneration.

Under these circumstances I shall adopt the recommendation of the deputy district registrar and allow the interim remuneration at $6,000.

The applicants also asked that the executors be allowed an annual sum as a managing fee for administering the estate. In my opinion section 80 of Cap. 262, R.S.B.C. 1924, being the Trustee Act, does not permit the allowance of a managing fee. It is an established rule, in general, that a trustee (which includes an executor) shall have no allowance for his trouble and loss of time. Lewin on Trusts, 13th Ed., 455. The said section 80 confers a privilege upon a trustee which he would not otherwise enjoy. That section does not contain any power to allow a managing fee. All that which the trustees do, in the management of an estate, is, as provided in said section 80, to be considered when fixing the remuneration for the "care, pains, and trouble, . . . expended in and about the trusteeship, . . . disposing of, and arranging and settling the same," etc.

Judgment

Reference has been made to an order for a management fee made in the *Estate of Silas James Folkins*. Upon examination of the will in that case, I find that there were several executors, one of which was a trust company, and there was a special direction therein that the trust company should have charge of all accounts and keep in its possession all the assets of the estate, etc., and I presume this is the reason why the management fee was allowed.

The order will go, confirming paragraphs 1 to 8 inclusive and paragraph 10 of the report. Costs of passing accounts and this motion to be taxed and paid out of the estate of the deceased.

Order accordingly.

PETRIE v. BROWN AND LOVE.

MCDONALD, J.

1934

Sept. 5.

PETRIE v. BROWN

Company law—Annual meeting—Shares held in trust—Motion by cestui que trust to restrain voting thereon—Company a necessary party.

The defendants were the registered holders in trust of 3,046 shares of Columbia Agencies, Limited, said shares forming part of an issue of 10,000 shares, being the purchase price of the assets of another company. The sale in question was not carried out and the plaintiff as a shareholder, claiming that as the agreement on which the issue was made was abandoned or materially modified, and the defendants had no right to vote upon said shares in face of his objection as a *cestui que trust*, he moved to restrain them from voting on said shares at the annual meeting of the company.

Held, that the motion should be dismissed as the company is a necessary party defendant to the action.

MOTION to restrain the defendants from voting at the annual meeting of Columbia Agencies, Limited, on certain shares of which they are the registered holders in trust. Heard by McDONALD, J. at Vancouver on the 3rd of September, 1934. Statement

Wood, K.C., for plaintiff.
J. W. deB. Farris, K.C., for defendants.

5th September, 1934.

McDONALD, J.: Motion to restrain defendants from voting at the annual meeting of Columbia Agencies, Limited, to be held on the 7th instant, upon 3,046 shares of which they are the registered holders in trust. The company is not a party to the action. The position may be stated briefly, I think, in this way, that said shares form part of an issue of 10,000 shares being the purchase-price of the assets of another company known as Columbia Life Assurance Company. The sale in question was not carried out (at least not in the form originally intended) and the plaintiff as a shareholder claims that inasmuch as the agreement, on which the issue was made, was abandoned or, in any event, materially modified, the defendants have no right to vote upon the said shares in the face of objection from him as a *cestui que trust*. Although the agreement does not state for whom defendants Judgment

MCDONALD, J.

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were to be trustees I think it may fairly be stated that plaintiff was one of such persons.

The principal objections taken are as to want of parties. First, ought the company to be a plaintiff, or ought the plaintiff to shew an unsuccessful appeal to the company, to bring the action? I think not, as I am satisfied that such an appeal would have been futile. See *Elliot* v. *Hatzic Prairie Limited* (1912), 21 W.L.R. 897; 6 D.L.R. 9, and cases there cited.

Secondly, is the company a necessary defendant? The point taken by defendants' counsel is that the company is a necessary party as defendant, for the reason that the plaintiff will not be injured by the defendants tendering their votes, provided the company does not permit the votes to be counted (assuming for the moment that the votes are illegally tendered). At first blush this argument does not sound convincing, but as plaintiff's counsel has not cited any similar case where the action was allowed to proceed, and in the limited time at my disposal I have not been able to find any, I hold that the objection is fatal. The cases cited by plaintiff's counsel from Wegenast on Canadian Companies, at p. 330, are not of much assistance for they are cases arising out of agreements made between one individual shareholder and another as to how one of them should vote (*e.g.*, on the election of directors). Such an agreement is enforced by way of injunction without the presence of the company, for the reason that only the parties themselves, as distinguished from the company, are interested. Such is not the case here, and, in my opinion, the motion must fail.

Judgment

Other points of importance were raised on the argument but need not be dealt with at the present time.

Motion dismissed.

HARRISON MILLS LIMITED v. ABBOTSFORD LUMBER COMPANY LIMITED.

MCDONALD, J. (In Chambers)

1934

Dec. 6.

HARRISON MILLS LTD. v. ABBOTSFORD LUMBER CO. LTD.

Practice—Discovery—Examination of officer of company—Rules 370b and 370c (2).

Rule 1 of Order XXXIA. provides that any officer may be examined without any special order, and anyone who has been an officer may by order be examined. Rule 2 of said Order provides that after the examination of an officer a party shall be at liberty to examine any other officer or servant without an order.

Held, that the word "officer" in the last mentioned rule does not include one who has been an officer.

The plaintiff's application to examine one who had been one of the officers of the defendant company, after he had already examined the president of defendant company, was refused.

APPLICATION for leave to examine one who has been an officer of the defendant company. Heard by McDONALD, J. in Chambers at Vancouver on the 5th of December, 1934. Statement

McFarlane, for plaintiff.
T. Edgar Wilson, for defendant.

6th December, 1934.

McDONALD, J.: Application by the plaintiff for leave to examine one who has been one of the officers of the defendant corporation. The plaintiff has already examined one who is now the president of the defendant company and applies under rule 2 of Order XXXIA. In my opinion there is no power to make the order though I think upon the merits this is a case where, if the power existed, an order should be made. Rule 1 of Order XXXIA. provides that any officer may be examined without any special order and anyone who has been an officer may by order be examined. Rule 2 provides that after the examination of an officer "a party shall not be at liberty to examine any other officer or servant without an order." The word "officer" last mentioned does not include one who has been an officer. The application must, therefore, be dismissed. Judgment

Application dismissed.

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

1934

Nov. 13.

ST. JOHN v. FRASER.

Inquiry and investigation—Securities Act—Conduct of inquiry—B.C. Stats. 1930, Cap. 64.

ST. JOHN v. FRASER

It is a matter of public policy that, as far as possible, judicial or *quasi*-judicial proceedings shall not only be free from actual bias or prejudice of the judges or investigators, but that they shall be free from suspicion of bias or prejudice. Where therefore on an application to dissolve an interim injunction obtained *ex parte* preventing an investigator from proceeding with an investigation under the Securities Act, the Court cannot assume that either the investigator or the Attorney-General would or are about to perpetrate any act contrary to natural justice, the application should be granted.

Statement

APPLICATION to dissolve an interim injunction obtained *ex parte*. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 12th of November, 1934.

J. W. deB. Farris, K.C., for plaintiff.
McCrossan, K.C., for defendant.

13th November, 1934.

Judgment

MORRISON, C.J.S.C.: The Security Frauds Prevention Act [now the Securities Act] B.C. Stats. 1930, Cap. 64, was enacted with a view to afford some measure of protection to the public. Neither its validity nor the *bona fides* of the investigation is in question in this application to dissolve the interim injunction obtained *ex parte*, but rather the manner in which the Attorney-General's representative has conducted the inquiry. On the material filed I cannot interpose. I have read all the cases cited by counsel, the last submission having been filed yesterday. Compendiously put they support the proposition that in inquiries or investigations, whether by a recognized legal Court or by persons who although not a legal public Court are acting in a similar capacity, public policy requires that in order that there should be no doubt about the efficiency and impartiality of its deliberations any person whose interests or reputation may be prejudiced should be given full opportunity to defend, and the person who is to take part in such investigation should not be put in a position

that he might be suspected of being biased. It is a matter of public policy that, so far as possible, judicial or *quasi*-judicial proceedings shall not only be free from actual bias or prejudice of the judges or investigators but that they shall be free from the suspicion of bias or prejudice. I cannot assume that either the investigator or the Attorney-General would or are about to perpetrate any act contrary to natural justice. However, I am free to think that the Act bears some resemblance to a bureaucratic offspring of the Legislature.

The application to dissolve the injunction is granted.

Application granted.

HORTON v. THE CENTRAL SHEET METAL WORKS.

Patent—Subject-matter—Invalidity by reason of lack of invention—Analagous use—Infringement—Claims broader than supported by the facts.

The plaintiff's patent issued in 1934 was for a defined combination of a sawdust-burner and a cook-stove, in a way not done before and with a useful result. The two elements of the combination were each well known articles in common use. The successful result was achieved by attaching the burner to the stove at a specified place discovered by the plaintiff. The defendant manufactured and sold sawdust burning cook-stoves identical for all purposes of this action with the plaintiff's patented article.

Held, that what was achieved by the plaintiff was the result of skilful workmanship and good shop practice and not by the exercise of the inventive faculty, and there was not subject-matter for letters patent.

Held, further, that the combination of a sawdust-burner with a cook-stove as described was merely analagous to the old use of sawdust-burners with furnaces, hot-water heaters and other like heat-consuming units, and hence there existed no proper subject-matter for letters patent.

Held, further, that the claims being more broad than the alleged invention as described, the patent is invalid.

LUCAS, J.

1935

Jan. 11.

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v.
THE
CENTRAL
SHEET
METAL
WORKS

ACTION for an injunction to restrain the defendant from infringing on the plaintiff's patent for new and useful improvements in sawdust-burners for cook-stoves. The facts are set out in the reasons for judgment. Tried by LUCAS, J. at Vancouver on the 12th of December, 1934.

Craig, K.C., for plaintiff.
Macrae, K.C., and *Clyne*, for defendant.

11th January, 1935.

LUCAS, J.: The plaintiff is the holder of Dominion of Canada Letters Patent No. 342555, dated June 26th, 1934, for new and useful improvements in sawdust-burners for cook-stoves and carries on in the business of manufacturing and selling such articles in Vancouver.

The defendant is in like business in Vancouver and has been manufacturing and selling furnaces and other heat-consuming units with sawdust-burners attached and now has made and sold articles which the plaintiff claims are an infringement on his patent. This action has been brought for an injunction to restrain the defendant from continuing such infringement and for damages and other appropriate remedies.

Judgment

Several issues were included in the pleadings but at the commencement of the trial counsel for both parties stated that an arrangement had been arrived at with respect to all issues but one, namely, that in which the defendant has denied that the alleged invention is proper subject-matter of letters patent. In answer to the plaintiff's demand for particulars of such defence the defendant has pleaded further that

> There is no patentable improvement upon existing prior knowledge and no new art disclosed. The alleged claims are merely the application of an old contrivance to an analogous purpose.

The plaintiff claims only in respect of claims numbered 1, 2 and 3 of the letters patent which are as follow:

> 1. In combination with a domestic cook-stove a sawdust-burner having its combustion chamber connected into the side of the combustion chamber of said cook-stove.
>
> 2. In combination with a domestic cook-stove a sawdust-burner having its

combustion chamber connected directly into one end of said cook-stove and through one side of the combustion chamber thereof.

3. In combination with a domestic cook-stove a sawdust-burner having its combustion chamber connected into one end of said cook-stove whereby the products of combustion are caused to enter the combustion chamber of said cook-stove through one side thereof.

It is admitted that if the patent were valid, that the articles being made and sold by the defendant would be an infringement.

The plaintiff has taken a sawdust-burner, an article previously well known and in common use in combination with furnaces and other heat-consuming units, and attached it to a common cook-stove in a way not done before, and with a resultant success as to heating the same for cooking purposes not heretofore achieved.

The working principle of the sawdust-burner, as explained in the evidence, is that the combustion of the sawdust is initiated in that portion of the apparatus which is outside the heat-consuming unit and to which is attached the feeder, but the combustion is completed in a second chamber called the combustion chamber into which the ignited sawdust passes through an aperture or hole and this combustion chamber is installed inside the heat-consuming unit be it furnace, hot-water heater or cook-stove so that the whole heat benefit of the combustion is created where required.

Judgment

In his evidence at the trial the plaintiff disclaimed all methods of attachment of the burner to the stove, save one. That is, he disclaimed any attachment of the sawdust-burner to the front or back of the stove or any place other than at the front end of the stove, namely, where the fire-box is located; and even there, only at a specific place, which, he says, he discovered after much experimentation.

The plaintiff referred to the particular place as a hole, meaning thereby that the combustion chamber of the sawdust-burner being necessarily constructed inside the stove and all the other portion of the burner being outside the stove it was necessary to cut a hole in the stove of proper size to enable the gases and particles of sawdust in their state of partial ignition and combustion to pass into combustion chamber inside the stove where combustion is completed and heat given off.

With reference to this matter which, in my opinion, is the

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1935

Jan. 11.

HORTON v. THE CENTRAL SHEET METAL WORKS

determining point in the case, the evidence of the plaintiff satisfied me that it was in the locating of the hole at the proper place, where the resultant draft and heating effects in the stove were best, that he considered that he had accomplished the result of a successful combination of a sawdust-burner and cook-stove which he now claims as an invention and in respect of which the said letters patent have been issued.

I find that the sawdust-burner installed by the plaintiff in his cook-stove is identical in scientific principle and alike in structural design for all material purposes with the burners in common use in combination with furnaces and other heat-consuming units. Also I find that there is no material difference in the combustion chamber as installed in the plaintiff's cook-stove from those installed in other heat-consuming units. The alteration in the stove made necessary in order to install therein the combustion chamber, requiring the taking out of the grates between the fire-box and the ashpit, does not in itself constitute any material difference in the original stove such as to enable the plaintiff to base thereon a claim for a patentable invention.

Judgment

There has been skilful workmanship on the part of the plaintiff, and the results achieved are what might well be expected from good shop practice; but there has been nothing done by the plaintiff in this connection beyond that. There has been no exercise of the inventive faculty upon which alone letters patent may issue.

I find that the use to which the plaintiff has put the sawdust-burner is merely analogous to its use upon furnaces and other like heat-consuming units and that therefore a valid patentable invention cannot result. In this connection I adopt the language of Lord Westbury in the House of Lords in *Harwood* v. *Great Northern Railway Company* (1865), 11 H.L. Cas. 654 at p. 682:

> No sounder or more wholesome doctrine, I think, was ever established than that which was established by the decisions which are referred to in the opinions of the four learned judges who concur in the second opinion delivered to your Lordships, namely, that you cannot have a patent for a well-known mechanical contrivance merely when it is applied in a manner or to a purpose, which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used.

Finally, I consider the claims numbered 1, 2 and 3 are altogether too broad to be supported by what has been done in this

case. This completed article is not merely a combination of a sawdust-burner and a cook-stove. It is at most only a combination of these two articles in a very limited and restricted manner, namely, at one particular end of the stove and at a very particular location at that end and as to the sawdust-burner in a strictly limited fashion.

I find, therefore, that the alleged invention is not the proper subject-matter of letters patent and the injunction must be dissolved and the action dismissed with costs.

Action dismissed.

RE JOSEPH AUSTEN SAYWARD, DECEASED.

Probate—Will—Testator—Executrix—Probate duty—Payable to registrar of Court—Issue of probate by registrar—R.S.B.C. 1924, Cap. 202, Secs. 2 and 3.

A testator by his will left $100,000 to The Royal Trust Company in trust for his daughter (an only child); $10,000 to the B.C. Protestant Orphanage; $10,000 to the Queen Alexandra Solarium, and the residue of his estate, real and personal, to his said daughter in the event of her living 30 days after his death, and appointed her sole executrix. After the 30 days, at the instance of the executrix, it was ordered that probate of the will be granted to her. The only charge in respect of the estate imposed by the Probate Duty Act was five per cent. on the two legacies of $10,000 each, and the amount of the duty, namely, $1,000, was duly paid by the executrix to the registrar. The registrar refusing to issue probate, the executrix applied for an order directing the registrar to deliver to her probate of the will.

Held, that the fact that the probate charge did not appear in the rules coming into force in 1912 would not change the practice, which had been established for 42 years, of the registrar assessing and collecting the charge. The proceedings are in this Court and there being no provision in the Probate Duty Act upon this point, it must be assessed and collected by the registrar who is "an officer of the Court generally." The total amount of duty chargeable having been paid the registrar must obey the previous order of this Court.

Statement

APPLICATION for an order directing the registrar at Victoria to deliver to the executrix probate of the will of Joseph

ROBERTSON, J. (In Chambers)

1934

March 20.

RE SAYWARD, DECEASED

Austen Sayward, deceased. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 19th of March, 1934.

Maclean, K.C., for the application.

Pepler, for the registrar.

20th March, 1934.

ROBERTSON, J.: The late Joseph Austen Sayward died at Victoria, B.C., on the 30th of January, 1934, and by his last will left $100,000 to The Royal Trust Company, in trust for his daughter Margaret Livingstone Sayward-Wilson; $10,000 to the B.C. Protestant's Orphanage; $10,000 to the Queen Alexandra Solarium; and "all the rest and residue of my estate and property, both real and personal," to his said daughter "in the event of her being living at the time of my death and continuing to live for not less than 30 days thereafter and in the event of her so being living and continuing to live" he appointed her sole executrix.

On the 12th of March, 1934, being more than thirty days after the death of the said Joseph Austen Sayward on the application of the said daughter, I ordered probate of the said will to be granted to her and this order was duly entered that day.

Judgment

Section 2 of the Probate Duty Act, R.S.B.C. 1924, Cap. 202 (hereinafter called "the Act") is as follows:

> 2. On every probate and on every letters of administration there shall be collected by way of duty, for the raising of a revenue for Provincial purposes, a charge of one per centum on the value of an estate to father, mother, husband, brother, sister, son-in-law, or daughter-in-law of deceased; and in case of all other heirs, devisees, legatees, or next of kin, except wife and children and grandchildren, five per centum on the value of the estate shall be charged.

The only charge then in respect of this estate, imposed by the Act is on the two legacies each of $10,000, so that there could be no possible difficulty in ascertaining the amount of the duty, namely, $1,000, and this amount the executrix has duly paid to the registrar. The registrar has refused to issue the probate "without claiming there is anything which the said executrix or her solicitors herein should lawfully do as a condition precedent to the issuance of the said probate."

The executrix now applies for an order directing the registrar to deliver to the said executrix the probate of the said will.

The Probate Duty Act is silent as to who is to assess or collect the amount of the probate duty. Counsel for the registrar submits that the order should not be made because no application has been made, and the finance department of the Province has not had any opportunity, to assess the probate duty and that the said department does not know what the estate amounts to; that there are certain gifts, *"inter vivos"* which under section 3 of the Probate Duty Act are liable to duty and that the registrar is not "deputed" by the Probate Duty Act to assess or collect the probate duty. As the entire estate, outside the two legacies, goes to the daughter of the testator, there is no part of the estate liable to duty under said section 3.

Probate duty was first imposed in this Province "by virtue of a general order, made by the Chief Justice of the Supreme Court, on the 2nd day of June, 1870." See preamble to No. 34, B.C. Stats. 1872. The registrar has not been able to find this order but no doubt it was made pursuant to The Supreme Court Fees Ordinance, 1870, R.L.B.C. 1871, No. 139, which, in part, is as follows:

. . . it shall be lawful for the Chief Justice of the Supreme Court of British Columbia, from time to time and at any time hereafter, to make all such general Rules and Orders as to him may appear necessary or advisable for altering or varying the Schedule of Fees attached to the said "Supreme Court Fees Ordinance, 1865," and for fixing the costs to be allowed for and in respect of any action, suit, or other proceeding, matter, or thing, either at law or in equity or otherwise howsoever, in the said Supreme Court, . . . , and also the fees to be taken by the High Sheriff and Deputy Sheriffs, and the Officers of the said Supreme Court of British Columbia, . . .

Judgment

It will be noticed that the Act in question provides for "Fees to be taken by . . . the officers of the Supreme Court of British Columbia."

On the 29th of March, 1877, pursuant to the said Supreme Court Fees Ordinance, 1870, the then Chief Justice of the Supreme Court made a general order, approved by the Governor on the 25th of January, 1878, which is to be found at p. 29 of the B.C. Gazette, 1878. Paragraph 1 thereof is as follows:

. . . And thenceforth until further order, there shall and may be demanded and taken by the officers of the Court, and the sheriff, and solicitors, and attorneys, the sums mentioned in the Shedule hereto . . .

And at p. 31 appears the charge on probates.

The provision for charging probate duty was continued by the

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March 20.

RE SAYWARD, DECEASED

Rules of Court, 1890—see Tariff of Fees, Appendix M, p. cxiii. For some reason this provision was not inserted in the Supreme Court Rules, 1906, and as a result an order in council (see B.C. Gazette, 1906, Vol. 1, p. 1133) was passed on the 4th of May, 1906, as follows:

SUPREME COURT RULES.

PROVINCIAL SECRETARY'S OFFICE,

4th May, 1906.

HIS HONOUR the Lieutenant-Governor in Council has been pleased to direct that the Tariff of Fees contained in the existing Rules of Court intituled the "Supreme Court Rules, 1906," be amended by adding the following to the Schedule of Fees payable to the Crown.

By Command,

FRED'K J. FULTON,

Provincial Secretary.

PROBATE.

On every probate and letters of administration, a charge of one per cent. shall hereafter be collected on the value of an estate to father, mother, husband, brother or sister of deceased; and in case of all other legatees, or next of kin, except wife or children, five per cent. on the value of the estate shall be charged. No charge shall be made on the value of the estate to wife or children.

The costs of any action or proceeding in Probate shall be the same as in other cases, and shall be regulated by this Schedule.

Judgment

This order in council was ratified and confirmed by Cap. 31, B.C. Stats. 1907. Section 2 of Cap. 183, R.S.B.C. 1911, again ratified and confirmed the said order in council of the 4th of May, 1906. The Act of 1907 and said section 2 of Cap. 183 expressly mentions only that part of the order in council of May, 1906, commencing with the words "On every probate and letters of administration," etc., but in my opinion the said Acts ratify and confirm the whole of the said order in council, thereby confirming the addition of said charge for probate to the Schedule of Fees payable to the Crown. The said provision, with regard to probate duty does not appear in the British Columbia Supreme Court Rules, 1912, or the British Columbia Supreme Court Rules, 1925.

Section 4 of Cap. 58, B.C. Stats. 1923, repealed Cap. 183, R.S.B.C. 1911, and section 2 thereof is the same as section 2 of Cap. 202, R.S.B.C. 1924, *supra*. So that at least down to the time of the British Columbia Supreme Court Rules of 1912 the provision in regard to the payment of probate duty, was part of the Schedule of Fees contained in these rules (p. 328) payable

to the Crown. It is clear from the description of the other fees herein mentioned that they would be such as would be collected in the Supreme Court registry, and therefore by the officials of this Court. Probates have always been signed and issued by the registrar of the Court.

The registrar informs me that until the passage of the Succession Duty Act, Cap. 39, B.C. Stats. 1907, he assessed and collected probate duty but after the passage of that Act, which, for the first time, set out a form of the affidavit of value and relationship, the deputy minister of finance when fixing the amount of the succession duty, which he was required to do under that Act, also assessed the amount of the probate duty which was collected by the registrar before delivering the probate. That practice continued down to quite recently when the said Succession Duty Act was held *ultra vires*. It is now submitted that the said practice should continue although there never was any warrant for it under the Succession Duty Act.

Judgment

Under the circumstances I fail to see that the finance department has anything to do with the matter. The fact that the probate charge did not appear in the Rules which came into force in 1912 would not change the practice, which had been established for 42 years, of the registrar assessing and collecting the charge. The proceedings are in this Court and there being no provision in the Probate Duty Act upon this point I am of opinion that it must be assessed and collected by the registrar who is "an officer of the Court generally." See section 22, Supreme Court Act. As it is clear that the total amount of the probate duty chargeable upon this estate has been paid, there is nothing left for the registrar to do except to obey the order of this Court, made on the 12th of March last.

The application is granted.

Application granted.

HARPER, CO. J.

1934

Dec. 20.

McGREGOR v. THE HOOVER COMPANY LIMITED.

Male Minimum Wage Act—Board of Industrial Relations—Order No. 10—Contract — Commission basis — Relationship of master and servant—B.C. Stats. 1934, Cap. 47.

McGREGOR v. THE HOOVER CO. LTD.

The plaintiff and defendant entered into a contract known as "Hoover Sales Broker Agreement" in which the plaintiff, described as a "Sales Broker" was appointed to effect sales of Hoover products subject to the terms thereof, the sales broker to receive a commission of 18 per cent. of the retail price of all Hoover products sold by him. The contract provided that the plaintiff act as sales broker within such area as is assigned to him by the district manager of the defendant, who may change the area from time to time; that the plaintiff co-operate at all times with the defendant and conform to its policies, also co-operate with its other sales brokers operating in his territory; that he is not to make any guarantees or warranty to purchasers varying from the standard guarantee given by the defendant, and he was obliged to make a weekly sales report attached to which was required all serial number tags taken from the products sold. All sales made were subject to the approval of the defendant and he was obliged to leave a part of his commission with the defendant as a protection reserve fund. In an action to recover the balance of wages owing under the Male Minimum Wage Act:—

Held, that the defendant still retained such power of oversight and direction over the plaintiff's operations as to bring the contract within the scope of the Male Minimum Wage Act.

ACTION to recover balance of wages owing the plaintiff under the Male Minimum Wage Act, tried by HARPER, Co. J. at Vancouver on the 11th of December, 1934. The plaintiff and defendant entered into a contract known as "Hoover Sales Broker Agreement" in which the plaintiff who was therein described as a "Sales Broker" was appointed to effect sales of Hoover products, subject to the terms thereof. Under the contract the sales broker was to receive a commission of 18 per cent. of the cash retail price of all Hoover products sold by him to users within his territory. During the week of September 10th to 15th, 1934, the plaintiff sold one "Dustette" and was paid a commission thereon of $3.37. The action is for work and service done during that week on an hourly basis at the rate of 40 cents per hour and a minimum of $1.60 per day, pursuant to Order No. 10 of the Board of Industrial Relations made on the 24th of July, 1934.

Statement

Prenter, for plaintiff: The terms of the contract create the relationship of employer and employee as defined by the Act, which is remedial: see *Davenport* v. *McNiven* (1930), 42 B.C. 468. The defendant exercised the control which brings it within *Rex* v. *Gautschi* (1934), 48 B.C. 287: see judgment of MACDONALD, J.A. at p. 293.

Williams, K.C. (*Sigler*, with him), for defendant: The plaintiff is an independent contractor; the relationship of master and servant does not exist: see *Performing Right Society, Ld.* v. *Mitchell and Booker* (*Palais de Danse*) *Ld.* (1924), 1 K.B. 762; *Reg.* v. *Walker* (1858), Dears. & B. 600; 169 E.R. 1136; *Quebec Asbestos Corp.* v. *Couture* (1929), S.C.R. 166; 3 D.L.R. 601; *Montreal L., H. & P. Co.* v. *Quinlan & Robertson. Ltd.* (1929), S.C.R. 385; 3 D.L.R. 568; *Reg.* v. *Marshall* (1870), 11 Cox, C.C. 490; *Reg.* v. *Bowers* (1866), 10 Cox, C.C. 250; *Harris* v. *Howes* (1929), 4 D.L.R. 1066; *Simmons* v. *Heath Laundry Company* (1910), 1 K.B. 543; *Stuart* v. *Pennant School District* (1927), 2 D.L.R. 940; *Cassidy* v. *Blaine Lake Rural Telephone Co., Ltd.* (1933), 3 W.W.R. 641. Argument

20th December, 1934.

HARPER, Co. J.: This action is brought under the Male Minimum Wage Act, B.C. Stats. 1934, Cap. 47, and Order No. 10, made on the 24th day of July, 1934, by the Board of Industrial Relations pursuant to the Act, to recover balance of wages alleged to be owing to the plaintiff.

This action is admitted to be in the nature of a test action to determine whether the plaintiff is an independent contractor or whether the relationship of master and servant exists between the parties of this action.

The facts are not in dispute. The material document in this case is called "Hoover Sales Broker Agreement." The contract being in writing the terms speak for themselves. Is there to be found therein such "control or direction" as to make it a contract of service as distinguished from a contract of services? Judgment

The nature and degree of the control must be considered to determine whether on the contract as a whole there is such "detailed control" which McCardie, J. in *Performing Right Society, Ld.* v. *Mitchell and Booker* (*Palais de Danse*), *Ld.*

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(1924), 1 K.B. 762, speaks of as the "final test, if there be a final test, and certainly the test to be generally applied." At the time it should be borne in mind that the definition of "employer" in the Male Minimum Wage Act is more comprehensive, including not only control but direction. MACDONALD, J.A. in *Rex* v. *Gautschi* (1934), 48 B.C. 287 at p. 293, says:

> Did respondent personally or through its 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 "employer."

The contract here provides that the plaintiff shall act as a sales broker only within such area as shall be assigned to him by the district manager of the defendant, under and pursuant to its territory sales plan. At the option of the district manager, this territory may be changed from time to time. Though not obligated to devote his entire time to this work the plaintiff must "devote a reasonable amount of his time to the selling of Hoover products."

The plaintiff further contracts to co-operate at all times with the Hoover Company and its dealers and "to conform to their policies." The conclusion I draw from this is that in matters of salesmanship the plaintiff is not altogether, as it were, "on his own feet." The defendant corporation and its dealers' powers of regulation of matters of policy are supreme and to these the plaintiff must submit. He is not even independent of other sales brokers within his own territory as by clause (3) he is required to co-operate at all times with other sales brokers operating in his territory.

Judgment

In the matter of giving guarantees or warranties the plaintiff is also not a free agent as he has bound himself to not make any guarantee or warranty to purchasers which varies "in the slightest degree" from the standard guarantee given by the Hoover Company upon its product.

The plaintiff is further obligated to make a weekly sales report and attached thereto he must forward to the defendant company all serial number tags taken from the products sold. All sales made are subject to the approval of the defendant or its dealer and until the signed order is accepted by the dealer, the plaintiff is responsible for all Hoover products in his custody. Moneys

paid to the sales broker must be accounted for to the defendant and he is obliged to leave part of his commission in the hands of the defendant to accumulate as a protection reserve fund.

The agreement is terminable by either party at any time without cause.

Reading this contract as a whole and in the light of the decisions of our Court of Appeal in *Davenport* v. *McNiven* (1930), 42 B.C. 468, and *Rex* v. *Gautschi* (1934), 48 B.C. 287, I do not think defendant surrendered to the plaintiff control. It still retained such power of oversight and direction as brings this contract within the scope of the Male Minimum Wage Act. The duty to co-operate with the dealer and with other sales brokers, the power to designate the territory within which the plaintiff should from time to time work, the prohibition against making warranties or guarantees, the obligation to conform to the policies of the defendant, the necessity to forward serial tags and the fact that the product to be sold was retained by the plaintiff as the property of the defendant, at least until an approved sale had been completed, are, in my opinion, some indicia which lead me to the conclusion that not only the end to be attained by the contract but the manner of carrying it out were kept under the oversight or direction of the defendant.

Judgment

The scope and intendment by the Male Minimum Wage Act has been expressed by MARTIN, J.A. as follows:

> It is only necessary to add, with respect to statutory encroachments upon common law rights, that in view of our local statute and authorities recently cited by me in *Victoria U Drive Yourself Auto Livery, Ltd.* v. *Wood* (1930), [42 B.C. 291]; 1 W.W.R. 522, 634, the former rule of interpretation has been curtailed and the remedial intentions of the Legislature must now be effectuated in the spirit declared by the statute:

Davenport v. *McNiven, supra,* at p. 473.

There will accordingly be judgment for the plaintiff.

Judgment for plaintiff.

ROBERTSON, J.

1934

Nov. 12.

ELKINGTON v. WILLETT

ELKINGTON v. WILLETT.

Mortgage—Mistake—Rectification—Statute of Frauds—Parol evidence.

Rectification of a mortgage of lands by including a parcel of land omitted by mistake may be obtained although apart from the mortgage so rectified, there is no memorandum to satisfy the Statute of Frauds.

ACTION by a mortgagee of lands against the executrix of the mortgagor for rectification of a mortgage of lands by including a parcel omitted from the mortgage.

The action was tried without witnesses upon a special case stated by the parties. The case stated shewed that shortly before the 1st of September, 1922, one W. A. Willett borrowed $2,000 from the plaintiff on a verbal agreement to give the plaintiff a mortgage on his residence and adjoining lands. The residence was on lot 2 and lots 4 and 5 comprised the adjoining lands. The parties both resided at Duncan, B.C. Willett was then employed in the office of Leather & Bevan, who were the plaintiff's agents and looked after all his investments. The plaintiff left the preparation of the mortgage to Willett, who advised him that it had been completed, whereupon the plaintiff made no further enquiry. Later Willett left Leather & Bevan and became the plaintiff's agent. The plaintiff never saw the mortgage until after Willett's death, which occurred on the 31st of March, 1933. It was then found that Willett had prepared a mortgage in the plaintiff's favour, dated the 1st of September, 1922, which, however, was not registered until June, 1926, and the mortgage did not include lot 2, but only lots 4 and 5. Willett had built his residence on lot 2 in 1913, but acquired no registered title thereto until 1930. At the time that he built he held an unregistered subagreement to purchase lot 2 from an agreement holder, whom he paid in full during 1913 and who obtained for him a conveyance from one McLay, the registered owner. Willett failed to register this conveyance promptly and was thereafter unable to get a clear title because McLay had by error given a mortgage over a larger tract including lot 2 to one Dykes. Willett's con-

Statement

veyance remained unregistered. This mortgage was not cleared off until 1928. Willett had obtained lots 4 and 5 long before under a different transaction. Willett at all times since 1913 had continuously been in occupation of lot 2 and had paid all taxes. He died insolvent, but without having made any assignment in bankruptcy. Other material circumstances are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria on the 9th and 12th of November, 1934.

Crease, K.C., for plaintiff: We say that the facts admitted shew mutual mistake. Willett told the plaintiff that the mortgage was completed, which was incorrect. We must assume that he was mistaken; if he stated what he knew was untrue, that would be fraud, and his personal representative cannot allege his fraud. She is in that dilemma. Once mistake is shewn, we are entitled to rectification, notwithstanding the Statute of Frauds, even though there is no written agreement and an interest in land is affected: *Craddock Bros.* v. *Hunt* (1923), 2 Ch. 136; *United States* v. *Motor Trucks, Ld.* (1924), A.C. 196; *Coote* v. *Borland* (1904), 35 S.C.R. 282; *Fordham* v. *Hall* (1914), 20 B.C. 562. It is immaterial that Willett had no registered title to lot 2 when he executed the mortgage on lots 3 and 4; he had an unregistered title; at the worst he could register subject to the Dykes mortgage; in any case we were entitled to have his interest in lot 2 included for what it was worth. If he had included it, as he should, even though he had no title, his later acquired title would feed the estoppel, and give us a good title.

Argument

Copeman, for defendant: We are defending only because there are creditors; and we think we must take any legal objection possible. We rely on the Statute of Frauds. Specific performance can only be ordered where land is involved if there is a written contract; rectification should be dealt with on the same principle. We say there was no mistake; Willett did not include lot 2 simply because when he gave the mortgage he had no title. We do not admit that we are in the dilemma suggested. We simply say the omission was not due to mistake; we are not forced to say what it was due to. Then, again, the plaintiff was negligent and cannot be relieved after Willett has become insol-

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vent: *Campbell* v. *Ingilby* (1887), 1 De G. & J. 393; *Ex parte Coming* (1803), 9 Ves. 115; *Wilson* v. *Balfour* (1811), 2 Camp. 579 at 582.

Crease, in reply: The cases cited do not apply to a specific equity to particular property. We have a specific equity to lot 2 and the creditors have none. If Willett were still alive it would be no defence to our action that he had creditors; they could not interfere. His executrix has no higher rights.

ROBERTSON, J.: This is a special case stated for the opinion of the Court.

Early in 1913 the deceased acquired lot 2, and had he promptly applied for registration at that time he could have obtained a title in the Land Registry office. Apparently he delayed doing so. In May of that year a mortgage was put on the property, and was duly registered on the 28th of May, 1913. That mortgage was not released until the 21st of June, 1928.

The facts stated in the special case shew that prior to the 1st of September, 1922, the plaintiff lent to the deceased $2,000 upon the verbal promise of the deceased to secure the same, with interest thereon at 8 per cent. per annum, by a mortgage upon certain property including lot 2, upon which the deceased's residence was situate. Now at this time the deceased was in a position to have had his title to lot 2 registered subject to the mortgage above mentioned.

Judgment

The deceased was in the employ of Leather & Bevan, real estate agents, at Duncan, who were the plaintiff's agents for making investments, and after the plaintiff had advanced the said loan to the deceased he left the preparation and registration of the promised mortgage to the deceased, who later informed him that he had completed the mortgage promised. The plaintiff relied upon the deceased to protect him, and made no further enquiries.

The mortgage, which is dated the 1st of September, 1922, did not cover lot 2; and it was not until after the death of the deceased, which took place on the 31st of March, 1932, that the plaintiff, who at all times believed that he had a mortgage covering, *inter alia,* lot 2, saw the mortgage, and then found out that lot 2 did not appear therein.

After the death of the deceased an envelope was found amongst his papers marked "W. H. Elkington," and in this envelope, in addition to a counterpart of the mortgage of the 1st of September, 1922, was a certificate of title to lot 2, wherein it appeared that the deceased was at the time of his death the registered owner; and also an insurance policy dated the 16th of April, 1931, which is signed by the deceased as agent for the issuing company; and in this policy appears the following: "Loss if any on buildings only payable to William H. Elkington, Esq., mortgagee." The insurance covered the building on lot 2. On the back of the policy is endorsed the word "dwelling." This policy could only have referred to the residence of the deceased; and shews clearly that he thought that it, and therefore the lot on which it stood, namely, lot 2, was covered by the mortgage to Elkington.

Then, again, the deceased's widow says that she knew from conversations with him that he had given a mortgage to the plaintiff; and always inferred from his statements that the mortgage included the residence on lot 2. And, further, she states that a few days before the death of the said deceased he told her he could not borrow money on the security of the said residence because the plaintiff already held a mortgage on it.

Judgment

The deceased built upon lot 2 in or about 1913.

From all these facts it is clear to me that the deceased intended to give a mortgage covering the said residence and said lot 2 to the plaintiff, and the plaintiff thought he had such a mortgage. It is a clear case of mutual mistake.

Under such circumstances, the law has been laid down clearly in the *United States* v. *Motor Trucks, Ld.* (1924), A.C. 196, that—reading from the head-note—

> Where owing to a mistake common to both parties to a contract in writing it does not express the true bargain between the parties, the Court in England has jurisdiction, since the Judicature Act, 1873, to rectify the contract and to order specific performance of it as rectified, although apart from the rectified contract there is no memorandum to satisfy the Statue of Frauds.

The provisions in our Supreme Court Act correspond, if they are not exactly the same, as the appropriate provisions in the English Judicature Act of 1873.

ROBERTSON, J.

1934

Nov. 12.

ELKINGTON v. WILLETT

It seems therefore clear to me that the order for rectification should go.

There is no necessity to order specific performance because when the document is rectified the plaintiff has all that he is entitled to. Necessary steps can thereafter be taken to effect the registration of the mortgage against lot 2, to which the deceased had at the time of his death a clear title.

Answering, then, the question set out in paragraph 11 of the statement of claim, I am of the opinion that the plaintiff is entitled to that part of the relief claimed by him in the statement of claim, *viz.*, rectification of the said indenture of mortgage dated the 1st of September, 1922, and registered as No. 58,502-G.

Judgment

I should like to add that it is a pleasure to see the very fair way in which the defendant Mrs. Willett, and her solicitor, have acted in this matter.

Costs to follow the event.

Judgment for plaintiff.

TATROFF v. RAY. (No. 2).

COURT OF APPEAL

1934

Nov. 19.

TATROFF v. RAY

Practice—Judgment—Minutes not settled—Appeal—Final judgment to be included in appeal book—Postponement—Rules 718d and 934—Court of Appeal Act, R.S.B.C. 1924, Cap. 52, Sec. 14.

On an appeal coming on for hearing the respondent raised the preliminary objection that the final judgment pronounced had not been perfected in the Court below, and submitted that hence there was no jurisdiction to hear the appeal.

Held, that the appellant is not bound to perfect a final judgment before giving his notice of appeal therefrom but it must be included in the appeal book when the appeal comes on for hearing; it was ordered that this appeal be set at the foot of the list to come on for hearing after the judgment is perfected.

APPEAL by plaintiff from the decision of FISHER, J. of the 21st of July, 1934 (reported, *ante*, p. 24) in an action for foreclosure of a mortgage. Statement

The appeal was argued at Vancouver on the 19th of November, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Craig, K.C., for appellant.

G. L. Fraser, for respondent, raised the preliminary objection that the formal judgment had not been entered; that the trial judge was still seized of the matter, and that this Court has no jurisdiction to hear the appeal. An application to Mr. Justice FISHER to settle the judgment was not heard owing to his illness, and later Mr. Justice D. A. MCDONALD, of the same Court, decided he had no jurisdiction to hear the application. The notice to settle is under rule 934. The final judgment must be entered before an appeal can be heard: see *Clayton* v. *British American Securities Ltd.* (1934), [*ante*] 28 at p. 56; *Rex* v. *Needham* (1931), O.R. 303 at 305. The rule was changed after the case of *Lang* v. *Victoria* (1898), 6 B.C. 117 was decided. Argument

Craig, contra: The judgment is completely settled in the reasons for judgment, and is appealable without entry of the judgment, which could not be done on account of the illness of

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Argument

the trial judge, and by reason of the refusal of the judge sitting in Chambers to sign the formal judgment: *Lang* v. *Victoria* (1898), 6 B.C. 104. This has been the practice for 30 years. It is no answer that the order has not been drawn up and entered. Because two judges below refuse to deal with the judgment that does not deprive us of the right of appeal: see *Dominion Trust Co.* v. *Royal Bank of Canada* (1920), 28 B.C. 360; Annual Practice, 1934, p. 1274.

Fraser, in reply, referred to *Smith* v. *Davies* (1886), 55 L.J. Ch. 496.

MACDONALD, C.J.B.C.: This case does not present any difficulty. I am of opinion that an appeal will lie, but the appellant is not bound to take out the final order before giving his notice, but when he comes before this Court he has to have it in the appeal book.

In the case of *Lang* v. *Victoria* (1898), 6 B.C. 117 the rule we now have that either party may take out the judgment was at that date not in existence, and there was no means of compelling the plaintiff to enter up the order and permit the other party to appeal. The Court overcame the difficulty by recognizing a right of appeal. Now, that is palpably apparent from the judgment of the Court in that case, and for that reason they allowed that appeal to meet the particular objection which would otherwise have deprived the appellant of his rights. The appellant now has the right to take out the judgment and his right to appeal is preserved. That rule, I think, was 718d—the latter part of it. I further refer to rule 12 of the Court of Appeal Rules, as to what the appeal book shall contain. The index should be at the beginning of the case and shew: (a) The date of commencement of the action or other proceedings; (b) Each pleading, order, or entry, with its date. That is what the appeal book must shew—each order, and in any case exactly what has taken place. The order must be taken out and included in the appeal book, and it is just as necessary a document as is the inclusion of the evidence taken at the trial.

MACDONALD, C.J.B.C.

The Chief Justice said in *Lang* v. *Victoria* (p. 118):

I think that the appeal should proceed notwithstanding the judgment has not been drawn up and completed. The Court has decided that the defend-

ant cannot force the plaintiff to complete his judgment nor complete the judgment for him. Hence the defendants' hands will be tied unless they can go on with their appeal in the absence of the formal steps to complete judgment.

That is the reason the Court then intervened in that special case. I entirely agree with Mr. Justice DRAKE, the dissenting judge, at p. 124, when he says this:

> A judgment of the Court for certain purposes speaks from the time it is pronounced, but for the purposes of appeal it has to be perfected. The Full Court can only hear appeals against orders drawn up and perfected. To hold otherwise would introduce uncertainty in practice, where certainty above all things is essential. It would enable dissatisfied litigants to appeal on all occasions, although no order, decree or judgment had been perfected, and thus reduce the practice of the Court to chaos.

MACDONALD, C.J.B.C.

For these reasons I think the appeal book is defective, and I would be in favour of postponing this appeal and putting it at the foot of the list to give counsel the opportunity to cure it.

MARTIN, J.A.: I am happy to think that the discovery of a misapprehension respecting the date of the judgment, and of a subsequent general order (to which, during the luncheon interval, I drew my learned brothers' attention, and to Mr. *Craig's* after we resumed) in *Lang* v. *Victoria* (1898), 6 B.C. 117, has removed any difficulty we might have experienced from that decision, and the reason therefor is made manifest. It happens that I was appointed to the Bench not long thereafter, and having it in mind, I thought there was some special reason for it, and when I began to inquire into it, it at once appeared that it is a correct decision, if I may say so, upon the rules as they then stood (*i.e.*, prior to the change in procedure noted on p. 109, but, unfortunately, there undated, which was made by "general order of Court" subsequent to 21st of February, 1898), and we cannot question it, since it is a decision of the Full Court on its own practice, and so when that decision is properly understood it presents no obstacle to our now resorting simply to rule 934, and all that is necessary to be done is to refer the judgment to the registrar to settle its minutes in the ordinary way (*cf. Clayton* v. *British American Securities Ltd.* (1934), [*ante*] 28 at 56-7; 3 W.W.R. 257) and the learned judge who pronounced that judgment, or some other judge for him (under Order LXII., r. 2) may "approve" it on his behalf so that it may be "signed,

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entered or otherwise perfected" under section 14 (2) of the Court of Appeal Act, and included in this appeal book on which we may then proceed with the hearing of the appeal, which meanwhile should be put at the foot of the list.

The objection to our jurisdiction should be overruled, and the costs of this motion should be in the appeal only, both parties having contributed to the difficulty that has arisen by overlooking the time when said general order came into effect.

MARTIN, J.A.

McPHILLIPS, J.A.

McPHILLIPS, J.A.: I am of the view that the right procedure would be to postpone the hearing of the appeal in order that the error complained of, the absence of the order of the learned judge, may be cured, but the order, I think, should be—the formal order should be if these payments the learned judge directed to be made were made, then the action should stand dismissed, that is, Mr. *Craig* should get an order to that effect, not an order *nisi* for the taking of accounts or anything of that kind, but an order that upon the payments which are mentioned in the judgment should be made, being made, then the action should stand dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that this should be set down on the list until the order is perfected. We are not concerned with the form of that order; that is to be settled by the registrar and signed by the trial judge or by another judge. Upon that being done the appeal will be heard.

MCQUARRIE, J.A.

McQUARRIE, J.A.: I agree.

Preliminary objection overruled.

Solicitors for appellant: *Fleishman & MacLean.*
Solicitor for respondent: *G. L. Fraser.*

ELKINGTON v. WILLETT. (No. 2.)

ROBERTSON, J. (In Chambers)

1935

Jan. 24.

ELKINGTON v. WILLETT

Practice—Mortgage—Foreclosure — Insufficiency of mortgaged property—Immediate foreclosure.

On a motion for judgment in default of defence in a foreclosure action, immediate foreclosure will be ordered if it appears that the allowance of a period for redemption would be a detriment to the mortgagee and no benefit to the mortgagor.

MOTION for judgment in default of defence. The action was to foreclose a mortgage of real estate and the writ, statement of claim, and notice of motion all asked for immediate foreclosure without any period for redemption. The defendant was sued as executrix of the deceased mortgagor, whose estate was insolvent. Affidavits filed shewed that the mortgaged property was dilapidated and could not be rented or sold for the amount of the mortgage until nearly $400 was spent in repairs. Interest was in arrear since 1931 and the plaintiff had paid several years' taxes. Heard by ROBERTSON, J. in Chambers at Victoria on the 24th of January, 1935.

Statement

D. M. Gordon, for plaintiff: We ask for immediate foreclosure, since to allow the usual period for redemption would only be detrimental to the plaintiff and will not help the defendant. The defendant has no hope of redeeming and cannot even pay this year's taxes. The security is depreciating and there will be no revenue until a large sum is spent in repairs. The Court can order foreclosure absolute in the first instance: *Anglican Synod* v. *Russell and May* (1927), 38 B.C. 400; Falconbridge on Mortgages, 2nd Ed., 409. In *Royal Bank* v. *Boorman,* unreported (R. No. 234, 1931, Victoria registry) MCDONALD, J. granted immediate foreclosure. The judgment, dated 22nd February, 1932, which I produce, shews this on its face. In that case the plaintiff was second mortgagee, the security was inadequate, the property produced no revenue and the second mortgagee had to keep making payments on the first mortgage to preserve the security.

Argument

ROBERTSON, J. (In Chambers)

1935

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Judgment

Copeman, for defendant: I cannot consent to the order asked for, but I do not controvert the statements made. Nor can I claim that to grant a period for redemption would be a real benefit to the estate.

ROBERTSON, J.: Since the insolvency of the estate precludes any possibility of redemption, and the property cannot be rented, or sold for the amount of the mortgage, until a considerable sum is spent in repairs, which the plaintiff naturally will not advance until he has title, there seems to be no object in granting a period for redemption, so this is a proper case for immediate foreclosure.

Judgment accordingly.

MCDONALD, J. (In Chambers)

1935

Jan. 31.

MORRISON v. MULRY

MORRISON v. MULRY (No. 2).

Judgment debtor—Examination of—Stay—Claim of judgment debtor against creditor—Stay pending action to establish—Jurisdiction—Terms—R.S.B.C. 1924, Cap. 15, Sec. 19

A judgment creditor obtained an order for the examination of the judgment debtor under section 19 of the Arrest and Imprisonment for Debt Act. The judgment debtor moved for a stay of proceedings under said order upon the ground that he is proceeding to trial with an action against the judgment creditor for an accounting as to certain partnership dealings alleged to have taken place between them extending over a number of years, which was commenced before the present proceedings were instituted.

Held, that there is inherent jurisdiction to grant the stay and that in the circumstances it should be granted but on the terms that the judgment debtor speed the cause in his action.

Humberstone v. *Trelle* (1910), 14 W.L.R. 145, applied.

Statement

APPLICATION for a stay of proceedings under the Arrest and Imprisonment for Debt Act. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. in Chambers at Vancouver on the 29th of January, 1935.

McFarlane, for judgment creditor.
Paul Murphy, for judgment debtor.

31st January, 1935.

MCDONALD, J. (In Chambers)

1935

Jan. 31.

MORRISON v. MULRY

McDONALD, J.: The judgment creditor, having a judgment against the judgment debtor for some $380 debt and $264 costs, obtained an order under the Arrest and Imprisonment for Debt Act, R.S.B.C. 1924, Cap. 15, Sec. 19, for the examination of the judgment debtor. That section provides that a judgment creditor may upon order examine his judgment debtor touching his estate and effects, etc. The only power in the Court, if it be shewn that the judgment debtor has fallen within the purview of the statute, is to commit the judgment debtor to prison. There is no power to order payment by instalments or anything of that sort.

The judgment debtor now moves for a stay of proceedings under the statute upon the ground that he is proceeding to trial with an action which he commenced against the judgment creditor before the present proceedings were instituted. In that action he asks for an accounting as to certain partnership dealings alleged to have taken place between them and extending over a considerable period of years. A stay is asked until that action has been tried. It is conceded that there is inherent jurisdiction to grant the stay but it is contended that the circumstances are not such that the Court in its discretion ought to grant it.

Judgment

I have had the advantage of the most helpful and careful argument from counsel and I have concluded that I ought to follow the principle which I understand to have been enunciated by the late Mr. Justice Beck in *Humberstone* v. *Trelle* (1910), 14 W.L.R. 145, and make the order. That decision I think is not in conflict with, but is rather in line with, the decisions in *Masterman* v. *Malin* (1831), 7 Bing. 435; *Wells* v. *Knott* (1910), 15 W.L.R. 285 and similar cases.

The order will go, costs to be in the cause.

The judgment debtor will be put on terms that in his action he speed the cause. The statement of defence has been delivered and there is no reason why the action should not be set down for trial at an early date.

Application granted.

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LONDON v. CITY OF VANCOUVER

LONDON v. CITY OF VANCOUVER.

Wharf—Unauthorized construction—Nuisance—Navigable waters—Title to soil in bed of—Right of access—Pier of bridge—Obstruction—Injurious affection—Compensation—Arbitration—Notice of proceedings—Limitation as to time—Case stated for opinion of Court—R.S.B.C. 1924, Cap. 13, Sec. 22—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 172 (20) and 226.

The claimant purchased lot 27, block 14, district lot 185, situate on the north shore of False Creek to the west of the foot of Burrard Street in Vancouver on the 20th of February, 1929, for $25,000. On March 18th, 1933, he acquired a lease of water lot No. 5 in front of said lot 27. In 1928 there was erected on and over said property a wooden wharf 64.40 feet wide and about 250 feet long, which extends beyond the present harbour head line of False Creek about 62 feet on the westerly line thereof produced, and about 43 feet on the easterly line thereof produced. The head line was established by the harbour commissioners in 1914 apparently without any order in council authorizing same. The wharf was erected without sanction or permission under the Navigable Waters' Protection Act. The claimant had no title to the *solum* or land covered by water under the wharf at the time when the notice of claim was given, but the wharf was maintained by the claimant and his predecessor in title since its erection. All tugs and scows berthed at the wharf project beyond and outside the area of the said water lot. The water at the end of the wharf is about 14 feet deep at high tide and 2 feet at low tide. Construction work was commenced by the city on Burrard Bridge at its north end in February, 1931, and the fender at Pier No. 4 was completed on April 8th, 1932. Pier No. 4 of the bridge rests in the waters of False Creek about 60 feet south-east of the claimant's wharf. The claimant made claim for compensation with respect to the injurious affection to his property on May 2nd, 1932, and a dispute having arisen between the parties as to whether the claimant was entitled to compensation in respect of alleged injurious affection in the value of his property by reason of interference or restriction of his rights of access to his property, such dispute was referred to a board of arbitration for determination. Pursuant to section 22 of the Arbitration Act the board stated a special case for the opinion of the Court and on the questions submitted:—

Held, 1. (a) That the claimant's wharf as constructed in the navigable waters of False Creek not being sanctioned by law is an illegal structure.

(b) That all that portion of the wharf constructed beyond the harbour head line is an illegal structure and is a public nuisance.

(c) The claimant is in the position of a trespasser so far as the Crown is concerned, but not so far as the respondent is concerned, with reference to that portion of claimant's wharf constructed beyond the harbour head line.

2. The construction of respondent's authorized work renders respondent liable to pay compensation to the claimant for injurious affection in respect to the claimant's said property in so far as concerns any restriction, if any, of the claimant's right of access to or from his said property from or to the navigable waters of False Creek.

3. Assuming there is some restriction of the right of access to or from the claimant's wharf as it now stands, the claimant is entitled to compensation in respect of that portion of said wharf which extends beyond the harbour head line, but he is not entitled now, to any compensation for future restriction as it is unknown at the present time.

4. The claimant's claim is not barred by section 172, subsection (20) or section 226 of the Vancouver Incorporation Act, 1921.

5. The board may take into account in considering the claimant's right to compensation for injurious affection the hope or expectation of having the present wharf legalized or its use not interfered with by any person in authority but not as to having a wharf as may be altered or reconstructed duly authorized and licensed.

6. The board is not entitled to take into account in considering the claimant's right to compensation for alleged injurious affection the possibility of the present harbour head line being re-established further to the southward into the waters of False Creek as it is too remote.

Statement

CASE STATED for the opinion of the Court pursuant to section 22 of the Arbitration Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Vancouver on the 18th and 19th of October, 1934.

A. Alexander, for claimant.

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

5th December, 1934.

Judgment

ROBERTSON, J.: This is a special case, stated for the opinion of the Court, pursuant to section 22 of the Arbitration Act, R.S.B.C. 1924, Cap. 13 (wherein T. W. B. London is referred to as the claimant, and the City of Vancouver as the respondent) as follows:

1. The claimant is owner in his own right of lot 27, block 14, District Lot 185, according to plan of subdivision of the City of Vancouver, Province of British Columbia, which said lot is situate on the north shore of False Creek to the west of the foot of Burrard Street.

2. The claimant purchased said property from the Keystone Holdings Limited on February 20th, A.D. 1929, for the sum of $25,000.

3. Later, on the 18th of March, A.D. 1933, the claimant acquired a lease of the water lot in front of said lot 27 from the Government of the Province of British Columbia, which said lot is known as water lot No. 5 and which said property is shewn on map, Exhibit 1 hereto annexed.

4. There is erected on and over said property a wooden wharf 64.40 feet

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in width by approximately 250 feet in length, which said wharf extends beyond the present harbour head line of False Creek to a distance of some 62 feet on the westerly line thereof produced and to a distance of 43 feet on the easterly line thereof produced, which said wharf is shewn on map, Exhibit 2 hereto annexed. The present harbour head line was established by the Board of Vancouver Harbour Commissioners in that behalf in or about the year 1914, but no order in council of the Governor in Council has been passed in respect thereof.

5. The said wharf was erected without any approval, sanction or permission of or granted by the Governor in Council under the Navigable Waters' Protection Act.

6. The claimant owns or enjoys no paper, documentary or other evidences of title to the *solum* or land covered by water on which such wharf is erected beyond the said harbour head line; but said wharf has been maintained in its present position by the claimant's predecessor in title and the claimant since its erection in 1928.

7. As presently constructed the berthing of any tugs or scows at said wharf requires that all such vessels so berthed shall project beyond and outside of the area of said water lot, either at the sides or the end of said wharf covering the same.

8. Respondent under authority duly granted to it pursuant to the provisions of the Navigable Waters' Protection Act in that behalf under order in council No. 2808 of the Governor in Council dated 6th day of December, 1930, and pursuant to by-law of the City of Vancouver in that behalf duly passed and ratified by the ratepayers of the City of Vancouver on the 11th day of December, 1929, caused to be constructed a steel and concrete bridge known as Burrard Bridge, situate on a line from the foot of Burrard Street in the said City across said False Creek in a southwesterly direction as shewn on plan, Exhibit 3 hereto annexed. The said bridge plans, site and structure were duly authorized and sanctioned by specific authorization granted under the said order in council.

Judgment

9. Pier No. 4 of said bridge rests in the waters of False Creek approximately 60 feet in a southeasterly direction from the claimant's wharf as shewn on said Exhibit 3.

10. The water at the end of said wharf at normally high tide is approximately 14 feet deep. At low tide it is approximately 2 feet deep and at half tide it is approximately 7-8 feet deep and the soundings shewing the depth of water in the vicinity of the said wharf and extending out to the said pier are as shewn on the map hereto annexed and marked Exhibit 4.

11. Construction work at the north end of the said bridge progressed as follows: February 24, 1931: Building wharf at north shore, adjoining Pier 4; March 11, 1931: Excavation at Pier 4 with large dredge started; April 27, 1931: Crib work for Pier 4 placed in position; June 28, 1931: First concrete placed on north shore in footing of northern abutment; July 8, 1931: Commenced pouring concrete for Pier 4; March 22, 1932: Piles for the dolphin at end of Pier 4 driven; April 8, 1932: Fender at Pier 4 completed.

12. The claimant made claim for compensation with respect to the injurious affection of his property by letter addressed to the City of Vancouver dated May 2nd, 1932. The arbitrator appointed by the claimant was appointed on the 16th day of March, 1933, and notice of his appointment was

served on the city clerk on the 18th day of March, 1933. The arbitrator appointed by the respondent was appointed on the 12th day of June, 1934. The third arbitrator was appointed by the above two arbitrators on or about the 16th day of June, 1934. The first session of the board of arbitrators was held on the 4th day of July, 1934. The time within which the arbitrators are required to make their award herein has been extended by order of the Honourable the Chief Justice to the 15th day of October, 1934.

13. A dispute having arisen between the said parties as to whether the said claimant is entitled to compensation in respect of alleged injurious affection in the value of the said property by reason of the alleged interference or restriction of the claimant's right of access to said property, such dispute has been referred to this board of arbitrators for determination.

14. It was contended before us on behalf of the respondent that:

(1) The claimant's wharf is an unlawful work erected without lawful sanction or approval in navigable water and without any authorizing order in council under the Navigable Waters' Protection Act.

(2) The said wharf is constructed beyond the harbour head line of False Creek to the extent of some 60 feet on its westerly line produced and to the extent of some 45 feet on its easterly line produced.

(3) The claimant has no lawful right or title to the *solum* or land covered by water upon which the said wharf rests or is constructed in so far thereof as concerns that portion which extends beyond the harbour head line.

(4) The said wharf is an illegal structure in navigable water and is an obstruction to navigation and constitutes a public nuisance and the claimant is and has been at all times material a trespasser; or in the alternative, that at most his occupation amounts to no more than mere leave or license.

(5) The claimant's claim is barred by the provisions of the Vancouver Incorporation Act, 1921, being chapter 55 of the Statutes of British Columbia, 1921 (Second Session), and more particularly by section 226 and by section 172, subsection (20) of the said Act.

Judgment

15. It was contended before us on behalf of the claimant that:

(1) The fact that the present wharf has been maintained and operated since the year 1928 up to the present time without objection or complaint of any person in authority is evidence from which it is open to us to infer that the wharf is maintained and operated by the leave and license of the proper authorities, or alternatively that the claimant's use and operation thereof will not be disturbed.

(2) The question whether said wharf is an obstruction to public navigation is not a subject for our enquiry and consideration in determining the right of the claimant for compensation for injurious affection under the provisions of section 172 of the said Vancouver Incorporation Act, 1921.

The questions for the opinion of the Court are:

1. (a) Is the claimant's wharf as constructed in the navigable waters of False Creek an illegal structure?

(b) Is all that portion of the said wharf constructed beyond the present harbour head line an illegal structure and does the same constitute a public nuisance as an obstruction to navigation in said water?

(c) Is the claimant in the position of a trespasser in law in so far as concerns that portion of the claimant's wharf constructed beyond the harbour head line?

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2. Does the construction of respondent's authorized work render respondent liable to pay compensation to the claimant for injurious affection in respect to the claimant's said property in so far as concerns any restriction, if any, of the claimant's right of access to or from his said property from or to the navigable waters of False Creek?

3. Assuming that there is (or may be in future) some restriction of the right of access to or from the claimant's wharf as it now stands, is the claimant in law entitled to compensation in respect of that portion of said wharf which extends beyond the harbour head line?

4. Is the claimant's claim barred by the provisions of the Vancouver Incorporation Act, 1921, being chapter 55 of the Statutes of British Columbia (Second Session), and more particularly by section 226, and section 172, subsection (20)?

5. Are we entitled to take into account in considering the claimant's right to compensation for injurious affection the hope or expectation of

(a) Having the present wharf legalized or its use not interfered with by any person in authority;

(b) Having a wharf as may be altered or reconstructed duly authorized and licensed?

6. Are we entitled to take into account in considering the claimant's right to compensation for alleged injurious affection the possibility of the present harbour head line being re-established further to the southward into the waters of False Creek?

Judgment

Section 172 of the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55 (hereinafter called the said Act) empowers the city to exercise various rights of eminent domain, including the construction of bridges, subject to the payment of compensation as follows:

(5) The city shall make or offer to the owners or occupiers of or other persons interested in real property, either before or after the same has been entered upon, taken, or used by the city in the exercise of any of its powers pursuant to this Act, or injuriously affected by the exercise of any of its powers pursuant to this Act, due compensation for any damages necessarily resulting from the exercise of such powers pursuant to this Act beyond any advantage which the claimant may derive from the works carried out by the city, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under the following subsections hereof:

It is objected by counsel for the respondent, that the claim for compensation hereinafter set forth, refers only to injurious affection in connection with the lot, and makes no reference to a claim for damages in respect of the wharf, and therefore in any event the claim in respect of the wharf, is barred by subsection (20) of section 172, *infra*, and alternatively that in any event the claim was not filed within one year, and is barred by said subsection (20) and section 226 of the said Act.

Subsections (20) and (21) of section 172 of the said Act provide as follows:

(20.) Every claim at present existing or which may hereafter arise under this section, except in the case of infants, lunatics, and persons of unsound mind, shall be made within one year from the date when the real property was so entered upon, taken, affected, or used, or when the alleged damages were first sustained:

(*a.*) Provided that, notwithstanding anything in this section contained, in no event shall any claim be made or lie against the city for compensation or damages after one year from the time the cause of action arose, or from the time the damages or injury in respect of which such claim has arisen first occurred, whichever time shall be the latest, but all such claims thereafter shall be absolutely barred:

(21.) The person making any claim shall deliver full particulars of the damages for which such claim is made, and the arbitrator or arbitrators, upon the hearing of the claim, shall have the same power as to amendment generally, or to amend such claim or particulars, or any proceedings had or taken upon the hearing thereof, as a judge would have in an action; and the arbitrator or arbitrators may, in his or their discretion, refuse at any time to hear, upon any matter or question, further evidence of a cumulative character:

Pursuant to these provisions the claimant's solicitors wrote a letter, dated May 2nd, 1932, to the City of Vancouver, as follows:

Judgment

We have been consulted by Mr. T. W. B. London in reference to the damage being done to his property, being lot 27, block 14, D. L. 185, by the construction of the Burrard Street Bridge.

Mr. London has been absent from the city for the past six or seven months and upon returning has discovered that the construction of the Burrard Street Bridge has very seriously affected his property above described. The construction of the piers of such bridge and the piling to protect such piers, has, to a large extent, destroyed the access to the wharf on Mr. London's property. For instance—the wharf was constructed and has been used for the purpose of loading and unloading scows, and large scows cannot now be brought to the wharf and smaller scows can only be manœuvred with the greatest difficulty.

We are instructed by Mr. London to demand compensation for the injury to the property. Mr. London does not necessarily ask that you acquire the entire property, but is willing to submit to arbitration to fix the amount of compensation to which he is entitled as a result of the damage caused to the property. Please let us hear from you immediately in this regard, as otherwise our instructions are to issue a writ in the matter.

Dealing first with the question, as to whether or not the claim includes injurious affection to the wharf, while it will be noticed that the reference at the head of the letter, and in the first paragraph of the letter, is only to the lot, the second paragraph seems to me to make it clear that the claimant was claiming in respect

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of the wharf, because therein it is stated that the bridge has "very seriously affected his property above described," *i.e.*, the lot, and thereafter that "the construction of the piers . . . has . . . destroyed the access to the wharf on Mr. London's property." Now a small part of the wharf may have been on the lot, but the balance of it was on the water lot to which the claimant obtained a lease in 1933, and the bed of the harbour south of the harbour head line, and it was the access to this part of the wharf, to which the letter refers, so that obviously the claim was being made for damages to the wharf; and this is made clearer by the concluding words of the second paragraph, wherein it is pointed out, that "scows cannot now be brought to the wharf," etc.

It seems to me therefore that the reference to the property in paragraph 3 of the letter covers both the lot and the wharf, and, therefore it is not necessary to consider the powers of amendment contained in subsection (21).

Dealing then with the other submission it would appear that on March 11th, 1931, the excavation for Pier 4 with a large dredge, was started and on April 27th, 1931, the crib work was placed in position and on July 8th, 1931, the respondent commenced to pour concrete for Pier 4. It is urged that the claim should have been filed within one year of the crib work being placed in position. I do not see how the claimant could possibly make a claim at this time because he would not know what his damages were or how his wharf or property were to be affected. Said subsection (20) required the claim to be filed "when the alleged damages were first sustained." I think they would be first sustained, when the permanent pier first interfered with the right of access to the wharf, and this could not be before the commencement of the pouring of the concrete. The crib work was, obviously, only a temporary arrangement and there would be no right to damages for this temporary interference with his right.

Judgment

In *Winnipeg* v. *Toronto General Trusts* (1911), 20 Man. L.R. 545, under a very similar section to that in the said Act the learned trial judge held that the owner of land injuriously affected might make his claim for damages within one year of the completion of the work "when the damage actually sustained

could with certainty be ascertained." The Court of Appeal did not find it necessary to deal with this ground as it decided the case on another point.

Again it is submitted section 226 of the city Act applies, but this is a general section applying generally to all proceedings against the city, whereas, section 172, is, in my opinion, a complete code upon expropriation and contains its own limitation subsections as above quoted. Therefore, it seems to me that section 226 has no application.

As will be observed, the respective contentions of the parties are set out in paragraphs 14 and 15 of the special case, and I now proceed to consider these. The claimant owns the lot in fee simple. This lot abuts on False Creek which is a tidal navigable arm of the sea. The claimant purchased this lot in 1929. His predecessor in title built the wharf in question on the foreshore and bed of the sea opposite this lot, in 1928, and when the claimant purchased the lot he also acquired the wharf. The claimant obtained a lease of the water-lot out to the harbour head line in 1933, but this does not assist him, as I think the arbitrators must consider the position, as of the date of the claim, *viz.*, the 2nd of May, 1932. At that time, the claimant and his predecessors in title had occupied and used the wharf for some four years.

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Now dealing with the claim in respect to the wharf, it will be seen that section 175 provides for the city making an offer to (a) the owners, or (b) the occupiers of, or (c) other parties interested in real property, etc., . . . or injuriously affected by the exercise of any of its powers pursuant to this Act. Now the claimant was not the owner of the property upon which the wharf, was, nor was he interested in that real estate, in the sense of having any legal right or claim thereto, but he undoubtedly was the occupier.

The public right of navigation in tidal waters, such as this, is clearly stated by Lord Westbury in *Gann* v. *Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192, at pp. 207-8, where he said:

> The case appears to me to depend on principles which have long been settled.
>
> The bed of all navigable rivers where the tide flows and reflows, and of all

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estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

See also *Gage* v. *Bates* (1858), 7 U.C.C.P. 116 at p. 121, where Richards, J. said:

> If the *locus in quo* is a public navigable river, then it is a public highway, and all her Majesty's subjects of common right may pass over it in boats and fish therein, notwithstanding the grant of the soil by the Crown, for such grant must be taken subject to the public right.

Any substantial interference with the right of navigation is a nuisance—see *The Queen* v. *Moss* (1896), 26 S.C.R. 322 at p. 332; *Kennedy* v. *The Surrey* (1905), 10 Ex. C.R. 29 at p. 40; *Liverpool and North Wales Steamship Company, Limited* v. *Mersey Trading Company, Limited* (1908), 2 Ch. 460 at 473; *Arsenault* v. *The King* (1916), 32 D.L.R. 622; *S.S. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.* (1931), A.C. 300 at pp. 305 and 309.

Judgment

It is a question of fact as to whether the wharf in this case is a nuisance. Pursuant to rule 389 I draw the inference from the facts set out in the special case, that the said wharf does substantially interfere with the right of navigation and I therefore think it is a nuisance. This however does not make the claimant a trespasser so far as the respondent is concerned.

The distinction between a trespass and a nuisance is pointed out in Coulson & Forbes on Waters, 5th Ed., 667, where it is said:

> All infringements of rights of water, natural or acquired, come under one or other of two classes—trespass or nuisance. Where the act complained of is a wrongful disturbance of another in the exclusive possession of property, it is a trespass; where the infringement of the right is the consequence of an act which is not in itself an invasion of property, the cause from which the injury flows is termed a nuisance. "The distinction between nuisance and trespass," says Mr. Angell, "is that the former is only a consequence or result of what is not directly or immediately injurious, but its effect is injurious. A person who digs a channel or erects a dam on his own land, does no more than what is, in itself, lawful; but as the effect of his so doing is to divert the water from a natural watercourse to the loss of a riparian

owner below, or to turn it back to the injury of a riparian owner above, such acts become unlawful,—'the law in such instances taking care,' says Blackstone, 'to enforce the precept of gospel morality of doing to others as we would that they should do unto ourselves.' Trespass, on the other hand, is a direct and immediate invasion of property,—as treading down grass in a neighbour's field, or destroying his enclosures."

The claimant would be a trespasser as against the Crown by reason of his constructing the wharf on Crown lands but, as against the public, the wharf would be a nuisance for which an indictment would lie or it might be abated by the Crown by proceeding under section 5 of the Navigable Waters' Protection Act, *infra*, or by a member of the public who had suffered special injury therefrom. See *Wood* v. *Esson* (1884), 9 S.C.R. 239. It may be that there are wharves in Vancouver Harbour constructed without any authority under the Navigable Waters' Protection Act, which have been there for many years, and upon which large expenditures of money have been made, which do interfere with navigation so that they are, technically, public nuisances. Could it be said in such a case that the respondent could exercise its powers under section 172, perhaps completely destroy the investment of the "occupier" and not be liable for "injurious affection"? It seems to me that word "occupier" governs such a case. In *Perry* v. *Clissold* (1907), A.C. 73, the owner of property was unknown and out of possession. Clissold had been in possession of the property for ten years and had spent considerable money thereon and he had paid taxes, in respect of the land, to the municipality. "Resumption" proceedings being taken by the Crown it was objected that as Clissold was a trespasser, without any estate or interest in the land, he was not entitled to any compensation but the Privy Council said (p. 79):

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It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner.

I turn now to the claim in respect of the lot. As set forth in paragraph 8 of the special case respondent obtained the necessary authority under the Navigable Waters' Protection Act, R.S.C. 1927, Cap. 140, to construct and did construct the bridge in question. Section 4 of this Act, in part, reads as follows:

4. No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained

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in accordance with plans and regulations approved or made by the Governor in Council.

It will be noticed that section 5 of the said Act does not say that, if an owner obtains sanction to build a bridge, he shall not be liable for damages to a riparian owner for injuries to his rights as such. The Act only protects a person, acting in accordance with the provisions, from an action for interference with the general right of navigation which every member of the public has. Mr. *Alexander,* counsel for the claimant, submits that assuming that wharf was not there his client's property has been injuriously affected by the diminished access to it by water.

It is now necessary to consider the claimant's rights as a riparian owner. It is admitted, for the purpose of this hearing, that the right of access may be diminished and, indeed, I think it is a fair inference from the special case, that said right has been diminished. Assuming, then, that the bridge does affect this right, would the claimant be entitled to damages for injurious affection? The cases lay it down that the person alleging that his land has been injured by the construction of a work, and claiming damages for injurious affection, is entitled to compensation, coextensive with the right of action the statute has deprived him of—see *Metropolitan Board of Works* v. *McCarthy* (1874), L.R. 7 H.L. 243. In *Lyon* v. *Fishmongers Co.* (1876), 1 App. Cas. 662, Lord Cairns said in his speech at pp. 671-2:

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> Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an "injurious affecting" of the land, that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf, and the river, may be an injury to the public right of navigation; but it is not the less an injury to the

owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented.

And again at p. 674, he said:

My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation.

In the same case Lord Selborne said at p. 684:

In the words of Lord Justice Mellish (10 Chy. App. at p. 689): "The right of embarking and disembarking, and so using his property as a wharf for the loading and unloading of goods," is, "a most valuable right," and I am at a loss to see why it should not be recognized as entitled to protection under the 179th section of the Thames Conservancy Act, although (as the Lord Justice went on to say), "it arises simply from the fact, that he owns land immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation."

Now in the last-mentioned case the wharf was, I think, on the plaintiff's land above high-water mark, and was not partly over the water, but ships or scows could come up to the wharf.

In *Original Hartlepool Collieries Company* v. *Gibb* (1877), 5 Ch. D. 713, the head-note in part is as follows:

A navigable river is a public highway, navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. Accordingly a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises, if used as a dock, by other vessels.

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Now, in this case, upon the facts, the bridge diminishes the right of access to the claimant's property, by scows or tugs approaching from the east, and also the right to moor the same alongside his property and therefore the claimant would have a right of action against the respondent, and, in this view it seems to me there is injurious affection.

With reference to the question as to whether or not the right to apply for a licence under the Navigable Waters' Protection Act should be considered, I refer to the judgment of Chief Justice Hunter, at p. 227, in the case of *Champion & White* v. *City of Vancouver* (1916), 23 B.C. 221, where he said:

In the case of *Cunard* v. *The King* (1910), 43 S.C.R. 88, the right to apply for a licence to build a wharf was recognized as a legal right, and therefore the value had to be taken into account in expropriation proceedings. In

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that particular case, while the Court was apparently unanimous in that opinion, some of the judges differed as to what ought to be done. The majority of them apparently thought that the chance, or contingent right of obtaining a licence to build a wharf was in that particular case merely of nominal value. In fact, Anglin, J. goes to the extent of saying that it was an application which would, no doubt, not be granted if made. However, all the judges in that case go to the extent of saying that the right to apply for a licence to build a wharf is a right recognized by the law, and that it must be taken into account in compensation proceedings.

For the above reasons I now answer the questions as follows:

1. (a) The wharf, not being sanctioned by law, is an illegal structure.

(b) The said part of the wharf is an illegal structure and is a public nuisance.

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(c) The claimant is in the position of a trespasser so far as the Crown is concerned, but not so far as the respondent is concerned, with reference to that portion of claimant's wharf constructed beyond the harbour head line.

2. Yes.

3. The claimant is entitled to compensation for the present restriction. I do not think he is entitled now, to any compensation for future restriction, as, it is unknown at the present time.

4. No.

5. (a) Yes.

(b) No.

6. No. This is too remote.

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ANDERSEN v. OMINECA SILVER KING MINES LIMITED

Mining law—Location of claims—Company—Claims in name of—Forfeit of charter—Loss of claims—R.S.B.C. 1924, Cap. 157.

The Speculator mineral claim was transferred to the Babine Silver King Mining Company, a corporation of the State of Idaho, by bill of sale recorded in May, 1926. Said company allowed its charter to be forfeited in the State of Idaho on the 30th of November, 1929, and the charter was reinstated on March 18th, 1930. It was registered as an extra-provincial company in British Columbia on May 8th, 1926, and withdrew such registration on July 12th, 1929. When the company forfeited its charter on November 30th, 1929, it held a free miner's licence, good until May, 1930, and it had recorded work on the Speculator which kept the claim in good standing in so far as the work requirement is concerned, until the summer of 1930. The Rex and Rex No. 1 claims were located over the same ground as that of the Speculator on the 4th of March, 1930, and duly recorded.

Held, that notwithstanding the existence of the free miner's licence and the record of assessment work, when the Babine Company forfeited its charter in Idaho on November 30th, 1929, the Speculator mineral claim ceased to be a valid mineral claim on that date, as a mineral claim cannot exist *in vacuo;* it must have an owner, therefore the ground covered by the Speculator was open to location when the Rex and Rex No. 1 were located, and these claims are valid and subsisting mineral claims.

ADVERSE ACTION under the Mineral Act. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 22nd of January, 1935. Statement

A. H. MacNeill, K.C., and *Pratt*, for plaintiff.

F. C. Elliott, for defendant.

29th January, 1935.

MURPHY, J.: Adverse action under the Mineral Act.

At the commencement of the trial defendant's counsel took the objection that the plaintiff's action should be dismissed on the pleadings. Defendant is the owner of the mineral claims Rex and Rex No. 1. Plaintiff in her statement of claim seeks to invalidate these claims on the ground that at the time they were located the lands which they covered were lawfully occupied for mining purposes by the Speculator mineral claim. The mineral claims relied upon by plaintiff in this action are the Contention Judgment

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and Windy mineral claims. Plaintiff asserts that the Rex and Rex No. 1 encroach largely upon the Contention and Windy. The Contention was located on July 29th, 1928, and recorded on 6th August, 1928; the Windy was located on October 10th, 1928, and recorded on October 22nd, 1928; the Rex was located on March 4th, 1930, and recorded on 18th March, 1930; the Rex No. 1 was located on March 4th, 1930, and recorded on March 18th, 1930. If the ground covered by the Rex and Rex No. 1 at the time of their location was lawfully occupied by the Speculator as a valid mineral claim then in so far as the Rex and Rex No. 1 encroach upon the Contention and the Windy mineral claims the ground occupied by these latter claims was also occupied at the date of their location by the Speculator mineral claim. This seems to be the result of the allegations made in the statement of claim. Defendant's counsel argued that as on the pleadings plaintiff shewed herself to have no interest in the ground in controversy she could not maintain adverse proceedings. He cited in support *Voigt* v. *Groves* (1906), 12 B.C. 170. I reserved decision on this motion. In putting in her case plaintiff proved that the Speculator was a valid and subsisting mineral claim on the dates when the Windy and Contention were located. It was further proven in the plaintiff's case that the ground occupied by the Rex and Rex No. 1 lies wholly within the boundaries of said Speculator mineral claim. It was therefore proven in plaintiff's own case that in so far as the Contention and the Windy were encroached upon by the Rex and Rex No. 1 the ground so in dispute was occupied by the Speculator at the dates of the location of the Windy and Contention. In my opinion the point taken by the defendant's counsel is sound (*Voigt* v. *Groves, supra*). If this view is correct then the plaintiff's action must be dismissed. In case, however, I am wrong in so holding, I deem it to be in the interest of the parties that I should adjudicate upon the other points raised. I hold that the Contention and the Windy, in so far as they are encroached upon by the Rex and Rex No. 1, are invalid because they were located over a valid mineral claim, the Speculator, and, consequently, I find that to that extent they are invalid mineral claims. With regard to the Contention I find further on the evidence that its No. 1 post is at the northwest corner of the lands surveyed as

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the said Contention mineral claim and that the No. 2 post of said claim is approximately at the northeast corner of the land so surveyed. The record of the Contention states that the claim lies to the left of the location line. In surveying the Contention claim the surveyor honestly but erroneously assumed the No. 1 post to be placed upon the Homestake mineral claim. The result is that the Contention mineral claim as surveyed is not the Contention claim as located. Had the Contention been surveyed in accordance with its location neither the Rex nor the Rex No. 1 would in any way encroach upon it. This is a further ground upon which plaintiff's action fails in so far as it is based on the Contention mineral claim.

With regard to the Windy mineral claim, I find it is an invalid location on the further ground that the so-called affidavit filed in support of its location is not an affidavit at all. It purports to be made by Leonard B. Gosling on behalf of Thomas S. Davey but it is sworn to by Davey not by Gosling. It is urged that this is a mere irregularity and is cured by the fact that certificates of work have been obtained for the Windy. In my opinion this contention is unsound. The Windy never became a mineral claim at all because one of the essential requirements to make it so under the Mineral Act was not complied with. *Collom* v. *Manley* (1902), 32 S.C.R. 371. I therefore hold that the Contention and the Windy, in so far as they are encroached upon by the Rex and Rex No. 1, are invalid. The Speculator mineral claim was transferred by a bill of sale to the Babine Silver King Mining Company. This bill of sale is dated May 12th, 1925. The Babine Company was a corporation of the State of Idaho and was incorporated May 16th, 1925. Although dated May 12th, 1925, and thus before the Babine Company was incorporated the bill of sale transferring the Speculator to it contains numerous acknowledgments of execution made before a notary public. The acknowledgment of execution by P. J. Higgins, the person who transferred the Speculator to the Babine Company, was taken on July 21st, 1925. The bill of sale itself was not recorded until May 31st, 1926. The inference to be drawn from these facts I think is that the bill of sale was not delivered to the company until after incorporation had been secured and that it is a valid document. The Babine Company allowed its charter to be for-

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feited in the State of Idaho on November 30th, 1928. The corporation was reinstated December 10th, 1928, and again allowed its charter to be forfeited November 30th, 1929. The charter was reinstated March 18th, 1930, and again forfeited December 1st, 1930, and has not since been reinstated. It was registered as an extra-provincial company in British Columbia on May 8th, 1926, and withdrew such registration on July 12th, 1929. From these dates it will be seen that the Rex and Rex No. 1 mineral claims were located at a time when the Babine Company had forfeited its charter in the State of Idaho. It had ceased to exist as a corporation and did not have its corporate existence revived until March 19th, 1930. On November 30th, 1929, when the Babine Company forfeited its charter in Idaho it held a free miner's licence good until May, 1930, and it had recorded work on the Speculator claim which kept that claim in good standing in so far as the work requirement is concerned until the summer of 1930. Despite these facts, in my opinion, the Speculator mineral claim, which it owned on November 30th, 1929, ceased to be a valid mineral claim on that date when the Babine Company forfeited its charter in Idaho. I do not think a mineral claim can exist *in vacuo*. It must have an owner. Further, to hold mineral property in the Province, the owner must be a free miner. By section 2 of the Mineral Act, R.S.B.C. 1924, Cap. 157, "'Free miner' means a person or joint-stock company." By the same section,—

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> "Joint-stock company" means any company for mining purposes
>
> (*a.*) Incorporated, licensed, or registered under the Companies Act or any former Act or Ordinance of the now Province of British Columbia, and being at the time of the exercise or attempted exercise of any privileges contained by this Act still an existing incorporated company:

As the Babine Company on the date when the Rex and Rex No. 1 were located was not an existing corporation and was not then registered in the Province it could not under these provisions be a free miner. I therefore hold that the ground covered by the Speculator was open to location when the Rex and Rex No. 1 were located and that these claims are valid and subsisting mineral claims under the Mineral Act.

The defendant is entitled to costs.

Action dismissed.

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REX v. GEORGE

REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE.

Criminal law—Homicide—Constable—Resisting arrest—Knowledge of cause of arrest—Criminal common law—Accomplice—Evidence of acts subsequent to killing—Admissibility—Criminal Code, Sec. 40.

On the 23rd of May, 1934, one of the accused, Eneas George, an Indian, committed an assault upon his wife with a knife on the Canford Indian Reserve, severely wounding her. At the instance of the Indian agent at Merritt, about twelve miles away, constable Gisbourne with a doctor was sent to the reserve, and finding the woman severely injured, took her to the hospital at Merritt. Gisbourne, with constable Carr, then drove back to the reserve to arrest Eneas, arriving there between 11.30 and 12 at night. Eneas was not in the village but receiving an intimation from others there that he was on a road which led to the back of a row of Indian houses, Gisbourne went over to this road where he saw Eneas with his three brothers, Richardson, Alex and Joseph coming towards him. Gisbourne advanced with an electric flash-light in his hand and said "I want Eneas." One of the brothers then said "Who sent you?" He answered "Barber" (the Indian agent). Gisbourne then said "Nobody can stop me: I am going to perform my duty." He then grabbed Eneas, saying "I am going to take this man to Merritt." Anticipating resistance Gisbourne then called for Carr who was some distance away. Richardson then said "Get hold of the policemen. We are going to fight them." The Indians then attacked Gisbourne and threw him down, Richardson snatching the flash-light from Gisbourne and hitting him over the head with it. Gisbourne managed to get to his feet and he ran some 60 or 70 yards back of the houses and towards the entrance to the reserve, closely followed by the Indians. He then turned and fired his revolver. Joseph fell, and at the same time Eneas and Richardson attacked him with sticks, Richardson hitting him on the head with a heavy stick killing him. The medical testimony was that Joseph's wound in the head may have been caused by a glancing blow from a bullet, but the loss of hearing and concussion from which it subsequently appeared he suffered was due to striking his head when falling or some other blow. Constable Carr then came to Gisbourne's assistance, but on the three men then attacking him he ran through the entrance gate, but they caught up to him just beyond the gate and killed him. They then put the two bodies in the police car, and forcing another Indian to drive it, drove to the main highway between Merritt and Spence's Bridge where they tried to push the car into the Nicola River, but the car struck against a tree on the way down, and as they could not move it they took the two bodies out and threw them into the river. On the trial for murder the three accused were found guilty and sentenced to be hanged. On the hearing of the appeal counsel for

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the defence was allowed to call Joseph as a witness, as he was in the hospital very ill at the time of the trial. Joseph admitted that he and his brothers knew why Gisbourne was about to arrest Eneas.

Held, on appeal, that there should be a new trial, MACDONALD and MCQUARRIE, JJ.A. dissenting.

Per MACDONALD, C.J.B.C.: The arresting officer failed to perform the statutory duty imposed on him by section 40 of the Criminal Code, to notify Eneas of the crime of which he was charged. The statute should be strictly construed and on a proper direction the jury might have found that the duty imposed by section 40 of the Code was neglected without justification, and the arrest was unlawful. There being no instruction to the jury on this pivotal point there should be a new trial.

Per MARTIN, J.A.: That the constable in making the arrest of Eneas without a warrant did so on lawful authority, because it was for an offence which the constable had "reasonable and probable grounds" for believing had been committed by said accused, and for which he could be arrested without a warrant and that as the evidence shewed, since Eneas already knew of the cause of the arrest, it was not a breach of the duty of the constable to refrain from going through the form of repeating that "notice" to him upon arresting him. There was compliance with section 40 of the Criminal Code, but the new evidence of Joseph George is of such substantial weight in determining the crucial facts constituting the commission of the offence charged that "justice requires" that another jury should give their verdict upon it before the sentence imposed can safely be carried into effect.

Per MCPHILLIPS, J.A.: That the conviction should be quashed; but owing to the various views of the members of the Court, would agree that justice will be done by ordering a new trial.

Per MACDONALD and MCQUARRIE, JJ.A.: That there was a common intention to prevent the arrest of Eneas. There was substantial compliance with section 40 of the Criminal Code on the part of Gisbourne on his attempt to arrest Eneas, and no jury acting reasonably would accept the evidence of Joseph in the face of all the established facts.

APPEAL by defendants, convicted on a charge of murder at the Assizes at Vernon on the 30th of June, 1934. The facts are sufficiently set out in the head-note and reasons for judgment of MACDONALD, C.J.B.C. The three accused were found guilty of murder on the trial and sentenced to be hanged.

Statement

The appeal was argued at Vancouver on the 11th to the 24th of October, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Henderson (*Castillou*, with him), for appellants: When Gisbourne came up to the four brothers he told Eneas he had come to arrest him but did not tell him what he was arresting him for.

Argument

and when Eneas resisted arrest Gisbourne fired a shot and Joseph George fell. The other brothers thought Joseph was killed and that is what caused the trouble: see *Rex* v. *Stanyer* (1923), 33 B.C. 223. The policeman did not have a warrant and when they make an arrest without a warrant they must tell what they are arresting him for: see section 40 of the Criminal Code. They had ample time to get a warrant before coming to the reserve. The learned judge should have directed the jury that the statement of the charge on which Eneas was arrested was required. He did not explain the effect of the section, namely, that there was an illegal arrest and the acts of the brothers were justified or were provoked owing to the illegal arrest: see *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1921), 2 A.C. 438 at pp. 450 and 458. Richardson and Eneas did the killing. Alex was present but did not strike either policeman with any club or weapon, though he grappled with both of them. The comments as to Carr was misdirection as no reference should have been made to Carr after Gisbourne was killed. Gisbourne's conduct was such as to irritate these men and this was followed by the supposed shooting of the brother Joseph. This was the killing of a man by reason of his own act. Eneas was resisting an assault as he was not notified of the cause of the arrest: see *Rex* v. *Ricketts* (1811), 3 Camp. 68. There was sufficient time to obtain a warrant for Eneas's arrest, but no warrant was issued: see *Downing* v. *Capel* (1867), L.R. 2 C.P. 461; *The Queen* v. *Cumpton* (1880), 5 Q.B.D. 341; *Rex* v. *Harlton* (1929), 51 Can. C.C. 329 at p. 339; *Cote* v. *Cote* (1923), 32 R.L. 344, 378; *Russen* v. *Lucas* (1824), Ry. & M. 26; *Reg.* v. *Phelps* (1841), Car & M. 180; *Rex* v. *Finlay* (1901), 4 Can. C.C. 539. No charge was laid against Eneas and until section 40 of the Code is complied with there could be no lawful apprehension: see *Montreal Street Railway Company* v. *Normandin* (1917), A.C. 170 at p. 174. The section must be strictly construed: see *London County Council* v. *Aylesbury Dairy Company* (1898), 1 Q.B. 106 at p. 109; Maxwell on Statutes, 7th Ed., 227. On the question of intent see *Reg.* v. *Rowlands* (1882), 8 Q.B.D. 530. There was no evidence that Gisbourne was a police officer: see Roscoe's Criminal Evidence, 15th Ed., p. 9; Maxwell on Statutes, 7th

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Ed., 315. Absence of proof of notification under section 40 opens up the defence of (a) Lack of premeditation; (b) self-defence; (c) provocation, and if the statute is construed as permissive it deprives them of these defences. We say section 40 is imperative: see *Salford Guardians* v. *Dewhurst* (1926), A.C. 619; *Rex* v. *Harvey* (1747), 1 Wils. K.B. 164. On the construction of penal statutes see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 497 to 501; *Parry* v. *Croydon Gas Co.* (1863), 15 C.B. (N.S.) 568 at pp. 575-6; *Rumball* v. *Schmidt* (1882), 8 Q.B.D. 603 at p. 608; *Tuck & Sons* v. *Priester* (1887), 19 Q.B.D. 629 at p. 645; *Leader* v. *Duffey* (1888), 13 App. Cas. 294 at p. 301. There was misdirection in three respects. Dealing with evidence as to the attack on Carr, the moaning of Carr had nothing to do with Gisbourne's death, neither has the evidence given by Carr's wife: see *Graves* v. *Regem* (1913), 47 S.C.R. 568. On evidence of similar acts and facts see Tremeear's Criminal Code, 4th Ed., 1605. Henry Brown was an accomplice after the fact and there were no directions as to an accomplice: see *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81; *Pitre* v. *Regem* (1933), S.C.R. 69 at p. 74; *Rex* v. *Hall* (1928), 21 Cr. App. R. 48; *Rex* v. *Boothby* (1933), 24 Cr. App. R. 112. On the admissibility of evidence of an after event see *Rex* v. *Atkinson* (1934), 24 Cr. App. R. 123; *Rex* v. *Martin; Rex* v. *Ansell; Rex* v. *Ross* (1934), *ib.* 177.

Sloan, K.C., A.G., for the Crown: Eneas stabbed his wife Mary Ann and slashed her with a knife. She was severely wounded and taken to the hospital on the afternoon of the 23rd of May. Gisbourne had reasonable and probable grounds for believing that an offence for which an arrest without a warrant could be made had been committed and that Eneas had committed it. On the interpretation and effect of section 40 of the Criminal Code, at common law a police officer is bound to disclose the reason for arrest unless the person being arrested knew that it was a police officer who was arresting him or knew why he was being arrested, and if a person with this knowledge kills the policeman making the arrest then lack of notice of the cause of the arrest does not reduce the crime from murder to manslaughter. Subsection 2 of section 40 has not changed the common law in this regard. Secondly, subsection 2 of section 40

is directory only and not imperative; the failure to give notice does not *per se* render the arrest illegal. Subsection 3 of said section sets out the result flowing from the failure to give notice of the cause of the arrest. It is an element to be taken into consideration by the jury in coming to a conclusion as to whether or not the arrest could be effected by reasonable means in a less violent manner. The giving of the notice is a condition subsequent to the exercise of a previous capacity derived from the statute. As to the first point, namely, as to whether the legality of the arrest is affected by reason of the failure to use the words of arrest, see *Pew's Case* (1630), 2 Cro. Car. 183; 79 E. R. 760; *Rex* v. *Woolmer* (1832), 1 M.C.C. 334; *Rex* v. *Whithorne* (1828), 3 Car. & P. 394; *Reg.* v. *Bentley* (1850), 4 Cox, C.C. 406. Subsection 2 of section 40 is declaratory of the common law. On the second point, subsection 2 is directory only: see Craies's Statute Law, 3rd Ed., 219; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562. The consequences of the construction must be weighed: see Maxwell on Statutes, 7th Ed., 71. If Gisbourne made a legal arrest under section 30 the failure to tell Eneas what he was being arrested for under section 40 (2) does not reduce the crime to manslaughter: see *Ex parte Budd* (1910), 17 Can. C.C. 235. Section 30 shews it is directory as the authority to arrest is section 30 and section 39 directs how far you may go in effecting an arrest. A police officer not telling the offence and being killed, it is murder if accused knew he was a police officer: see *Rex* v. *Ricketts* (1811), 3 Camp. 68. Richardson said "Let us fight the policeman": see *The Queen* v. *Cumpton* (1880), 5 Q.B.D. 341; *Rex* v. *Harlton* (1929), 51 Can. C.C. 329; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562 at 566; *The Liverpool Burough Bank* v. *Turner* (1860), 30 L.J. Ch. 379 at p. 380. As to the charge, there is a correct charge of section 40 as the trial judge states fully the effect of the section. Breach of duty is one element to be taken into consideration: see *Rex* v. *Wu* (1933), 48 B.C. 24; *Director of Public Prosecutions* v. *Beard* (1920), A.C. 479 at p. 496. We do not have to prove the actual appointment of an officer, the fact that they are acting as officers is sufficient: see Archbold's Criminal Pleading, 28th Ed., 417-8; *Butler* v. *Ford* (1833), 1 C. & M. 662. It is sufficient to prove they acted in the capacity of officers. As to the reasons why subsection 3 of

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section 40 was passed see *Codd* v. *Cabe* (1876), 34 L.T. 453; *Reg.* v. *Carey* (1879), 14 Cox, C.C. 214. Henry Brown was not an accomplice, he was an accessory after the fact: see *Rex* v. *Ratz* (1913), 21 Can. C.C. 343. An accessory after the fact is not an accomplice: see *Rex* v. *Kellen* (1927), 33 O.W.N. 153. Even if Henry Brown were an accomplice, there has been no substantial wrong due to failure to caution the jury: see *Rex* v. *Sowash* (1925), 37 B.C. 1 at p. 19; (1926), S.C.R. 92.

Nicholson, on the same side: Conversation between Barber, Gisbourne and Kerr at the police station is admissible to shew Gisbourne had reasonable and probable cause for the arrest of Eneas without a warrant. When knowledge becomes an element in the case such a conversation is admissible to prove such knowledge: see Phipson on Evidence, 7th Ed., 141; *Chatfield* v. *Comerford* (1866), 4 F. & F. 1008; *Oswald* v. *Mewburn* (1842), 7 U.C.Q.B. (o.s.) 471; *Rex* v. *Smith* (1907), 13 Can. C.C. 326. The evidence of what happened to Carr after Gisbourne's death is admissible on several grounds. The killing of the two and disposing of the bodies is all one transaction. It tends to shew the course of conduct of the three men on the night in question and assists in shewing motive or state of mind when attacking Gisbourne. It tends to rebut the defence suggested in the cross-examination of Joseph Edwards, namely, that they were acting in self-defence or moved by provocation. It is admissible to shew an attempt to get rid of the only white witness present at the time of Gisbourne's killing: see Stephen's Digest on the Criminal Law, 7th Ed., 231; *Rex* v. *Ellis* (1826), 6 B. & C. 145; *Rex* v. *Bond* (1906), 2 K.B. 389 at p. 400; *Rex* v. *Gibson* (1913), 21 Can. C.C. 477 at pp. 484-6; *Rex* v. *Sowash* (1925), 37 B.C. 1. Evidence is admissible of what they did to Carr to shew their motive, actuated by provocation or self-defence. The whole picture should appear and evidence can be given to effect this: see *Rex* v. *Campbell* (1919), 33 Can. C.C. 364 at pp. 369-70; *Rex* v. *Sowash* (1925), 37 B.C. 1 at pp. 19 and 22; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65; *Rex* v. *Hamilton* (1931), 55 Can. C.C. 85 at pp. 92-3; *Rex* v. *Stawycznyj* (1933), 60 Can. C.C. 153 at pp. 115-6; *Brunet* v. *Regem* (1918), 57 S.C.R. 83. As to evidence of similar acts and facts see Tremeear's Criminal Code, 4th Ed.,

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1607. Again as to section 40 of the Code see *Rex* v. *Bevis* (1924), 57 N.S.R. 513. Taking the case as a whole there has been no substantial miscarriage of justice: see section 1014 of the Code. That there was common intent in this case see *Rex* v. *Rice* (1902), 5 Can. C.C. 509.

Henderson, in reply: The cases referred to with relation to section 40 can be distinguished: see Russell on Crimes, 8th Ed., Vol. I., pp. 688-9. In *Pew's Case* (1630), 2 Cro. Car. 183, the arresting person had no time to state what he was arresting the accused for. There is no authority for saying the section is directory. You must not do violence to the fair construction of the statute: see Craies's Statute Law, 3rd Ed., 219 and 441; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562. On the corroboration of an accomplice see *Pitre* v. *Regem* (1933), S.C.R. 69, where the cases are collected.

Henderson, on motion to introduce further evidence: Joseph George a brother of the three accused, who was wounded when Gisbourne was killed, was sent to the hospital and was not able to hear at the time of the trial. I move that he be examined as a witness before this Court: see *Rex* v. *Robinson* (1917), 86 L.J.K.B. 773. The affidavits shew this is material evidence that may affect the result: see *Rex* v. *Wilks* (1914), 10 Cr. App. R. 16; *Rex* v. *Lee* (1916), 12 Cr. App. R. 67; *Rex* v. *Guerin* (1931), 23 Cr. App. R. 39; *Rex* v. *Cumyow* (1925), 36 B.C. 435. Carr's body was found after the trial and evidence of the doctor who examined the body on proceedings before the coroner should be admitted, and Dr. Gillies should be called to correct an error in his evidence.

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Sloan, contra: Gillies's evidence is not changed by the affidavit. His evidence shewed the wound on Joseph was not by a bullet. The evidence that Joseph might give was available through any of the three defendants, and they did not see fit to give it. The evidence is not such as might reasonably affect the jury: see *Rex* v. *Mason* (1923), 17 Cr. App. R. 160; *Rex* v. *Marcus* (1923), *ib.* 187; *Reg.* v. *Chapman* (1838), 8 Car. & P. 558.

[Motion as to the introduction of the evidence of Joseph George (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissent-

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ing), was adjourned until the Court heard the evidence, the evidence to be heard on the 26th of October, 1934, at 11 a.m.]

26th October, 1934.

Joseph George was called, examined by Mr. *Sloan* and cross-examined by Mr. *Henderson*. Mr. *Henderson* then applied for a new trial.

Cur. adv. vult.

12th December, 1934.

MACDONALD, C.J.B.C.: This is an appeal from sentence of death of the appellants pronounced after a trial by a jury.

I will give a broad statement of the principal facts. On the 23rd of May, 1934, one of the appellants Eneas George committed an assault upon his wife at the Canford Indian Reserve and wounded her almost unto death with a knife. As soon as the news reached the Indian agent at Merritt some eight miles away, he sent constable Gisbourne and Dr. Gillies, Jr., to investigate and, if necessary, bring the woman in to the hospital. They did so and found her very seriously injured, put her in their car and were on their way back to Merritt when they met at a place called Fraser's Store, Joseph George a brother of Eneas on his way in to the Indian village from an adjoining reserve for the purpose of rendering assistance to his brother's children. Joseph had been advised that morning by an Indian horseman of the offence against his sister-in-law. Gisbourne told Joseph that he would come back later in the day to arrest Eneas. They then parted, and Joseph proceeded to Eneas's house and was told that his brothers the appellants were repairing a fence somewhere on the reserve. He proceeded to find his brothers and remained with them from that time, namely, late in the afternoon, until midnight when they together were proceeding to the Indian village and were met by Gisbourne at point X on the photograph, Exhibit B I. Gisbourne had gone out late in the evening taking constable Carr with him to make the arrest. He arrived close to midnight and after searching the village for Eneas and not finding him met the four Indians at the said point X on a road leading to the Indian huts. He advanced towards them and said "I want Eneas." One of the brothers said to him "Who sent you?" He answered "Barber" (the Indian agent). Gisbourne

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said "Nobody can stop me. I am going to perform my duty." He grabbed Eneas saying "I am going to take this man to Merritt." He appears to have thought that the arrest was being objected to, and called to Constable Carr, who was some distance away, "Come over. We are going to take all these men." Then Richardson George called to his brothers to "get hold of the policemen. We are going to fight them." He then grappled with Gisbourne who was then thrown down. Richardson got Gisbourne's flash-light and struck him on the head several times with it, the others taking part in the fight. Having got to his feet and recognizing that he was over-matched Gisbourne turned and retreated down the road, the Indians at his heels, Eneas striking him with a stick. On reaching the point Z marked on the said plan about 200 feet from X, the officer turned on his assailants and drawing an automatic pistol fired a shot. Joseph who was with his brothers stepped or staggered back a few paces and fell. There was a wound on his face which the medical testimony suggested might indicate the grazed wound of a bullet. Joseph, it afterwards appeared, had lost his hearing and sustained a concussion of the brain which the medical testimony said could not have been caused by the wound on the face, but was probably caused by his hitting his head on a stone or other hard substance.

After the firing of the shot Richardson seized a large stick of wood and struck Gisbourne over the head with it, killing him on the spot. Carr who had been standing by his automobile a short distance away rushed to the rescue of Gisbourne and was also killed. The appellants then carried the body of Joseph into the Chief's house when it was discovered that he was not dead. Some significant remarks were made by appellants when Gisbourne was killed. A cry of rage arose from the appellants when Joseph who they thought had been killed fell—"Sway [Joseph] is dead. We are going to kill the policeman," which they did as aforesaid.

After carrying Joseph into the Chief's house, the appellants left it and disposed of the bodies of Gisbourne and Carr.

That, I think, is a fair statement of the facts leading up to and including the homicide of Gisbourne. Was it culpable homicide or merely excusable homicide resulting from the affray? That

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question depends upon whether the arrest was lawful or not. Section 40 of the Criminal Code provides the things to be done by an officer when making an arrest. The only defect in the arrest was the failure of Gisbourne to notify Eneas of the cause of it. It was his statutory duty to do this if practicable. On a proper charge the jury might, and I think would have found it entirely practicable on the facts above stated. The jury was not instructed upon this point of the case. Had they been so instructed it might have appeared and I think it would have appeared that Gisbourne had not done all that was necessary to a valid arrest. He had ample opportunity to tell Eneas why he was being arrested. It is said that section 40 is an affirmance of the common law, but even if this be so it must receive its proper construction. It is true that in *Pew's Case* (1630), Cro. Car. 183, referred to in a note to *Rex* v. *Ricketts* (1811), 3 Camp. 68, it was thought unnecessary because there the prisoner was quite well aware of what he was accused of. He was caught in the act. The use of the words "where practicable" seems to me to make the section more imperative where it is practicable. The question of practicability was one of fact for the jury and they should have been instructed on that point in the charge. There being therefore what might have been found by the jury to be no notice to Eneas of the offence of which he was charged, it was open to them to find that the arrest was unlawful and that the case was reduced to that of a mere affray, and if an affray the action of Gisbourne in threatening the appellants and Joseph with death was, in my opinion, legal justification for the homicide of Gisbourne. It was done on the spur of the moment with no time for their passions to cool.

The validity of the conviction depends for its support on the validity of the arrest of Eneas and the affray which followed, since it was one transaction. I think it must be conceded that Gisbourne was a peace officer—section 2, subsection (27) of the Code, also that a warrant was unnecessary, sections 273 and 274 of the Code; but it must be noted that the arresting officer failed to perform the statutory duty imposed upon him to notify Eneas of the crime of which he was charged. There was a suggestion by the Attorney-General that in a case where the prisoner must have known the crime for which he was being arrested, it was

unnecessary to tell him. It is said to be the common law and that it gets some support from *Pew's Case, supra.* But I think that where the necessary acts to be performed in making a lawful arrest are stated in a statute and one of them is that the prisoner should be notified of the cause of his arrest, the statute should be strictly construed to carry out the intention of the Legislature. See also *Barker* v. *Palmer* (1881), 8 Q.B.D. 9 at p. 10; *Rex* v. *Harvey* (1747), 1 Wils. K.B. 164; *Reg.* v. *Carey* (1879), 14 Cox, C.C. 214; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 497.

Here on a proper direction in the charge to the jury the jury might well have found that the duty imposed by section 40 of the Code was neglected without justification and that the arrest was unlawful which would, of course, have put an entirely different complexion upon the case. It is clear from the authorities that in a mere affray where one person is killed, there being justification, the charge of murder may be reduced to manslaughter. Further, eliminating the validity of the arrest there was sufficient ground upon which the jury could find that the homicide of Gisbourne was manslaughter not murder. There being no instruction to the jury on this pivotal point I think the conviction must be set aside and a new trial ordered.

It may be that had Gisbourne told Eneas why he was being arrested and had treated the Indian diplomatically Eneas might have submitted quietly to the arrest and the unfortunate circumstances which I have related avoided. The officer was dealing with Indians, wards of the Government, who might very well have been tractable to an officer coming in contact with them as Gisbourne did. Without wishing to reflect too much on the officer I think he was rather peremptory in his bearing towards the Indians.

MARTIN, J.A.: Since the conviction of the three appellants at the Vernon Assizes on the 30th of June last for the murder of Indian police constable Gisbourne, on the preceding 23rd of May, new evidence was taken by this Court during the hearing of the appeal before us, on the 26th of October last, being that of Joseph George, a brother of the appellants who was not indicted with them nor called as a witness at their trial, though he had

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been present with them at the affray (wherein two brave policemen most lamentably lost their lives) because the serious injuries he had received in the course of it were then believed to have been most probably of a permanent nature which incapacitated him as a witness.

Fortunately, however, he recovered sooner and more completely than was expected, so that when he appeared before us there was, apart from a certain degree of deafness, no apparent obstacle to his giving his testimony in a normal manner.

We decided to allow that new evidence to be given because we thought it was "necessary and expedient in the interest of justice," to do so, pursuant to section 1021 of the Criminal Code, and after having heard it our duty, as declared under section 1014, is to decide whether upon it and upon the evidence given at the trial, we should direct an acquittal, or a new trial, "and in either case make such other order as justice requires"—*cf.* *Hubin* v. *Regem* (1927), S.C.R. 442.

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In the discharge of my duty in this case of exceptional gravity and difficulty I have given very long and careful, indeed anxious, consideration to the whole of the evidence, both old and new, weighing it all together, and have reached the firm conclusion that the new evidence of Joseph George (given, to all appearance, fairly, even to the extent of supporting the Crown's case on an important point) is of such substantial weight in determining the crucial facts constituting the commission of the offence charged, that "justice requires" that another jury shall give their verdict upon it before the sentence imposed upon these three appellants can safely be carried into effect. As the evidence now stands it would, in my opinion, be open to a jury to return a different verdict if they decided to give full credence and effect to that of Joseph George.

In coming to the conclusion that there should be a new trial, I adhere to the wise and long-established rule, which particularly applies to criminal appeals, that the evidence should not in such case, for obvious reasons, be canvassed, unless it is necessary to do so, and the present case is, in my opinion, peculiarly one wherein, for many reasons, the rule should be observed.

With respect to the legal questions in issue, chiefly those

arising out of section 40 of the Code, I shall hand down further reasons at the earliest opportunity.

4th January, 1935.

MARTIN, J.A.: In continuation of the reasons for judgment that I handed down on the 12th of December last I now proceed to give my views upon such questions of law as merit further consideration.

First, with regard to section 40 of the Criminal Code, as follows:

40. It is the duty of every one executing any process or warrant to have it with him, and to produce it if required.

2. It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable of the process or warrant under which he acts, or of the cause of the arrest.

3. A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.

This section was embodied in our original Criminal Code of 1892 as section 32 and is taken from section 42 of the Draft Code of the Criminal Code Bill Commission (composed of Lord Blackburn and Barry, Lush, and Fitzjames Stephen, JJ.) of 1879, at p. 71 of the Report presented to Parliament by the commissioners in that year, and, as pp. 5-7, 10-11, 13-4, -5, 17-8 of the Report shew, it was intended to declare "what the unwritten criminal law is, so far as it is settled," and by references in the margin to shew "how far [the Draft Code] corresponds with and how far it deviates from the existing law," which was done in pursuance of the power conferred upon said learned judges by their commission (p. 3)

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to suggest such alterations and amendments in the existing law as to indictable offences and the procedure relating thereto as may seem desirable and expedient.

At p. 18, the commissioners say in particular, respecting the group of sections in Part III. (entitled "Justification and Excuse for Acts which would be otherwise offences") which contains said section 42 (our section 40):

Sections 25 to 66, both inclusive, contain a series of provisions as to the circumstances which justify the application of force to the person of another against his will. To these we have already referred at some length. We believe that in the main these provisions embody the common law, though

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on some points they lay down a definite rule where the law is at present doubtful, and in others correct what appear to be defects in the existing law. We have noticed in marginal notes the points in which we conceive the law to be altered by these sections.

The only alteration is that indicated in relation to the 3rd clause (our subsection 3) the marginal note to which says, "This is believed to alter the common law," and so it is to be inferred that in the opinion of the distinguished commissioners the two preceding clauses (our subsections 1 and 2) do not alter but "in the main . . . embody it." Mr. Justice Taschereau in the 3rd edition of his Criminal Code (1893), p. 19, says, "this (subsection 3) is believed to alter the common law" and cites the said Report as his authority; and in Crankshaw's Criminal Code, 5th Ed., p. 58 it is said:

> The third clause of this section is believed to alter the common law; but the first and second clauses are declaratory of the common law as held in several cases.

It is to be noted, however, that the said commissioners were so careful of matters of this class, *i.e.*, "Justification and Excuse," that they reported on them specially at p. 10, and concluded:

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> While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law so far as it affords a defence should be preserved in all cases not expressly provided for. This we have endeavoured to do by section 19 of the Draft Code.

That section is:

> COMMON LAW PRINCIPLES. All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act, except in so far as they are thereby altered or are inconsistent therewith.
>
> The matters hereby provided for in this Part are declared and enacted to be justifications and excuses for all charges to which they apply.

With the exception of the final clause (which is not presently relevant) that section is identical with section 16 (formerly 7) of our Code and it has been unanimously declared by the Supreme Court of Canada in *The Union Colliery Company* v. *The Queen* (1900), 31 S.C.R. 81 at 87, that:

> It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

See also the decision of the Ontario Divisional Court (Boyd, C. and Ferguson, J.) in *Rex* v. *Cole* (1902), 5 Can. C.C. 330 at 336; and *Brousseau* v. *Regem* (1917), 56 S.C.R. 22.

The final sentence in the *Union Colliery Co.* case citation is exactly appropriate to this one, because, as shall appear, subsection 2 of our section 40, which is that upon which the present question turns, deals with the matter of giving notice to the accused in ordinary cases but does not purport, either "expressly or by implication to repeal" long established common law "principles" on that point.

I have referred so much to said Report because in expounding our Code to Parliament, on its second reading on 12th April, 1892 (Crankshaw's Criminal Code, 1st Ed., 1893, p. 806 *et seq.*) the Minister of Justice, Sir John Thompson, said that it was "founded on the English Draft Code . . . ., on Stephen's Digest of the Criminal Law (edition of 1887), Burbidge's Digest of the Canadian Criminal Law of 1889, and the Canadian Statutory Law," and that, p. 807:

> The present Bill aims at a codification of both common and statutory law; but it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes.
>
> The common law will still exist and be referred to; and in that respect the Code will have the elasticity so much desired by those who are opposed to codification on general principles.
>
> Substantially, the Bill follows the existing law.

It was to carry out this view and object of the Code that section 7 (now 16) was passed as aforesaid, and the result, as applied to the present question, is that "every one arresting another" may prove such "circumstances of justification" for that act as would entitle him to do it in accordance with the principles of the common law, which must be those laid down by the decisions of the competent Courts of the Realm; and the principle invoked by the Crown in the present case is that the constable in making the arrest of Eneas George without a warrant did so on lawful authority (sections 30, 646-7, Criminal Code) because it was for an offence (wounding his wife by stabbing her) which the constable had "reasonable and probable grounds" for believing had been committed by said accused, and for which he could be arrested without a warrant, and that, as the evidence shewed since Eneas already knew, *i.e.*, had "notice . . . of the cause

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of the arrest," it was not a breach of the "duty" of the constable to refrain from going through the form of repeating that "notice" to him upon arresting him. This submission is, to my mind, sound, and recognized in principle for centuries by high authority beginning with the leading *Pew's Case* (1630), Cro. Car. 183; 79 E.R. 760; Russell on Crimes, 8th Ed., Vol. I., 695, 681-3; Archbold's Criminal Pleading, 29th Ed., 910 (the effect of which is correctly stated in the distinguishing foot-note to *Rex* v. *Ricketts* (1811), 3 Camp. 68, *viz.*: "Where the party knows the officer and his business, the law requires no express notice to be given") and including *Rex* v. *Gordon* (1789), 1 Leach, C.C. 515, 518 (n.); *Rex* v. *Howarth* (1828), 1 M.C.C. 207 (wherein the judges held p. 216 that "the circumstances of the case told him why he was apprehended, and that it was not necessary to tell him what he must have known"); *Rex* v. *Payne* (1833), *ib.* 378; *Rex* v. *Woolmer* (1832), *ib.* 334 (a decision of nine judges) followed in *Reg.* v. *Bentley* (1850), 14 J.P. 671 (the best report) and 4 Cox, C.C. 406; *Rex* v. *Whithorne* (1828), 3 Car. & P. 394; *Rex* v. *Davis* (1837), 7 Car. & P. 785 (by Baron Parke, dispensing with notice to poachers being found and pursued in a wood); *Reg.* v. *Lockley* (1864), 4 F. & F. 155, 159; *Reg.* v. *Carey* (1879), 14 Cox, C.C. 214; and a very apt passage from that very high authority, Mr. Justice Foster's Crown Cases, 3rd Ed., pp. 310-1, *viz.*:

> Or if the officer be within his proper district, and known or but generally acknowledged to bear the office he assumeth, the law will presume, that the party killing had due notice of his intent, especially if it be in the day-time. In the night some farther notification is necessary, and commanding the peace, or using words of the like import notifying his business will be sufficient.

Now in the present case Joseph George admitted that the four brothers knew that the constable had come to arrest Eneas for stabbing his wife and that he told them he "wanted Eneas" and had been sent by Mr. Barber, the Indian agent, for that purpose.

The test of the question is to be found in this: that if this case were being tried today in England, where there is no criminal code or section similar to our said subsection 2, the constable could "justify" his authority and act of arrest by the common law "principle" that since the accused already had "notice" of the cause of his arrest it was not rendered unlawful simply

because the constable did not again notify him of what he already knew, and in my opinion that same justification is preserved to him in Canada by said section 16, as interpreted by the Supreme Court, *supra,* and it would, *e.g.,* furnish a complete defence to a charge of assault or action for false arrest and imprisonment—*cf., Whitworth* v. *Dunlop* (1934), 48 B.C. 161. It would be strange, indeed, if by a useless technical requirement an arrest otherwise lawful could be invalidated, and it is not strange that no case was cited to us, nor have I been able after a most diligent search to find one which, when clearly understood on its different facts (*cf., e.g., Rex* v. *Harlton* (1929), 51 Can. C.C. 329) supports such a submission, and that the law in Canada at the time of the enactment of our Code in 1892 was the same as it is now in England appears clear from this passage from that very sound work of our Criminal Law by Mr. Justice Burbidge, *supra* (relied on by Sir John Thompson, *ante,* as one "foundation" for his Code) at p. 217, *viz.*:

> Notice may be given, either by words, by the production of a warrant, or other legal authority, by the known official character of the person killed, or by the circumstances of the case.

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It would indeed be difficult to imagine stronger "circumstances" for dispensing with a second notice to the accused than are present herein because, as the facts now appear, beyond present question from the new evidence of Joseph George taken before us, it had been decided by the four brothers, after a protracted family discussion of his conduct, that Eneas was to be delivered up to justice to answer the charge of wounding his wife and that his three brothers were to take him to the Indian agent at Merritt the next morning and hand him over, and in pursuit of that resolve and plan they were, close upon midnight, actually accompanying him on their way to the Chief's house on their reserve, where his five children then were, to spend the rest of the night before starting to Merritt in the morning, when they were unexpectedly met in the dark by said Indian police constable Gisbourne, who was well known to them as such, who insisted on taking Eneas at once to Merritt instead of waiting till the morning, to which course the Indians demurred as unnecessary because they were going to do it so soon themselves voluntarily, and that sudden action precipitated the fight that almost immediately began and led to the deplorable killing of the two constables.

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Now, whatever may be the facts in other cases, under such exceptional circumstances as these, *viz.*, knowledge of everything necessary to constitute notice in every essential particular, it would, to my mind, require a clear and compelling authority to make it incumbent upon us to hold that there was "a failure to fulfil" a duty imposed by subsection 2 because the constable did not go through the form of again telling (notifying) Eneas in brief what he already knew in detail. As has been seen, it never was, and is not now, necessary by common law principles, that a constable should do so, and in accordance with the reasoning of the judgment of the Supreme Court in the *Union Colliery Co.'s* case, *supra,* there has, in my opinion, been no change made in those principles by subsection 2 either expressly or by implication.

It follows, therefore, that since, in my opinion, it never was at common law and is not now necessary for a constable to give such notice under present circumstances there has been no failure of duty under subsection 2 and consequently his act of arrest was fully justified by the exercise of his lawful authority.

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Such being the case, what he thus lawfully did is outside the scope of subsection 2 which is designed, as the commissioners say, *supra,* to be "applicable to ordinary cases" and not to those of an extraordinary kind which render the imposition of an ordinary duty superfluous and futile; and therefore this case is excluded from the operation of the subsection, and it also flows therefrom that subsection 3 has likewise no application because it only comes into operation after a failure to fulfil a duty has occurred.

The result of this is that it now becomes unnecessary to consider the question of the section being imperative or directory, because since it does not apply to these special facts at all, its nature and import are irrelevant.

I conclude this first "highly complicated and most unsatisfactory" question by (*vide* Kenny's Outlines of Criminal Law, 14th Ed., 465, citing that great criminal lawyer C. S. Graves, Q.C.) continuing to refrain from discussing the evidence more than is absolutely necessary to bring out the legal point involved, but it is only just to the appellants to note that while the new evidence of their witness Joseph George has strengthened the case for the

Crown on this very important point, and cured, for present purposes in this Court, any objections founded upon the original evidence of notice (which is for the jury to decide) or direction on that head, yet at the same time said new evidence in other respects places their initial acts in a more favourable light, and if given full credence to by a jury would dispose of any suspicion that they had formed a concerted design to prevent the law from taking its due course upon Eneas; *e contrario* it shews that they had among themselves assumed the tribal, or family at least, obligation of delivering him up to the White Man's justice in accordance with ancient precedent in native Indian cases in this Province.

Turning then to the second question, arising out of the submission that Henry Brown, a young Indian, aged 19, living on the reserve, was in law an accomplice, and therefore the usual cautionary direction should have been given to the jury, I am unable to accept that view of his position having regard to the uncontradicted evidence which shews that he witnessed part of the fight but ran away to his father's house before the killing. Later Richardson George came to that house, with blood on his clothing, and a handcuff on one wrist, and compelled him by threats to come out and, against his wish, to drive the car, containing the bodies of the two constables (and three of the brothers), to the Nicola River in which they were thrown by Richardson George, and that they all returned to the Chief's house in the early morning for about three hours and Richardson and Alex George then went up a hill with him and told him to hide some of their clothing, which they took off and changed, and a policeman's baton, and he was warned "not to tell" and was given $10 but later he shewed the police the different places where these incriminating things had been hidden and they were recovered therefrom.

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I have no doubt that under his terrifying circumstances Brown comes within the recent decision of the Irish Court of Criminal Appeal in *Attorney-General* v. *Whelan* (1934), I.R. 518, and that the defence of duress *per minas* would be open to him upon indictment as an accessory after the fact, under sections 71 and 849, which he became by assisting the slayers to escape the consequences of their acts by concealing the bodies, *i.e.*, evidence—

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cf. Rex v. *Levy* (1911), 7 Cr. App. R. 61; and *Rex* v. *Dumont* (1921), 49 O.L.R. 222. There are limitations to this rule, as was pointed out in *Whelan's* case, *supra*, p. 526, *viz.*:

> It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of this general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification. We have not to determine what class of crime other than murder should be placed in the same category. We are, however, satisfied that any such consideration does not apply in the case of receiving. Where the excuse of duress is applicable it must further be clearly shewn that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats.

In the present case, however, there was not that "reasonable opportunity" for reassertion and Brown took no part in the commission of the crime but "only after the felony was complete assisted the felons to elude justice," which, as Erle, J. said in *Reg.* v. *Hansill* (1849), 3 Cox, C.C. 597, 599, "is the question" that determines ordinarily the guilt of an accessory after the fact. Brown, beyond doubt, acted only under the "overpowering of [his] will" and therefore if at the worst he could be regarded at all as an accomplice (and I do not think he was—*Rex* v. *Kellen* (1927), 33 O.W.N. 153; and *cf.* 16 C.J. secs. 1360-3, p. 675) it would only be in a technical and not a true sense, and therefore the usual caution on corroboration became at best a matter of form that could safely be dispensed with, and hence no "substantial wrong or miscarriage of justice has actually occurred" (section 1014 Criminal Code) by its omission.

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Finally, as to the submission that the evidence relating to the disposal of the body of constable Carr should not have been admitted, because the killing of Gisbourne (which alone was charged in the indictment) was undoubtedly completed and that of Carr apparently so, and therefore further evidence concerning Carr was very largely unnecessary and prejudicial to the accused when presented to the jury: in my opinion under the circumstances of this case this objection should not prevail because that evidence was part of the *res gestæ*, and it was necessary in order

to present the whole story of the case to the jury, to tell them what happened to both men from the beginning of the transaction wherein they were both killed till the end of it when their bodies were carried off together and thrown into the river at the same time within a few moments. The fact that, in telling the whole story, it was brought out that Carr was pounded on the head with a stone by one of the accused upon shewing signs of life on the way to the river, and that there still was life in him when thrown into it, does not render the evidence inadmissible but on the contrary it tended immediately to indicate a continuous mental attitude on the part of the accused towards the deceased, and was "so . . . inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances," in which case "the detail of the party's whole conduct must be pursued," as the Irish Court of Criminal Appeal recently held in *Attorney-General* v. *Fleming* (1934), I.R. 166 at 181-2, reviewing the leading cases and adopting the judgment of Kennedy, J., in *Rex* v. *Bond* (1906), 2 K.B. 389 at 399-400, as the *locus classicus* for the statement of the principle, which is in accord with our judgment in *Rex* v. *Sowash* (1925), 37 B.C. 1 at 22. It cannot be doubted, I think, if it had been shewn that upon Carr shewing signs of life the accused endeavoured to revive him and exhibited even at the last moment feelings of humanity instead of a continuous sanguinary tendency, that it would have been the duty of the Crown to put such favourable facts before the jury, and how then can they be excluded if unfavourable? But furthermore, and apart from *res gestæ*, the evidence of the drowning of Carr while still alive was admissible on the ground that the accused were concealing evidence against themselves by destroying a witness of the first importance, thereby putting in force the criminal's dread maxim of safety—"dead men tell no tales."

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It follows that upon all the evidence adduced, below and here, all the legal questions raised should, in my opinion, be decided against the appellants, and so the new trial that ought, I think, to be granted is based only upon the reasons that I have already given.

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McPHILLIPS, J.A.: I merely wish to state that my firm

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opinion is that the conviction of all three should be quashed; but owing to the various views of the members of the Court, under the circumstances I will withdraw that judgment, and agree to a new trial so that no miscarriage can take place.

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MACDONALD, J.A.: Before the judgment of the Court was formally announced I outlined the evidence in detail in written reasons to shew that, in my judgment, the new evidence given before us by Joseph George (evidence which, if true, was within the knowledge of the accused) was not of such weight or character, had it been given at the trial, that it would affect the verdict of the jury. The whole body of evidence, together with undisputed physical facts, made it clear to me, with deference to other views, that no jury of reasonable men would or should accept the story now advanced that—to state it in general terms—practically the first act in the drama for no apparent reason was the firing of a gun by Gisbourne. No jury, in my view, would permit that testimony to displace a mass of consistent evidence shewing beyond reasonable doubt that the firing of the gun was one of the last acts of a man facing death in a particularly brutal and shocking manner at the hands of the accused.

Now that a new trial has been ordered by a majority I withdraw my detailed analysis of the evidence and substitute for it the foregoing statement to support in a general way my view that a new trial should not be granted on that ground. I confine my attention therefore to a discussion of other points in the case.

The main point urged before us was that Gisbourne's arrest of Eneas George was illegal because of failure to state "the cause of the arrest" pursuant to section 40 of the Code. That section reads as follows: [already set out in the judgment of MARTIN, J.A.]

We are only concerned with failure to state to Eneas "the cause of the arrest" because with reasonable grounds for suspecting that he wounded his wife he was subject to arrest without a warrant. The jury too might believe from all the evidence that Eneas knew not only that Gisbourne was a police officer but also what he was wanted for. That question is now placed beyond doubt by the evidence of Joseph George. It would not, however,

be material on the question of legality if literally and in a mechanical way this statement must be formally made by the arresting officer. The case was given to the jury on the basis that the omission to state the cause of arrest—which was assumed—did not affect its legality and if that is true the point is disposed of.

I will assume it is true, as Mr. *Henderson* urged, that the verdict was based upon the charge by the trial judge to the jury of the murder of a constable in the performance of his duty. I think, although alternative positions were placed before them that it was based upon that ground—at all events the accused cannot complain if we assume it. The trial judge, it was submitted, should have told the jury that notice as to "the cause of the arrest" was essential under section 40; that if they found no notice—and the *onus* being on the Crown no other finding could be made—they should have been told that there was no arrest at all but only an assault in which event the defences of provocation and self-defence would be available to the accused.

At common law a police officer making an arrest was bound to disclose the reason for it unless the one apprehended knew he was a police officer. If one with that knowledge killed the arresting officer lack of notice of the cause of the arrest would not reduce the crime from murder to manslaughter. In *Rex* v. *Ricketts* (1811), 3 Camp. 68, relied upon by Mr. *Henderson* it is not part of the case that Webb was a police officer. A foot-note correctly outlines the common law in its reference to *Pew's Case* found in (1630), Cro. Car. 183; 79 E.R. 760, *viz.*, "where the party knows the officer and his business the law requires no express notice to be given." There it was held—and the authority of the case has not, I think, been questioned—that if one kills an officer who is about to execute legal process upon him, he is guilty of murder although the officer uses no words as to the cause of arrest or expresses his intention of making the arrest at all. It does not follow from the phrase that the officer "peradventure had not time" to use words of arrest or to shew the warrant that it would not be murder if he had time and failed to do so. The different result in *Rex* v. *Ricketts, supra,* is due to the fact that Webb was not an officer like Gardiner in the *Pew Case*. At common law, therefore, one

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coming as an officer to arrest, and not offering any other violence or provocation, although he used not the words "I arrest you," . . . nor was demanded the cause, the law presumes it to be malice and murder in him that so kills one being an officer and coming to execute process: (*Pew's Case*) and section 40 subsection 2 does not, as later pointed out, change the common law.

Must an officer go through the form of telling one he finds, *e.g.*, actually committing an offence why he is arresting him? Clearly not. It is always "practicable" to do so, but often quite futile and unnecessary. Where there is, as the Attorney-General put it, authority to make an arrest these details as to acts and manner of effecting it, even if applicable to the case at Bar would have no bearing on the question of validity or legality. Gisbourne's authority to arrest Eneas was derived from sections 30, 646 and 647. By section 30 the peace officer was "justified" in arresting and justification or authority is nowhere in the Code contingent upon use of words introductory to an arrest. It was not necessary to procure a warrant or to lay an information even if time to do so. He might as a police officer arrest on reasonable and probable grounds and he had reasonable grounds for believing that an offence had been committed for which the offender might be arrested without a warrant.

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The authority to arrest is, as stated, derived from the statute and the manner of exercising that authority is a matter of procedure. In *Rex* v. *Woolmer* (1832), 1 M.C.C. 334; 168 E.R. 1293, a common law case, it was held by a majority decision of all the judges that to kill an officer attempting to arrest a man would be murder though the officer had no warrant or failed to notify him of the charge against him even though the man had done nothing for which he was liable to be arrested. If this is not so it would only be necessary for one who slays an officer in the performance of his duty to say that he was not told why he was arrested and thus escape a conviction for murder. If one knows that the man attempting to arrest him is a police officer he must submit to the authority of the law. He may procure redress in due course if it is found that the arrest was not warranted. In *Rex* v. *Whithorne* (1828), 3 Car. & P. 394; 172 E.R. 470 two men, Perry and Smith, were poaching. Gamekeepers (officers) apprehended them. The two prisoners called to a third party

nearby who came up, killed the officer and rescued the other two. All three were charged with the crime. It was objected for the prisoners that as the gamekeepers did not tell them who they were (and in principle it would apply to any other detail such as not telling them the cause of their arrest) the charge should be reduced to manslaughter. Vaughan, B. stated the common law in saying:

> With respect to the keepers' not announcing who they were, there is no pretence for saying that the prisoners did not know that perfectly well. And they did not make any question of their authority. They did not say, "You have no right to take us—Who are you?" or anything of that sort. I am of opinion that this was a legal apprehension, and, being so, all the legal consequences must follow.

In *Reg.* v. *Bentley* (1850), 4 Cox, C.C. 406, the prisoner indicted for cutting and wounding with intent to resist apprehension was arrested by a police constable not in uniform and without a warrant. The officer told him that he wanted him on a charge of highway robbery. Bentley asked the officer for further information relative to the charge. This was refused, whereupon he told him that he would not go to the station-house or submit to arrest "unless he was told why or by what authority he was apprehended." When after this statement the officer proceeded to arrest him he was violently assaulted. The report of the argument of counsel is instructive and the judgment of Talfourd, J. a sound defence of the true view that where the apprehension is lawful one resisting it cannot escape the penalty for so doing by entering into a controversy in respect to details in connection with the arrest or the cause of it. He said:

> If the apprehension is in point of fact lawful, we are not permitted to consider the question, whether or not he believed it to be so, because that would lead to infinite niceties of discrimination. The rule is not, that a man is always presumed to know the law, but that no man shall be excused for an unlawful act from his ignorance of the law. It was the prisoner's duty, whatever might be his consciousness of innocence, to go to the station-house and hear the precise accusation against him. He is not to erect a tribunal in his own mind to decide whether he was legally arrested or not. He was taken into custody by an officer of the law, and it was his duty to obey the law.

That was always the common law and we have only to enquire if it has been changed by statute.

There were however many cases at common law where the failure to produce a warrant was fatal to the validity of an arrest.

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See *Codd* v. *Cabe* (1876), 1 Ex. D. 352 where Mellor, J. at p. 356, said:

> Whenever a warrant has been issued to arrest a person charged with an offence in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it; if he has not, the arrest will be illegal.

See also *Reg.* v. *Carey* (1878), 14 Cox, C.C. 214; *Reg.* v. *Chapman* (1871), 12 Cox, C.C. 4. The law placed safeguards around the liberty of the subject requiring compliance with formalities; otherwise the arrest was illegal. If a warrant was actually issued to arrest for an offence less than a felony and the police officer did not have it in his possession at the time of the arrest there could be no conviction for assaulting a police officer in the course of his duty. In *Reg.* v. *Chapman, supra,* it was held to be manslaughter not murder where an officer attempting to arrest a poacher was killed by him. The officer had seen the warrant but did not have it in his possession at the time. The law, however, in this respect was changed in England by the Criminal Justice Act, 1925 (15 & 16 Geo. V.), c. 86, s. 44, doubtless to avoid the harshness of the rule. In Chitty's Statutes (1926), Vol. 24, it is stated in the foot-note at p. 108 that this section alters the law as laid down in *Galliard* v. *Laxton* (1862), 2 B. & S. 363 and *Codd* v. *Cabe* (1876), 1 Ex. D. 352.

As to our section 40, subsection 3, Taschereau in his work on the Criminal Code (1893) at p. 19 states in a foot-note (then section 32) that "This [now section 40, subsection 3] is believed to alter the common law" and he refers to some of the cases cited herein. Crankshaw in his fourth edition at p. 53 makes—I think correctly—the same observation adding that the first two sections are declaratory of the common law as held in several cases. The common law therefore is not changed by section 40 (1) and (2). The only consequences of failure or omissions, in certain cases, whether as to producing a warrant or omitting to state "the cause of the arrest" (having however no bearing on the question of authority or legality) is now stated and defined. The same authority that prescribed it a "duty" to state the cause of arrest also prescribed the only consequences flowing from omission.

Mr. *Henderson* referred to *Rex* v. *Harlton* (1929), 51 Can. C.C. 329 but on its facts it is not of assistance. I only point out that reference to it shews that there was, p. 342,

no indication in the evidence that Waddell knew that any crime had been committed, or that the accused was suspected of having committed any crime. quite different to the case at Bar where there were good reasons for suspecting that a crime for which a warrant was not necessary had been committed. Indeed Waddell undertook to effect an arrest (he was only asked to watch) against the orders of his superior officer not knowing what the accused was wanted for. It is significant that the question of failure to state the cause of arrest was not raised nor discussed. In *Reg.* v. *Phelps* (1841), Car. & M. 180 it is only necessary to say that the police officer had no right to apprehend Norris. No case was cited nor can I find any where one known by the accused to be a police officer is killed the crime is ever reduced from murder to manslaughter. All the cases shew otherwise. The arrest of Eneas George therefore was legal (Gisbourne laid hands upon him and therefore arrested him after which resistance was offered by all the accused) —it was not merely an assault and no defence of provocation or self-defence was available to the accused. Gisbourne could not give provocation by doing what he had a legal right to do. If therefore section 40, subsection 2 does not change the common law as applicable to the special facts of this case, *viz.*, a police officer, knowledge and notice, it follows that for our purposes we may treat it as if never enacted. There was therefore no breach of duty on Gisbourne's part in failing to tell Eneas the cause of his arrest. The point is more fully dealt with in the admirable judgment of my brother MARTIN in which he gives evidence of great research and I express full concurrence. His reference also to the inapplicability of subsection 3 of section 40 is a necessary *sequitur*.

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Even, however, if wrong in that view (although I base my judgment upon it) I would still arrive at the same conclusion in respect to the validity of the arrest if a higher Court should find that section 40 subsections 1 and 2 do in fact alter the common law on the ground that, in such case, these sections must be treated as directory only. A statute imposing duties need not always be read as imperative. "In general" as stated by Denman, J. in *Caldow* v. *Pixell* (1877), 2 C.P.D. 562 at 566 "the provisions of statutes creating duties are directory." While the statement appears in a civil case the Lord Chancellor's words in

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The Liverpool Borough Bank v. *Turner* (1860), 30 L.J. Ch. 379 at 380 and 381 are applicable to all statutes, *viz.*:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed.

It is always necessary to enquire into the purpose and scope of a statute to ascertain if non-compliance with what may appear to be an imperative duty renders the act itself, in connection with which the failure occurred, a nullity. Clearly in section 40, the duty to state the cause of the arrest is not a condition precedent to the exercise of power or authority to arrest; it is only a condition, which if not observed will be an element in the enquiry referred to in the latter part of subsection 3.

Again while not conclusive, it is of some weight to observe that an imperative rule of conduct usually admits of no avoidance. Here it is only a duty "where practicable"; where not practicable no such duty exists. Authority to arrest cannot very well depend upon the use of words which in some cases may not be necessary at all. In the case at Bar the trial judge held that it was "practicable" to perform this duty. That was a question of fact for the jury but the accused have no ground for complaint on this score.

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The authority for the arrest, as intimated, is found in section 30. Section 39 affords protection to the officer from criminal responsibility (*i.e.*, for assault) in the use of proper force where an arrest is resisted. When the same phrase, *viz.*, "criminal responsibility" is used in section 40, subsection 3, it means the protection referred to in section 39. I think too subsection 3 of section 40 recognizes that what took place where the cause of arrest was not stated was an "arrest" not an assault. The enquiry is, could "the arrest [be] effected" by more reasonable means in a less violent manner? Under section 39 the protection is lost if more force than necessary is used. Under section 40 a breach of two duties, *viz.*, to produce a warrant, if it is required, and to state the cause of the arrest, if practicable will not "of itself" (*i.e.*, without regard to using excessive physical force) deprive the officer of protection; or, to put it another way, it will not at once be assumed because of these omissions that more force

than necessary was used in which case protection was lost under section 39. That, as I view it, is the result. The word "deprive" in subsection 3 is of some assistance. It connotes power to arrest legally notwithstanding these omissions; failure to perform a duty "of itself" does not "deprive" him of his original authority. It has only consequential effects.

I shall not discuss the charge in detail in the light of the foregoing observations. The case in the main was fully and adequately presented to the jury. It is clear that any error in the charge militated against the Crown and was helpful to the accused.

It was submitted that Henry Brown was an accomplice and that the usual caution should have been given. He was not, however, a participant in the killing by act or intent. Only nineteen years old under threats he assisted in the disposal of the bodies and in the concealment of evidence. At the highest he could only be an accessory after the fact and could not have been indicted on the charge of murder (*Rex* v. *Ratz* (1913), 21 Can. C.C. 343; *Rex* v. *Kellen* (1927), 33 O.W.N. 153). Even if there was doubt on the point—and I have none—his evidence accords so completely with the other evidence and the known facts that there is little doubt as to its truth and therefore "no substantial wrong" occurred from the alleged omission. (*Rex* v. *Sowash* (1925), 37 B.C. 1 at 22).

A further ground of appeal is the alleged improper admission of evidence under two heads: First, the conversation between Gisbourne, Carr and Barber in the police office at Merritt on the night of the 23rd of May in respect to the stabbing of the wife of Eneas George before the two officers started for the reserve to arrest Eneas. This evidence was properly admitted to shew that Gisbourne had reasonable and probable grounds for arresting Eneas (section 30) without a warrant. While in general such evidence (conversations in the absence of the accused) is inadmissible yet, where the state of mind or knowledge of probable facts is an issue, acts, statements and declarations from which it may be inferred is not hearsay but original evidence. The evidence referred to at the top of p. 342 in *Rex* v. *Harlton* (1929), 51 Can. C.C. 329 is of a similar character. It is admitted on the prin-

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ciples stated by Cockburn, C.J. in *Chatfield* v. *Comerford* (1866), 4 F. & F. 1008 and the point is not really debatable.

The second objection, *viz.*, that it was improper to admit evidence of the killing of Carr together with a detailed account of what happened to him after the commission of the crime for which the accused were indicted, *viz.*, the murder of Gisbourne, while more debatable is not well founded. Mr. *Henderson* did not object to the admissibility of all this evidence but rather to certain details relating to events subsequent to the killing of Gisbourne, particularly the evidence shewing that Carr, while still alive, as the accused, at all events thought, was thrown into the river. This he complained unduly inflamed the jury. On that point, if it has any weight, each succeeding step in this tragedy was sufficiently revolting to inflame any jury, if they were likely to be unduly influenced thereby. The fact that Carr was battered on the head with a large stone after the alleged ground of provocation was known to be removed (*viz.*, that their brother was killed) was more revolting than the, comparatively speaking, more humane act of throwing his supposedly living body into the river. However, all this evidence was admissible because the killing of both; the joint disposal of the bodies and the secreting of evidence of the crime (blood-stained clothing, etc.) was one continuous act. Their whole conduct until the perpetrators finally quitted the task of killing and concealing was evidence of motive and of the accused's state of mind not only subsequently but at and before the moment they killed Gisbourne. Their conduct in killing Carr might properly be viewed by the jury in determining whether or not the accused were in fact resisting an arrest without just cause or were provoked to attack by the firing of a gun and the supposed killing of Joseph. That alleged provocation ought to pass away with the occasion for it because they knew before killing Carr that their brother was not dead. Evidence too that they also resisted Carr in his vain attempt to arrest Eneas (Carr did not have a gun and according to the evidence he used placatory language towards them) might be considered in deciding whether or not Gisbourne met with resistance in making a similar attempt a short time before. I think too, although it is not necessary to reach a conclusion on this point, that if A murders B in the presence of C and kills C to

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destroy evidence that fact might be given in evidence to shew state of mind. The trial judge admitted all this evidence and on proper grounds and at the same time warned the jury of its proper use. In *Rex* v. *Ellis* (1826), 6 B. & C. 145 it was held that where several felonies were so related as to form part of one transaction evidence of them all may be given to prove the accused guilty of one of them. "Generally speaking" said Bayley, J. at pp. 147-8—

> it is not competent to a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to shew the character of the other.

I shall only refer to *Rex* v. *Bond* (1906), 2 K.B. 389, particularly at 400, where the principles are discussed. The principles are settled (*i.e.*, on the question of design or intent or to rebut a defence otherwise available) in the well-known case of *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 and the only question is their application. Just as the evidence of the death and burial of other infants committed to their care rebutted a defence of a *bona fide* intention to adopt them so the slaying of Carr and each subsequent step taken (its weight is another matter) is evidence rebutting a possible defence inasmuch as it tends to shew that a far more sinister purpose was in the minds of the accused in attacking Gisbourne not merely sudden provocation afforded by flashing a light, or by appearing at midnight or by (if the jury believed it) firing a shot either to wound or to overcome resistance and inducing the act of killing. Provocation (*i.e.*, deprivation of the power of self-control which alone excuses the act), if in truth it exists, soon passes away. The Lord Chancellor, at p. 65, said:

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> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

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I refer also to *Rex* v. *Campbell* (1919), 33 Can. C.C. 364 (and the observations of Harvey, C.J. at 366); *Rex* v. *Bond* (1906), 2 K.B. 389; 21 Cox, C.C. 252 at 259; *Rex* v. *Sowash* (1925), 37 B.C. 1 at 22; *Rex* v. *Hamilton* (1931), 55 Can. C.C. 85; *Rex* v. *Stawycznyj* (1933), 60 Can. C.C. 153; *Brunet* v. *Regem* (1918), 57 S.C.R. 83.

The question of the sufficiency of the charge on the question of common intention was raised. I shall not consider it in detail. I consider the charge of the learned trial judge on this point ample and accurate and do not find in any other parts statements or references that detract from the views there expressed. True he did not ask the jury to take into consideration anything that might have transpired among the accused up to their actual meeting with Gisbourne. He told them that a common intent to resist arrest might be formed instantly—after Gisbourne's arrival. That was putting it to the jury on the narrowest possible ground and if the jury, as they did, found affirmatively on the point, as thus narrowly presented to them, the defence cannot complain. The only new aspect is—in view of the evidence of Joseph George before us on appeal stating that he and the accused for some hours before the arrival of Gisbourne were considering, not resistance to arrest but the actual surrender of Eneas—would this evidence likely lead the jury to a different conclusion on the question of common intent to kill? I am not usurping the functions of the jury in answering that question in the negative. It is the duty of this Court, having decided to admit that evidence, to say, not how it appeals to us but how, in our view, a jury would likely regard it on the point under consideration. I think the evidence of a common intention to resist arrest, at least on the arrival of Gisbourne, is so clear that no other jury could reasonably alter the decision of the first jury on this point. Even if they accepted the evidence of Joseph George, they would be bound to find, as reasonable men, that the actions of the accused upon being accosted by Gisbourne could only be referable to one thought, *viz.*, a determination to prevent the arrest of Eneas. This, of course, would have to be qualified if the jury accepted the new evidence that practically the first act of Gisbourne, without reason or logic behind it, was to fire a gun with results to

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Joseph George so serious that the accused thought he was dead. If that occurred it would change the whole complexion of the case but, as already intimated, I cannot conceive of any jury acting reasonably accepting that evidence in the face of all the established facts.

I have not overlooked other points raised by Mr. *Henderson*. I do not refer to them as I consider them not of such substantial weight as to affect the result. I have not referred either at length to the careful and painstaking charge of the trial judge. While slight errors may have crept in, almost unavoidable on a trial so long and difficult, still, as already stated, in my view, in the anxiety of the trial judge to be fair, they militated against the Crown.

MACDONALD, J.A.

I would dismiss the appeal.

McQuarrie, J.A.: I have carefully considered the evidence adduced at the trial, the charge of the learned trial judge and his report herein. In my opinion it is clear that the appellants with another brother Joseph George formed a common intention to prosecute an unlawful purpose which was to prevent the lawful arrest of one of their number Eneas George, and to assist each other therein.

It is also clear that in furtherance of the said unlawful purpose the appellants killed Francis Hartley Gisbourne.

The learned trial judge conducted the trial in a most careful, fair and impartial manner and I cannot see that there is any merit in any of the objections raised in this appeal by counsel for the defence as to rejection or improper admission of evidence or otherwise in the proceedings at the trial. I do not think that there was any error in the judge's charge prejudicially affecting the appellants, and, in my opinion, the evidence submitted by the Crown fully justified the verdict of the jury, notwithstanding the evidence of Joseph George who gave evidence before this Court on leave previously granted. As a matter of fact it seems to me that Joseph George's evidence strengthened the Crown's case, more particularly in regard to the objection of the defence that the attempted arrest of the appellants or of Eneas George was illegal. In that connection I refer to his evidence, reading as follows:

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Now Joseph when you were down at the fence you were discussing the cutting of Mary Ann with Eneas and your brothers were you not? Yes we were discussing. We were also discussing to take Eneas over to Merritt——

But when Gisbourne came——

Henderson: Well, let him finish answering the question.

Sloan: I thought he had finished.

And we also were afraid that he would commit suicide or something, as he was down-hearted enough.

Henderson: I have an objection that the witness is not allowed to answer the question before my friend propounds another question.

MACDONALD, C.J.B.C.: If he has anything to say he may say it now. Has he answered the question Mr. Interpreter?

Sloan: The last question was, were they discussing the cutting of Mary Ann at the fence, and then he went on to say something else that I did not ask him about. However, you can ask him. Yes, we were discussing that.

Well, that is all I asked him. I did not ask any more. Now, when Gisbourne came you recognized him, did you not, by his voice and appearance before Eneas was grabbed? I did not recognize him at first.

No, but you heard him speak before he grabbed Eneas? Yes, before he said he wanted Eneas.

And you recognized Gisbourne by his voice before he grabbed Eneas? Recognized his voice.

And the man? I recognized his voice and I figured it was him.

And you and your brothers knew why Gisbourne was there that night, did you not, Joseph? I did not—I did not know till we met him.

I know, but after you met him you knew? Yes.

MCQUARRIE, J.A.

And you knew that he had come to take Eneas for the stabbing of Mary Ann, didn't you? We knew. That is the reason that Richardson told him why didn't he come in the day time.

Ask him to just answer the question without any reference to what Richardson said. I say you and your brothers knew that Gisbourne had come to arrest Eneas for the stabbing of Mary Ann? We remember.

He starts off again, he says, we remember. He starts off.

MACDONALD, J.A.: What did he say? He says we remember.

Sloan: Well, answer the question. I will put it another way. I understand, Joseph, that you were going to take Eneas down to Merritt the following day, is that right? Yes.

And you were going to take him down to Merritt to take him to the police station for the stabbing of his wife, were you not? Yes.

So you knew why Mr. Gisbourne came, that he came to take Eneas that night for the stabbing of Mary Ann? Yes, we knew that. We remember, the way he goes again.

Well, the first part of his answer I suppose is the one that governs. He says he knew that. What exactly are the words he uses? He says yes, we knew that.

I would dismiss the appeal.

New trial ordered, Macdonald and McQuarrie, JJ.A., dissenting.

Solicitor for appellants: *H. Castillou.*

Solicitor for respondent: *J. R. Nicholson.*

REX v. WILLIAMS, CLAYTON AND DAVIDSON.

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REX v. WILLIAMS

Criminal law — Libel — Evidence — Accomplice—Corroboration—Charge—Warning to jury.

The accused Clayton and his partner one Walsh conducted a literary bureau and published a paper called the "Daylight." They prepared a defamatory article on one Victor Spencer, and on November 14th, 1933, sent a proof sheet of it by messenger to Spencer with a letter telling him that a denial by him of any part of it would be deleted from the article. Spencer did not reply, and on the 20th of November following another copy of the article was sent to him. On November 24th Clayton was arrested and then let out on bail. A witness one Downs had previous to this visited Clayton and Walsh in their office when Walsh told him "they were going to get money out of Spencer." On December 5th following the accused Davidson and Williams came to Vancouver and took a room in the Austin Hotel where they were drinking. Next day a taxi-driver brought one Lundy to their rooms, Clayton having in the meantime visited the rooms. They then told Lundy "they were going to put a man on the spot for twenty grand," but they needed $300 for financing the publication. Lundy said he could get the money, and on leaving the hotel went to Spencer, told him of the plot, and Spencer's solicitor gave Lundy $100 with which he went back to the hotel and gave it to Williams. Later Davidson and Williams were arrested and the money was found on Williams. Clayton, Williams and Davidson were convicted on a charge of conspiring to publish a defamatory libel. The accused appealed mainly on the ground that Lundy was an accomplice and that the jury was not warned of the danger of convicting on the evidence of an accomplice.

Held, affirming the decision of MORRISON, C.J.S.C., that as Lundy's evidence discloses that he simply took a pretended part in the plot with the object of exposing it, and the other evidence on the trial is not seriously inconsistent with this view of his conduct, the learned judge below was justified in finding that he was not an accomplice, and the appeal should be dismissed.

APPEAL by accused from their conviction by MORRISON, C.J.S.C. on a charge that between the 1st of November and the 8th of December, 1933, they did unlawfully conspire, combine, confederate and agree with each other and with one L. E. Walsh to commit an indictable offence, to wit, to threaten to publish a defamatory libel of and concerning one Joseph Victor Norman Spencer with intent to extort moneys from the said Joseph Victor Norman Spencer.

Statement

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The appeal was argued at Victoria on the 12th, 13th and 14th of June, 1934, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Wismer, for appellants Williams and Davidson: Clayton and one Walsh conducted a "literary bureau." They got out a paper called the "Daylight." A libelous article on Victor Spencer was printed and a copy was sent to Spencer with a letter in November. There was no reply to the letter and four days later Clayton was arrested and charged with publication of a defamatory libel. The paper was never put on the streets, but there was publication by its being sent to Spencer. On the 6th of December following, Davidson and Williams were in the Austin Hotel when Lundy and Whitney came in in the morning. They were all drinking and later Lundy told Spencer of Davidson's and Williams's statement that "they were going to put him on the spot for twenty grand." We submit that the question of accomplice or no accomplice was a matter for the jury. The learned judge should have left it to the jury after explaining the law as to whether Lundy was an accomplice or not, and should have said that if they found that he was an accomplice it was dangerous to convict on his evidence unless there were corroborations: see *Brunet* v. *Regem* (1928), S.C.R. 375; 50 Can. C.C. 1 at p. 5. The learned judge omitted to put the defence of the prisoners or at least he so belittled the defence that the jury was likely to regard the charge as a direction that the defence was not worthy of serious consideration: see *Rex* v. *Deal* (1923), 32 B.C. 279 at p. 283; *Rex* v. *Nicholson* (1927), 39 B.C. 264; *Rex* v. *McCutcheon* (1916), 25 Can. C.C. 310 at p. 312; *Rex* v. *Simington* (1926), 45 Can. C.C. 249 at p. 257.

Argument

Hurley, for appellant Clayton: The article in question was never put on the streets. It was sent to Spencer on November 14th with a letter which was never answered and another letter was sent on the 20th. Spencer then sent one Stacey to see Clayton and Walsh but Clayton told Stacey he merely wanted to know whether the article was true. If he had extortion in mind that was the time he would have put it to Stacey. Clayton was arrested on November 24th and it is admitted there was no conspiracy up to that time. The defence was not adequately put to the jury.

C. L. McAlpine, for the Crown: Clayton and Walsh contemplated getting $50,000 by threatening to publish the article. Lundy could not be termed an accomplice. He paid no attention to the talk of Davidson and Williams until they mentioned Spencer, and then when an opportunity arose he went out and got in touch with Spencer and his solicitor and did what he would not do if he were an accomplice: see *Rex* v. *Gallagher* (1924), 43 Can. C.C. 39 at pp. 44-5; *Rex* v. *Ah Jim* (1905), 10 Can. C.C. 126; *Rex* v. *Berdino* (1924), 34 B.C. 142; 16 C.J. 677; *State* v. *McKean* (1873), 14 Am. Rep. 530; *Rex* v. *Despard* (1803), 28 St. Tri. 346; *Reg.* v. *Mullins* (1848), 3 Cox, C.C. 526; *Gouin* v. *Regem* (1926), 3 D.L.R. 649; *State* v. *Riddell* (1916), 96 Atl. 531; Russell on Crimes, 8th Ed., Vol. II., p. 2128. If the Court is of opinion he was an accomplice, and no objection is taken he is bound: see *Rex* v. *Boak,* 35 B.C. 256 at p. 265; (1925), S.C.R. 525 at p. 536. On December 6th the men in the Austin Hotel were drinking but they knew what they were doing. The learned judge put to the jury the defence adequately and there was no express comment as to the prisoner not testifying: see *Rex* v. *Bagley* (1926), 37 B.C. 353 at p. 369; *Rex* v. *Brayden* (1926), 46 Can. C.C. 336 at p. 341; *Bigaouette* v. *Regem* (1926), 47 Can. C.C. 271. Argument

Wismer, in reply, referred to *People* v. *Bollinger* (1886), 11 Pac. 799; *Rex* v. *Evans* (1934), 48 B.C. 223; *Rex* v. *Smith* (1916), 12 Cr. App. R. 42; *Rex* v. *Brooks* (1906), 11 Can. C.C. 188; *Allen* v. *Regem* (1911), 18 Can. C.C. 1 at p. 7.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.: Williams, Clayton and Davidson were convicted of conspiracy for threatening to publish a defamatory libel of and concerning one Joseph Victor Norman Spencer with intent to extort money from him. They were tried together by a jury. The evidence given by the Crown witnesses fully sustains the charge. Clayton was sentenced to four years in the penitentiary and the other two to two and one-half years each. MACDONALD, C.J.B.C.

The substantial ground of appeal is that the principal witness for the Crown, Lundy, was an accomplice and that the jury was

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not warned of the danger of convicting on the evidence of an accomplice. Lundy was not held by the judge to be an accomplice, therefore no warning was given, nor do I think it was required. The libel and the intent to extort money by its threat of publication was hatched by appellant Clayton and his partner one Walsh who disappeared from the scene and thus escaped prosecution. Copy of the libel was prepared by Clayton and delivered by a messenger to Spencer with a request to deny anything therein if he could, and an intimation that if he did make denial of any part of it Clayton if satisfied that the denial was true would delete the part denied. The witness Lundy's evidence makes out a complete case against all three accused. The witness Downs gave evidence against Clayton but not against the other defendants. Whitney another witness was cross-examined by defendants' counsel and from his evidence it appears that he and Lundy went to the Austin Hotel. Whitney knew Davidson and Williams and met them there where they remained drinking together until three o'clock in the afternoon, Clayton being present part of the time. His evidence is of very little importance either for or against any of the defendants. It is clear that he does not connect Davidson and Williams with the offence.

MACDONALD, C.J.B.C.

Detective Ellice served a search warrant and said that Clayton admitted the sending of the Spencer letter. Ellice asked Clayton his idea in sending it. He replied, "There is money in this sort of business." John Berry a detective went to the door of the room in the Austin Hotel where he heard loud conversation and threats about playing fair. He searched Williams and found $100 marked money on him. This money had been supplied to Lundy by Spencer's solicitor, Lundy having left the party at about 3 p.m., and gone to acquaint Spencer of his discoveries. In the room referred to Detective Kinnear said there were Williams, Lundy and Davidson. No objection was taken by counsel for the prisoners to the absence of warning to the jury in the charge. I find it impossible to say that there was error in this respect on the part of the learned judge. Presumably he did not regard Lundy as an accomplice and on the evidence before him he may well have believed he was not an accomplice and having charged the jury on that footing I cannot say that he was wrong.

I have read the other grounds of appeal and think they do not require extended notice. The case was left fairly with the jury and I think their verdict is fully sustained by the evidence. I would dismiss the appeals from conviction.

They also appeal from sentence. These appeals should also be dismissed.

MARTIN, J.A.: With all due deference to the contrary opinion of my learned brothers, this appeal should, in my opinion, be allowed because of misdirection and non-direction amounting to misdirection in the charge to such an extent that the evidence on behalf of the accused was not fairly presented to the jury, particularly in explanation of and in relation to the more than suspicious conduct of the principal Crown witness, Lundy, and as a whole the evidence on their behalf was so inadequately put to the jury and belittled in comparison to that adduced by the prosecution, that, to use the appropriate language of section 1014 (2) of the Criminal Code "a substantial wrong or miscarriage of justice has actually occurred" and therefore a new trial should be directed.

MARTIN, J.A.

I only add, with respect to the submission, made to us but not below, that said Lundy was in truth an accomplice, that while that *status* is a question of fact to be determined by the jury, yet if there is nothing more than a scintilla of evidence to go to them on that point, the judge may properly refrain from submitting it particularly where, as here, with only weak evidence at most, he was not asked to do so, which, under the present weak and doubtful circumstances, should "turn the scale" in support of his view and action—*Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, 127-8.

MACDONALD, J.A.: I have read the evidence carefully and have no doubt that if the jury chose to accept the evidence of Lundy with all its infirmities they might reasonably convict Williams and Davidson. As to Clayton, although it is surprising that without any apparent reason his partner Walsh should outline the plot to the witness Downs in Clayton's presence, there was ample evidence to support his conviction.

MACDONALD, J.A.

The only question for consideration is the submission of error

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in law in instructing the jury. It was urged that Lundy was an accomplice and that the customary warning as to corroboration was not given. He concluded, it was submitted, an agreement with the accused to participate in the spoils before he reported their activities to Spencer. After that he took part in plans to trap them. Asked, however, "Did you have any intention at any stage to go through with this transaction," *i.e.*, the scheme to extort, he replied "Absolutely not."

Was it necessary to submit to the jury the question as to whether or not Lundy, who played the part of an *agent provocateur,* was an accomplice when his evidence shews that he simply took a pretended part in the plot with the object of exposing it. Other evidence in the book is not seriously inconsistent with this view of his conduct. I think Stuart, J.A. in *Rex* v. *Gallagher* (1924), 43 Can. C.C. 39 at 40 is right in saying that

> it is a question of fact for the jury whether a witness is an accomplice or not after the presiding judge has instructed them as to what constitutes an accomplice and has decided that there is evidence from which the jury could reasonably infer that the witness comes within that category.

MACDONALD, J.A.

The evidence of the alleged accomplice in that case is fully outlined but as in the view of the learned judge "although there was perhaps a faint scintilla of evidence of a criminally corrupt purpose on O'Rourke's part of an intention to aid and abet" a jury could not reasonably infer it and a judge if he were trying that case alone should withdraw it from the jury. If a police agent—as often occurs—pretends to take part in a crime to secure a conviction it is not necessary for the trial judge to submit to the jury the question of whether or not he is an accomplice unless there is evidence from which a jury might reasonably infer it. No different principles apply to a lay witness who fills the same role. I cannot say therefore, even assuming that I might be of opinion that there was more than a scintilla of evidence, that the trial judge was clearly wrong in concluding—as we must assume he did—that there was no question to submit to the jury in this respect. Similarly where the evidence is clear or the fact apparent from the nature of the case (*e.g.*, criminal operations) that one is an accomplice it is not necessary to submit the question to the jury. It is only necessary to caution the jury as in *Rex* v. *Baskerville* (1916), 2 K.B. 658. If of course there is reasonable

evidence indicating that such a witness is an accomplice the question should be submitted to the jury coupled with the usual caution in case of an affirmative answer. Even if I am wrong in my conclusion—and I do not think so—it would in view of other corroborative evidence be difficult to say that a miscarriage of justice occurred.

Other grounds of appeal equally applicable to all accused were (a) failure in the charge to segregate the evidence as applicable to each of the accused and (b) failure to place or to adequately place the respective defences to the jury. It would have been better to point out that certain evidence applied only to one or other of the accused. The evidence of Downs, for example, incriminated Clayton only. That of course ought to be clearly apparent to the jury and the omission should result in no serious prejudice. The defence too including the condition particularly of Davidson from drinking might have been presented in more detail. In all trials the defence of the accused whether weak or strong should be presented to the jury with the same meticulous care as the case for the Crown. That is an obvious essential of even-handed justice. We must on appeal be satisfied however that errors in this and other respects outlined result in a substantial wrong before disturbing a conviction and I am not so convinced.

MACDONALD, J.A.

I would dismiss the appeal.

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

MCQUARRIE, J.A.

Appeal dismissed, Martin, J.A. dissenting.

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Jan. 8.

IN RE LEWIS, DECEASED

IN RE ESTATE OF THOMAS DANIEL LEWIS, DECEASED.

Testator's Family Maintenance Act—Husband and wife—Agreement making provision for wife on husband's death—Covenant by wife not to invoke Act—Not a bar to jurisdiction of Court—R.S.B.C. 1924, Cap. 256.

A testator had seven children by his first wife, all of them being of age when he married his second wife (the petitioner) in May, 1927. Shortly after the petitioner built an apartment-house in California, but she had to borrow $5,000 from her husband to complete it and later a further $1,500, to pay taxes and other expenses. On June 22nd, 1929, husband and wife entered into an agreement with a view to providing for the wife after the husband's death, whereby the testator released the wife from repayment of the above sums, agreed to pay her $10,000 on the execution of the agreement, and to enter into a declaration of trust whereby a $10,000 Dominion bond and a $5,000 insurance policy be delivered to her at his death, she agreeing to accept same as adequate provision for her at the time of testator's death, and covenanting to release all marital rights she may have whatsoever. Later the wife borrowed a further $6,000 from the testator which by agreement was charged against the above bond. Testator died in September, 1933, and by his will left his house in Oak Bay, B.C., to his wife for life. His estate was valued at $101,834. On the wife's petition under the Testator's Family Maintenance Act it was held that adequate provision had not been made for her and the executors were ordered to pay an additional $45 per month for her maintenance until further order.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that a settlement on the wife including a term that she would not make an application under the Act is not a bar to the jurisdiction of the Court below to make an order under its statutory powers. Such a contract has evidential value and should be considered in the Court below in deciding the need of maintenance, but does not preclude the Court "not merely in the interests of the wife but of the public" from making an order on proper grounds under the statute.

Statement

APPEAL by the beneficiaries of the estate of T. D. Lewis, deceased, from the decision of MORRISON, C.J.S.C. of the 28th of June, 1934, on the petition by the wife of the testator for adequate provision for maintenance out of deceased's estate. At the time of his death deceased had seven children by his first wife, all of them being of age. The petitioner was married to deceased on the 26th of May, 1927. Shortly after, petitioner built an apartment-house at Santa Monica, Califorina. The building was

not the monetary success contemplated and petitioner obtained a loan of $5,000 from her husband to complete the building, and her husband advanced a further $1,500 later for taxes and other expenses in connection with the building. On the 22nd of June, 1928, the husband and wife entered into an agreement with a view to providing for the wife after the husband's death, in which the testator released his wife from repayment of the $6,500 above referred to, agreed to pay her $10,000 on the execution of the agreement, and to enter into a declaration of trust whereby a $10,000 Dominion Government bond and a $5,000 insurance policy be delivered to her at the time of his death. The wife covenanted to accept the above payments as a complete settlement of all claims against her husband's estate, and in consideration thereof to release any rights of dower or marital rights she may have under the laws of any Province and to accept same as adequate provision, maintenance and support after her husband's death. Subsequently the wife borrowed $6,000 from her husband to meet certain expenses, and on the 12th of September, 1930, they entered into a further agreement to charge the $10,000 bond with the payment, upon the death of the husband, of the $6,000. The testator made his will on the 12th of September, 1930, and a codicil on the 29th of July, 1931. Under the will the testator left his wife his house in Oak Bay, B.C., valued at $5,230, for life, provided she pay the taxes and keep the property insured and in good repair. The testator died on the 15th of September, 1933. The estate was valued at $101,834, which included real property valued at $55,000. It was ordered that adequate provision had not been made for the petitioner, that she should receive $150 per month inclusive of her own income, and that the executors should pay her $45 a month from the date of death of deceased.

Statement

The appeal was argued at Vancouver on the 3rd to the 5th of October, 1934, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Hossie, K.C., for the beneficiaries: The applicant was the second wife of the testator. The house of the testator in Oak Bay valued at $5,200 was given to the wife for life, she to pay the taxes, insurance and upkeep during her incumbency. Before

Argument

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testator's death she accepted a gift of $25,000, and covenanted at the same time that she would not ask for any more. The estate was valued at $100,000, of which there was real property valued at $55,000. He had seven children, all of age. The agreement *per se* does not oust the jurisdiction, but there should be careful consideration of it before making an order under the Act. She covenanted not to resort to this statute. A statute shall not be used as an instrument to fraud: see *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334 at p. 340; *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82 at p. 97. As to the effect of the covenant see *Matthews* v. *Matthews* (1932), P. 103 at p. 107; *Hyman* v. *Hyman* (1929), A.C. 601 at pp. 608-9; *In re Anderson Estate* (1934), 1 W.W.R. 430 at p. 437. Apart from the Act a widow can contract herself out of anything she would get on the death of her husband: see *Toronto General Trusts Co.* v. *Quin* (1894), 25 Ont. 250; *Hogan* v. *Hogan* (1901), 1 I.R. 168; *In re Jutras Estate* (1932), 2 W.W.R. 533. Her conduct ousts her from any benefit under the Act: see Spencer Bower on Actionable Misrepresentation, 2nd Ed., 223-5; *Macnaghten* v. *Paterson* (1907), A.C. 483 at p. 493. She has an apartment-block in California which cost $30,000, and about $2,000 in addition. She does not require any additional support. There is only a revenue of $2,033 per annum from the estate, barely enough to pay the taxes. This Court has the same discretion as the Court below: see *Walker* v. *McDermott* (1931), S.C.R. 94; *In re Anderson Estate* (1934), 1 W.W.R. 430 at p. 438. Immediately after the death of the testator she endeavoured to set aside the will and she is estopped by the deed she signed: see *Hamilton* v. *Hamilton* (1892), 1 Ch. 396; *Carter* v. *Silber* (1891), 3 Ch. 553. They are not entitled to costs out of the estate: see *In re Jutras Estate* (1932), 2 W.W.R. 533; *In re Anderson Estate* (1934), 1 W.W.R. 430 at p. 440.

Argument

Beckwith, for respondent: She had a steady income of $100 per month only. This agreement containing the covenant was signed in 1928; that was before the depression. In any case the covenant does not deprive her of the benefit of the statute, but there is special reason here for granting relief: see *Dewhurst* v. *Salford Guardians* (1925), Ch. 655; *Hyman* v. *Hyman* (1929),

A.C. 601; *Matthews* v. *Matthews* (1932), P. 103 at pp. 105-7; *Bateman* (*Lady*) v. *Faber* (1898), 1 Ch. 144; *Stanley* v. *Stanley* (1878), 7 Ch. D. 589. That she is not estopped see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 402. As to whether the estate can stand a further payment to the widow and the discretion of the Court see *In re Livingston, Deceased* (1922), 31 B.C. 468 at pp. 469-70; *Allardice* v. *Allardice* (1911), A.C. 730.

Hossie, replied.

Cur adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.: This was a petition under the Testator's Family Maintenance Act for maintenance of the wife out of the deceased husband's estate. Section 3 of that Act provides that:

> Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children.

MACDONALD, C.J.B.C.

In my opinion the learned trial judge has exceeded his powers in making the order appealed from. The petitioner, the testator's second wife, entered into an agreement with the testator in the year 1928, whereby the testator settled upon her certain property of his amounting in all to about $31,000 and she on her part declared that she regarded that as sufficient maintenance for her after his death and released his estate from all liability under any Act of the Province, which, of course, includes the Act in question. This she reaffirmed in 1930. Now, in my opinion, while the judge was entitled under the Act to disregard "any law or statute to the contrary" of his order he was not entitled to disregard the agreements aforesaid. The wording of the statute is express and there is nothing in it which would amount to a necessary intendment beyond the words of the statute.

While I am inclined to think that the provision made for the wife was ample yet I found my judgment upon the construction of the statute. The rule is well established that a statute which

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interferes with private rights must be supported by words clear and unambiguous. The language is clear in this statute that the Court may desregard a statute or law to the contrary but not a contract and hence the learned trial judge was, in my opinion, in error in disregarding the contracts in question. The law on this subject is elaborately considered in Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 443 and 450 under the heading "Statutes interfering with Private Property, Rights, Titles or Interests" and "Statutes striking at Common Law Rights." In *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, at p. 208, it was said:

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> It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

A number of very authoritative decisions are referred to in this connection, both in the Court of Appeal and in the Judicial Committee.

The appeal should, therefore, be allowed.

MACDONALD, J.A.: I have carefully considered the material facts, but no useful purpose would be served by reviewing them. In view of the decision of the Supreme Court of Canada in *Walker* v. *McDermott* (1931), S.C.R. 94, we are compelled to go to unexpected lengths in interfering with wills, and pursuant to the principles involved in that decision it is impossible for us to interfere herein with the discretion of the trial judge in ordering, for the present, and subject to future variation and adjustment, should facts or conduct warrant it, that $45 a month should be taken from the appellant's estate for the maintenance of the respondent. There are stronger grounds for such an order than there were in said *Walker's* case, wherein a majority of the Supreme Court of Canada (Rinfret, J. dissenting) permitted a married daughter, not shewn to be in need of maintenance, to share to the extent of $6,000 in a comparatively small estate of $25,000 left by her father to his widow; the widow too had made a large contribution in cash and labour in accumulating that estate. It was such a will as I would (if in similar circumstances) have made without the slightest misgiving as to its propriety, and I had felt sure it was not the intention of the

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Legislature to permit wills of that character to be interfered with. The decision suggests the need of an amendment to disclose the intention of Parliament beyond the possibility of misunderstanding because as the statute now stands with that construction put upon it there is an invitation (now frequently acted upon) to attack wills without just cause thereby promoting domestic discord and injustice. I do not say that the order in the case at Bar cannot be justified apart from that decision. I only say that in view of it we cannot possibly interfere. It is, too, as pointed out by my brother MARTIN at the hearing, a special order of a tentative nature and because of its form, with its safeguarding provisions, there is still less reason for disturbing it.

It was submitted by Mr. *Hossie,* although as I recall it, finally very faintly, if not indeed withdrawn, that a settlement on the wife, including a term that she would not make an application under the Act in question herein, was a bar to the jurisdiction of the Court below in making an order under its statutory powers. That is not so. Such a contract had evidential value as stated in *Matthews* v. *Matthews* (1932), P. 103, and should be taken into consideration by the learned judge below (and we must assume that he did so) in deciding upon the need of maintenance but it does not preclude the Court "not merely in the interests of the wife but of the public," from making an order on proper grounds under a statute of this character—*Hyman* v. *Hyman* (1929), A.C. 601, 614, 629.

My brother MARTIN authorizes me to say that he agrees with this judgment, and would only add that he is of opinion that the language used in section 4 conferring the power in question, *viz.,* "Notwithstanding the provisions of any law or statute to the contrary," also supports its final conclusion, because due effect must be given to the expression provisions of "any law" as distinguished from those provisions embodied in the "statute" law, and "provisions" made by law apart from those made by statute must primarily at least, in this connexion, be founded upon the decisions of Courts of law in expounding and establishing the "provisions" or rules of the law of contract, including that of marital relationships, whether they are derived from the common law in its wide sense (*cf.* Lord Blackburn in *Mackonochie* v. *Lord*

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Penzance (1881), 6 App. Cas. 424, at 446, or from Acts of Parliament, *e.g.*, the Statute of Frauds.

I would dismiss the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: On the hearing of the appeal it was admitted by counsel for the appellants that the agreements between the deceased and the respondent are not a bar to a claim under the Testator's Family Maintenance Act. On the other hand, counsel for the respondent admitted that money was paid under the said agreements but asserted that circumstances have altered since the execution thereof to such an extent as to entitle the respondent to apply for assistance under the Act. The learned Chief Justice who heard the petition found that the deceased had died leaving a will and without making therein, in the opinion of the Court, adequate provision for the proper maintenance and support for his wife, the respondent. I would not disturb that finding.

The only question which remains to be decided is whether the provision made for the respondent in the order appealed from is adequate, just and equitable in the circumstances. I am of opinion that it is. In any event the order is subject to review and with that in mind it is provided therein that the respondent shall deliver to the appellants every six months from the date of the order a detailed report of her receipts and expenditures. I can see no reason for interfering with the allowance made by the learned Chief Justice to the respondent which appears to be justified under the conditions prevailing at the time the order was made. I would, therefore, dismiss the appeal.

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

Solicitors for appellants: *Clearihue & Straith.*
Solicitors for respondent: *Beckwith & Davey.*

REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE. (No. 2.)

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Jan. 9.

REX v. GEORGE

Criminal law—Practice—Murder—Conviction—Appeal—Majority of Court conclude there should be a new trial—Judges granting new trial do so on different grounds—Effect of—Criminal Code, Sec. 1014, Subsec. (c).

On appeal from a conviction for murder, two of five judges held that the appeal should be dismissed and the remaining three decided there should be a new trial, but two of them gave different grounds in their reasons for judgment why there should be a new trial.

Held, that it is not necessary that the collective decision of the majority should be based on the same reasons which lead to the conclusion that there has been a miscarriage of justice in order to bring the case within subsection (*c*) of section 1014 of the Criminal Code.

MOTION by the Crown to the Court of Appeal for an order varying the pronouncement made by the Court in Victoria on the 13th of December, 1934, whereby it was ordered that there should be a new trial of the appellants on the charge on which they were convicted and for an order that the appeal be dismissed. Statement

The motion was heard at Victoria on the 9th of January, 1935, by MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Nicholson, for the motion: The appeal should be dismissed on the reasons that are handed down. Mr. Justice M. A. MACDONALD and Mr. Justice MCQUARRIE agree in dismissing the appeal, Mr. Justice MCPHILLIPS allows the appeal and would quash the convictions, but owing to the views expressed by the other members of the Court he concluded that justice would be done by ordering that there be a new trial, and although the Chief Justice and Mr. Justice MARTIN would grant a new trial they do so for different reasons. The Chief Justice would grant a new trial on the ground that the learned judge below did not properly charge the jury on the question of whether it was practicable in the circumstances for Gisbourne when about to arrest Eneas to notify him of the crime for which he was to be arrested, as the jury might have found that it was practicable, and on that ground alone he granted a new trial. Mr. Justice Argument

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MARTIN based his granting of a new trial on the evidence of Joseph George given before the Court of Appeal, concluding that the jury might have come to a different conclusion if they had heard his evidence, and he stated in his reasons that in the circumstances it was not necessary for Gisbourne to notify Eneas of the cause of his arrest. The result is that no three judges agree in granting a new trial for the same reason. In these circumstances the appeal should have been dismissed. I rely particularly on section 1014 of the Criminal Code, also on sections 1012 to 1021 inclusive.

Argument

Henderson, for accused: The interests of justice require a new trial. Three of the judges agree that there should be a new trial, although on different grounds. This makes no difference, as they agree in the result: see *Marks* v. *Marks* (1907), 13 B.C. 161, and on appeal (1908), 40 S.C.R. 210.

MACDONALD, C.J.B.C.: I would dismiss the motion. Whatever may be the final decision of this case if it should go to the Supreme Court of Canada, my opinion is that section 1014, section 1013 and the amendments thereof, do not entitle us to say that there was not a case for a new trial in order to prevent a miscarriage of justice. If the Parliament of Canada had intended that there should be a majority judgment on a particular point, they should have said so. They do not say that; they say in subsection (*c*) "on any ground"; and we have had a decision of this Court "on any grounds," we have the decision that there was an omission on the part of the unfortunate constable in not telling Eneas the charge upon which he was arrested, and that therefore the arrest was an assault and not an arrest at all. And then there is the ground upon which Mr. Justice MARTIN put it on the evidence of Joseph George, as I remember it, in which he came to the conclusion that there was a miscarriage of justice. And among the three you have a majority of the Court saying that the conviction should be set aside because there was a miscarriage of justice. And then, of course, having set aside the conviction it was for the Court to grant a new trial, or refuse a new trial, as it might deem fit; and it thought fit to grant a new trial. And therefore that new trial I think was

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properly ordered. There was really no ground such as advanced by Mr. *Nicholson,* for interfering with the judgment which was pronounced in this Court. Mr. *Nicholson* has made his argument on practically a technical ground. And while a technical ground is perfectly admissible, yet the Court ought not to be astute to bring about the execution of three men on a ground that is merely technical, and that is capable of two separate meanings.

In this case it seems to me that the only meaning to be attached to subsection (*c*) is that if the majority of the Court, on any ground, whether they agree on one particular ground or not, they do agree that there has been a miscarriage of justice, and that a new trial ought to be ordered. Section 1014 is remedial and ought to be liberally construed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: By section 1014 the Court is given power to "allow the appeal if it is the opinion," etc. I pause here to say that the submission of Mr. *Nicholson* that "it" means the opinion of the majority of the Court is correct because its opinion can only be expressed in that way as a Court. But if "it" is of opinion that by subsection (*a*), to put it in brief, that the verdict of the jury should be set aside because it is unreasonable or cannot be supported by the evidence; that is the first class; the second class is, "or that the judgment of the trial Court should be set aside on the ground of a wrong decision of any question of law"; or (*c*) "that on any ground there was a miscarriage of justice"; then under any one of those three classes it may allow the appeal. I think that last class should, to find its true meaning, be read in this way: "that there was a miscarriage of justice on any ground"; and then the whole section becomes very plain, because it means that the three different heads of jurisdiction to allow an appeal are, first, that the verdict may be set aside as unreasonable, second, that the judgment should be set aside on the ground of a wrong decision on a question of law, and, third, that there was a miscarriage of justice upon any ground—not upon any other ground, but upon any ground—which is inclusive of the two preceding; that is to say, if there is anything that appears before the Court, either under those classes, or grounds, or under any ground referred to by section 1013, from which the Court, *i.e.,* the majority of the Bench, reaches the opinion that there

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was a "miscarriage of justice," for any joint reason or for separate reasons, it becomes immaterial *quacunque via* they reached that joint conclusion. In other words, it is not necessary that the collective decision of the majority should be based on the same reasons which lead to the conclusion that there has been a miscarriage of justice in order to bring the case within class (*c*).

I think it is unnecessary to say anything further than that, because it seems to me to be sufficient to cover the exact point.

I am sure we feel indebted to Mr. *Nicholson* for drawing our attention to this question, because it is one which should receive the attention of Parliament if it should be that its intention was different from this construction. I would add, that the reference I made to section 1013 in subsections (*a*) and (*b*), shews that a distinction is also drawn therein between "any ground" and "any other ground" in subsection (*c*)—which shews, and I emphasize the point, the distinction I have drawn as to subsection (*c*) of 1014, wherein the wider expression "any ground" is employed and not "any other ground" than those set out in (*a*) and (*b*): in other words, (*c*) includes grounds additional to those in (*a*) and (*b*).

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McPHILLIPS, J.A.: I would dismiss the motion. It would seem to me if there was any merit in the submissions made by Mr. *Nicholson,* that the only forum where it may be considered is the Supreme Court of Canada; and the considerations that have been advanced here which I consider devoid of merit may well be submitted to that final Court of Appeal and be considered by that Court. In my view they are not matters for the consideration of this Court. This Court has directed a new trial; two of my learned brothers (MACDONALD, C.J.B.C. and MARTIN, J.A.) have given written judgments that a new trial be had, and I have agreed with them, that a new trial should be directed. As I indicated before, I was firmly of the opinion that the convictions should be quashed *in toto,* and that the prisoners should go free, but withdrew my judgment to prevent a miscarriage of justice—because if I adhered to that view the grave result would have been that there would be no judgment of this Court, and the verdict of murder in the Court below would stand, in that the Court consisting of five, stood two to dismiss the appeal, two for

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a new trial, and one quashing the convictions, which in its result would be devoid of the necessary judgment of three to constitute the necessary majority of the Court.

MACDONALD, J.A.: The point is of grave importance, and it was proper to bring it to the attention of the Court on the settlement of the judgment. It means, if Mr. *Henderson* is correct, that in the case of a criminal appeal based let us say on three grounds, a majority of the Court might be against the appellant, holding by a majority that the conviction should not be set aside on any of the points raised, and yet the apparent anomaly follow that the appeal should be allowed. That seems to be a curious result; but yet I think it is possible under the circumstances of this case. Under subsection (*c*) of 1014 the Court in a final review of the case, noting that while the reasons may differ, a majority have decided that the conviction should be set aside, may conclude on "any ground" (and the ground just mentioned is sufficient) that it would be a miscarriage of justice to allow the verdict to stand and permit execution of the sentence; or to put it another way the Court may regard the facts and findings outlined as a proper "ground" for allowing the appeal. I do not say we are bound to do so; that point need not be decided; I only say we have that right under subsection (*c*). This is simply repeating in another form, as I understood him, the views expressed by my brother MARTIN.

MACDONALD, J.A.

MCQUARRIE, J.A.: Section 1014 is the guiding section in connection with appeals to this Court. That section is very specific. It says, "On the hearing of any such appeal against the conviction the Court of Appeal shall allow the appeal if it is of opinion," etc. There are (*a*), (*b*) and (*c*) then given. Now as I understand it, Mr. *Henderson* argued that in case there were three judges of this Court who decided that there should be a new trial, and which is the case here, those judges might so decide on different grounds, *viz.*, each one on a different ground, the first one on ground (*a*), second one on ground (*b*), and the third one on ground (*c*); but he also argued that ground (*c*) was cumulative; and where three of the judges agreed, or were of the opinion that there had been a miscarriage of justice, that would

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be sufficient. I have read the reasons for judgment, and I do not see where any three of the judges, or any two of them, express the opinion that there was a miscarriage of justice. They do not say so; each one of the three gives a different ground, but no two of the three say that there was a miscarriage of justice, as far as I can see. Now that being so, there may be something in the point raised by Mr. *Nicholson;* and I hope, if possible, he will be able to take the case to the Supreme Court of Canada, that it may be decided there.

Motion dismissed.

MURPHY, J.

1935

Feb. 6.

COLLINS v. THE TORONTO GENERAL TRUSTS CORPORATION

COLLINS *ET AL.* v. THE TORONTO GENERAL TRUSTS CORPORATION.

Administration—Husband and wife—Intestacy of husband—Widow—Value of estate—Taken as of time of death of intestate—B.C. Stats. 1925, Cap. 2, Secs. 3 and 4.

G. H. Collins died intestate, leaving a widow without issue. The chief asset of his estate was 256,017 shares in B.C. Nickel Mines Limited, 5½ cents per share being the outside price that could have been obtained for the shares at the time of his death. Other claimants who would be entitled to share in the estate provided its value exceeded $20,000, claimed that the net value of the estate should be ascertained not as of the date of deceased's death but one year after, relying on section 3 of the Administration Act Amendment Act, 1925, which as far as material, reads as follows: "No distribution of the surplusage of the personal estate of an intestate shall be made until one year after the death of such intestate."

Held, that notwithstanding the delay in distribution the interest of the persons entitled vests in them from the time of the decease of the intestate, the value of the intestate's estate must be taken as at his death and the widow is entitled to the whole estate.

Statement

ISSUE as to the distribution of the estate of George E. Collins, who died intestate on the 6th of August, 1933. Tried by MURPHY, J. at Vancouver on the 4th and 5th of February, 1935.

J. W. deB. Farris, K.C., and *Savage,* for Amelia Collins.

A. Bruce Robertson, for The Toronto General Trusts Corporation.

Bray, for T. R. Corkings and B. C. Leonard.

6th February, 1935.

MURPHY, J.: George H. Collins died intestate on August 6th, 1933, leaving a widow, Amelia Collins, one of the plaintiffs herein.

The chief asset of the estate of George H. Collins was 256,017 shares in B.C. Nickel Mines Limited. At the trial I found as a fact that 5½ cents per share was the outside price at which these shares could have been realized upon at the time of George H. Collins's death. On that valuation the widow, Amelia Collins, would take the whole estate as the net value thereof would be under $20,000. The other plaintiffs Thomas R. Corkings and Bernice Corkings Leonard, who would be entitled to a share in deceased's estate, if its value exceeded $20,000, claim herein that the net value of the estate should be ascertained not as of the date of the deceased's death on August 6th, 1933, but one year thereafter, *viz.,* August 6th, 1934. The only remaining question for decision therefore is for the purpose of determining who is/are entitled, pursuant to the provisions of the Administration Act, as of what date should the net value of the estate be ascertained. In my opinion this date is that of the death of the deceased, *viz.,* August 6th, 1933. It was so decided in *In re Heath, Heath* v. *Widgeon* (1907), 2 Ch. 270; *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53 and *Edwards* v. *Freeman* (1727), 2 P. Wms. 435 at p. 441. No authority was cited in support of the opposite view but section 91A of the Administration Act, R.S.B.C. 1924; B.C. Stats. 1925, Cap. 2, Sec. 3, was relied upon. So far as material it reads as follows:

Judgment

> No distribution of the surplusage of the personal estate of an intestate shall be made until one year after the death of such intestate.

It will be observed that this language fixes no period for distribution. It merely enacts that distribution shall be postponed for a year after death. The reason for this enactment is set out

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COLLINS v. THE TORONTO GENERAL TRUSTS CORPORATION

Judgment

in Williams on Personal Property, 18th Ed., 592. The author there says:

> In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution.

The author goes on to say, citing *Edwards* v. *Freeman, supra*:

> But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease of the intestate; so that in case any of them should die within a twelve-month after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators.

I hold the widow is entitled to take the whole of the estate.

The costs of all parties to be paid out of the estate.

Order accordingly.

HARRAP v. HARRAP.

ROBERTSON, J.

1934

Dec. 20.

HARRAP v. HARRAP

Practice—Petition for divorce—Co-respondent a party—Style of cause—R.S.B.C. 1924, Cap. 70, Sec. 13; Divorce Rules 1925, r. 4.

On a petition for divorce there was no style of cause, but paragraph 6 thereof stated that "on the 21st of March, 1931, the above-named respondent committed adultery with one Leslie Doney." The respondent applied to set aside the petition on the ground that "the said Leslie Doney, the alleged adulterer had not been made the co-respondent in the case" as required by r. 4 of the Divorce Rules, 1925, and section 13 of the Divorce Act.

Held, that said paragraph 6 of the petition is a compliance with Divorce Rule 4 and section 13 of the Divorce Act.

Held, further, that a divorce petition does not contain a style of cause.

APPLICATION to set aside a divorce petition on the ground that the alleged adulterer has not been made the co-respondent in the case. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 17th of December, 1934. Statement

F. C. Elliott, for the application.
Beckwith, contra.

20th December, 1934.

ROBERTSON, J.: This is a divorce petition in which the husband is the petitioner. There is no style of cause in the petition but paragraph 6 thereof states that "on the 21st day of March, 1931, the above-named respondent committed adultery with one Leslie Doney." The respondent now applies to set aside the petition and other proceedings on the ground that "the said Leslie Doney, the alleged adulterer, has not been made the co-respondent in the case," as required by r. 4 of the Divorce Rules, 1925, and section 13 of the Act, commonly called the "Divorce Act," R.S.B.C. 1924, Cap. 70. Rule 4 provides that: Judgment

> In every petition for dissolution of marriage on the ground of adultery the alleged adulterers, if male, shall be made co-respondents in the cause. . . .

Section 13, *supra*, provides:

> Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, . . .

ROBERTSON, J.

1934

Dec. 20.

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Counsel for the respondent submits that it is not sufficient to name the adulterer in the body of the petition; there must be a style of cause in which he appears as co-respondent. Our Divorce Rules provide that proceedings under the Act shall be commenced by "filing a petition" and that "in the body of the petition shall be stated" certain things. There is no form of petition given in the rules.

There is nothing in our Divorce Rules, or in the forms in the Schedule thereto, which shew that a style of cause is required in the petition. Apparently a style of cause is required in the affidavit of service or the entry of appearance—see Appendix 3, B.C. Supreme Court Rules, 1925, p. 384.

Judgment

The English Divorce Rules 1 to 4 are almost identically the same as the first four divorce rules in British Columbia, and section 28 in the English Act is the same as our section 13, *supra*.

I have examined two English text-books on divorce, *viz.*, Brown & Latey on Divorce, 11th Ed., 393, and Rayden & Mortimer on Divorce, 3rd Ed., 603, where I find forms of petition are set forth, and it is clear that a divorce petition in England does not contain a style of cause. In my opinion, therefore, paragraph 6 of the petition is a compliance with Divorce Rule 4, and section 13 of the Divorce Act.

The application is dismissed with costs.

Application dismissed.

IN RE LEGAL PROFESSIONS ACT AND *IN RE* A SOLICITOR, THOMAS MUNROE MILLER.

ROBERTSON, J. (In Chambers)

1935

Jan. 3.

IN RE LEGAL PROFESSIONS ACT AND IN RE A SOLICITOR

Practice—Legal Professions Act—Taxation of solicitor's costs—Form of summons—R.S.B.C. 1924, Cap. 136, Secs. 79, 80 and 81; Cap. 224, Sec. 3.

On petition by a former client of a solicitor that an account for professional services, rendered to him by the solicitor, be referred to the registrar for taxation with the usual directions, objection was taken that the proceedings should have been made by way of originating summons.

Held, that the Rules of Court are statutory by reason of section 3 of the Court Rules of Practice Act, and in view of this the appendices in the 1925 Rules must regulate the procedure and practice in the matters therein provided for, and therefore Form 40 in Appendix K of the British Columbia Supreme Court Rules, 1925, should be used and the petition is dismissed.

PETITION by Thomas Alexander that an account for professional services, rendered to him by *Thomas M. Miller*, a solicitor, be referred to the registrar for taxation with directions under the Legal Professions Act. Heard by ROBERTSON, J. in Chambers at Victoria on the 18th of December, 1934. Statement

R. O. D. Harvey, for petitioner.
T. M. Miller, in person.

3rd January, 1935.

ROBERTSON, J.: This is a petition of Thomas Alexander, a former client of *Thomas Munroe Miller*, that an account for professional services, rendered to him by the said *Miller* be referred to the registrar for taxation, with all usual directions. The proceedings are taken under the Legal Professions Act, R.S.B.C. 1924, Cap. 136. Judgment

The bill in question was rendered about the 31st of January, 1934, and the petition herein was filed on the 13th of December, 1934. Had proper proceedings been taken within one month Alexander would have been entitled to an order of course under section 79 of the said Act, which provides:

79. Upon the application of the party chargeable with such bill, within one month, a judge of the Supreme Court shall, without money being paid into Court, refer the bill and the demand thereunder to the proper taxing

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officer of the Supreme Court, and the judge making the reference shall restrain the bringing of any action for such demand pending the reference.

Section 80 of the said Act provides:

80. In case no application is made within the month by the party chargeable with such bill, a judge of the Supreme Court, on the application of the solicitor or firm of solicitors rendering the bill, or his or their legal representative or assignees, may order a reference, with such directions as to taking the accounts between the solicitor and the party chargeable with such bill, and with such conditions as to the time of payment of the amount certified upon the reference to be due, as to the judge seems proper.

Although section 80 does not say that the person chargeable with the bill may apply after the expiration of the month, yet reading this section with section 81, it would appear that he would have such right. In my opinion, however, an order under section 80 is not an order of course. The corresponding section of The Solicitors Act, 1843 (6 & 7 Vict., c. 73), is section 37. The first part of that section provides for an application by the client within one month and in such case the client is entitled to an order of course for the section provides the judges are "required" to refer the same, but when the application is made by the solicitor or the client after the expiration of one month then the section provides that "it shall be lawful" for such reference to be made. Jessel, M.R., deals with this difference, in his judgment in *Ex parte Jarman* (1877), 4 Ch. D. 835, at pp. 837-8, where he says:

Judgment

> That is according to the Act of Parliament, 6 & 7 Vict. c. 73. The Act says in the clearest terms that the order shall be made. By sect. 37, upon the application of the party chargeable by such bill as therein mentioned, it is said that the Lord Chancellor or the Master of the Rolls, or the other Courts or judges referred to, are "hereby respectively required" to refer such bill to taxation. There is no option at all; it is not only an order of course, but it is imperative on the judge. So the order to tax the bill is right. But then the Act of Parliament goes on to say: "Provided also that it shall be lawful for the respective Courts and judges"—it being no longer imperative, but lawful—"in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such Courts or judges respectively where any such business has been transacted in the Court in which such order was made." No doubt those words "it shall be lawful" are to be distinguished from the preceding words, "are hereby respectively required." When the words "it shall be lawful" occur in an Act of Parliament, as a general rule, they mean that the thing shall be done, and it is considered to be a mere matter of course; but when I see the

words in the same section with the words "the judges are hereby required," I conceive there is then some discretion left to the judge, and that, although in an ordinary case, as a matter of course, he must order it, in a special case he need not order it. That is how I read the section.

But section 80 in our Act says the Court "may" order, etc., and the power is therefore fully discretionary. In addition said section 80 provides that the Court may, in such order, make conditions as to the time of payment, and section 96 provides for execution in the circumstances therein mentioned. I do not think any such provision with regard to payment would be imposed without hearing the client. This express provision as to payment is not in said section 37. If the order is not an order of course, the applicant is bound to give notice to the other side so that all the circumstances of the case, from the point of view of both parties, may be before the Court in order that it may have before it all the material upon which to exercise its discretion.

The objection is taken that the proceedings should have been made by way of originating summons, and in support of this is cited the case of *Re Phelan, a Solicitor* (1916), 9 W.W.R. 1434, in which the facts are stated to be that an application was made by the client by an ordinary summons intituled In the Matter of the Act (*i.e.*, the then Legal Professions Act, which upon all points bearing upon this case is the same as the present Act) and the solicitor, and it is therein stated that Mr. Justice MACDONALD dismissed the application holding that it should have been made by an originating summons.

Judgment

The British Columbia Supreme Court Rules, 1912, were then in force and in Appendix K, at p. 264, appears form No. 40, intituled "Summons on Client's Application to tax Bill," which will be seen is a special form of summons and quite different to the form of an ordinary summons which is set out at p. 249 of the 1912 Rules. It is also somewhat different from the form of originating summons which appears at p. 249 as No. 1A, but still I think it would be described as an originating summons.

In view of this I decided to have the record looked up in *Re Phelan, supra,* and I am advised by the registrar that no reasons for judgment are on file and that there was only one summons by the client, and that that summons was not dismissed; on the

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contrary an order was made thereon on February 15th, 1916, directing taxation of the bills.

Further I have examined the summons in that case and it is an originating summons in the form set out in said No. 1A, p. 249, of the 1912 Rules. It is therefore clear to me that the report is incorrect.

The petitioner submits that the application may be made by petition and refers to the practice in England in the Chancery Division to applications by petition. See Halsbury's Laws of England, Vol. 26, p. 790, and in the Queen's Bench Division by originating summons—see Halsbury, *supra,* p. 793.

Our Rules of Court, 1925, are statutory—see subsection (3) of section 4 of the Court Rules of Practice Act, R.S.B.C. 1924, Cap. 224, as enacted by Cap. 45, B.C. Stats. 1925, Sec. 2, which provides as follows:

Judgment

> (3.) Subject to subsections (4) and (5), the orders and rules and their appendices, intituled "Supreme Court Rules, 1925," made by Order of the Lieutenant-Governor in Council approved the twenty-fifth day of August, 1925, . . . shall . . . regulate the procedure and practice in the Supreme Court in the matters therein provided for.

Subsections (4) and (5) of said section 4 have no bearing on the question. In view of the above statutory provision, the appendices in the rules must regulate the procedure and practice in the matters therein provided for and therefore form No. 40 in Appendix K should have been used. Accordingly the petition is dismissed, but without costs, as I am informed by the registrar the practice has not been settled.

Application dismissed.

ROBERTSON, J. (In Chambers)

1935

Jan. 24.

DIXON v. WORKMEN'S COMPENSATION BOARD

DIXON v. WORKMEN'S COMPENSATION BOARD.

Workmen's Compensation Board—Deceased pensioners—Estate of—Crown debt—Priority—R.S.C. 1927, Cap. 156, Secs. 2, 3 and 9 (3)—B.C. Stats. 1926-27, Cap. 50, Secs. 2, 3 and 4.

Subsection (3) of section 9 of the Old Age Pensions Act, provides in part as follows: "A pension authority shall be entitled to recover out of the estate of any deceased pensioner, as a debt due by the pensioner to such authority, the sum of the pension payments made to such pensioner from time to time, together with interest at the rate of five per cent. per annum compounded annually."

In answer to questions submitted by the executrix of the estate of a deceased pensioner for the opinion of the Court:—

Held, that the amount claimed against the estate of said deceased by the defendant under and by virtue of said subsection, is a Crown debt and takes priority over all other debts owing by the estate except: "(a) Expenses actually and necessarily incurred in burying the deceased and in collecting and preserving her estate. (b) The remuneration of the executor or administrator and her necessary legal costs of administration. (c) Probate and succession duties."

ORIGINATING SUMMONS by the executrix of the estate of Emma Garnham, deceased, for the opinion of the Court as to priority in relation to certain claims against the estate. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 19th of December, 1934. Statement

Shandley, for executrix.

24th January, 1935.

ROBERTSON, J.: This is an originating summons taken out by the executrix of the estate of Emma Garnham for the opinion of the Court upon the following questions:

1. Is the amount claimed against the estate of the said Emma Garnham, deceased, by the defendant under and by virtue of section 9, subsection 3 of chapter 156 of the Revised Statutes of Canada, 1927, a Crown debt?

2. If the claim referred to in the last preceding paragraph is held to be a Crown debt, does it take priority over all other debts owing by the estate of the said Emma Garnham, deceased, except

(a) Expenses actually and necessarily incurred in burying the deceased and in collecting and preserving her estate?

(b) The remuneration of the executor or administrator and her necessary legal costs of administration?

(c) Probate and succession duties. Judgment

By section 3 of Cap. 35, Statutes of Canada, 1926-27, assented

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to 31st March, 1927, now Cap. 156, R.S.C. 1927 (hereinafter called the Dominion Act) it was provided:

3. The Governor in Council may make an agreement with the Lieutenant-Governor in Council of any Province for the payment to such Province quarterly of an amount equal to one-half of the net sum paid out during the preceding quarter by such Province for pensions pursuant to a Provincial statute authorizing and providing for the payment of such pensions to the persons and under the conditions specified in this Act and the regulations made thereunder.

The said section 3 was amended in 1931 but this makes no difference to the decision of this matter.

Sections 2, 3, and 4 of Cap. 50, B.C. Stats. 1926-27, assented to the 7th of March, 1927, read as follows:

2. The Lieutenant-Governor in Council may enter into an agreement with the Governor-General in Council as to a general scheme of old-age pensions in the Province pursuant to the provisions of any Act of the Dominion heretofore or hereafter passed relating to old-age pensions, and the regulations made thereunder, and for the payment by the Dominion to the Province quarterly of an amount equal to one-half or more of the net sum paid out during the preceding quarter by the Province for old-age pensions pursuant to the provisions of this Act.

3. The Lieutenant-Governor in Council may by Order authorize and provide for the payment of old-age pensions to the persons and under the conditions specified in any Act of the Dominion heretofore or hereafter passed relating to old-age pensions, and the regulations made thereunder.

Judgment

4. (1.) Notwithstanding the provisions of the "Workmen's Compensation Act," the Workmen's Compensation Board shall, in addition to the duties assigned to it under that Act, be charged with the administration of this Act, including the consideration of applications for old-age pensions and the payment of old-age pensions.

(2.) The Workmen's Compensation Board may appoint such special officers, clerks, and servants as are required for the proper administration of this Act, and, subject to the approval of the Lieutenant-Governor in Council, may fix their salaries.

Apparently the arrangement contemplated by the above Acts was carried out and the late Emma Garnham, for some years previous to her death, had been receiving an old-age pension. At the time of her death she owed bills to a hospital and to her doctor. There are also the funeral expenses.

Section 2 (*a*) of the Dominion Act provides as follows:

(*a*) "Pension authority" means the officer or body charged by law with the consideration of applications for pension or with the payment of pensions;

Subsection 3 of section 9 of the Dominion Act provides, in part, as follows:

3. A pension authority shall be entitled to recover out of the estate of any deceased pensioner, as a debt due by the pensioner to such authority, the sum of the pension payments made to such pensioner from time to time, together

with interest at the rate of five per cent. per annum compounded annually, ...

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The Workmen's Compensation Board filed a claim for $1,529.99 for pension moneys paid to the said Emma Garnham from the 15th of October, 1927, to the 31st of December, 1933, plus interest at 4 per cent. compounded annually and its counsel submits this is a Crown debt and entitled to priority over the debts due to the hospital and to her doctor and other creditors.

Counsel for the plaintiff submits that the Workmen's Compensation Board is a corporation, entirely independent of the Crown, and can sue, and be sued, and that the debt created by said subsection 3 of section 9 of the Dominion Act is not a Crown debt as said subsection 3 provides for its recovery "as a debt due by the pensioner to such authority."

It will be convenient if I first consider the relation of the Workmen's Compensation Board to the Crown. The pension authority is defined by the Dominion Act to be a body, charged by law, with the consideration of applications for pension, or, with the payment of pensions and these are the duties which are cast upon the Workmen's Compensation Board by section 4 of the Provincial Act. It is, therefore, the "pension authority" within the meaning of the Dominion Act and is, therefore, the body entitled to recover pursuant to subsection 3 of section 9 of the Dominion Act. Now the Workmen's Compensation Board already had very large and important duties to fulfil under the provisions of the Workmen's Compensation Act, and receives, and distributes large sums of money in connection therewith. The moneys which the Workmen's Compensation Board pay for pensions, and for salaries and expenses incurred in the administration of the Act, are paid from the Consolidated Revenue Fund of the Province (see section 5 of the Provincial Act), and it is clear that any moneys which the Workmen's Compensation Board may recover under said subsection 3 of section 9 would be Crown funds, and no doubt, would be paid into the Consolidated Revenue Fund. The Workmen's Compensation Board could not deal with these moneys except for pension purposes. The Workmen's Compensation Board is "charged with the administration of the Act, including the consideration of applications for old-age pensions and the payment of old-age pensions."

Judgment

From the foregoing, it is clear that the Workmen's Compensa-

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tion Board is merely the agent of the Crown charged with the duties above mentioned. Now apart from subsection 3 of section 9, there would be no claim by anyone for the recovery of moneys paid for old age pensions. Said subsection 3, however, provides for the recovery of the said sums out of the estate of the deceased pensioner and, I think, for the convenience of collection, provides that the said payment shall be a debt due to the pension authority. As these moneys are the moneys of the Crown and the pension authority is acting as its agent, I have no doubt that this debt is a Crown debt. In *Public Works Commissioners* v. *Pontypridd Masonic Hall Company* (1920), 2 K.B. 233, the facts were that the plaintiffs entered into an agreement with the defendants for the use of the defendants' hall for County Court purposes. After some years the term was surrendered by operation of law, but by inadvertence the plaintiffs continued to pay rent for the hall. The plaintiffs sued to recover the sums so paid, as money paid under a mistake of fact, and the defendants pleaded the Statute of Limitations. The plaintiffs were an incorporated body and it was submitted by counsel for the defence that they were thereby a "distinct entity," and that they, thereby, came into Court "with rights and liabilities of ordinary litigants." Lord Justice Bankes, sitting as a judge of the King's Bench Division, tried the case and he said, at pp. 234-5:

Judgment

> The defendants plead the Statute of Limitations. To that the plaintiffs answer that they are suing as the representatives of the Crown to recover this money, and that the Statute of Limitations does not apply as against the Crown. Two cases have been referred to, *Graham* v. *Public Works Commissioners* (1901), 2 K.B. 781 and *Roper* v. *Public Works Commissioners* (1915), 1 K.B. 45, both of which make it clear that if a body, whether incorporated or not, is in fact acting in any particular matter as agents for the Crown, they are to be treated in law as such agents, and from that it follows that the Statute of Limitations does not apply to them. In this case I have no hesitation in coming to the conclusion that the plaintiffs are merely acting in their capacity as agents of the Crown in endeavouring to recover this money, although they possess a statutory right to bring the action in their own name.

In this case I think that the Workmen's Compensation Board is merely acting in its capacity as agent of the Crown in administering the Act for the Crown, in endeavouring to recover this money, although it possesses a statutory right to bring the action in its own name.

Both questions are answered in the affirmative.

Questions answered in the affirmative.

CARTER v. PATRICK.

MCDONALD, J.

1935

Feb. 5.

CARTER v. PATRICK

Administration—Intestate estate—Foreign divorce—Validity—Estoppel—Brothers, sisters, nephews, nieces and grand-nephew — Grand-nephew shares in estate—B.C. Stats. 1925, Cap. 2, Secs. 116 and 118.

Christina Patrick, who died intestate, was survived by R. A. Patrick who claimed to be her husband, and by brothers, sisters, nephews, nieces and one grand-nephew. R. A. Patrick while domiciled in Saskatchewan obtained a divorce from his wife in an action brought by him in California in 1922 on the ground of cruelty and desertion, but now claims the divorce was granted without jurisdiction.

Held, that having invoked the California Courts in his claim for a divorce he cannot now be heard to say that that forum acted without jurisdiction, and he takes no share in the estate.

Held, further, that the grand-nephew is entitled to share in the estate with the brothers and sisters and nephews and nieces of deceased.

In re Estate of David McKay, Deceased (1927), 39 B.C. 51, followed.

ORIGINATING SUMMONS for directions as to distribution of the estate of Christina G. Head-Patrick, deceased. Heard by McDONALD, J. at Vancouver on the 1st of February, 1935. Statement

C. C. Bell, for official administrator.
E. Meredith, for R. A. Patrick.
Creagh, for brothers, sisters and children.
Robson, for grand-nephew.

5th February, 1935.

McDONALD, J.: Proceedings by way of originating summons for directions as to the distribution of the estate of Christina G. Head-Patrick intestate, deceased, leaving an estate amounting to approximately $20,000.

The first matter to dispose of is as to the claim of Richard A. Patrick who claims as husband of the intestate. His claim is contested on the ground that he in the year 1922, while domiciled in Saskatchewan, obtained a divorce in an action brought by him in California on the ground of cruelty and desertion, and that he was not in fact the husband of the deceased at the time of her decease. He meets that contention by saying that the divorce was granted without jurisdiction and that he is for that reason Judgment

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the widower of the deceased. I hold against him upon the ground that he having invoked the California Courts in his claim for a divorce cannot now be heard to say that that forum acted without jurisdiction. (See *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482; *Swaizie* v. *Swaizie* (1899), 31 Ont. 324 and *Burpee* v. *Burpee* (1929), 41 B.C. 201.) On this ground I hold that Richard A. Patrick takes no share in the estate.

The next question that arises is whether a grand-nephew shares with brothers and sisters and nephews and nieces of the deceased. As to this question I follow the decision of the late Chief Justice HUNTER in *In re Estate of David McKay, Deceased* (1927), 39 B.C. 51. It is true that his Lordship there gave a different decision to that which would have been given in England under the Statute of Distribution or which was given in Manitoba in *In re Budd Estate* (1934), 2 W.W.R. 182 in which was cited *Crowther et al.* v. *Cawthra et al.* (1882), 1 Ont. 128. The reason, I take it, why the learned Chief Justice decided as he did is because our statute is different from those in other jurisdictions. See B.C. Stats. 1925, Cap. 2, Sec. 116 and Sec. 118. I think that the learned Chief Justice having considered those sections decided that the proviso at the end of section 118 applied to that section only and did not apply to section 116 under which latter section the present estate falls. Following his decision I hold that the grand-nephew is entitled to share.

Judgment

Costs of all parties will be paid out of the estate.

Order accordingly.

FAIRGRIEF v. ELLIS.

MCDONALD, J.

1935

Feb. 7.

FAIRGRIEF v. ELLIS

Contract—Statute of Frauds—Interest concerning land—Surrender—Second verbal agreement—Consideration.

The defendant, 72 years of age, lived with his son on a small property on Lulu Island which was worth about $2,500. He was estranged from his wife who resided in California, she refusing to live with him in British Columbia. In August, 1933, his son having gone away, he wrote the plaintiffs, who were old and intimate friends of his, asking them to be his housekeepers. Upon their arrival it was verbally arranged between them that if they would become his housekeepers and take charge of his home during his lifetime the home would become theirs upon his death. In August, 1934, defendant's wife suddenly and without warning came to his home, demanded that the plaintiffs should leave the house, and that she would take charge. The defendant then promised the plaintiffs that if they would give up their rights under the former arrangement and leave his home he would on or about the 1st of October, 1934, pay them $1,000. This offer was accepted and the plaintiffs left his home. In an action to recover $1,000:—

Held, that although the defendant was not in law bound to perform the first agreement nevertheless as the defendant thought he was under an obligation to the plaintiffs, and in order to be released from that obligation he made the second agreement, there was good consideration to support the promise to pay $1,000, and the plaintiffs are entitled to judgment.

ACTION to recover $1,000 that the defendant had agreed to pay the plaintiffs in consideration of their giving up their rights under a previous agreement whereby the defendant promised them that if they would become his housekeepers and take charge of his home during his life his home on Lulu Island valued at $2,500 would become theirs at the time of his death. The further facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 4th of February, 1935. Statement

W. C. Thomson, for plaintiffs.
A. Alexander, for defendant.

7th February, 1935.

McDONALD, J.: Defendant is a retired gentleman, 72 years of age, owning and residing upon a small parcel of land on Lulu Island, worth approximately $2,500. For some years his rela- Judgment

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1935

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tions with his wife have been strained; she refused to live with him in British Columbia and maintained her residence in California.

Plaintiffs are sisters, cultured maiden ladies about 50 years of age, who until the year 1933 lived in Winnipeg where they had been employed in clerical work though in recent times they were for considerable periods out of employment. They had been close friends of the defendant over a period of some 25 years and their relations may be judged from the fact that they called him "Dad." In the spring of 1933 the plaintiff Cornelia Fairgrief came to British Columbia on an excursion and visited with the defendant for some three days. Following that occasion some letters passed between the defendant and the plaintiff Anne Fairgrief wherein the plaintiff Anne Fairgrief was invited to visit the defendant. This invitation she declined. In August of that year defendant's son, who had for some months been residing with him, departed for the United States whereupon defendant wrote the plaintiff Anne Fairgrief stating that he was alone and that he required a housekeeper and that he wished the plaintiffs to come and keep house for him, final arrangements to be made after their arrival. Plaintiffs thereupon came to the defendant's home and took up their residence with him upon a verbal agreement that if they would become his housekeepers and take charge of his home during his lifetime the home would become theirs upon his death.

Pursuant to the above agreement plaintiffs entered upon their duties, took full charge of the home, performed all the household duties and did a good deal of work outside including painting, cleaning up the ground and other works of a more or less permanent nature. In addition to being his housekeepers they were his congenial companions and the three lived comfortably and happily until August, 1934, when the defendant's wife (much to his surprise for he had expected nothing of the sort) suddenly arrived in Vancouver. Defendant requested the plaintiffs to remain and be kind to his wife while she should reside with them, he feeling quite assured that her stay would not be a lengthy one. At the end of about a month defendant told the plaintiffs that he was grieved to be obliged to tell them that his wife insisted that they should depart the premises as she intended to remain and

take charge. Defendant, knowing of his obligation to the plaintiffs, promised them if they would give up their rights under the agreement already entered into, and would depart from his home he would on or about the 1st of October, 1934, pay them $1,000. That offer was accepted and plaintiffs removed themselves from the premises. The plaintiffs now bring action to recover that sum of $1,000. I have no doubt at all that the defendant's repudiation of his agreement resulted from the interference of his wife. Having persistently refused to live with him and assist him in making a happy and comfortable home, she was determined that the plaintiffs should not be allowed to render that assistance which she herself declined to render. Incidentally it may be said that her further actions justify to some extent this assumption for she again left her husband on November 2nd, 1934, and has not returned to him. Although there is a conflict of evidence I find the facts to be as above stated.

On the above facts, can the plaintiffs succeed? It is contended in the first instance that the agreement first made cannot be enforced by reason of the 4th section of the Statute of Frauds, the agreement being one relating to an interest in land. With that contention I agree and I also agree that the plaintiffs cannot rely upon the fact that they have partly performed their contract for the reason that the acts which they performed are not necessarily referable to the contract alleged by them but might equally be referable to the contract set out by the defendant, *viz*:

Judgment

> That the agreement under which the plaintiffs came to reside with the defendant . . . was that in return for their board and lodging the plaintiffs were to keep house for the defendant until the defendant's wife came up from California.

See *Haddock* v. *Norgan* (1923), 33 B.C. 237; (1924), 34 B.C. 74.

Notwithstanding the above, however, I cannot understand why the plaintiffs cannot succeed on their claim for $1,000. When the agreement was made in September to pay the plaintiffs $1,000 the defendant thought that he was under an obligation to the plaintiffs and in order to be released from that obligation and so that the plaintiffs might agree to peacefully vacate his premises, he made the second agreement. Even although he was not in law bound to perform the first agreement nevertheless I think there was good consideration to support the promise to pay $1,000.

MCDONALD, J.

1935

Feb. 7.

FAIRGRIEF v. ELLIS

Judgment

The strongest case upon which the defendant's counsel relies is *Ronayne* v. *Sherrard* (1877), I.R. 11 C.L. 146. That was a case in which the plaintiff being tenant from year to year to the defendant of a plot of ground and a cottage built on it agreed to surrender the premises (without notice) in consideration of being permitted to pull down the cottage and hold the materials for his own use. Later this agreement was varied, it being agreed that the plaintiff instead of removing the cottage should be paid by the defendant the value of the materials thereof. It was held that the agreement as varied, or to put it in another way, that both agreements related to an interest in land and not being in writing no action would lie. In my opinion this is not a parallel case. I agree with plaintiffs' counsel that this case comes more nearly within the principle of the decision in *Haigh* v. *Brooks* (1839), 10 A. & E. 309. There the plaintiff in consideration of the defendant's promise sued on gave up to the defendant a guarantee which was in fact unenforceable by reason of section 4 of the Statute of Frauds. The Court held that nevertheless the promise sued upon could be enforced. There the defendant, just as the defendant here, even although he might have been mistaken as to his legal rights, in consideration of his promise, obtained that which he desired and he must be held to his bargain. There will be judgment for the plaintiffs for $1,000. Inasmuch however as the plaintiffs were obliged to amend their statement of claim, in order to comply with the evidence, I think there is "good cause" for depriving the plaintiffs of their costs.

Judgment for plaintiffs.

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Mortgagors' and Purchasers' Relief Act—Mortgage—Action for interest on foreclosure—Commenced before Act in force—Execution after—Right to proceed without leave—Conflict between sections—B.C. Stats. 1934, Cap. 49, Secs. 3 and 4.

Section 3 (2) (*e*) of the Mortgagors' and Purchasers' Relief Act, 1934, enacts: "This Act shall not apply to any instrument upon which proceedings in any Court are pending at the time of the commencement of this Act." Section 4 (1) (*a*) of said Act enacts: "No person shall take or continue proceedings in any Court by way of foreclosure on sale or otherwise, or proceed to execution on or otherwise to the enforcement of a judgment or order of any Court, whether entered or made before or after the commencement of this Act, for the recovery of principal money or interest thereon secured by any instrument."

The plaintiff obtained judgment against defendant for interest and costs in a foreclosure action, registered it against defendant's lands and proceeded to execution. The action was commenced before but judgment was obtained after the above Act came into force.

An application for an order restraining plaintiff from proceeding to execution, to cancel registration of the judgment and to set aside the garnishing order on the ground that the plaintiff obtained judgment without obtaining leave pursuant to the above Act, was refused.

Held, on appeal, affirming the decision of LENNOX, Co. J. that the general purpose and tenour of the Act is to prevent proceedings for the recovery of sums due for principal and interest under mortgages, etc., being taken except by leave of a judge. The exception from that general purpose outlined is in section 3 (2) (*e*) making the Act inapplicable to "any instrument upon which proceedings in any Court are pending at the time of the commencement of the Act."

APPEAL by defendant from the order of LENNOX, Co. J. of the 4th of September, 1934, dismissing the defendant's application for an order that the plaintiff be restrained from proceeding to execution under a judgment of the 10th of April, 1934, and that the district registrar of titles at Vancouver do cancel registration of the said judgment made by the plaintiff under the Execution Act. The action was to recover interest due on a mortgage given by the defendant to the plaintiff for $800 on lot 13, district lot 744, group one, in the City of Vancouver, and in default of payment, for foreclosure. The plaintiff recovered judgment on the 5th of June, 1934, and issued execution against

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all the defendant's lands. On August 15th following the defendant offered to quit claim the mortgaged property to the plaintiff but the plaintiff refused to accept it. The defendant's application was to restrain the plaintiff from proceeding in execution and that registration of the judgment be cancelled on the ground that the judgment was obtained without first obtaining leave of a judge pursuant to the provisions of the Mortgagors' and Purchasers' Relief Act, 1934.

The appeal was argued at Vancouver on the 8th of October, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Bray, for appellant: Judgment was obtained and registration thereof without obtaining leave under section 4 of the Mortgagors' and Purchasers' Relief Act, 1934. This Act was passed on March 29th, 1934. The judgment in question was obtained on April 10th, 1934, and entered on June 5th, 1934. The judgment was for interest on the mortgage.

L. St. M. Du Moulin, for respondent: By section 3, subsection (2) (*e*) of the said Act the respondent is entirely excluded from the Act, namely that this action is on an instrument and was pending when the Act came into force. The case of *Moon* v. *Durden* (1848), 2 Ex. 22 at p. 44 is authority for the proposition "No person shall take or continue proceedings where they occur in section 4, subsection (1) (*a*)" to mean "No person shall take proceedings or if taken after the commencement of this Act, shall continue proceedings." The next point is that if any conflict arises between section 3, subsection (2) (*e*) and section 4, subsection (1) (*a*) the former being a particular section must prevail and the latter must give way. See also *Pretty* v. *Solly* (1859), 26 Beav. 606 at 610; *Churchill* v. *Crease* (1828), 5 Bing. 177; *In re Watson* (1893), 1 Q.B. 21 at p. 23. He should first apply to the registrar under section 232 of the Land Registry Act: see *Hansen* v. *Taylor* (1933), 46 B.C. 556 at p. 560.

Bray, in reply: He proceeded on a judgment and judgment was obtained after the passage of the Act. "Judgment" is not included in what is referred to in the word "Instrument." Where two sections of a statute conflict the latter prevails: see *Rex* v.

Caskie (1922), 35 B.C. 78. Our agreement is on the words "Or proceed to execution."

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8th January, 1935.

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MACDONALD, C.J.B.C.: The appeal should be dismissed.

The Mortgagors' and Purchasers' Relief Act, 1934, applies only where relief is claimed for the recovery of principal moneys. This action is for the recovery of interest and that, under section 3, does not fall within the Act.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree in dismissing this appeal.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: Plaintiff (respondent) obtained judgment against defendant (appellant) for $132.35 for interest and costs in a foreclosure action; registered it against appellant's lands and proceeded to execution. He also issued an attachment order after judgment. The appellant complains that a certificate of judgment was obtained and registered under the Execution Act without securing leave so to do from a judge pursuant to the Mortgagors' and Purchasers' Relief Act, 1934, Cap. 49, B.C. Stats. 1934; also that similar leave was not obtained for the issuance of the garnishing order. An application to LENNOX, Co. J., for an order restraining respondent from proceeding to execution; to cancel registration of the judgment and to set aside the garnishing order having been refused this appeal was brought.

MACDONALD, J.A.

It is common ground that it was not necessary to obtain leave to launch the original action giving rise to the judgment referred to because the Mortgagors' and Purchasers' Relief Act came into force and effect after the commencement of the action and section 3 (2) (*e*) enacts that:

> This Act shall not apply to any instrument upon which proceedings in any Court are pending at the time of the commencement of this Act.

It was urged, however, that it was not possible to proceed to execution without leave because before reaching that stage in the litigation the Act came into force and it contained the following clause:

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4. (1.) No person shall:—

(*a*.) Take or continue proceedings in any Court by way of foreclosure or sale or otherwise, or proceed to execution on or otherwise to the enforcement of a judgment or order of any Court, whether entered or made before or after the commencement of this Act, for the recovery of principal money or interest thereon secured by any instrument:

The word "instrument" is defined in section 2 to mean "any mortgage or agreement of sale or purchase in respect of or affecting lands" and as by section 3 (2) (*e*) "proceedings in any Court" upon any "instrument" (or mortgage) are not to be affected if the action was pending when the Act received the Royal assent respondent submits that not part of, but all the proceedings in a pending action from the issuance of the writ to final realization of the judgment are excluded from the operation of the Act and no leave is necessary at any stage for subsequent steps in the action.

If it was intended by the Legislature to follow the usual practice in legislation of this character, *viz.*, to provide that existing rights should not be affected, it would not wittingly by another section destroy that right by making it impossible to collect a judgment by way of execution or otherwise in an action properly brought before the passage of the Act. If section 4 (1) (*a*), standing alone, bears the construction contended for by Mr. *Bray* must it be read as if, in effect the words "except as more expressly excepted from the purview of the Act by section 3 (2) (*e*)" were inserted after the opening words "No person shall" in section 4? Certainly, if it is clearly stated in section 3 (2) (*e*) a special section, that the Act shall not apply to such a proceeding as contemplated herein the general sections of the Act must be read as best they can, subject to this exception.

MACDONALD, J.A.

It is a settled canon of construction that where there is a special and a general section in the same Act and the latter read "in its most comprehensive sense, would overrule the former," (*Pretty* v. *Solly* (1859), 26 Beav. 606 at 610) "the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." As stated another way in *Churchill* v. *Crease* (1828), 5 Bing. 177 at 180:

The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception.

This rule too applies, in my opinion, where the general section not only is in conflict with the special section but follows it in the Act displacing the well-known rule that where two sections are repugnant the last shall prevail.

It was submitted by Mr. *Bray* that section 4 was really the special section with section 3 (2) (*e*) general in its scope. I cannot agree. The general purpose and tenour of the Act is to prevent proceedings for the recovery of sums due for principal and interest under mortgages, etc., being taken except by leave of a judge. The exception from that general purpose outlined is in 3 (2) (*e*) making the Act inapplicable to

Any instrument upon which proceedings in any Court are pending at the time of the commencement of this Act.

If it is true—and it is—that this section permits proceedings under an instrument under way when the Act was passed to be carried to fruition without leave or hindrance we need not concern ourselves with the task of interpreting section 4 or with reconciling the apparent conflict. When this special section on its proper construction provides that whatever other provisions the Act may contain they have no application to any "instrument" or mortgage "upon which proceedings are pending" it means that the "instrument" may be utilized and its covenants enforced in the ordinary way by action, judgment and execution. It is idle to say that "This Act shall not apply" at all to this particular "instrument" and at the same time make it apply by rendering it for the time being, at all events, an unenforceable and at least a partially useless instrument. The Legislature intended, as usual in such cases, to except pending litigation and whether easy or difficult to decipher the rest of the Act it must be read subject to this exception.

MACDONALD, J.A.

I would dismiss the appeal.

McQUARRIE, J.A.: I agree that the appeal should be dismissed.

MCQUARRIE, J.A.

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*
Solicitors for respondent: *Russell, Russell & Du Moulin.*

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Jan. 8.

REX v. JONES AND MANLOVE

REX v. JONES AND MANLOVE.

Criminal law—Obtaining money by false pretences—Sale of shares in company—Representation that shares sold were treasury shares—Shares in fact owned by one of accused—Criminal Code, Sec. 407 (a).

At the instance of the accused J., a company called System Service Limited was incorporated in British Columbia, and by agreement between J. and the company of May, 1933, in which he described himself as president of System Service Incorporated, a company incorporated under the laws of the State of Delaware, he, as agent of the American company transferred to the Canadian company the right to use and operate in Canada a patent being a new and useful improvement in vouchers, also two registered trade-marks, in consideration for which the Canadian company agreed to issue to J. all its capital stock less directors' qualifying shares, J. agreeing at the same time to pay the obligations of the company until it was in a position to declare dividends. The complainant C. was introduced by the accused M. to J., and after two certain interviews with J., C. was induced to invest $6,250, for which she received ten shares in System Service Limited from J. On a charge by C. against J. and M. for obtaining her money by false pretences, of several false representations alleged by C., it was held that they represented to her that she was buying stock owned by the company and that her money was going into the treasury of the company and they were convicted.

Held, on appeal, affirming the conviction by ELLIS, Co. J., that from complainant's evidence it is apparent that there is no proof that she knew she was buying the shares of Jones and not treasury shares, and the appeal should be dismissed.

Statement

APPEALS by accused from their conviction by ELLIS, Co. J. of the 5th of June, 1934, on a charge of obtaining by false pretences the sum of $6,250 from one Kathryn E. Church with intent to defraud. A company called System Service Limited was incorporated in British Columbia by the accused Jones, and by agreement between himself and the company of the 15th of May, 1933, in which he described himself as president of System Service Corporation, a company incorporated under the laws of the State of Delaware, he, as agent to the American company, transferred to the Canadian company the right to use and operate in Canada a patent covering a new and useful improvement in vouchers, also two registered trade-marks, in return for which System Service Limited agreed to issue to Jones all its capital

stock, less directors' qualifying shares fully paid up, Jones covenanting with the company until the company declares a dividend to indemnify and save harmless the company from liability, expenses and debts arising including incorporation expenses, and pay all claims until a dividend be declared. One Miss Church was introduced by Manlove to Jones, and after certain interviews with them was induced to invest $6,250 for which she received ten shares in System Service Limited from Jones. She states she was assured by both accused that the company had sold a large number of shares and had very few left, that it was an absolutely safe investment, that there was no possibility of her losing her money, that System Service Limited owned Canadian Reserves Limited (another company incorporated by the accused Jones), that if she bought in one company she was buying in both, that System Service Limited had five guarantors who put up $10,000 each, that they had five more lined up, that these guarantors would guarantee shareholders and make it absolutely safe, that after a few more shares were sold the company would have $50,000 in its treasury, that shares would double in value and would pay dividends in six months, and that she was buying treasury stock. In answer to her enquiry as to why she was only getting ten shares of a par value of $125 each for $6,250 she was told that it was to keep down the income tax. It was found on the trial that the company had no money and the stock being transferred to Jones there was no means whereby the company could obtain money by the sale of stock, also that there were never any guarantors, and Miss Church relied on the statement that she was buying treasury stock and that her money was going into the company. The accused were convicted and sentenced to six months' imprisonment.

Statement

The appeal was argued at Vancouver on the 27th, 28th and 29th of November, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C., for appellant Jones: The charge is under section 407 of the Criminal Code. Jones organized two companies, first the Canadian Reserve System Limited, a Dominion company, making it possible to obtain mortgages on houses at a reasonable rate, and secondly the System Service Limited, a Provincial

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company that would act as fiscal agent for the first company. Miss Church got Jones's shares and she knew what she was getting as she received a document at the time which shewed she was getting them from Jones. The real business of the first company was that of a loan company. Manlove was employed by Jones and he bought shares in System Service Limited. In September, 1933, she bought the shares in question and the transfer was signed by Jones. Shortly after Jones and Manlove fell out and Manlove told her her money was not safe. Both criminal and civil proceedings were commenced, but the civil action was stayed. She says she was buying treasury stock. Her evidence cannot be relied on. Accused is entitled to the benefit of the doubt: see *Clark* v. *Regem* (1921), 61 S.C.R. 608; *Rex* v. *Payette* (1925), 35 B.C. 81 at pp. 89 and 90. She says the determining factor was that it was absolutely safe; if that is so she was not induced by the other representation that she was buying treasury stock. *Reg.* v. *Lince* (1873), 12 Cox, C.C. 451 is the case relied on by the trial judge but the facts are quite different. See also *Hewgill's Case* (1854), Dears. C.C. 315. It is not sufficient to prove false representation, it must be proved it was done with intent to defraud.

Argument

Adam Smith Johnston, for appellant Manlove: Manlove merely introduced Miss Church to Jones. Miss Church repeatedly contradicted herself, and a woman with a memory such as hers should never convict. There is no evidence that Manlove ever made any misrepresentation. All the evidence shews he was relying on Tupper and Angell. He acted conscientiously and what he said was true: see *Derry* v. *Peek* (1889), 14 App. Cas. 337.

Owen, for the Crown: Jones came to Vancouver in March, 1933. He incorporated System Service Limited locally but he never received a certificate to do business. All shares but three were in Jones's name, and all he gave for them was a patent and two trade-marks. It appears that Jones throughout acted as agent for the American company. *Reg.* v. *Lince* (1873), 12 Cox, C.C. 451 applies to this case. See also *Reg.* v. *English* (1872), *ib.* 171. The question of safety of the investment is one element in the prosecution. The trial judge concluded that one false statement proved was sufficient: see *Reg.* v. *Woolley*

(1850), 4 Cox, C.C. 193; *Reg.* v. *Giles* (1865), 10 Cox, C.C. 44; *Rex* v. *Barker* (1910), 5 Cr. App. R. 283; *Reg.* v. *Fry* (1858), 7 Cox, C.C. 394. Manlove was there when the representations were made and is equally guilty: see *Rex* v. *Johnston* (1831), 57 Can. C.C. 132. Even if the Crown were limited to their representing the shares sold as treasury shares, that is sufficient.

Bull, in reply: The appeal is a rehearing and the Court can draw inferences from the facts. The learned trial judge founded his conviction on certain facts. If these are not tenable they should be rejected. Jones used the money to promote the companies.

Argument

Johnston, replied.

Cur. adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.: After reading the careful and commendable reasons of the learned trial judge, I have no doubt that the appellants have failed to befog his mind by the devious pretences to which they resorted in order to get the money of the lady in question. I am not impressed by appellants' counsel's argument in their behalf that the language of the judge is to be confined to one false representation, namely, that the shares they were selling her were treasury shares. They contended that this was the only representation on which the learned judge relied and that, as it was contended, she knew that this representation was true or virtually true she is not entitled to succeed.

MACDONALD, C.J.B.C.

One need only read the reasons of the learned judge and the evidence in the case to see that several other false pretences were made to her, for instance that there were four guarantors in the sum of $50,000 to protect the shareholders. It was admitted by appellants that this was false and the falsity of it, in my opinion, was not known to the plaintiff. There are several other false representations which I think have been clearly proven. There was the representation that when a few more shares were sold the company would have $50,000 in the treasury. The whole frame of the appellants' scheme indicates that they were not acting *bona fide*. The appellants' counsel very wisely, I think, confined his argument to what was said by the learned judge at

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p. 280 of the appeal book in speaking of the respondent's evidence, as follows:

There were some discrepancies, but on the whole her evidence was consistent. Neither of the accused were quite as frank, and I accept what she said, in the main, as the true account of what happened when the money was paid by her, and that she was induced, by false pretences, to part with her money.

Now that language is consistent with the evidence in general. The judge's language relied upon is:

and relying on the statement that she was buying treasury stock and that her money was going into the funds of the company.

That it is contended by appellants' counsel was the only statement relied upon by her. I am unable to adopt that submission. Unquestionably false statements were made to her other than the one as to the treasury stock. Now the knowledge that the

MACDONALD, C.J.B.C.

stock she was buying was not treasury stock depends upon her evidence. Certain documents were shewn to her by the appellant Jones which, it is claimed, disclosed the fact that the shares were Jones's shares.

You did not see any of these documents? No.

System Service Limited agreement between System Service Limited and Jones, and an agreement between Canadian Reserve and System Service Limited? No, I did not.

From her evidence it is apparent that there is no proof that she knew she was buying the shares of Jones and not treasury shares.

I, therefore, think the appeals should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree in dismissing these appeals.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss both appeals.

MACDONALD, J.A.

MACDONALD, J.A.: A careful perusal of the record and the oral reasons for judgment of the trial judge shew that the only representation alleged to be false relied upon by the complainant was that she was buying treasury stock rather than stock owned by Jones either personally or in a representative capacity. Crown counsel in his opening statement, speaking of the purchase of shares by the complainant, said:

The main representation—the misrepresentation which the Crown alleges was made to Miss Church is that she was told those were treasury shares.

It is true that particulars were given of twelve other false

representations but four or five of them were abandoned and only in respect to one of them is there a finding by the trial judge. While he refers to different statements made to the complainant he finds that on one only did the complainant rely. Any number of statements might or might not be false. That is not material. It must be shewn that she relied on the statement complained of and parted with her money on the faith of it. As stated the trial judge based his judgment on one allegation only as I read his reasons and as it conforms with the Crown's position in opening I am not disposed on the evidence of the complainant to find *de novo* that she parted with her money on the strength of any other representation.

On the question of treasury shares I was disposed on the hearing of the appeal, having in view the necessity for precision in criminal matters, to hold that she knew she was not buying them because of her failure to deny certain defence evidence as she might have done in rebuttal. However, on re-reading her evidence, unsatisfactory as it is on this aspect, I am not able to say that her failure to merely strengthen her original evidence by again taking the stand is fatal to the conviction.

MACDONALD, J.A.

No other point requires consideration. An attempt was made to shew that the company either in its incorporation or operation was not a *bona fide* commercial enterprise. The trial judge was right in saying, after pointing out that a reputable solicitor for the company regarded it as legitimate, that after all that question was "beside the point." It was not shewn to be a sham company. We must assume *bona fides*. It is solely a question of a false representation or otherwise in respect to the one specific matter referred to.

I would dismiss the appeals.

MCQUARRIE, J.A.

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

Appeals dismissed.

Solicitor for appellant Jones: *W. W. Walsh.*
Solicitor for appellant Manlove: *P. J. McIntyre.*
Solicitor for respondent: *W. S. Owen.*

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Jan. 15.

WALTERS v. THE OCEAN ACCIDENT AND GUARANTEE CORPORATION LIMITED.

WALTERS v. THE OCEAN ACCIDENT AND GUARANTEE CORPORATION LTD.

Insurance—Car insured by owner—Accident—Passenger injured—Judgment against owner—Action by injured against insurer—Lack of co-operation by insured—Waiver—B.C. Stats. 1925, Cap. 20, Sec. 24—Statutory condition 8 (2).

Statutory condition 8 (2) of the Insurance Act provides, *inter alia*: "The insured, . . . whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal."

The plaintiff obtained judgment against her son for damages for personal injuries caused by his negligence while driving his motor-car in which she was a passenger. Execution was issued but nothing recovered. The son was insured against liability for damages by the defendant company. The company undertook the conduct of the defence in the mother's action against her son, but owing to the attitude of the son on his approaching the time for the examination for discovery, concluding the son violated the above statutory condition, the company withdrew from the defence and repudiated liability. In the mother's action against the insurance company under section 24 of the Insurance Act, it was held that from the beginning the son failed to co-operate with the insurer, that there was a violation of statutory condition 8 (2) and the action was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the evidence supports the finding of fact in the Court below that the son failed to co-operate with the insurer and the plea of waiver on the ground that the company continued to take steps to defend the action after knowing the facts, cannot be sustained as they did not waive a right to repudiate liability by deferring action until properly and reasonably convinced by investigation that proper grounds for repudiation had arisen.

Statement

APPEAL by plaintiff from the decision of MCDONALD, J. of the 9th of May, 1934, in an action under section 24 of the Insurance Act, B.C. Stats. 1925, Cap. 20, to recover from the defendant company $4,500 and $364.10 costs under a policy of insurance of the 9th of August, 1929, made between the defendant and one Enurchas Walters. On the 28th of November, 1933, the plaintiff obtained judgment in an action in the Supreme Court of British Columbia against the said Enurchas Walters

for the above-mentioned sums for damages for bodily injuries arising out of an accident in the use of an automobile owned and maintained by Enurchas Walters. The plaintiff issued a writ of *fieri facias* against the said Enurchas Walters in respect of the judgment and it was returned *nulla bona*. Enurchas Walters was insured by the defendant company against liability for damages up to the amount of $5,000 which he was legally liable to pay for bodily injury to any person by reason of his ownership, maintenance or use of the car. The action was dismissed.

The appeal was argued at Vancouver on the 24th and 25th of October and the 2nd, 29th and 30th of November, 1934, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Wismer, for appellant: The plaintiff was driving with her son when the accident took place on the 13th of November, 1929. She recovered judgment against her son for $4,500. Their main contention is that the son failed to co-operate with the company on the trial, contrary to the statute: see *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180. The insurance company was not concerned with the woman but only getting out of paying. She alleged negligence and proved it: see *Marley* v. *Bankers' Indemnity Ins. Co.* (1933), 166 Atl. 350; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110; *Kelly* v. *Constitution Indemnity Co.* (1933), 3 D.L.R. 50; *Fairbanks Canning Co.* v. *London Guaranty & Accident Co.* (1911), 133 S.W. 664; *Parrott* v. *Western Canada Accident & Guarantee Insurance Co.* (1920), 13 Sask. L.R. 405, and on appeal (1921), 61 S.C.R. 595; *S. & E. Motor Hire Corporation* v. *New York Indemnity Co.* (1930), 174 N.E. 65. Non-co-operation defence must be proved conclusively: see *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110. In this case there was nothing but suspicion: see *McLean* v. *Johnston* (1923), 3 W.W.R. 913. On the law on an indemnity contract and the conclusiveness of a judgment against the insured see *Century Indemnity Co.* v. *Rogers* (1932), S.C.R. 529; 31 C.J. 461; 36 C.J. 1121; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 431; *McKnight* v. *General Casualty Insurance Co. of Paris, France* (1931), 44 B.C. 1; *Parker* v. *Lewis* (1873), 8 Chy. App. 1056. On the effect of section 24 of the Insurance Act see Welford's Accident

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Insurance, 2nd Ed., 451; *Lundblad* v. *New Amsterdam Casualty Co.* (1928), 163 N.E. 874; *Barnard* v. *Wieland* (1882), 30 W.R. 947. The whole question in the first case was whether the tires were in reasonable repair, in fact it was a blowout: see *Moran Bros. Co.* v. *Pacific Coast Casualty Co.* (1908), 94 Pac. 106 at p. 108.

Donnenworth, on the same side: In the case of *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180 no notice of the accident was given the company. On the question of notice see *Century Indemnity Co.* v. *Rogers* (1932), S.C.R. 529 at p. 531; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1933), A.C. 70; *Home Insurance Co.* v. *Lindal and Beattie* (1934), S.C.R. 33; *England* v. *Dominion of Canada General Ins. Co.* (1931), 3 D.L.R. 489. When an insurance company is given notice they cannot then impeach the judgment: see *Washington Gas Co.* v. *District of Columbia* (1896), 161 U.S. 316; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 431, sec. 484, where the authorities are collected; *B. Both Tool Co.* v. *New Amsterdam Casualty Co.* (1908), 161 Fed. 709.

Argument

Locke, for respondent: Three points must be considered: Whether the trial judge was right in finding (1) That the essentials of a cause of action were not pleaded; (2) that the mere tendering in evidence of the judgment against Enurchas Walters does not prove that he was legally liable in damages to his mother for negligence; (3) that Enurchas Walters had colluded with his mother against the insurance company and therefore disentitled to indemnity. There are four essentials she must plead under section 24 of the Act, and only two are pleaded. The section must be strictly construed: see *Vandepitte* v. *Preferred Accident Insurance Co.* (1932), 102 L.J.P.C. 21 at p. 27. She does not allege that E. Walters incurred liability. That the mere tendering the judgment does not prove liability to the mother see *Yorke* v. *Continental Casualty Co. of Canada* (1929), 64 O.L.R. 109 at p. 110; *Ballantyne* v. *Mackinnon* (1896), 2 Q.B. 455; *Allan* v. *McTavish* (1883), 8 A.R. 440 at pp. 442-3. On the question of estoppel, there can be none as between this plaintiff and the defendant: *Vandepitte* v. *Preferred Accident Insurance Co., supra,* at p. 27. Estoppel must be mutual: see

Everest & Strode on Estoppel, 3rd Ed., 4. That the pleadings disclose no cause of action, and even if they did under section 24 of the Act there is no evidence to support it, see *Hornbrook* v. *Toronto Casualty Fire, Etc. Co.* (1932), 46 B.C. 383 at p. 393. After they found there was a breach of the statutory condition they promptly withdrew. The distinction between this and the case of *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110 is obvious. The case of *England* v. *Dominion of Canada General Ins. Co.* (1931), 3 D.L.R. 489 was wrongly decided. In any event being between the assured and the company it does not apply. On the appeal (see 40 O.W.N. 508) no reasons for judgment are given. One relying on estoppel must shew he has altered his position to his detriment: see Everest & Strode on Estoppel, 3rd Ed., 8; *Pickard* v. *Sears* (1837), 6 A. & E. 469. On the failure of the assured to co-operate with the company see *The Fidelity & Casualty Co. of New York* v. *Marchand* (1924), S.C.R. 86; *Talbot* v. *London Guarantee and Accident Co.* (1897), 17 Occ. N. 216. E. Walters was really plaintiff in the former action against himself: see *The Fidelity & Casualty Co. of New York* v. *Marchand* (1924), S.C.R. 86 at p. 93. It was not co-operating when he got a solicitor to act for his mother against himself. It was neither reasonable nor honest. All the circumstances must be considered. Instead of co-operating with the company he was actively working on the other side. He completely ignored and violated statutory condition 8 (2) of the policy. That there was no waiver on the part of the company in abandoning the defence see *S. & E. Motor Hire Corporation* v. *New York Indemnity Co.* (1930), 174 N.E. 65. The defence was properly pleaded. *McLean* v. *Johnston* (1923), 3 W.W.R. 913 at p. 916 and *Barnard* v. *Wieland* (1882), 30 W.R. 947 do not apply. The statutory right to sue under section 24 of the Insurance Act is subject to all the equities between the company and the assured. The facts which give rise to the statutory obligation must be pleaded: see Odgers on Pleading, 10th Ed., 102-3.

Argument

Wismer, replied.

Cur. adv. vult.

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MARTIN, J.A.: After a careful consideration of the evidence herein I find myself unable to say that the learned judge below was clearly wrong in his finding of fact upon which this case turns, *viz.*, failure to "co-operate with the insurer," and therefore the conclusion he reached should not be disturbed on this ground, nor do the facts before us, and the finding thereupon, directly or indirectly, support the plea of waiver, set up in the reply, of the insurer's right to rely on that breach of the statutory conditions of the policy. The appeal therefore should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. The defence set up of conspiracy to defraud in my opinion woefully failed. The action of the respondent in so contending, to my mind, was nothing less than scandalous and has been pressed before this Court as below, based on no legal material whatever and so recklessly made that it justifies the observation I have made above. It would seem that where the insured is—as in this case—a son of the injured person and, as it happens, only of the age of 23 years, he must disassociate himself with his mother and have no regard for the injuries she has suffered. Here the mother was seriously injured in a motor accident in the car of her son driven by her son the accident being caused by the negligence of the son and in that he shewed some concern for his mother: that amounted to a conspiracy to defraud the insurer.

I have given careful attention to the evidence and I do not hesitate to say that there is no evidence whatever to warrant any such defence—it can only have been advanced in the way of an endeavour to embarrass and prejudice the plaintiff (the appellant) in her case.

The learned trial judge would appear to have based his judgment upon first the fact that in this action, which is based upon a statutory right to recover under the Insurance Act, Cap. 20, Sec. 24, B.C. Stats. 1925, is not complete in itself, but that the establishment of negligence must be again determined in this action, that is to say *de novo*. Further the learned judge would appear to have held that there was lack of co-operation under the terms of the policy of insurance upon the part of the insured

(the son of the plaintiff who is not a party to this action) with the insurer (the defendant). Now as to this I feel free to say that lack of co-operation if existent would afford no defence to this action, but I do not see upon the evidence that there was any lack of co-operation. To admit of that being a complete defence it, in effect, would mean the nullification of the right of action given by statute; that is, that all that the insurer would have to set up would be this defence that there was lack of co-operation on the part of the insured and if proved that would end the case —an easy way to escape liability, and what an opportunity for collusion between the insured and the insurer.

The statutory right of the third person who suffers injuries by reason of the negligence of the insured to recover for such injuries from the insurer cannot be so cavalierly dealt with. It is a statutory right in no way dependent upon the contractual obligation upon the insured to co-operate with the insurer. If this should be held to be the law, the right of action given to the third person would certainly become a most illusory one indeed.

With great respect to the learned trial judge it is not open in the face of the judgment sued upon which imports negligence upon the insured for it being said: MCPHILLIPS, J.A.

> Suffice it to say the insured Enurchas Walters, completely ignoring his obligation under his policy, from the beginning failed to co-operate with his insurer. On the contrary, he really set out to compel the insurer to pay his mother the damages which she has suffered and that regardless of whether he had been negligent or not. In fact in the light of his own statement he had not been negligent. Under those circumstances, I think there is no liability under the policy.

So long as that judgment stands it is conclusive in the matter. Now as to the action which resulted in the plaintiff recovering judgment against Enurchas Walters, what was the obligation of the insurer—the defendant—in this regard? Turning to the policy of insurance we find this contractual obligation entered into between the insurer and insured:

> (2) To defend in the name and on behalf of the insured and at the cost of the insurer any civil action which may at any time be brought against the insured on account of such injury to person.

Here the plaintiff was most seriously injured and in an action brought by the plaintiff against her son Enurchas Walters for negligence, the plaintiff recovered damages for bodily injuries in the sum of $4,500 and taxed costs amounting to the sum of

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$364.10. In due course an execution issued to enforce the judgment but a return of *nulla bona* was made thereto by the sheriff. Following that this action was brought, founded upon the judgment. It is here most pertinent to remark that the defendant in pursuance of the contractual obligation which was upon it undertook the defence to the action but later abandoned the defence although it is to be noted the solicitors upon the record never were changed. Paragraph 5A amendment to the statement of claim in this action reads as follows—indicating what the defendant did:

> 5A. The plaintiff says that on the 4th day of July, 1933, the defendant filed an unconditional appearance on behalf of the said Enurchas Walters in the said action, No. W1093/33 and undertook and adopted the defence of the said Enurchas Walters therein, pursuant to the terms of the said policy of insurance and that on the 16th day of September, 1933, the defendant filed a statement of defence in reply to the plaintiff's statement of claim in the said action on behalf of the said Enurchas Walters, and continued the conduct of the defence of the said Enurchas Walters until the 6th day of October, 1933, and that during the said period the solicitors acting on behalf of the said Enurchas Walters in said action were employed and paid by the defendant, and that the defendant by reason of the facts aforesaid elected to become privy and did thereby become privy to the proceedings in the said action No. 1093/33 and is bound and estopped from denying that the judgment rendered therein was awarded as compensation for the plaintiff's said injuries within the meaning of the said policy of insurance.

In my opinion the facts establish a complete estoppel as against the defendant in any way endeavouring to contend that the judgment is not binding and conclusive upon it. There was the obligation to defend, the defence was undertaken, pleadings filed and other steps taken, and if the defence had been continued to the trial, which was the contractual obligation of the defendant, and the judgment was that there was no negligence upon the part of Enurchas Walters, that would have been the end of the matter. But we find that the defendant in breach of its covenant to defend the action chooses to abandon it, after having entered upon it, and in this Court asserts that there was no negligence. It knew all the facts, then why not have presented them to the Court? It is not permissible now for the defendant to advance any such contention so long as that judgment stands, and it is existent today, it is a liability by way of a judgment debt against Enurchas Walters, the insured, and the defendant, the insurer, is under contractual obligation to indemnify the insured in

respect thereof, but apart from that obligation there is the statutory obligation by reason of the judgment provided by section 24 of Cap. 20, B.C. Stats. 1925, which reads as follows:

> 24. Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

It has been contended at this Bar that the case of *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180 is conclusive against the plaintiff as in this action the negligence has not been proved as against the insured and that the judgment is not sufficient proof but must be established again in this action against the insurer the defendant. In my opinion this is not a tenable defence especially upon the particular facts of this case. The insurer was under a contractual obligation to defend the action of the plaintiff against the insured, did defend, appeared by its solicitor who remained throughout the trial as the solicitor on the record although, of course, the insurer had advised its abandonment of the defence, but only about a month before the trial. The trial took place, the insured defending the same and Mr. Justice FISHER before whom the trial took place found negligence against the insured. Upon these facts to my mind it is impossible for any such defence being set up (*England* v. *Dominion of Canada General Insurance Co.* (1931), O.R. 264; 3 D.L.R. 489; affirmed 40 O.W.N. 508). It may be said that the insurer in this case did not continue the defence to and inclusive of the trial, but did the insurer, becoming aware that the defence would fail, in bad faith and in breach of its contractual obligation drop the defence at the eleventh hour? In my opinion that was what was done, something that, in my opinion, no Court will approve. There is estoppel here. Then there is this further point. Can it be said that the *Yorke* case is really such a decision as is binding upon this Court, that is to say, "that the insured was legally liable in damages to the plaintiff for the injury, are not established as against the insurer by the production of the judgment obtained by plaintiff against the insured"? (See head-note (1930), S.C.R. 180).

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The *Yorke* case proceeded upon and was decided upon an admission of counsel as further on we have this in the head-note: "the defendant, by reason of an admission at the trial, was precluded from contending that the liability of S. to plaintiff had not been established by production of the judgment against S." and see at pp. 186-7.

After Mr. *Grant*, who appeared for the respondent, had read to his Lordship section 85 of the Insurance Act, the following discussion took place (pp. 186-7):

His Lordship: Does that mean that the plaintiff will have to make her case over again?

Mr. Grant: Oh, no, she sues on the judgment.

His Lordship: The insurance company have [had] an opportunity to come in, and they are practically precluded by the judgment.

Mr. Grant: Yes, my Lord.

Mr. Walsh: Yes, nothing turns on that; I am ready to admit all that.

In view of this admission it is not now open to the appellant to contend that the liability of Mrs. Swartz to the respondent for injuries received has not been established by the judgment.

MCPHILLIPS, J.A.

It is naturally with some hesitancy that I present this view, as, of course, this Court, as well as all other Courts in Canada, are bound by and treat the judgments of the Supreme Court of Canada with deserved and highest respect, yet where the interests of suitors are at stake, it is the duty of the Courts to apply the law and I have ventured here to say that the decision as to the requirement to again establish the legal liability for the injury to the plaintiff in this action cannot be said to be other than *dicta* as that decision was unnecessary in the *Yorke* case as the case proceeded upon an admission of counsel. I had occasion to take the same course in *Boyle* v. *Seguin* (1921), 2 W.W.R. 195 at pp. 201-3; *Boyle* v. *Seguin* (1922), 1 A.C. 462; 91 L.J.P.C. 137; 1 W.W.R. 1169; and that case went on appeal to the Privy Council and their Lordships were pressed with the case of *Smith* v. *Canadian Klondike Mining Co.* (1910), 16 W.L.R. 196 and (1911), 19 W.L.R. 1, a decision of the Supreme Court of Canada, and at p. 1182 of (1922), 1 W.W.R., Lord Shaw delivering the judgment of their Lordships of the Privy Council said:

In these circumstances their Lordships agree with the conclusion come to by the learned judge, MCPHILLIPS, J.A., rather than with that arrived at by the other learned judges who deferred to the *dicta* in the *Smith* case already dealt with.

(Also see *Charles R. Davidson and Company* v. *M'Robb or Officer* (1918), A.C. 304 at p. 322, Lord Dunedin, and *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J.P.C. 76 at p. 81, the Lord Chancellor (Earl of Halsbury.))

In *Charles R. Davidson and Company* v. *M'Robb or Officer*, *supra*, we have Lord Dunedin saying:

I now turn to the point of whether I am bound to take the view which I personally do not hold in respect of decisions of this House.

My Lords, I apprehend that the *dicta* of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shewn to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case. Now, the *dicta* I have quoted were not as *dicta* agreed to by Lords Macnaghten and Mersey.

Apart from the view that the *Yorke* case is not a binding authority upon the facts of this case, I would refer to the case of *McKnight* v. *General Casualty Insurance Co. of Paris, France* (1931), 44 B.C. 1, and especially at pp. 11-12, in the judgment of my learned brother MACDONALD, J.A. He there quoted from Halsbury's Laws of England, Vol. 13, p. 347 [2nd Ed., 431]:

A person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the latter, not because he is a privy, but because that is the true meaning of the contract.

MCPHILLIPS, J.A.

Now in that case the same course was adopted as here—the company took over the defence and later retired from the defence. Nevertheless, the company was held liable. Here palpably the insurer finding that upon the facts it could not succeed retired from the defence. In my opinion there is complete estoppel here against the insurer the defendant. I had occasion in *Hanley* v. *Corporation of the Royal Exchange Assurance of London, England* (1924), 34 B.C. 222, to make certain observations as to the defence of the insurance company there. It was a case of fire insurance. But in principle what I there said is equally applicable to the defence of the defendant the insurer in the present case. At pp. 238-9, I said:

The trenchant language of the Vice-Chancellor in the *Mackie* case [*Mackie* v. *The European Assurance Society* (1869), 21 L.T. 102] provides an excellent precedent for me to make some deserved observations in the present case. I unhesitatingly condemn the defence here made, it is not only frivolous but is callous to a degree almost unthinkable when it is considered that the appellant company is a powerful, long existent and well-known English company with a history traditional in its nature and in keeping with the

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high standard so universally maintained on this continent by English companies to be rudely and ruthlessly departed from in this case. . . . To give effect to this class of defence would be the subversal of the well-recognized principles of law governing insurance contracts. Vice-Chancellor Malins was moved to say in the *Mackie* case (p. 106), treating of the defence there made:

"Having raised these objections, fatal to the public and to the success of the office, and most unwisely taken, and frivolous and ridiculous in themselves, I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damage, with interest on the money. I should be glad if I could make them pay damages for the injury which this defence has caused the plaintiff; it could not have originated with the respectable directors or solicitors, but the miserable officials."

I have no hesitation in adopting the language of the Vice-Chancellor and applying that language in the present case. . . . I cannot believe, as Vice-Chancellor Malins could not believe, in the *Mackie* case, that the defence has had the approval of the directors in England. If there was any such approval on the part of the directors, it could only have been given upon some incomplete knowledge or misunderstanding as to the facts.

MCPHILLIPS, J.A.

In the result in the *Hanley* case the company, notwithstanding it succeeded in the Court, was pleased to pay the claim. I would indeed be gratified if the company in this case does the same because, in my view, with great respect to all contrary opinion, the claim of the plaintiff so seriously injured by the insured's negligence is in my opinion justly entitled to succeed. She was a semi-invalid for some two years after the accident and no doubt will suffer from the effects of the accident throughout her life. In this connection, I would refer to what Lord Wright said in delivering the judgment of their Lordships of the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Co.* (1932), 102 L.J.P.C. 21 at p. 27:

On the other hand, "honour policies" are common in insurance business, and any insurance company which failed to fulfil its "honourable obligations" would be liable to pay in loss of business reputation.

In my opinion the insurer the defendant is liable in law for the amount of the judgment sued upon together with interest and costs.

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: This action is based on section 24 of the Insurance Act, B.C. Stats. 1925, Cap. 20. The plaintiff (appellant) some time before obtained judgment for damages amounting to $4,500 against her son Enurchas Walters for his negligence in driving a motor-car (four years before) in which she was a

passenger. The son, now her judgment debtor, was at all material times insured against liability for damages by the respondent insurance company. The judgment creditor, his mother, failing (as I am sure was anticipated) to realize the amount by execution against her son's non-existent estate, brought this action against the insurance company under section 24 referred to.

While we covered, properly enough, much ground during the argument the disposition of this appeal turns upon questions of fact if answered favourably to the respondent. The insurance policy was issued subject to the usual statutory conditions calling for co-operation between the assured and the company in defending any action brought upon the occurrence of an accident. This statutory condition (8 (2)) is part of the contract and no action to recover the amount of a claim under the policy can be brought by any one unless that requirement is complied with.

The trial judge in his reasons for judgment dismissing the action states that "from the beginning" (*i.e.*, after his mother was injured) the assured "failed to co-operate with his insurer." That is a very explicit finding on a vital point. We cannot reverse it unless convinced that it is clearly wrong. I cannot do so. The truth is that the son promoted the action brought against himself by his mother to the detriment of the insurance company with whom he was bound to co-operate. One can understand and appreciate that where family relations exist the temptation in cases of this sort, to see that the injured relative recovers at the expense of the insurance company, regardless of the true facts, is a strong one. All, however, that is required of the assured is an honest and fair statement of the facts of the case to his insurer together with reasonable co-operation. To be called upon to tell the truth should not be regarded as a hardship. The insurance company covenanted to defend the action only upon compliance by the assured with the statutory conditions.

MACDONALD, J.A.

I asked Mr. *Wismer*, counsel for appellant, at the conclusion of the argument what further submission (or submissions) he could offer if the findings of fact of the trial judge should not be disturbed. He replied, with his usual candour and grasp of essentials, that in such an outcome he relied upon the doctrine of waiver, alleging that the solicitor for the insurance company

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long after knowing the facts (and if we so find after knowing of the alleged lack of co-operation) continued to take all necessary steps in the defence of the action thereby, to quote from the plaintiff's pleadings, becoming privy "to the proceedings in the said action" (*i.e.*, the action wherein the mother recovered judgment against her son) "and is bound and estopped from denying that the judgment recovered therein was awarded as compensation for the plaintiff's said injuries within the meaning of the said policy of insurance." Now if we assume merit in this plea it is again answered by a finding of fact at the trial which, in my view, cannot be disturbed, *viz.*, that "as soon as the insurer became aware of the situation and of the attitude which Enurchas Walters took on his approaching the time for the examination for discovery, the insurer immediately repudiated liability at the very first opportunity." Even were it true that a stranger—the present appellant—might take advantage of an alleged estoppel it is first essential to shew that rights accruing to any one were in fact waived or that a position was assumed by the insurance company from which it could not withdraw. One does not waive a right to repudiate liability by deferring action until properly and reasonably convinced by investigation that proper grounds for repudiation have arisen.

As intimated these two findings of fact dispose of the appeal without considering many other points raised in argument, some of which might lead to the same conclusion.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *F. M. Donnenworth.*
Solicitors for respondent: *Martin & Sullivan.*

THE BRITISH COLUMBIA LAND AND INVESTMENT AGENCY LIMITED v. MONTREAL TRUST COMPANY.

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BRITISH COLUMBIA LAND & INVESTMENT AGENCY LTD. v. MONTREAL TRUST CO.

Sale of mortgaged lands—Deed absolute in form—Intended to operate as a mortgage—Evidence of—Admissibility—First mortgage—Implied obligation of purchaser of equity of redemption to indemnify vendor.

C. and N. (N. being in control of the Nickson Construction Company) were customers of the Royal Bank, of which M. was manager. The Construction Company owed the bank $15,500 and the bank was pressing for payment. N. asked C. for an advance to liquidate the company's indebtedness to the bank. C. agreed to advance the money and accepted as security the equity of redemption in two parcels of real estate (Burrard Street property and Powell Street property) held by Prudential Holdings Limited (in which N. held practically all the stock), the Powell Street property having been mortgaged to the respondent for $15,000. C., for undisclosed reasons, did not want his name to appear on any document and his banker M. acting for him arranged with the manager of the appellant company whereby the two properties were conveyed to the appellant company to be held on behalf of C., C. at the same time indemnifying said company against loss. A resolution of the directors of Prudential Holdings Limited authorized the sale by deed to the appellant, the latter to assume all mortgages against the properties sold. This resolution was filed on the appellant's application to register title, C.'s view being that it would be better to take a deed as an aid to realization on the security if necessary. C. advanced the $15,500 and the Nickson Construction Company's indebtedness to the bank was retired. Subsequently the Burrard Street property was sold and the proceeds used in reduction of N.'s debt to C. Then respondent obtained from Prudential Holdings Limited for a consideration an assignment of all their rights, including the right to indemnity, against the mortgage on the Powell Street property. The respondent recovered judgment against the appellant in an action to recover principal and interest on the mortgage on the Powell Street property on the implied obligation of the appellant as purchaser to indemnify Prudential Holdings Limited for payments due under the mortgage.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, J.A. dissenting), that the appellant contends the land in question was conveyed to it to be held in trust for C. as security for a debt and the respondent acquired no right to indemnity as against it. The documents however contain no evidence of such a transaction. On their face they imply the conventional transaction set out in documents between mortgagors and mortgagees, vendors and purchasers, and assignments not of trust, and were acted upon as such by the parties. The evidence of the documents should be accepted as excluding the implication for

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trust, and further the respondents had an assignment from the Prudential Holdings Limited of all its rights including the right to indemnity against all mortgages on the property, and the appellant is estopped from disputing the respondent's claim.

APPEAL by defendant from the decision of MCDONALD, J. of the 19th of June, 1934, in an action to recover $1,198.57 interest due on a mortgage of the 15th of January, 1925, made between Prudential Holdings Limited as mortgagor and plaintiff as mortgagee to secure repayment of the principal sum of $13,000 with interest at 6 per cent. on lots 5 to 9 inclusive in block 2 of subdivision "C" of district lot 183, group one, New Westminster District. By conveyance of the 15th of February, 1926, the Prudential Holdings Limited conveyed to the defendant the said lands subject to the said mortgage of the 15th of January, 1925, and the plaintiff claims that the Prudential Holdings Limited thereupon became entitled to be indemnified by the defendant against its obligation to pay the moneys payable by it under the terms of said mortgage. In the alternative the plaintiff claims that the defendant by accepting the conveyance and by applying to register the same in the Land Registry office and by filing in support of its application to register a certified copy of a resolution passed by the directors of the Prudential Holdings Limited, authorizing and confirming the sale for $15,500 and reciting that "the defendant is to assume all mortgages against the properties sold" and by entering into possession of the property, it bound itself and agreed to assume and pay the said mortgage. By assignment of the 1st of June, 1933, the Prudential Holdings Limited assigned to the plaintiff the full benefit and advantage of all claims which the Prudential Holdings Limited then had or might thereafter have against the defendant. The defendant denies that it ever agreed to assume the mortgage and avers that before the 15th of February, 1926, the late Charles V. Cummings agreed to advance by way of loan to the Prudential Holdings Limited the sum of $15,500 and the Prudential Holdings Limited agreed to secure repayment to Cummings by conveying to Cummings, *inter alia*, the lands above mentioned and Cummings advanced the $15,500 to Prudential Holdings Limited by causing the Montreal Trust Company to pay same to the said Prudential Holdings Limited for him, and he requested Prudential Holdings

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Limited to convey the said lands to his nominee, the defendant, to be held by the defendant in trust for Cummings as and by way of mortgage to secure repayment of said sum. Pursuant thereto the Prudential Holdings Limited conveyed the said properties to the defendant by conveyance on the 15th of February, 1926, the defendant acting at all times solely as trustee for Cummings.

The appeal was argued at Vancouver on the 21st, 22nd and 23rd of November, 1934, before MACDONALD, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C. (*Bruce Robertson,* with him), for appellant: One Nickson held substantially all the stock in Prudential Holdings Limited; he owed The Royal Bank $15,000 and was pressed for payment. One Cummings agreed to advance him $15,500 and agreed to take the property in question and another property that was held by Prudential Holdings Limited, as security for the loan. Cummings did not want his name to appear so the properties were transferred to the Montreal Trust Company who held the property in trust for him, the sale of the property in question being subject to the mortgage held by the plaintiff. We say we did not buy the property but merely took it by way of mortgage security, and we are not the true owners as we hold it for Cummings. Can the plaintiff sue us although we are not a party to the mortgage? The conveyance was made to the Montreal Trust Company but the company did not sign anything: see *Frontenac Loan and Investment Society* v. *Hysop* (1892), 21 Ont. 577. On the evidence of Mitchell taken on commission being admissible as part of the *res gestæ* see Taylor on Evidence, 12th Ed., Vol. I., p. 342, sec. 512; Phipson on Evidence, 6th Ed., 499; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Walters* v. *Lewis* (1836), 7 Car. & P. 344; *Bennison* v. *Cartwright* (1864), 5 B. & S. 1; 122 E.R. 733 at p. 738; *Matchett* v. *Stoffel* (1916), 10 O.W.N. 276; *Higham* v. *Ridgway* (1808), 10 East 109; English & Empire Digest, Vol. 22, p. 98; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 585, sec. 656. Statements of the real owner and not the nominal should be taken: see English & Empire Digest, Vol. 22, p. 88; *Woolway* v. *Rowe* (1834), 1 A. & E. 114; *La Roche* v. *Armstrong* (1922), 91 L.J.K.B. 342 at p. 344; *Beauchamp* v. *Parry* (1830), 1

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B. & Ad. 89; *Falcon* v. *The Famous Players Film Co.* (1926), 1 K.B. 393 at pp. 405-6; Phipson on Evidence, 7th Ed., 240. That the defendant is absolved from the implied liability to indemnify the vendor see *Campbell* v. *Douglas* (1916), 54 S.C.R. 28; *Mills* v. *United Counties Bank, Limited* (1912), 1 Ch. 231; *Fullerton* v. *Brydges* (1895), 10 Man. L.R. 431. If we either as purchaser or mortgagee hold a title for someone else we are not liable on an implied indemnity: see *Walker* v. *Dickson* (1892), 20 A.R. 96; *Corby* v. *Gray* (1887), 15 Ont. 1; *Sokolov* v. *Kachmark* (1929), 1 W.W.R. 353. Cummings advanced $15,000 and now that the Montreal Trust Co. has come in to keep Cummings's name out of the transaction owing to this he asks us to pay another $15,000.

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Bourne, for respondent: Mitchell's evidence taken on commission was rejected by the trial judge: see *Allan* v. *McLennan* (1916), 23 B.C. 515. The vendor assigned to the plaintiff his right to be indemnified by the defendant company: see *Maloney* v. *Campbell* (1897), 28 S.C.R. 228. This is an ordinary case of the mortgagee endeavouring to collect his money. Where there are documents intended to embody the entire agreement between the parties the Court should decide on the documents without outside evidence. There is a conveyance expressed to be subject to a mortgage. There is no covenant in the deed but there is a resolution in order that the trust company can obtain the conveyance. They assume the mortgage. The deed with the resolution amounts to an implied covenant to pay and is an estoppel: see *Small* v. *Thompson* (1897), 28 S.C.R. 219 at p. 225; Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 215, sec. 269; English & Empire Digest, Vol. 17, p. 222. To induce a Court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only, evidence of such intention must be clear and conclusive: see *McMicken* v. *The Ontario Bank* (1892), 20 S.C.R. 548 at p. 575; *Forman* v. *Union Trust Co.* (1927), S.C.R. 1; *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13. The evidence of Coulter for the defence shews the contract was the conveyance plus the resolution embodying the terms of the mortgage. That this was a conveyance and not a mortgage see *Barton* v. *Bank of New South Wales*

(1890), 15 App. Cas. 379 at pp. 380-1; *Wilson* v. *Ward* (1930), S.C.R. 212 at p. 217. The evidence shews this was a sale and not a mortgage. It was drawn in the statutory form. The manager of the defendant company said it was intended the company be principal. That there is on the part of the defendant an obligation to pay see *Esser* v. *Pritzker* (1926), 58 O.L.R. 537 at p. 543; *Disney* v. *Howich* (1925), 57 O.L.R. 365 at p. 370; *Hart* v. *Hart* (1881), 18 Ch. D. 670 at p. 674.

Des Brisay, on the same side: That the evidence of Mitchell is inadmissible see *In re Rosenblat Estate* (1932), 40 Man. L.R. 380 at p. 385; Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 585-6, sec. 656; Phipson on Evidence, 7th Ed., 270.

Argument

Farris, in reply, referred to *Beatty* v. *Fitzsimmons* (1893), 23 Ont. 245 at pp. 250-1.

Cur. adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.: The real defence in this case is that the land belonged to one Cummings who agreed to advance to the Prudential Holdings Limited and did advance a large sum of money upon a mortgage on the same land on the alleged verbal promise of Cummings to convey the lands in question to the Prudential Holdings Limited upon their undertaking to convey it back to Cummings or to Cummings's nominee. The conveyance of the land was to be held in trust to secure Cummings, and therefore the plaintiff acquired no right to indemnity by defendant. The documents, however, contain no evidence of such a transaction. On their face they imply the conventional transaction used in documents between mortgagors and mortgagees, vendors and purchasers and assignments not of trust, and were acted on as such by the parties. Apart from the contradictory and disputed evidence I accept the evidence of the documents as excluding the implication of trust.

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Moreover, the plaintiff had an assignment from the Prudential Holdings Limited of all its rights including the right to indemnity against all mortgages of the property, and is estopped from disputing the plaintiff's claim in this action.

I would, therefore, dismiss the appeal.

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MACDONALD, J.A.: Appeal by the Montreal Trust Company, defendant in the action, from a judgment of MCDONALD, J. holding it liable to the respondent The British Columbia Land and Investment Agency Limited for interest (and liability for principal would follow in due course) under a mortgage given to respondent as mortgagee by Prudential Holdings Limited, as mortgagor on Vancouver property for the sum of $13,000 with interest at 6 per cent.

I recite the essential facts because it is clear to me that the written documents presently referred to were not intended to finally embody the entire agreement between the parties. Parol evidence was therefore admissible to shew that a document *ex facie* a deed was in fact a mortgage. Such evidence must be conclusive and the *onus* was on appellant to rebut by evidence the usual presumption that the document was what it purported to be (*McMicken* v. *The Ontario Bank* (1892), 20 S.C.R. 548).

The late C. V. Cummings and one T. R. Nickson (also the Nickson Construction Company, controlled by Nickson) were customers of The Royal Bank of which Mitchell was the manager.

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The Construction Company owed the bank $15,500 and payment was demanded. Nickson asked Cummings for an advance to enable him to liquidate his indebtedness to the bank and Cummings agreed to assist him on certain terms. For security (as I believe) Nickson offered his equity of redemption in two parcels of real estate held by Prudential Holdings Limited (in which he owned practically all the stock) and mortgaged to respondent for $15,000 as aforesaid, but for domestic and personal reasons undisclosed by the record Cummings, while he wanted security, did not wish his name to appear on any document. He, therefore, asked his banker, Mitchell, if it could be arranged, meaning, as I read the evidence if he (Cummings) could make the advance to Nickson or his Construction Company and receive security on the real estate referred to without his name appearing in any way. Mitchell who knew the reasons for Cummings's attitude advised him that with the aid of the appellant, it could be arranged. Mitchell then telephoned to Bone, manager of appellant, the Montreal Trust Company, advising him of the facts referred to including the further fact that an indemnity would be taken from the party concerned (Cummings's name was withheld from

Bone) and enlisting his company's aid in carrying it through. This was agreed to. Mitchell then asked the bank's solicitor to investigate the titles and to take a conveyance of the properties to the appellant company. It was Cummings's view as stated to Mitchell that it would be better and simpler to take a deed, as an aid to realization on the security if necessary.

Cummings then advanced the required amount to the bank, the latter sent its cheque for $15,500 to appellant Trust Company and it, at the bank's request, made out a cheque in favour of Prudential Holdings Limited for $15,033.11 representing the alleged purchase price after necessary adjustments and stating (the letter signed by Bone) that it was "in respect of the purchase of lot 15 and north half of lot 16, &c." The cheque to the Prudential Holdings Limited was by endorsement transferred to the bank. Mitchell on behalf of all parties kept control of the transaction and of the cheques to ensure that with Cummings's advance the Nickson Construction Company's indebtedness to the bank should be retired and Cummings should be secured through the agency of his nominee, the appellant. At the same time a letter signed by Mitchell and his assistant manager was written to appellant in part as follows:

Confirming the various conversations which we have had with your Mr. Bone during the past few days, it is our desire that you should purchase in your name from the Prudential Holdings Limited—ALL AND SINGULAR those certain parcels or tracts of land. . . . In consideration of your agreeing to hold the said lands, subject to the said mortgages, [to respondent] in trust for and for the use of our principal and to sell or otherwise dispose of the said land, subject to the said mortgages, as our principal shall direct, we undertake to obtain an indemnity from our principal protecting you from any loss in this transaction, this indemnity agreement to be delivered to you, duly executed, on demand. . . .

It is agreed that you are not to be responsible in any way in respect to the said lands or the mortgages upon them, either to pay charges upon the said lands or otherwise beyond the amount of rents from the said lands which come into your hands and moneys paid to you by our principal for payment of charges on the said lands.

The indemnity agreement has been executed by an undisclosed principal and we hold the same to be delivered to you upon your demand, it being understood that no demand will be made upon us for this agreement until you are entitled to enforce its terms.

Bone replied, in part, as follows:

It is agreed that we are not to be responsible in any way in respect to the said lands or the mortgages upon them either to pay charges upon the

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said lands or otherwise, beyond the amount of rents from the said lands or otherwise, beyond the amount of rents from the said lands which come into our hands (for which we agree to account) and moneys paid to us by your principal for payment of charges on the said lands.

Some time later one of the properties (Burrard Street) was sold and the proceeds applied in the reduction of Nickson's indebtedness to Cummings. To indicate how Nickson viewed it and to shew that in executing a deed he was not (except in form) conveying the property or his equity therein to appellant, he later gave an option to P. Burns & Company to purchase the Powell Street property (subject to the mortgage in question to respondent) and wrote to Mitchell asking him to "get ready a statement shewing just how much will be owing to the Montreal Trust Company." That meant an inquiry as to the amount he owed to Cummings, Nickson being well aware that the appellant company was Cummings's nominee holding the security for him. It is not material that the letter is signed by Nickson, rather than Prudential Holdings Limited, the company he controlled. Our inquiry is as to the true nature of the transaction and on that point it is evidence. Mitchell furnished Nickson with the statement requested. It shewed an indebtedness at that time of $12,557 and the only source by which the original indebtedness could be reduced was by the sale of the Burrard Street property already referred to. All this was inconsistent with a purchase of the property. It is significant that Nickson was not called as a witness. If he could say that he sold his equity to appellant he would doubtless be asked to do so. His acts shewed clearly that he retained the equity and used it as security to protect Cummings for his advance.

Mitchell also knew that Cummings treated it as a loan upon which Nickson paid interest while Nickson on his part expressed the belief that the properties would be sold shortly and the loan liquidated. In case of sale any surplus was to go to Prudential Holdings Limited. That, according to Mitchell, "was distinctly understood."

Further appellant company in managing the property collected rent and applied it in the usual way on interest, insurance, taxes, etc., and when rentals were insufficient called upon The Royal Bank of Canada, the agent responsible for initiating and carrying

through the transaction, to supply the necessary funds to make up the difference.

Notwithstanding the foregoing facts all the formalities observed in arranging the security indicated a sale. A resolution of the directors of Prudential Holdings Limited authorized the execution of a deed and confirmed the sale of the property from the company to appellant, the latter "to assume all mortgages against the properties hereby sold." This resolution, unknown at that time to appellant, was filed on the application to register title. Other incidents and facts (descriptive words, *e.g.*, "owner") were of similar import. All this, however, while evidential and entitled to weight cannot displace the whole body of evidence indicating the true nature of the transaction. If A borrows $1,000 from B and as security only, to the knowledge of both, transfers Blackacre by deed to B, it is a mortgage and not a deed conveying the beneficial ownership and its true character is not changed because by all parties concerned with its execution and registration it is treated as a deed. It is quite immaterial whether or not the solicitor who registered the document thought it was a deed and equally immaterial if in case A was a company that its directors authorized its execution as a deed. There is nothing to prevent A and B treating the transaction, so far as formalities are concerned, as a deed for reasons of convenience or otherwise knowing that *qua* the parties concerned it is a mortgage.

It transpired doubtless because of depreciation in real estate values that the properties transferred as aforesaid to the appellant were not of sufficient value to provide for the mortgage to respondent much less to also provide security for Cummings's advance. Respondent therefore obtained from Prudential Holdings Limited for a consideration an assignment to it of—

> . . . the full benefit and advantage of all claims or rights which the said assignor [Prudential Holdings Limited] has or hereafter may have against the said Montreal Trust Company either at law or in equity or whether by way of claim for indemnity in respect of the said mortgage or the principal, interest or any other moneys remaining unpaid thereunder or otherwise howsoever and DOTH HEREBY assign, transfer and set over unto the assignee [respondent] all the right, title, interest, claim and demand which the said assignor has or hereafter may have against the said Montreal Trust Company under or with respect to the said mortgage and the said conveyance

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or either of them and whether the said claim arises or shall arise under an express or under an implied covenant.

Respondent in this action now proceeds on the assumption that if, as it submits, there was a sale of the property to appellant subject to the mortgage there is an implied obligation on the part of the purchaser to indemnify Prudential Holdings Limited for payments due under the mortgage to respondent and Prudential Holdings Limited having assigned its right of indemnity to respondent the latter may enforce the assigned rights against appellant and compel it to pay the interest on the mortgage and it necessarily follows the principal also.

I may assume for the purposes of this judgment that if Prudential Holdings Limited conveyed the property (subject to the mortgage) to appellant as a *bona fide* sale there is an implied agreement by the purchaser to indemnify the mortgagor—and the rights accruing to the grantor under that implied agreement may be assigned to respondent—in which case the judgment should stand. That too may be assumed (without deciding it) although the real purchaser was Cummings not his nominee the appellant. There is however no such right of indemnity if the property was taken as security for a debt.

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The first question in determining the real nature of the transaction arises in respect to the evidence relied upon to establish it. The trial judge rejected much of it believing it inadmissible to vary the document but admitted it to the record in case a higher Court differed from him on the point. The alleged objectionable evidence was given chiefly by Mitchell, Bone and *Coulter,* the latter, a barrister, who testified that he remembered "talking with Cummings with regard to the proposition made that he advance money to Nickson." He was in possession of all the facts as between Nickson and Cummings. As secretary of the Prudential Holdings Limited, he gave evidence corroborating the view of the transaction outlined by Mitchell. Mitchell's evidence was objected to in part on the ground that it was hearsay (*e.g.,* statements to Bone in respect to the nature of the transaction as obtained from Cummings) in part on the ground that it was inconsistent with the written documents and finally because he repeated as evidence statements made to him by Cummings, since deceased. Mitchell's evidence was taken on commission

and apart altogether from the question of its admission below as on an interlocutory application (*Allan* v. *McLennan* (1916), 23 B.C. 515 at 523) I think it was admissible. Evidence of acts, statements and declarations contemporaneous with the transaction, *viz.*, what was said and done, are admissible to prove its real nature and if directed to the proof of the main issue it is not hearsay but primary evidence. There can be no doubt that everything said by Cummings to Nickson and by the latter to the former touching the transaction would be admissible evidence. It is also true that if instead of speaking directly they acted through and spoke by a common agent (Mitchell) he can give evidence of the transaction based upon their statements. The purpose or object of a transaction—and necessarily the transaction itself—cannot often be proven without admitting evidence as to what was said by the interested parties. The character of an act may be proven by declarations concerning it. As put by Phipson in his 7th Ed. at p. 54:

> Acts, declarations, and incidents which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gesta*.

Statements too by Cummings (since deceased) to Mitchell are also admissible on the well-known rule that where one is in a position to know a fact and makes a declaration concerning it orally or in writing which is against his interest at the time (it is not enough that it later turns out to be against his interest) is evidence of the fact as between third persons after his death. Whatever may be said later, in view of real estate values depreciating, it was undoubtedly at that time against Cummings's pecuniary and proprietary interest to treat the transaction not as a sale but as security for a debt (*Higham* v. *Ridgway* (1808), 10 East 109; 103 E.R. 717.) All his declarations therefore bearing on the submission that he was not by himself or his nominee the owner of the property were admissible. Nor is it only declarations by deceased persons that are admissible. Declarations in reference to the subject-matter of an action in respect to his own rights under certain conditions are admissible although the declarant is still alive (see Lord Denman, C.J. in *Woolway* v. *Rowe* (1834), 1 A. & E. 114; 110 E.R. 1151 at 1152.) There is such a declaration and it is of vital importance

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in determining the character of the transaction—in the letter written by Nickson to Mitchell (Exhibit 3) in which he speaks of the option to purchase he gave to Burns. Certainly he had no authority to give an option on appellant's property if he or his company had no equity in it. Clearly we may reach a conclusion as to the company's attitude by the acts of one who controlled it when he writes a letter based on the assumption that he or his company still have an equity of redemption. It derogates from, qualifies and affects his title and is admissible, confining it only to a question of admissibility on the one point, *viz.*, the nature of the deal. There are broader grounds for considering its admissibility (*e.g.*, admissions by a predecessor in title—because these statements were made before the assignment to respondent of Prudential Holdings Limited's right to indemnity—) but it is enough to confine it to the necessities of this case.

On all the facts (and as the trial judge did not make a finding we must do so) notwithstanding a part of the evidence given by Bone favourable to respondent I have no doubt (assuming as I do that the evidence must be conclusive) as to the real nature of the transaction, *viz.*, that appellant as a nominee for Cummings held this property as security for a debt. Nickson made the first advance for assistance and when a loan is obtained it is usually secured by a mortgage or its equivalent. Cummings was not in the market as a purchaser of land. No evidence in the record is inconsistent with that view and a large body of it is wholly inconsistent with any other deduction. It is, therefore, the only finding of fact that can reasonably be made.

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Bone's evidence was relied upon by the respondent. It is not accurate to say that he admitted that the resolution already referred to passed by Prudential Holdings Limited, upon the execution of the transfer correctly disclosed the true nature of the transaction, *viz.*, that the deed from Prudential Holdings Limited to appellants was intended to be treated as an outright transfer of the beneficial interest in the property. It is true that, due no doubt to the fact that he received partial information only from Mitchell, and was not therefore fully aware of all the facts that he was led on cross-examination into making statements from which a false inference might be drawn unless corrected by a reading of all his evidence in the light of undisputed facts. The

resolution was passed by Prudential Holdings Limited. Bone did not see it at any time while the security, as I call it, was arranged. It was called to his attention for the first time on his examination for discovery in the course of the action. The resolution *per se* does not establish that a document, in form a deed, can not, if the evidence justifies it, be treated as a mortgage. The submission, however, is that Bone admitted that its recital, *viz.*, that the transaction, was a sale and that all mortgages against the property were assumed by appellant is an accurate statement of the actual facts, and represents the true nature of the transaction. That is not Bone's evidence properly read. When asked if this resolution "set out the transaction between your company and the Prudential Holdings Limited" his answer is "other than the assumption—no definite intention as to the assumption of the mortgages" adding "it was not our intention to assume the mortgages," and again:

> Does not the resolution Mr. Bone correctly state your understanding of the transaction? Not in this assumption of the mortgages. We are very specific in that line.

When he states elsewhere that it is a correct statement of the transaction he means (although expressed very badly—leaving his evidence open to misconstruction) subject to the reservation referred to. In any event his evidence, even in so far as it may be regarded as favourable to the respondent is not conclusive against the appellant. It is a part only of all the evidence by a witness not in a position to speak with knowledge. We must look at the whole body of evidence in the book and after doing so, in my opinion, a Court or a jury could not reasonably say that all we are concerned with is an ordinary sale of real estate to appellant. It was on the contrary a transaction usually entered into in some form or other to secure the lender where one borrows money from another. All the evidence, apart from doubtful inferences drawn from Bone's testimony points in that direction.

As to what follows there is no doubt. It is now settled that the equitable obligation imposed on the purchaser of an equity of redemption to indemnify the vendor, even where there is no covenant to assume the mortgage, only arises where the purchaser is a real one, *i.e.*, where the relationship of vendor and purchaser actually exists and an assignee could have no higher rights.

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Campbell v. *Douglas* (1916), 54 S.C.R. 28 affirming the judgment of the Ontario Appellate Division ((1915), 34 O.L.R. 580) makes this clear. This obligation may be displaced by evidence to shew that such was not the intention of the parties (*Sokolov* v. *Kachmark* (1929), 1 W.W.R. 353 at 358). I need not discuss the case in detail but refer only to the judgment of Hodgins, J.A. at p. 583, in the Court below, where he outlines principles concurred in throughout. *Mills* v. *United Counties Bank, Limited* (1912), 1 Ch. 231 at 236, referred to by the Chief Justice in the Supreme Court may also be usefully referred to. Once it is established that the relationship of vendor and purchaser does not exist there is nothing further to be said that can assist the respondent in this case. While not conceded I think this was recognized by Mr. *Bourne*. He urged strongly, that a sale and purchase took place in the case at Bar. *Fullerton* v. *Brydges* (1895), 10 Man. L.R. 431, is further authority for the view that the right of indemnity contended for does not arise where a conveyance is taken as security for a debt. Nor does it apply to a nominee like this appellant who upon request takes a deed absolute in form but for security purposes only (*Walker* v. *Dickson* (1892), 20 A.R. 96), followed by this Court in *Walker* v. *Woodyatt* (1931), 44 B.C. 110.

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Mr. *Bourne* invoked the doctrine of estoppel basing it largely on appellant's acts (and its solicitors) in applying to register the conveyance as a deed on behalf of reputed owners and in support depositing a resolution of the directors of Prudential Holdings Limited, already referred to, authorizing the execution not of a security but of a deed including the assumption of the mortgage. I do not agree. The transaction, of course, was put through in that form. That does not prevent disclosure of its true nature. The Prudential Holdings Limited did not change its position to its prejudice because of the form followed. There can be no estoppel as between two parties to a transaction because of acts done with the acquiescence of both. No one was deceived, least of all Nickson or his company. His subsequent acts in offering the property for sale shew that he or his company were not misled. There was therefore no substantial contradiction of the view that the conveyance was in fact a security only by these acts

because it was mutually understood that the transaction should be carried through in this way.

I would allow the appeal.

MCQUARRIE, J.A.: I would dismiss the appeal. The evidence of Bone, who is manager for the defendant at Vancouver, supports the plaintiff's claim that the documents filed as exhibits set out the arrangement between the parties. The same applies to the resolution which was passed by the Prudential Holdings Limited, authorizing the conveyance to the appellant, which was filed in the Land Registry office by the appellant with its application for registration of the title in its name. Bone admits that the appellant had knowledge of the resolution and that it sets out the transaction. The said resolution provides that the appellant shall assume the mortgage which is the subject-matter of the action. It seems to me that the appellant undertook the full responsibility for payment of the said mortgage and while it may be true that it was acting for an undisclosed principal, the knowledge of whose existence was not communicated to the other parties, the appellant must rely entirely on the agreement for indemnity which it obtained from the late C. V. Cummings. It undoubtedly is entitled to relief against the third party.

Appeal dismissed, Macdonald, J.A. dissenting.

Solicitor for appellant: *R. Symes.*

Solicitors for respondent: *Bourne & Des Brisay.*

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WONG SOON *ET AL.* v. GAREB.

Practice—Action commenced in Supreme Court—By consent transferred for trial to County Court by order of local judge of Supreme Court—Appeal—Jurisdiction—R.S.B.C. 1924, Cap. 53, Secs. 24, 73 and 74.

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An action to recover certain premises, for damages for trespass and for an accounting arising out of alleged breach of covenants in a lease, was brought in the Supreme Court and by consent of the parties an order was made pursuant to section 24 of the County Courts Act by the local judge of the Supreme Court, that the action be tried in the County Court. Judgment was given for the plaintiff and the defendant appealed.

Held, that section 24 did not authorize the making of the agreement or the order and there is no jurisdiction to hear the appeal.

APPEAL by defendant from the decision of THOMPSON, Co. J. of the 18th of June, 1934, in an action to recover possession of certain demised premises, being part of the Nu-Way Cafe in the town of Golden, and for damages for trespass on said premises independent of contract. The action was commenced in the Supreme Court and later, pursuant to section 24 of the County Courts Act, the parties agreed that the action be tried in the Court of East Kootenay and an order was made by THOMPSON, Co. J. as local judge of the Supreme Court that the action be tried in that County Court.

Statement

The appeal was argued at Victoria on the 31st of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Jackson, K.C., for appellant.

Clearihue, for respondent, on preliminary objection: The action was commenced in the Supreme Court, then by consent of the parties an order was made by THOMPSON, Co. J. as local judge of the Supreme Court that the action be tried in the County Court. There is no jurisdiction to make the order and there is no appeal: see *Overn* v. *Strand* (1931), 44 B.C. 47 at pp. 56 and 59, and on appeal (1931), S.C.R. 720; *The Canadian Pacific Railway Company* v. *Fleming* (1893), 22 S.C.R. 33 at p. 36; *Burgess* v. *Morton* (1896), A.C. 136.

Argument

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Jackson: An order was made by THOMPSON, Co. J. as a local judge of the Supreme Court that the action be tried in the County Court. This was done under section 24 of the County Courts Act which provides for these proceedings. *Overn* v. *Strand* does not apply as no order was made in that case, it being merely by consent. The local judge has jurisdiction to make the order. This is a judgment on a contract and is within section 73. Section 24 gives us the right of appeal.

Argument

Clearihue, in reply, referred to *Soper* v. *Pemberton* (1910), 14 W.L.R. 200.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): The parties consented that this case should be tried by the County Court judge, and as this Court held in *Overn* v. *Strand* (1931), 44 B.C. 47, the County Court judge was acting as an arbitrator, and there is no appeal. I would sustain the preliminary objection.

MARTIN, J.A.

MARTIN, J.A.: I would sustain the objection to our jurisdiction to entertain this appeal for the reason that I gave in *Overn* v. *Strand* (1931), 44 B.C. 47 at p. 59, and the Chief Justice at p. 56, and my brother M. A. MACDONALD at p. 66. It is clear that sections 73 and 74 of the County Courts Act cannot be relied on to support the agreement made, ostensibly, under section 24, because they are remitting sections, providing in certain limited cases for the change of the trial and the lodgment of the writ from the Supreme to the County Court: Mr. Justice GREGORY gave, in my opinion, a correct decision in *Soper* v. *Pemberton* (1910), 14 W.L.R. 200.

Those sections do not in the slightest warrant the trial of this case in the County Court, because section 73 applies only to an action of contract alone, not one which has distinct claims of tort and contract, and this writ and judgment includes and upholds claims for pure torts as well as in contract. Section 74 relates only to the remission by special order of those actions of tort wherein "the plaintiff has no visible means of paying the costs," etc., and therefore does not apply to this case.

Then as to section 24, authorizing an agreement by signed memorandum for trial in the County Court: it applies only to cases "which may be brought," *i.e., in futuro,* in the Supreme

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Court, and not to those already brought therein, which are governed by said sections 73-4, as clearly appears by the context in section 24, when read in the light of the form, No. 172, authorized to invoke that section.

The result is that the voluntary trial proceedings taken herein are not covered by sections 73, 74 or 24, but simply by the broad principle that the parties have consented to submit their dispute to the decision of a special tribunal, *ex cursum curiæ*, of their own selection, *i.e.*, to an arbitrator in effect, and by his decision they are bound, as in *Overn's* case and in *Harris* v. *Harris* (1901), 8 B.C. 307, in which I sat, and the other cases cited by Mr. *Clearihue*, and consequently no appeal will lie therefrom, so we have no jurisdiction to entertain this one, and it must be quashed. The order of THOMPSON, Co. J., made upon said misconceived memorandum of agreement, in his capacity as a local judge of the Supreme Court ordering that the "County Court of East Kootenay . . . holden at Golden, B.C., shall have jurisdiction and power to try this action . . . " was made without jurisdiction, and is therefore a nullity.

MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I agree in the allowance of the motion.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I agree there is no such authority based upon sections 24, 73 or 74 of the County Courts Act. Section 24 relates to actions *in futuro, i.e.*, actions about to be commenced, not actions *in esse*. The form in the rules, 172, bears out this construction. Without therefore statutory authority for it the agreement between the parties amounted to a contract to try the dispute in a certain way; in other words by an arbitration. From that there is no appeal and it must be quashed.

MCQUARRIE, J.A.

MCQUARRIE, J.A. (oral): I agree that the preliminary objection should be sustained, following *Overn* v. *Strand* (1931), 44 B.C. 47.

Appeal quashed.

Solicitor for appellant: *A. M. Grimmett.*
Solicitor for respondent: *E. A. Boyle.*

IN RE DENTISTRY ACT AND THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COULTAS.

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IN RE DENTISTRY ACT AND THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA *v.* COULTAS

Medical practitioner—College of dental surgeons—"Council"—"Infamous and unprofessional conduct" — Suspension from practice — Appeal— R.S.B.C. 1924, Cap. 66—B.C. Stats. 1931, Cap. 15, Secs. 13, 14 and 19.

Doctor C., a qualified dentist, rented rooms 4, 5 and 6 with doors between in a building in Vancouver and practised his profession in rooms 4 and 5. While so practising he was a party to forming a company called The School of Mechanical Dentistry Limited, was a director thereof and participated in the profits of its business. He sublet room 6 to the company and the company advertised in the daily papers for the sale of dental plates for $7.50 or more. When a customer came to room 6 the attendant would first decide what quality of plate he wanted and would then direct him to rooms 4 and 5 for the purpose of obtaining an impression. Upon an impression being taken for which a charge of $2.50 was made, the impression would then be given to the attendant in room 6, where a plate was made therefrom. The customer would then go back to rooms 4 and 5 where the dentist would fit the plate to his mouth. The School of Mechanical Dentistry would then charge the customer $7.50 or up according to the quality of plate that was ordered. Under section 13 (2) of the 1931 amendment to the Dentistry Act, the Council of the College of Dental Surgeons found Doctor C. guilty of infamous and unprofessional conduct, which was affirmed on appeal to the Supreme Court.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN and MACDONALD, JJ.A. dissenting in part), that nothing complained of was contrary to the terms of the Dentistry Act and there is nothing to found a finding of unprofessional conduct upon unless it be the vague assumption of illegal motives drawn from legal acts. There were mere suspicions of a nature that could never be accepted in judicial proceedings as proof of wrong-doing.

APPEAL by Dr. Coultas from the decision of MCDONALD, J. of the 18th of September, 1934, dismissing an appeal from the decision of the Council of the College of Dental Surgeons of British Columbia of the 21st of June, 1934, whereby said Council found Dr. Coultas guilty of infamous and unprofessional conduct in respect of the practice of dentistry. Doctor Coultas, a qualified dentist, occupied rooms 4 and 5 in the building at the south-west corner of Granville and Robson Streets in

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Vancouver where he practised his profession. He also rented room 6 adjoining, which he sublet to The School of Mechanical Dentistry Limited. He participated in the forming of said company and was a director thereof. The company advertised in the daily newspapers as follows:

"$7.50 Dental Plate. Never before has such an astounding offer been made. This offer is made possible by the fact that we only make and repair plates and nothing else. These plates are equal in quality to those you usually pay $25 for. Finest material," etc.

The company makes a contract with persons answering the advertisements, to supply plates, and after making the contract they conduct such patients into rooms 4 and 5 to Dr. Coultas, who takes an impression. The impression is then handed to the patient who returns to the office of the company which makes a plate from the impression. The plate is then handed back to the attendant in rooms 4 and 5 where it is fitted into the jaw of the patient. There is an open door leading from room 6 to rooms 4 and 5. A charge of $7.50 and up is made by the company for the plate, and $2.50 by the dentist for making the impression.

The appeal was argued at Victoria on the 23rd and 24th of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Argument

Henderson (*A. J. Patton,* with him), for appellant: If guilty we should be punished under section 71 and not section 39 of the Act. There is nothing in the charge that would bring us under the word "infamous." They must proceed under the Act: see *Wake* v. *Mayor, &c., of Sheffield* (1883), 12 Q.B.D. 142 at p. 145. Here there is no more than an offence under section 71: see *Barraclough* v. *Brown* (1897), 66 L.J.Q.B. 672; Maxwell on Statutes, 7th Ed., 137; *British Columbia Electric Railway Company, Limited* v. *Stewart* (1913), A.C. 816 at p. 827. We come under section 71 because it is a later section. The penalty imposed is suspension: see *Rex* v. *Caskie* (1922), 35 B.C. 78; *Rex* v. *Smith* (1923), 32 B.C. 241; *Rex* v. *Goslett, ib.* 216; *Cope* v. *Doherty* (1858), 27 L.J. Ch. 600 at p. 709. On the question of repugnancy see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 481 and 485; Craies's Statute Law, 3rd Ed., 198. The charge and the Act have the word "or" between "infamous" and "unprofessional" whereas the judg-

ment has "and." He cannot be found guilty of two offences on one charge. This is a disjunctive charge that ends up with a conviction conjunctively. Section 5 of the Act says seven shall be elected members of the Council whereas eight were elected. The change to eight members was not approved by the Lieutenant-Governor in Council as required by section 25 of the Act. Coultas had disposed of his shares in the company on June 1st, 1934, whereas the board sat on June 24th following. The word "infamous" must be taken in its ordinary and natural meaning and there is no evidence of infamous conduct. The only objection they have is the advertising and that comes under section 78.

Maitland, K.C. (*Remnant,* with him), for respondent: Any offence that justifies a conviction is an "infamous" offence. "Unprofessional" is a lesser degree than "infamous" but if the act is "infamous" it must be "unprofessional." The word "or" should be held to mean "and," the object and intention being prohibition, the two things prohibited being coupled by the word "or." As to the interpretation to be put on the word "infamous" see *Rex* v. *General Medical Council* (1930), 1 K.B. 562 at p. 569; *Allinson* v. *General Council of Medical Education and Registration* (1894), 1 Q.B. 751; *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; *Hill* v. *Clifford* (1907), 2 Ch. 236; *Re Hanington* (1907), 6 W.L.R. 37 at p. 42; *In re Moody and the College of Dental Surgeons* (1909), 14 B.C. 206; *Latimer* v. *College of Physicians & Surgeons of B.C.* (1931), 55 Can. C.C. 132; *In re Telford* (1905), 11 B.C. 355 at p. 359. There is no right of appeal in the English Act but our Courts have followed the English decisions: see *In re Telford, supra,* at p. 359. The Council could find both "infamous" and "unprofessional" conduct: see *In re Telford, supra.* In this case Coultas was the company and there is abundant evidence to shew that the company was organized and conducted by and for him. The company was actually convicted and no appeal was taken from this conviction. If the word "infamous" is not included in the finding of the Court below it can be struck out: see *Rex* v. *Leahy* (1920), 28 B.C. 151.

Argument

Henderson, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: The appellant was found guilty by the Council of Dental Surgeons of "unprofessional conduct" contrary to the Dentistry Act, because he organized a joint-stock company called The School of Mechanical Dentistry, which manufactured artificial teeth and sold same to customers and because he acted for a time as a director of the company, and because he let one of his rooms to the company for a workshop and because he assisted the company in advertising cheap plates to the public. In respect of none of these acts was the Denistry Act directly contravened by the company or by himself, but it was held that the company and he indirectly contravened the Act; that the inferences to be drawn from said acts were that appellant was not acting with professional correctness; in fact that he and the company which was convicted in another proceeding were practising dentistry illegally.

I will to begin with remove some misconceptions under which counsel for the respondent laboured and which may have had some influence on the Council's action. It was argued that the company had no power to sell their wares to the public since they had not in their memorandum of association taken power to do so. That was not a question with which the Council was concerned. If true it was for the shareholders or the Courts to deal with, not the Council. Then again it was argued that the finding of the Council was final and conclusive on the question of discipline and for this *Rex* v. *General Medical Council* (1930), 1 K.B. 562 at p. 569 was submitted as authority. There Lord Justice Scrutton said, referring to two well-known authorities:

MACDONALD, C.J.B.C.

> It has been well settled . . . that the Council are the judges without appeal of the existence or absence of serious misconduct in a professional respect.

One has only to refer to the English Medical Act (21 & 22 Vict. c. 90), Sec. 29, to understand the reason of this, and to note that no review of their finding is provided for in the Act. That is what Lord Justice Scrutton meant when he used the language above quoted. The same thing was even more authoritatively said in *Ex parte La Mert* (1863), 33 L.J.Q.B. 69. I may venture to say, with respect, that I think our Legislature was wise in allowing an appeal and review of the findings of an interested body, the appellant's rivals.

Having, therefore, taken the Council's decision out of its claimed finality one may ask what real basis there was for drawing the inferences of guilt which they drew. Nothing complained of was contrary to the terms of the Dentistry Act. There is, therefore, nothing to found a finding of unprofessional conduct upon unless it be the vague assumption of illegal motives drawn from legal acts; I shall call them suspicions which can in judicial proceedings never be accepted as proof of wrong-doing.

The president of the Council himself patronizes similar mechanical aid to his practice. He takes or sends his impressions of the gums of his patients to what is called a mechanical laboratory, situate in the same building, to have his artificial plates made by non-professional workers. There are said to be many of these shops in Vancouver patronized by dental surgeons. No contention was made here that such mechanical shops were illegal or that those dentists who patronized them were acting contrary to the Dentistry Act. It is a very broad assumption that because the mechanical worker recommended the appellant to its customers the Council on such evidence could infer that the appellant had concocted a scheme to elude the provisions of the Act.

The public have an interest in this matter as well as the dentists. The public might infer on just as good grounds as those adopted by the Council that the dentists are overcharging them and that these proceedings had their inspiration in selfish rivalry, and that an opportunity to obtain cheaper artificial teeth is sought to be prevented by resort to this class legislation. No doubt the Legislature had that fear in mind when they provided for a review of the Council's proceedings and depended on the Courts to see that the powers granted to the dentists should not be abused, as I think it has been in this case.

I would set aside the order of suspension of the appellant.

MARTIN, J.A.: In this appeal two distinct questions are raised on two distinct charges preferred against the appellant of "infamous or unprofessional conduct in respect to the practice of dentistry" under amended section 39 of the Dentistry Act Amendment Act, 1931, Cap. 15, Sec. 13.

As to the first, and most serious one, alleging "infamous conduct," it is sufficient to say that no evidence whatever was given

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in support of it and it should not have been laid and should have been dismissed by the Council, and it was the proper thing to do, even belatedly, when the respondent's counsel told us at the end of this argument that he would welcome the exoneration of the appellant from that imputation, which will be done by the allowance of the appeal on this charge.

As to the second charge, of unprofessional conduct, we would not, in my opinion, be warranted in setting aside the unanimous adjudication of a council (composed of eight dental surgeons) on a purely professional matter, even though we felt disposed to disagree with it, unless there was such an absence of evidence that it could fairly be said that they could not reasonably found their adjudication thereupon: now, with all due deference to other views, I am unable on the present evidence to go that far.

It follows, therefore, that said adjudication of the council on this second charge cannot, in my opinion, consistent with the authorities, be legally disturbed, and so it must stand; but the penalty of suspension for six months obviously cannot be supported because it was erroneously imposed on the basis that the defendant was guilty of both charges whereas at most he is only guilty of the lesser one, and therefore in the due exercise of the wide powers conferred upon us by section 51 of the said Act, to do "in the premises as [we] may seem right," the term should be largely reduced and, in my opinion, having regard to all the circumstances, the justice of the case will be met by imposing a suspension for one month.

MARTIN, J.A.

The appellant is entitled to the costs of this appeal because he has been completely successful on one charge and substantially successful, by reducing the penalty, on the other.

In reaching this conclusion I have not overlooked the English cases cited, *e.g.*, *Rex* v. *General Medical Council* (1930), 1 K.B. 562 but they are not applicable because of essential differences in the statutes on which they are founded and which caused Lord Justice Scrutton, at p. 569, to make certain deprecatory observations on their employment of the intractable and solitary phrase "infamous conduct" as necessarily including all aspects of professional misconduct: our statute happily avoids this objection by using the alternative and discriminating phrase "infamous or unprofessional conduct in any respect."

MCPHILLIPS, J.A.: I concur in the judgment of my learned brother the Chief Justice and agree that the appeal should be allowed.

MACDONALD, J.A.: I agree that there is a distinction in the Act between "infamous conduct" and "unprofessional conduct" and appellant's counsel is right in his submission that the former charge should not have been sustained. "Infamous conduct" implies turpitude of a marked character. Mr. *Maitland* in fact withdrew it during the course of the hearing. The Council, I think, fell into error in treating distinct and separate charges as referable to the one offence and possibly, had their attention been directed to it, the same period of suspension, *viz.*, six months, would have been imposed on a finding of "unprofessional conduct" only. We cannot, however, definitely say so, and because, in my opinion, only the charge of "unprofessional conduct" should be sustained, I would reduce the period of suspension to one month.

I must, however, with deference to contrary views, but with much emphasis, say that there is in my opinion no justification for setting aside one of the findings made by the council, *viz.*, that appellant was guilty of "unprofessional conduct." It is a board charged, like the Benchers of the Law Society, with disciplinary powers over its members. If, as in the case at Bar, a solicitor organized a company falsely stating in its memorandum of association that it was formed for one specific legitimate purpose, whereas in fact it carried on work of an entirely different character without any legal authority (see memorandum of association) and that work was (certainly part of it) to direct business to the solicitor's office, said solicitor being its president and a shareholder would an Appeal Court, if a right of appeal was given in the terms of the Dentistry Act, say that the act of the Benchers of the Law Society in disbarring such a member could not be upheld? The truth is it would be quite impossible to justify their action if they failed to disbar for a time at least.

MACDONALD, J.A.

One of the charges upon which the finding of unprofessional conduct was based before the Council was stated in the following words, *viz.*: In that appellant uses

the advertisements, offices, servants and employees of the said The School

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of Mechanical Dentistry Limited for the purpose of bringing patients to the offices of the said Dr. Charles J. Coultas.

It is so clear from the direct evidence not to mention unavoidable inferences that the Council was justified in finding that appellant did the acts complained of for the purpose referred to, *viz.*, to bring patients to his office that I do not trouble to refer to it except very briefly. If it was a matter for conjecture or doubt, I would analyze it fully. To cover up a palpable deception the appellant incorporated a company, to put it briefly, to carry on scholastic work in dentistry, not to sell dentures. Its real work for which it had no authority, was not only to sell dentures but to direct customers for plates, not to dentists generally but to this appellant to secure the necessary dental work incidental thereto. In addition there was evidence to shew not only that this company directed patients through a "funnel"—a connecting door—to appellant's office, but it did acts of dentistry itself, a thing prohibited by section 71 of the Act. Further this company incorporated by appellant under false colours was actually convicted on the 8th of March, 1934, for practising the profession of dentistry and that conviction stands. Yet it is said that the Council could not find or had no evidence inferential or otherwise to find that the dentist who incorporated it and controlled this company convicted of an offence, using it to direct customers to his own office, was not guilty of "unprofessional conduct." He was a director of the company and responsible for its acts. It was we must assume properly (and I think it was) convicted of doing an illegal act, *viz.*, practising dentistry, something a company cannot do and yet it is suggested that the council cannot find that this director is guilty of "unprofessional conduct" in any respect.

MACDONALD, J.A.

If there was any doubt the matter is placed beyond it, when it is remembered that by section 39 (2) of the Act (Cap. 66, R.S.B.C. 1924) the board has power to suspend one found guilty, after inquiry as just intimated, of "unprofessional conduct in any respect."

I shall only add that the cases, and ordinary logic discloses that where a disciplinary body on whom statutory powers are conferred with a view to maintaining high or even average standards in a profession, exercise those powers an Appeal Court

cannot interfere if there was any evidence upon which the Council could reasonably act. (*Allinson* v. *General Council of Medical Education and Registration* (1894), 1 Q.B. 751.)

MCQUARRIE, J.A. (oral): I agree that the appeal should be allowed.

I am afraid that there has been a chance of confusing the charges made against Dr. Coultas and the charges made against The School of Mechanical Dentistry Limited. I am afraid that that has come into at least some of the judgments that have been delivered today. We must be very careful that the two charges are kept separate and apart from each other. The case at Bar concerns the charges made against Dr. Coultas.

As has been stated, at the hearing counsel for the respondent consented to the reduction of the charge against Dr. Coultas to one of unprofessional conduct. So that we have to consider on this appeal, not whether he was guilty of infamous and unprofessional conduct, but whether he was guilty of unprofessional conduct alone. I am inclined to think that there has been no evidence adduced to convict him of even unprofessional conduct. I cannot see that there was anything wrong about Dr. Coultas incorporating The School of Dentistry, or being a director of it. There was nothing unprofessional about Dr. Coultas renting one of his offices to this School of Dentistry. Neither was there anything unprofessional in Dr. Coultas taking care of patients who required the attention of a dentist, for the purpose of making impressions, and also for the purpose of fitting the dentures after they were manufactured. If Dr. Coultas was justified in doing all those things that I have enumerated, there is nothing very much else that could be charged against him.

MCQUARRIE, J.A.

I think there is a whole lot in what my learned brother MCPHILLIPS has said about the professions, and more particularly in reference to the human side of this case. I do not want to say anything about charges, the charges made by dentists I have no doubt are very reasonable. But at the same time, just as my brother MCPHILLIPS has said, there are a great many people who cannot afford to pay the regular charges of the dentists who are carrying on practice in the ordinary way. Now if schools of mechanical dentistry are going to enable those people to be able

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to obtain artificial teeth, which are badly required, at reasonable prices, it is just possible that what Dr. Coultas did in the premises was rather commendable. Perhaps that may be going a little bit too far, but it is worthy of consideration. If you are going to draw the line between what a professional man may do and what he may not do there are going to be many difficulties in the way. And if you find on investigation of all the professions that at least some very reputable professional men are not coming pretty close to the line, then I will be very much surprised.

Appeal allowed, Martin and Macdonald, JJ.A. dissenting in part.

Solicitor for appellant: *A. J. Patton.*

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

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OKANAGAN LOAN AND INVESTMENT TRUST COMPANY v. McDONALD AND THE ROYAL BANK OF CANADA.

Mortgage—Collateral securities—Default—Foreclosure—Collateral securities included—Order nisi—Second mortgagee—Misjoinder—Rule 189.

OKANAGAN LOAN AND INVESTMENT TRUST COMPANY v. McDONALD AND THE ROYAL BANK OF CANADA

The plaintiff company held a mortgage on two lots in Kelowna owned by the defendant McDonald and the defendant The Royal Bank held a second mortgage on said lots. The plaintiff also held as collateral to the mortgage 4,000 shares in Gold Medal Foxes Limited and 8,000 shares in Highland Lass Limited. The defendant McDonald being in default, the plaintiff sued for an account of the sum due for principal and interest under its mortgage, and in default of payment for foreclosure. Having obtained liberty to proceed with the action under the Mortgagors' and Purchasers' Relief Act, 1932, and no appearance being entered by either defendant, the plaintiff obtained judgment by default and an order *nisi* for taking accounts. Upon the plaintiff applying for final order for foreclosure the defendant The Royal Bank entered an appearance and called upon the plaintiff to first realize on its collateral and thus reduce the indebtedness, improving thereby the position of the second mortgagee. This being refused the bank moved that the writ of

summons and all subsequent proceedings be set aside for irregularity on the ground of misjoinder, as there has been joined with an action for the recovery of land a claim for foreclosure of securities; that the order *nisi* for foreclosure be set aside and The Royal Bank be allowed to defend the action. The application was dismissed.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting in part, and MCPHILLIPS, J.A. dissenting), that there was no misjoinder of claims under rule 189 and the action was properly constituted, but the respondent must realize on its collateral securities before it can obtain foreclosure in view of the second mortgagee's right to redeem by payment of the sum properly due on the first mortgage. The personal judgment and the order *nisi* are set aside and the registrar's certificate reopened to ascertain the real sum due.

APPEAL by defendant The Royal Bank of Canada from the order of MORRISON, C.J.S.C. of the 7th of October, 1934, dismissing the bank's motion to set aside the writ of summons in the action and all subsequent proceedings on the ground of misjoinder of causes of action, and for an order that the order *nisi* for foreclosure made on the 31st of January, 1934, in default of appearance, be set aside. The action was for the recovery of the amount due under the defendant's covenant in a mortgage of the 15th of May, 1925, made between the plaintiff and defendant, and for an account of what is due for principal and interest. In default of payment of the amount found to be due, the plaintiff asked for foreclosure of the lands mortgaged, namely lot 6 and the west seventeen and five one-hundredths feet of lot 5 in block sixteen, registered plan 462, and for foreclosure of 4,000 shares in Gold Medal Foxes Limited and 8,000 shares in Highland Lass Limited, held as collateral security. On the 24th of October, 1933, the plaintiff obtained an order under the Mortgagors' and Purchasers' Relief Act, 1932, to proceed against the defendant for judgment on his covenant contained in said mortgage, and for foreclosure of the lands therein described, and on January 24th, 1934, in default of appearance, the plaintiff obtained an order *nisi* that accounts be taken and that the defendants be given six months to redeem. By the registrar's certificate of the 6th of February, 1934, the amount found due was $18,074.31. The plaintiff moved for final order of foreclosure on the 20th of August, 1934. The Royal Bank of Canada, holding a second mortgage on the premises to secure the sum of $45,000, then entered an appearance and moved as aforesaid.

Statement

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OKANAGAN LOAN AND INVESTMENT TRUST COMPANY v. MCDONALD AND THE ROYAL BANK OF CANADA

The appeal was argued at Vancouver on the 23rd of November, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C., for appellant: We did not enter appearance until after the order *nisi* and final accounts were taken. Certain stocks as collateral security were pledged to the first mortgagee. There were 8,000 shares of Highland Lass worth one dollar per share and when the first mortgagee holds collateral security he must first realize on the collateral security to reduce the debt. He must exhaust his remedies against the collateral. He may apply the moneys received from the collateral and then foreclose for the deficiency: see *Dyson* v. *Morris* (1842), 1 Hare 413; Fisher on Mortgages, 7th Ed., 778. When he applied for final order we entered an appearance and proceeded under rule 304. They have joined in an action to realize on land a claim to realize on personal security contrary to rule 189: see *Scottish Temperance Life Assurance Co.* v. *Johnson* (1916), 23 B.C. 510; *Jones* v. *Cohn* (1924), 33 B.C. 321. Because he got leave to proceed under the Moratorium Act does not relieve him from rule 189.

Argument

H. V. Craig, for respondent: The defendant must shew he has a good defence. He has no defence on the merits. We obtained an order *nisi* and moved for final order before they entered appearance. We submit we do not have to sell the shares. *Dyson* v. *Morris* (1842), 66 E.R. 1094 was an action for the sale of an insurance policy assigned to the mortgagee upon trust to receive the moneys to become due, and does not apply to this case, but see *Harrold* v. *Plenty* (1901), 2 Ch. 314. They chose to let the order *nisi* go and allow the time for redemption to expire. An action for foreclosure is not an action for the recovery of land and does not come within rule 189. *Jones* v. *Cohn* (1924), 33 B.C. 321 does not compel us to apply for leave: see *Phillips* v. *Phillips* (1900), 44 Sol. Jo. 551.

Bull, in reply, referred to *Hunt* v. *Worsfold* (1896), 2 Ch. 224; *Wilmott* v. *Freehold House Property Company* (1884), 51 L.T. 552.

Cur. adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think there was a misjoinder of

causes in this case. It is an action joining a foreclosure of a land mortgage with an assignment of shares in joint-stock companies. No appearance was entered by the defendants and no opposition was made to the subsequent proceedings in Court which resulted in a final order of foreclosure, foreclosing not only the mortgage but the assignment of the stock as well. The defendant The Royal Bank of Canada was the second mortgagee of the lands. The shares were held by the plaintiff as collateral security for the mortgage debt. The said bank submits that the plaintiff should have realized on its said collateral security by sale and credited the proceeds on the mortgage debt. The plaintiff obtained an order pursuant to the Mortgagors' and Purchasers' Relief Act, 1932, for leave to bring the action but obtained no order pursuant to rule 189 of the Rules of the Supreme Court. That rule provides that:

> No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land.

It makes certain exceptions which do not apply to this case. I have, therefore, no doubt that the order asked for in respect of the land mortgage should not be granted and that the foreclosure of the assignment of the shares should be set aside. The bank ignored the proceedings and now after the final order has been made comes forward to claim the foreclosure action was not properly constituted.

MACDONALD, C.J.B.C.

I think the judgment can be sustained as to the land but not as to the shares. In the case of *Dyson* v. *Morris* (1842), 66 E.R. 1094 at pp. 1097-8, Vice-Chancellor Sir James Wigram, dealing with an analogous case, said:

> Looking at the real estate alone there is no question as to the decree I should make if that were the plaintiff's only security. The decree would be the ordinary decree in a foreclosure suit. Again, if the subject of the suit were stock or personal chattels alone, the decree to be made would, I conceive, be equally a matter of course. There can, I apprehend, be no doubt that in a case of a mortgage of stock, and in the case of a mortgage of personal chattels . . . the remedy of the mortgagee would be by sale. And I apprehend a right to the same kind of relief would exist in equity in the case of a simple assignment of a policy of assurance.

In that case the policy of insurance could not be realized upon because the assured was still alive. The learned judge therefore said (p. 1099):

> I think the plaintiff, in this case, must take the usual decree of foreclosure, retaining the policy for what it may hereafter be made available.

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The only alternative course to setting aside the proceedings in this case would be to set aside the foreclosure of the assignment of the policies leaving the plaintiff the right to enforce it as he may be advised.

It is argued that the law is the same today as it was then and I agree that it is a mere security on chattels not connected with land and cannot be foreclosed. I have been unable to obtain the report cited for that proposition as it is not in the law library.

Since there appears to have been no defence to the action for foreclosure of the land mortgage I see no reason for setting the whole aside. The assignment, however, has been wrongly included. I take it that the Court in an action for foreclosure of the land alone could have granted relief without touching upon the assignment leaving the plaintiff to whatever remedies it might have with respect to the assignment and if that be so it will be sufficient to amend the proceedings by deleting the foreclosure of the assignment leaving those as to the land standing. I think this course will do substantial justice in the premises and I therefore so direct and that the proceedings be amended by deleting from them any reference to the assignment of the shares. This will leave the assignment still in the possession of the plaintiff unaffected by what has taken place. The delay is not a bar—*Atwood* v. *Chichester* (1878), 3 Q.B.D. 722.

The appeal should be allowed in part.

MARTIN, J.A.

MARTIN, J.A.: Two questions are raised in this appeal. As to the first, I am of opinion that the cases cited by Mr. *Craig* shew that there was no misjoinder of claims under rule 189 and therefore the action was properly constituted.

As to the second: the authorities cited by Mr. *Bull* justify, in my view, the submission that the collateral securities (shares in two companies) assigned to the mortgagee by the mortgagor, must be realized and proper credits given before the amount due on the mortgage can be finally fixed so as to entitle the appellant (second mortgagee) to protect its security, if need be, by paying off prior encumbrances at their true amount; and the personal judgment against the common mortgagor for the full amount of the first mortgage, without allowance for the value of the collateral security, cannot stand, and so the registrar's certificate

must be reopened for the ascertainment of the real sum due thereupon: the appeal should be allowed to this extent.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in entire agreement with the judgment of the learned Chief Justice of the Supreme Court of British Columbia in dismissing the notice of motion of The Royal Bank of Canada for an order that the order *nisi* of foreclosure made the 24th day of January, 1934, by default of appearance be set aside and the defendant The Royal Bank of Canada be allowed in to defend the action in that the said order *nisi* gives the plaintiff relief to which it is not in law entitled.

In my opinion there was no misjoinder of causes and in any case it would be a mere irregularity. The causes of action were wholly in their nature that of foreclosure. The 4,000 shares in Gold Medal Foxes Limited and 8,000 shares in Highland Lass Limited were held as security under the same instrument collateral to the indenture of mortgage and there was the right in law to obtain foreclosure of these shares as well: further there would be the right of redemption both as to the land and shares and no leave was necessary even were it necessary this Court should now give leave for the joinder (*Hunt* v. *Worsfold* (1896), 2 Ch. 224; *Phillips* v. *Phillips* (1900), 44 Sol. Jo. 551; *Harrold* v. *Plenty* (1901), 70 L.J. Ch. 562; *Stubbs* v. *Slater* (1910), 79 L.J. Ch. 420 at pp. 426, 431). The long delay constitutes—upon the special facts of this case—waiver; if there was merit in the objection made a Court of Equity should not as I read the authorities give—at this late date—effect to any such objection.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The respondent, first mortgagee, sued McDonald as mortgagor and The Royal Bank of Canada as second mortgagee for an account of the sum due for principal and interest under its mortgage and in default of payment for foreclosure. It held as collateral to the mortgage debt 4,000 shares (nominal value $1) in Gold Medal Foxes Limited, and 8,000 shares (no par value) in Highland Lass Limited, owned by McDonald and duly assigned. Having obtained liberty to proceed with the action under the Mortgagors' and Purchasers' Relief Act, 1932, and no appearance being entered by either defendant, it obtained judg-

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ment by default against McDonald and an order to take accounts of what was due to it under its mortgage for principal, interest, costs, taxes, etc.; also that upon payment of the amount so found respondent would reconvey the mortgaged property and deliver up the share certificates or in default (in the event that happened) foreclosure.

After the order *nisi* but before the final order for foreclosure was obtained The Royal Bank of Canada was permitted by respondent to enter an appearance. The bank thereupon called upon respondent to realize on its collateral and thus reduce the indebtedness, improving thereby the position of the second mortgagee. This being refused the bank launched a motion in Chambers for an order that the writ of summons and all subsequent proceedings should be set aside for irregularity on the ground of misjoinder inasmuch as an action for recovery of land was without leave joined with another cause of action, *viz.*, a claim for foreclosure of securities; also that the order *nisi* for foreclosure made in default of appearance be set aside and that appellant be allowed to defend the action on the ground that the order *nisi* gave respondent relief to which in law it was not entitled. The application was dismissed by MORRISON, C.J.S.C. and from that order this appeal is brought.

Mr. *Bull* submitted that respondent must realize on its collateral before it can obtain foreclosure in view of the second mortgagee's right to redeem by payment of the sum properly due to the first mortgagee. If for example a payment on account of the first mortgage had been made respondent could not foreclose to the prejudice of the second mortgagee without giving credit therefor. The order *nisi* therefore is bad because the right to foreclosure is given on failure to pay an amount which ought to be reduced by the value of the securities. It is a mixed mortgage containing a charge on lands and a pledge of securities.

In *Dyson* v. *Morris* (1842), 1 Hare 413, disregarding its special facts in respect to terms of a trust, where the mortgagee held an assignment of a policy of insurance on the life of the mortgagor, the Vice-Chancellor in discussing general principles said, at p. 423:

> Again, in the case of a mortgagee, whose security was composed both of land and stock, or personal chattels, or a policy simply assigned as a

security, I should probably experience little difficulty as to the decree to which the mortgagee would be entitled. In the case of securities so constituted, the course usually recommended out of Court to a mortgagee is, first to realize his collateral securities, and then to proceed to foreclose the mortgage for so much of his debt as the collateral securities may not satisfy. A decree in that form would therefore follow the course usually pursued out of Court, and it is the form which the justice of the case manifestly requires; for it is only by first realizing his collateral securities, and afterwards proceeding to foreclose the mortgage, that a mortgagee can get a valid decree of foreclosure without foregoing the benefit of the collateral securities, which he cannot, as a matter of course, be required to do.

Failure to realize on the securities before foreclosing for the deficiency would result in reopening it in respect to land when subsequently a sale of the securities should be made or attempted (Fisher & Lightwood's Law of Mortgage, 7th Ed., 778).

It follows also that the personal judgment obtained is for an excessive amount and should be set aside (*Scottish Temperance Life Assurance Co.* v. *Johnson* (1916), 23 B.C. 510).

MACDONALD, J.A.

I would set aside therefore the personal judgment and the order *nisi* and allow the appeal.

MCQUARRIE, J.A.

MCQUARRIE, J.A.: I agree with my brothers MARTIN and M. A. MACDONALD that the appeal should be allowed, and concur with their reasons for judgment which I have had the privilege of perusing.

Appeal allowed, Macdonald, C.J.B.C. dissenting in part, and McPhillips, J.A. dissenting.

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

Solicitor for respondent: *H. V. Craig.*

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1935

March 21.

PORTEOUS v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

PORTEOUS v. THE BOARD OF SCHOOL TRUSTEES OF THE DISTRICT OF NORTH VANCOUVER.

Practice—Municipal Act—Appointment of commissioner of district—Board of school trustees—Successors—Applicability—R.S.B.C. 1924, Cap. 226, Sec. 35—B.C. Stats. 1932, Cap. 39, Sec. 16.

A commissioner was appointed for the District of North Vancouver under section 467 of the Municipal Act, and when appointed said section declares that he shall have all the powers and authority theretofore vested in or exercised by the board of school trustees under section 468 of said Act, all powers and authority theretofore vested in or exercisable by the board of school trustees shall cease and determine and the members of the said board shall be deemed to have retired from office. On an action being brought against the board of school trustees of the District of North Vancouver the said commissioner applied for an order setting aside the writ of summons and service thereof on the ground that the defendant corporation ceased to exist at the time of the appointment of a commissioner for said district.

Held, that the legislation in no way relates the commissioner to the board of school trustees, but merely deprives the latter of its powers and authority and vests same in the commissioner. He is not a successor in office of the school trustees and the application should be granted.

Statement

APPLICATION by the commissioner of the District of North Vancouver to set aside a writ of summons in an action against the board of school trustees of said district. The facts are set out in the reasons for judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 18th of March, 1935.

Nicholson, for the application.
Donaghy, K.C., contra.

21st March, 1935.

Judgment

MURPHY, J.: Application on behalf of the commissioner of the District of North Vancouver for an order setting aside the writ of summons herein and setting aside the service of said writ upon the acting commissioner of said district.

The application is based upon the contention that the defendant corporation has ceased to exist because of the appointment of a commissioner for the District of North Vancouver. Section 467 of the Municipal Act, R.S.B.C. 1924, Cap. 179, as amended by section 19, Cap. 39, B.C. Stats. 1932, authorizes the appointment of a commissioner. When appointed said section declares that he shall have all the powers and authority theretofore vested in or exercisable by, amongst other bodies, the board of school

trustees. Section 468 of the Municipal Act, as amended by said Cap. 39, B.C. Stats. 1932, enacts that upon the appointment of such commissioner all powers and authority theretofore vested in or exercisable by amongst other bodies the board of school trustees shall cease and determine and the members of amongst other bodies the board of school trustees shall be deemed to have retired from office. The Public Schools Act, Cap. 226, R.S.B.C. 1924, provides for the election of a board of school trustees for each municipal school district. Section 35 of said statute enacts that the trustees so elected and their successors in office shall be a corporation. Elaborate provision is made for the election of such school trustees and for the election of their successors when their term expires. In case of a vacancy from the resignation of a trustee or for any cause other than the expiry of the regular term of office the council of the municipality is to be notified by the remaining trustees. The council is then to take steps for the election of a trustee to fill such vacancy. If this is not done within one month the remaining trustees, with the approval of the council of public instruction, may appoint a qualified person as trustee to fill the vacancy. Such person when so appointed shall hold office for the residue of the term for which his predecessor was elected.

Judgment

The point for decision on this application is whether or not the commissioner for North Vancouver district is a successor in office within the meaning of section 35 of the Public Schools Act. Said section provides that the trustees elected under said Act and their successors in office shall be a corporation. The Public Schools Act makes no provision whereby a commissioner appointed under the Municipal Act would be a successor in office to the duly-elected school trustees. The successors in office under that Act are obviously the persons elected or appointed under its provisions to take the place of trustees whose terms have expired or whose office has been vacated by resignations or otherwise. In my opinion the continued existence of the corporation created by said section 35 depends, so far as the provisions of the Public Schools Act are concerned, upon the existence of trustees elected or appointed under said Act. Such a corporation, so far as that Act is concerned I think ceases to exist when all the trustees retire from office and no persons are

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either elected or appointed to take their places. If this view is correct then defendant corporation has ceased to exist unless the commissioner has become a successor in office to the trustees in office at the time he was appointed because by virtue of said section 468 of the Municipal Act, as amended by Cap. 39, 1932, upon such appointment all the said trustees shall be deemed to have retired from office. If then the corporation of the board of school trustees has been continued in existence this must be because section 467 of the Municipal Act, as amended by said Cap. 39, 1932, constitutes the commissioner a successor in office within the meaning of section 35 of the Public Schools Act. Said section 467 does not in terms declare the commissioner to be such successor in office. What it does enact is that he shall have all the powers and authority theretofore vested in the board of school trustees. It is argued that because he is so vested with such powers and authority he is in law a successor in office to the elected trustees. The corporation created by section 35 of the Public Schools Act is of course a legal entity distinct from the elected trustees who constitute it. It acts through them because a corporation can only act through a human agency but such acts if they fall within the legal authority of the corporation are its acts and not the acts of the agents who are the medium of their execution. Therefore, to say that because a commissioner is empowered to perform the acts of the corporation created by the school board he becomes the school board is I think erroneous. Section 467 vests all powers of the school board in the commissioner who thereupon exercises them not because of the existence of the school board corporation nor as the human agency of such corporation but by virtue of his appointment as commissioner and in his own right as such commissioner. The school board corporation could conceivably continue to exist even if shorn of all power and authority but it could only so continue under the section bringing it into existence if there are successors in office to the original school trustees. As the legislation above set out in no way relates the commissioner to the corporation but merely deprives it of its powers and authority and vests same in the commissioner I do not think he is a successor in office to the school trustees. The application is granted.

Application granted.

IN RE LEGAL PROFESSIONS ACT AND *IN RE* BARKER, A SOLICITOR, AND SKRINE.

MURPHY, J. (In Chambers)

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April 9.

IN RE BARKER, A SOLICITOR, AND SKRINE

Practice—Solicitor's costs—Ex parte order for taxation—Non-disclosure of clients disputing retainer—Application to set aside order.

Upon a solicitor obtaining an *ex parte* order for the taxation of a solicitor and client's bill of costs, the fact that he knew that the client disputed his retainer to the whole bill and that he did not disclose this fact when applying for the order, is not a valid objection to the *ex parte* order on an application to set it aside.

In re Jones, a Solicitor (1887), 36 Ch. D. 105, followed.

APPLICATION to set aside an *ex parte* order that the costs claimed by *Percy C. Barker,* a solicitor, against John H. Skrine and Mrs. Ethel Skrine be taxed. Heard by MURPHY, J. in Chambers at Vancouver on the 8th of April, 1935. Statement

Todrick, for plaintiff.
J. A. MacInnes, for defendant.

9th April, 1935.

MURPHY, J.: Application to set aside an order made *ex parte* whereby it was ordered that the costs claimed by *Percy Collison Barker,* a solicitor, against Skrine *et al.* should be taxed. The chief ground for the application is that when the *ex parte* order was obtained it was not disclosed that both clients disputed the retainer *in toto*. It was argued that this was a material fact that should have been brought to the attention of the Court when the *ex parte* order was made and consequently the order should be set aside regardless of whether or not it would have been made on the merits. The solicitor admits that he knew at the time he obtained the *ex parte* order that the clients disputed the retainer *in toto* but maintains that as a matter of law he proceeded correctly in obtaining the *ex parte* order without disclosing this fact. This exact point was decided in *In re Jones, a Solicitor* (1887), 36 Ch. D. 105. There, as here, an *ex parte* order was obtained and the fact that the client disputed the retainer *in toto* was known to the solicitor and not disclosed when the order was Judgment

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obtained. An application to set aside the *ex parte* order was refused.

It was there pointed out that where a solicitor obtains the order for taxation the client may object to every item on the ground of want of retainer. In *Re Graham and Wigley* (1908), 52 Sol. Jo. 684, Joyce, J. said:

> It is clear upon the authorities that the question [whether or not there was any retainer] can be dealt with by the master when the bills are brought in.

I have enquired from the taxing officer and am informed that it has been the practice in his office to decide such an issue. It appears from *Re Hilliard et al., Ex parte Arthur & Co.* (1891), 35 Sol. Jo. 698 that in England in the Queen's Bench Division there is no such thing as obtaining an *ex parte* order for taxation. The order made in *In re Jones, supra,* was in the Chancery Division. In the *Hilliard* case the Court of Appeal stated that it was desirable that the practice in both divisions should be the same in this matter of obtaining orders for taxation and stated that time would be taken to consider the situation. No report however can be found where the question was further dealt with. Since the decision in *In re Jones* supports the solicitor's contention here and since, as stated, the taxing officer informs me that the practice in his office has been to decide there the question of retainer or no retainer I do not think that such practice should be disturbed by a single judge. The affidavit upon which the *ex parte* order was made was not served with the order but it was served subsequently. The fact that it was not served was not made the basis of attack on the *ex parte* order originally, and being a mere irregularity should not I think at this stage be acted upon as a reason for setting the order aside.

Judgment

The application is dismissed with costs.

Application dismissed.

IN RE ESTATE OF HUGH MAGEE, DECEASED.

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Jan. 8.

IN RE ESTATE OF HUGH MAGEE, DECEASED

Will — Construction — Discretion of trustees — Originating summons — Whether partial intestacy.

A testator by his will gave to his wife one-half of the income of his estate for life, the balance to be disposed of as follows: "To such of my children including the said George E. Magee [one of the trustees] from time to time as to my executors shall appear to be most in need, the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger share to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees." The testator died in 1909 and his wife died in 1927. On originating summons it was held that there was not a partial intestacy but a trust, and the children of the testator living at the time of the death of the widow took immediately vested interests in the *corpus* of the estate and the Court should intervene and enforce the trust. There should be immediate distribution of the *corpus*, the children to share equally, and in case of the death of any child since then the children or representatives of the deceased child are entitled to the share of such deceased child.

Held, on appeal, reversing the decision of FISHER, J. (MACDONALD, C.J.B.C. dissenting in part, and MCPHILLIPS, J.A. dissenting), that there is a valid will and the estate vests only when the time for distribution arrives. That time may never arrive and will not if it should appear to the trustees that the last surviving child is in need. If no distribution should be made before the death of the last survivor a partial intestacy will ensue, a resultant trust in favour of the donor follows, and distribution would be made according to law.

APPEAL by Charles W. Magee, Edith G. V. Magee and May I. Magee from the order of FISHER, J. of the 22nd of August, 1934, construing the will of Hugh Magee, deceased, upon originating summons of the 13th of October, 1933, on the application of Hugh C. Magee, a lunatic, by Maude L. Magee, his committee in lunacy. By his will dated the 7th of August, 1903, the testator appointed *Sir Charles Hibbert Tupper, K.C.*, and his son George E. Magee his executors. He left to his wife his residence and all his personal property. The balance of the real property

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was left to the executors to be disposed of, the proceeds to be invested in public stocks and securities of whatever nature as to the executors may seem fit, the income to be distributed as follows:

One half thereof to my wife during her life in manner hereinafter described and the rest as follows: To such of my children including the said George E. Magee from time to time as to my executors shall appear to be most in need the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my deside being that as far as possible the division shall be made so as to give the larger shares to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees. The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to the others for her support or for necessaries of life supplied or to be supplied to her as to my trustees shall see fit. It is my wish and desire that my executors will retain and manage the estate vested in them so long as they profitably can disposing of the profits or rentals as aforesaid from time to time but this is not to affect the discretion hereby vested in them as to the management leasing or sale of the same or of any portion thereof.

By codicil of the 22nd of July, 1908, *Sir Charles Hibbert Tupper, K.C.,* was appointed sole executor and trustee of the will. The testator died on the 9th of May, 1909, and his second wife died on the 17th of September, 1927. In January, 1933, the estate in the hands of the executors was valued at about $140,000. There were ten children at the death of the testator, three of whom died after the death of their step-mother. On the hearing it was held that there was not a partial intestacy but a trust, and that the children of the testator living at the time of the death of the widow took immediately vested interests in the *corpus* of the estate, the Court should intervene in order to distribute such *corpus* now among the said children or their representatives as hereinafter indicated, and thus enforce the trust. The children of the testator living at the time of the death of the widow are entitled to immediate distribution of the *corpus,* to share equally, and in case any of such children have died since then, the children or heirs or personal representatives as the case may be of the deceased child are entitled to receive the share of

such deceased child of the testator, and distribution should take place now or so soon as it can take place without any unnecessary sacrifice of any of the assets of the estate.

The appeal was argued at Vancouver on the 19th, 20th and 21st of November, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C. (*T. Edgar Wilson,* with him), for appellants: The will was made over 30 years ago and the testator died about 25 years ago. The wife died in 1927 and it was held that the time for distribution was on the death of the wife and that the children should take in equal shares. With this we disagree, as it is contrary to the terms of the will. The death of the wife has nothing to do with the distribution: see *In re Coleman. Henry* v. *Strong* (1888), 39 Ch.D. 443; *Ross* v. *Ross* (1894), 25 S.C.R. 307; *Gill* v. *Barrett* (1860), 29 Beav. 372; *Hetherington* v. *Oakman* (1843), 2 Y. & C.C.C. 299. These are not vested legacies: see *Harvey* v. *Ashton,* 2 Eq. Ca. Abr. 539; 22 E.R. 454. It is a will having a primary thought for the wife and children and does not contemplate the next generation: see *In re Pemberton and Lewis* (1917), 25 B.C. 118; *Inderwick* v. *Tatchell* (1903), 72 L.J. Ch. 393. Argument

McCrossan, K.C., for respondent (plaintiff): The plaintiff is the eldest son. Following the wording of the will the facts shew conclusively that the time for distribution can never arise. In respect of the distribution of the *corpus* there is an intestacy in the will. The will is invalid in some respects and the result is that a partial intestacy has intervened. There is no gift over or residuary disposition whatever. There is no time fixed for distribution and this amounts to an intestacy. The Court must implement the hiatus in the will and fix a time for distribution. The will indicates a vested interest applying to one class, *i.e.*, testator's children. The condition should be treated as a condition subsequent and the gift stands: see Theobald on Wills, 8th Ed., pp. 636-7 and 698; *In re Greenwood. Goodhart* v. *Woodhead* (1903), 1 Ch. 749; *In re Smith. Public Trustee* v. *Aspinall* (1928), Ch. 915. The children are wholly dependent on the estate for maintenance and we ask for a compelling order for distribution of the estate. If the trustees have absolute control

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it goes to the extent of delegating to the trustees the making of another will: see *Grimond (or Macintyre)* v. *Grimond* (1905), A.C. 124 at p. 126. There is no period fixed and no power in the trustees to make distribution. On the question of discretion the trust is void for vagueness and uncertainty: see Halsbury's Laws of England, Vol. 28, p. 27, sec. 52; *Fowler* v. *Garlike* (1830), 1 Russ. & M. 232. As to the point of time of vesting see *Busch* v. *Eastern Trust Co.* (1928), S.C.R. 479 at p. 486. All the estate goes to the children and we have a right to distribution. The gift of the income carries with it the *corpus*: see Halsbury's Laws of England, Vol. 28, p. 697, sec. 1315; *Coward* v. *Larkman* (1888), 60 L.T. 1 at pp. 2 and 4; *Lyndon* v. *Lyndon* (1930), N.Z.L.R. 76 at p. 78; Jarman on Wills, 7th Ed., 864; Godefroi on Trusts, 5th Ed., 242; *Josselyn* v. *Josselyn* (1837), 9 Sim. 63. The main point is the time of vesting and that should be on the death of the widow.

Argument

Reid, K.C., for defendant Mary Dester: The Court will not interfere with trustees where they are given absolute discretion where there is no proof of *mala fides*. There is no suggestion of *mala fides* here: see *Tabor* v. *Brooks* (1878), 10 Ch. D. 273. The rule is to find out the general scheme the testator had in mind when he made his will: see *In re Estate of J. D. Helmcken, Deceased* (1924), 34 B.C. 184 at p. 186. The will provides: (1) Protection for the wife during her life; (2) protection for the children during their lives; (3) the property should go to the children as at the death of the wife. The class is fixed at the time of the death of the wife and when the last child is left the *corpus* should be divided as the children or representatives were at the time of the death of the wife.

Bull, K.C., for trustees: The trustees disagreed as to the position of the children of the children who died. There is a perfectly good devise that can be carried out and there can never be an intestacy. If it came to a time when there are no children left then there is a resulting trust to the donor. This will was before this Court before: see (1925), 36 B.C. 195.

Locke, for defendant Etta McKibbon: I adopt Mr. *McCrossan's* position. There was a vesting at the time of the death of the widow. An alternative important point is in regard to the payment of income namely one-half to the widow and one-half to

the children. There is no power to pay income after the wife's death. The intention of the testator must be deduced from the wording of the document and the surrounding circumstances. The wording of the will with respect to the distribution amongst the children is too indefinite and vague to be given effect to in a Court of law: see *Ross* v. *Ross* (1894), 25 S.C.R. 307. There is a presumption that the testator wants his children to inherit and it is a case where all parties come to the Court for assistance from an impossible situation: see Halsbury's Laws of England, Vol. 28, p. 670, secs. 1285 to 1291. It is a case where the doctrine of *cy pres* applies.

Savage, for Toronto General Trusts Corporation: Estate of Eliza J. Carson: I agree with Mr. *Locke's* argument. It is evident that the estate vests at the time of the widow's death. I am satisfied with the judgment in the Court below.

McLellan, for widow and daughter of James D. Magee, deceased: I agree with the arguments of Mr. *McCrossan* and Mr. *Locke.*

Argument

Farris, in reply: I agree with Mr. *Bull* that interest is payable by the trustees after the widow's death. As to the will being indefinite *Ross* v. *Ross* (1893), 25 S.C.R. 307 involves a different principle. The primary consideration is to keep the estate in the hands of the trustees so that the income will be there for those who need it. If there is a resulting trust after the death of the last child then the estate would be divided *per capita.* When a testator fixes a class then it is not vague. The gift of income here is not unlimited so as to affect the *corpus,* as in the first place payment of income stops when the trustees decide that the children are not in need, and secondly there is a provision as to how the *corpus* must go: see *Baker* v. *Smith* (1853), 1 W.R. 490; *Hughes* v. *McNaull* (1923), 1 I.R. 78 at p. 84. The class to whom the *corpus* is to go is not yet determined: see Jarman on Wills, 7th Ed., 454.

Cur adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This involves the construction of a will. In my opinion the testator gave to his wife, *inter alia,* one-half of the income of his estate subject to a discretionary varia-

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tion appearing subsequently in the will and which does not in my opinion affect the construction of it. The rest of his estate (interest and principal) is disposed of as follows:

To such of my children including the said George E. Magee from time to time as to my executors shall appear to be most in need the payments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger shares to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees.

Arguments were submitted by opposing counsel as to the time vesting of the interest given to the children and as to the time or times of payment to them having due regard to the needs of the poorer beneficiaries. In my opinion the gifts vested in interest at the death of the wife. There is no other definite period to be inferred from the will and that time, I think, is clearly enough indicated. The time or times of distribution was left absolutely to the discretion of the trustees and with that discretion we cannot interfere. Children living on the death of the wife would take *per capita,* and the children of those who died after that date would take *per stirpes.* The trustees may make such distribution whenever they please and are not bound to wait as was suggested until the needs of every beneficiary becomes apparent.

MACDONALD, C.J.B.C.

I see no need to express any further opinion. It remains for the trustees to exercise their discretionary powers on this construction, or if the Court should put a different construction on it in accordance with such construction.

The costs of all parties should be paid out of the estate.

MARTIN, J.A.

MARTIN, J.A.: I agree with the judgment of my learned brother M. A. MACDONALD.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment of FISHER, J., following an application made by way of originating summons for the determination of certain questions and matters arising out of the last will and testament of Hugh Magee.

The will requiring construction reads as follows: [After setting out the will his Lordship continued.]

The following questions were submitted on the 13th of October, 1933, to the learned judge—the fact being that the widow of the testator had then been dead some seven or more years: [His Lordship set out the questions and continued.]

The learned judge on the 22nd of August, 1934, made answer as follows: [His Lordship set out the answers and continued.] Thereupon a formal Order was taken out under date October 1st, 1934, as follows: [His Lordship set out the order and continued.]

An appeal was taken to this Court by Charles W. Magee, Edith G. V. Magee and May I. Magee from the order of FISHER, J., of the 22nd of August, 1934, asking that the judgment or order of FISHER, J., hereinbefore set forth be set aside alleging error generally in decreeing that the *corpus* of the estate of the testator vested at the date of the death of the widow in those of the testator's children living at the date of the death of the widow but should have held that no interest in the *corpus* of the estate vested until the executors should exercise their discretion under the will of the testator and divide the *corpus* of the estate or failing such division then until the death of the last surviving child of the testator, and holding that the class among which the *corpus* of the estate should be distributed was constituted of those living at the date of the death of the widow of the testator but should have held that the class among which distribution of the *corpus* should be made would be constituted of those living at the date of the distribution, and that there was error in the holding that the executors had no absolute discretion as to distribution and that distribution should now take place but should have held that the only and proper time for distribution of the *corpus* would be when all the children living are not in need of assistance but are unembarrassed financially and that the distribution when made would be among those children living when the date for distribution has arrived. I have set forth the main questions argued and advanced by the appellants upon this appeal and if these contentions must be given effect as being the true application of the law in the carrying out of this will, it means as it occurs to me a slow process of complete disinheritance of all those intended to benefit by the terms of the will of the testator. At the outset, it may be said, as I view the authorities, that

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vague provisions in wills cannot stand. The policy of the law is all in favour of early distribution of the estate. What is contended for here by the appellants offends in every way, in my opinion, and deprives the testator's children of ever benefiting in the *corpus* of the estate, the executors always being enabled to say—feeling compelled to say—that one or more of the children living need assistance—embarrassed financially. This is what is advanced today and prevents distribution, the executors having this contention pressed upon them by these appellants. One consideration that immediately flashes upon the mind is this: if that be so, distribution now will put people in affluence whilst today they are in penury. Can it be said in view of this that it could ever have been the intention of the testator in his will to bring about such a happening? I do not consider that the law is so ineffective that a situation of this kind is not capable of being removed. It may be said rightly and fairly in this case that the executors and their successors have been good and careful custodians of the estate and have greatly increased the value of the estate. I think it was stated during the argument that it is of the value of considerably over $100,000. In view of this it would be reasonable from every point of view that distribution should take place unless it is that intractable law stands in the way.

It is clear here that it was the intention of the testator that the *corpus* was to go to and be distributed "among my children then living," but when was the distribution to be? "Then after the death of my wife." It is true we have these words prefaced by "If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially," the trustees were to be at liberty to divide the estate. Further my view is that there is no absolute discretion given to the trustees to postpone distribution as they may see fit. The portion of the will that really needs close study is in the following terms: [already set out in the judgment of MACDONALD, C.J.B.C.].

The absolute discretion there given must be confined to the division of the estate—as to individual proportion—that is that the absolute discretion is so limited and not a discretion at large.

Clearly the distribution is to be made to the testator's children

"then after the death of my wife my trustees may divide the estate among my children then living." This punctuated the time of vesting and who shall participate in the distribution. It is here contended though that the trustees at their sweet will may postpone the distribution to such time as there will be few or none of the children living. This is the length to which the argument goes as advanced by counsel for the appellants. To give effect to any such contention would naturally be abhorrent to any Court and I do not think the Court is powerless to prevent any such injustice being done, and defeating the manifest intention of the testator that all his children living at the date of the death of his wife should participate in the division of the *corpus* of the estate and further that the heirs of any of the children of the testator living at the date of the death of his wife should also participate in the distribution of the *corpus* of the estate.

Now it is advanced and pressed strongly that the time for distribution has not yet arrived because of the fact that it is not shewn that none of the children is in need of assistance or unembarrassed financially. I do not think that there is any hindrance here because in my view the law will not admit of this provision in the will constituting any obstacle. The provision in itself is too vague and, in my opinion, wholly inoperative and of no effect and in regard thereto I rely strongly upon the line of reasoning expressed by the then Chief Justice of Canada—Sir Henry Strong—in *Ross* v. *Ross* (1894), 25 S.C.R. 307 at p. 330, where that learned judge said this:

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> "Poor relations" must be interpreted as meaning "heirs-at-law." The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected.

If it is that any of the persons entitled in the distribution of the *corpus* of the estate are in need of assistance and are embarrassed financially then all the greater reason for the immediate distribution of the estate. Is it to be permitted to the trustees to say "some of them are in need of assistance and are embarrassed financially, therefore we will not distribute"? If the position is one of intractable law of course nothing can be said but, in my opinion, it is not: to give effect to this contention as here made would be a travesty of the law. Here is a case where

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to me it is apparent that the non-action of the trustees failing to distribute the *corpus* of the estate amounts to defeating the trust. The law undoubtedly is that where in the view of the Court there is failure to make a distribution the Court will interfere and direct a distribution to be made. No doubt the case must be made that that is the duty of the trustees under the trust. It is for the Court to interpret the will, but in so doing it is the province of the Court to arrive at what the testator meant and has said it is not conceivable that the testator meant, in effect, that so long as some of his children, living at the date of the death of his wife, are financially embarrassed, there will be no distribution. To so construe the will means disinheritance. That view I cannot agree with; with distribution taking place it is patent the financial embarrassment becomes at an end. In any case I look upon this provision in the will that where there is need of assistance and financial embarrassment is, in the language of Sir Henry Strong, in *Ross* v. *Ross, supra,* "too vague and uncertain to have any meaning attached to it, and must therefore be rejected."

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I might further upon this point refer to what the Earl of Halsbury, L.C., in *Grimond* (*or Macintyre*) v. *Grimond* (1905), A.C. 124 at 126 said:

> Where the directions are so extremely vague that you cannot say what it is that the testator meant.

Can it reasonably be said that the testator meant to bring about what is here taking place? Persons intended to benefit under the will because they are poor are disinherited—the others in affluence object to distribution and hope to be the final gainers by reason of longevity, a monstrous thing, as the persons entitled and desiring distribution are growing old.

The condition here, of need of assistance and financial embarrassment, is too uncertain for the Court to ascertain its meaning. It is a well-known rule of law that heirs-at-law are not to be deemed disinherited unless by express words. The procedure adopted here is bringing about that result and the appellants are pressing for that result, that is, a few only will be the participants when the distribution takes place—those in need are not to share (*Doe* v. *Dring* (1814), 2 M. & S. 448, *per* Lord Ellenborough, C.J. at p. 454; *Hall* v. *Warren* (1861), 9 H.L. Cas. 420, 436;

Martelli v. *Holloway* (1872), L.R. 5 H.L. 532, 548; *In re Pounder* (1886), 56 L.J. Ch. 113, 114; *Leach* v. *Leach* (1843), 2 Y. & C.C.C. 495 *per* Knight Bruce, V.-C. at p. 499; *Coward* v. *Larkman* (1888), 60 L.T. 1 at p. 2, 2nd column, Halsbury, L.C.).

As to the time of the vesting of the estate I have no hesitancy. It is abundantly clear that under the will the vesting took place upon the death of the widow; that is to say, became vested in the testator's children then living.

In *In re Estate of J. D. Helmcken, Deceased* (1924), 34 B.C. 184, MACDONALD, J. considered the point and referred to the leading cases (*Hickling* v. *Fair* (1899), A.C. 15 at pp. 26-7; *Taylor* v. *Graham* (1878), 3 App. Cas. 1287 at p. 1297; *Cradock* v. *Cradock* (1858), 4 Jur. (N.S.) 626 at p. 628; *Swan* v. *Bawden* (1842), 11 L.J. Ch. 156; *Martin* v. *Holgate* (1866), L.R. 1 H.L. 175, 184, 186, 188-9). There is this principle to be remembered in this case: that the Court prefers in considering the terms of the will that construction which in its application will most benefit the testator's whole family on the ground that that must have been his intention and construes the will so as to embrace all or as many of the children as possible (*In re Hamlet. Stephen* v. *Cunningham* (1888), 39 Ch. D. 426, 433, 434; *Bouverie* v. *Bouverie* (1847), 2 Ph. 349, 351; *Lee* v. *Lee* (1860), 1 Dr. & Sm. 85, 87; *White* v. *Hill* (1867), L.R. 4 Eq. 265, 271; *Williams* v. *Haythorne. Williams* v. *Williams* (1871), 6 Chy. App. 782, 785).

MCPHILLIPS, J.A.

I would further consider, and my opinion is, that the heirs of any one of the testator's children—the parent living at the time of the death of the widow—will be entitled to participate in the distribution of the *corpus* of the estate.

I would dismiss the appeal.

MACDONALD, J.A.: Appeal from an order of Mr. Justice FISHER on the construction of a will which, after devising an estate to trustees provided that they should

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pay the income of the trust premises first thereout discharging all liabilities in respect to my estate as follows: one-half thereof to my wife during her life in manner hereinafter described and the rest as follows: To such of my children including the said George E. Magee [one of the trustees] from time to time as to my executors shall appear to be most in need, the pay-

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ments to be at the absolute discretion of my executors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger share to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees. . . .

The testator died 25 years ago and the estate has been administered by trustees who distributed the income, first, in respect to one-half thereof to the widow (subject to the decision in *In re Estate of Hugh Magee, Deceased* (1925), 36 B.C. 195) until her death in 1927 and in respect to the other half (and the whole after the death of the wife) to the children according to their need. Distribution of income was made, first, to a number of children of the testator and on the death of some of them to the survivors. The trustees acted on the view that all the income (less the share going to the wife during her lifetime) should be available for distribution among needy children without disposal of the *corpus* until the time arrived, if at all, when, in their view, none of the children should require assistance. The *corpus*, it is submitted is subject to distribution not on the death of the wife but at some period after her death when it is ascertained by the trustees that none of the children is embarrassed financially. The prerequisites for distribution of the *corpus* therefore are (1) the death of the wife (a) ascertainment that none of the surviving children is in need of assistance or embarrassed financially. When these prerequisites are satisfied the estate vests in the surviving children, the division to be made by the trustees as directed. It follows that the children of any deceased son or daughter do not share in the estate.

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From all that has been said upon the construction of wills it is enough to refer to the wholesome observations of the Earl of Halsbury in the House of Lords in *Inderwick* v. *Tatchell* (1903), 72 L.J. Ch. 393 at 394. His Lordship said:

> I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. By the hypothesis it does not speak for itself, but you must arrive at some inter-

pretation which will make it speak, and make it speak intelligibly. I so far go with the contention of the appellants here, that I think it is quite possible—nay, I may go further and say I think it is probable—that if the testator had contemplated the particular event that has happened in this case he would have provided for it. But with that single observation I am not at liberty, because an event has happened which I think has not been provided for, to conjecture what the testator would have provided if he had thought of it beforehand. I am not at liberty to disregard the application of the ordinary rule of construction of every document—namely, that you must look at the whole document, and, if you can, you must read the words according to their natural and reasonable meaning.

In this case the whole difficulty arises because of the plight of grandchildren whose deceased parents were beneficiaries while living. If, as stated in the judgment referred to the testator had contemplated this event he might (or on the other hand might not) have provided for it. We are not permitted however to indulge conjectures as an aid to interpretation.

The testator's plan, as disclosed by the instrument fairly read, was to preserve the estate until the death of the wife. After her death, a further reason remained for deferring distribution and for keeping the estate vested in the trustees, *viz.*, that needy children could best be provided for in that way. Earlier distribution might result in dissipation of her or her portion by the improvident, hence the direction to keep the *corpus* intact so that income would be available so long as any child remained in need. This condition might continue until one child only survives. The class, however, to whom distribution should be made, if at all, cannot be determined until the time for distribution arises. The children then living will form the class entitled to the *corpus*. This, as I view it, is the meaning of the instrument reasonably interpreted. We cannot apply the rule that a disposition of the income carries with it the capital; that rule does not apply where there is another disposition of the capital or a clear intent that it shall be preserved for special purposes.

MACDONALD, J.A.

After the death of the wife the trustees were obliged to enquire if the time had arrived when no children were in need. If a negative answer was given to that question they had no power to distribute the *corpus* involving the *sequitur* that as yet no class was ascertained. If some years later on making the same enquiry, the trustees should come to the conclusion that no child was then in need they should distribute the *corpus* among the

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children living at that time. No doubt this view creates the hardship already referred to prejudicially affecting the children of deceased sons and daughters—and possibly the Court could make a better will if permitted—but that was the will the testator made. His view may have been, as already intimated, that by this scheme he provided that an income would be available for children as long as they were alive and in need, concerning himself only with his own children and not with the second generation. He may have thought that some among his children would prove to be improvident and require this protection. The impecunious son would be prevented from squandering his portion leaving him without any income at all. That would appear to be the substantial consideration the testator had in mind.

I cannot agree, therefore, that the estate vested in the beneficiaries upon the death of the wife. That would mean the selection of an arbitrary date for distribution without regard to the injunction not to do so while any child was in need. Even if it did, another alleged injustice would arise, *viz.*, children of sons or daughters of the testator dying between his death and that of the wife would not share in the estate. The property vests at the time the trustees are given the right to distribute it. There is a perfectly good devise to trustees upon trusts that can be carried out.

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Mr. *Reid* submitted that the estate vested in the children living at the date of the wife's death but that the trustees might defer distribution until a further date when none of the children was in need. At that time the estate would go to the children living at the death of the wife or to the heirs of any who died in the meantime. He read the first "then" as meaning "in that case" and the second "then" (both in italics) as referring to the date of the wife's death. I must confess there is some force in this submission but if counsel who revised the will had instructions of that nature relating to so important a matter as the date of vesting it would not be expressed in this loose fashion leaving it open to a doubtful and highly speculative interpretation. I think we should interpret the second word "then" in the natural sense in which it is used, *viz.*, as referring to the children living at the time it should be determined that no one was in need. That event determines the class, *viz.*, those living at that time.

My conclusion, therefore, is that the estate vests only when the time for distribution arrives. That time may never arrive and will not if it should appear to the trustees that the last surviving child is in need. That in itself is a conclusive argument against earlier vesting. Where a devise is made to one payable at a time that must arrive it is at once a vested legacy. Where however the devise is upon an uncertain event (one that may or may not happen) no vesting can take place before its occurrence and if the beneficiary dies in the meantime the legacy lapses. If no distribution should be made before the death of the last survivor a partial intestacy will ensue in which event a resultant trust will arise in favour of the donor and distribution would be made according to law. However, it is not necessary at this stage to express a final opinion on this point and I will not do so.

It was urged that the words "in need of assistance" and "all unembarrassed financially" are vague and uncertain phrases and should be disregarded. That is not so. The phrases are easily understood. It is only when no class at all is fixed that uncertainty arises. If, however, the suggestion of vagueness is based upon the view that because of ever-present need a time for distribution may never arise the answer is that such a contingency is provided for. The testator did not want distribution to take place while any were in need. The word "if" should not be overlooked "if at any time it appears," etc. That is a *sine qua non* to distribution by the deliberate selection of words. It is not at all vague.

MACDONALD, J.A.

I may add that it is not possible for the trustees to make distribution merely to relieve financial embarrassment and thus enable them to say that no one is in need. Nor may the trustees conclude that if a share of the *corpus* would take away financial embarrassment they may consider that the time for a division of the capital has arrived. They must first fairly conclude that the beneficiary, from income received from the estate or from other sources is reasonably able to provide for his or her ordinary personal and domestic obligations. That course must be followed unless all parties agree to a division of the *corpus* or unless the Legislature intervenes.

I would allow the appeal.

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McQUARRIE, J.A.: I agree that the appeal should be allowed. I have had the privilege of reading the reasons for judgment of my learned brother M. A. MACDONALD and agree with same. As he has expressed my own views in the matter so clearly and logically, I feel that it is unnecessary for me to say anything further.

Appeal allowed, Macdonald, C.J.B.C. dissenting in part, and McPhillips, J.A. dissenting.

ROBERTSON, J. (In Chambers)

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HARRAP v. HARRAP

HARRAP v. HARRAP (No. 2).

Practice—Pleadings—Application under Deserted Wives' Maintenance Act—Charge of adultery—Subsequent petition for dissolution charging same act of adultery—Estoppel—R.S.B.C. 1924, Cap. 67, Secs. 3 and 6.

On the 5th of December, 1934, the petitioner filed a petition for the dissolution of his marriage with the respondent, paragraph 6 of the petition reading as follows: "That on the 21st of March, 1931, the above-named respondent committed adultery with one Leslie Doney." In May, 1933, the respondent had taken out proceedings under the Deserted Wives' Maintenance Act for an order compelling the petitioner to pay her a sum sufficient for maintenance and on the hearing the petitioner set up that he had not deserted his wife and that she had been guilty of the very same adultery that is charged in the above paragraph. The magistrate found there was no desertion and no adultery but on appeal by the respondent it was held by the County Court judge that the petitioner had deserted his wife and that she had not committed adultery. On respondent's application to strike out said paragraph on the ground that the matter is *res judicata* and the petitioner is estopped from setting up this same charge of adultery:—

Held, that although subsection (3) of section 6 of the Deserted Wives' Maintenance Act provides that "A finding by any magistrate that adultery has been proved shall not be evidence of the adultery except for the purpose of proceedings under this Act" and the subsection was intended to take away the right of the husband in other proceedings to rely upon a finding of adultery under the Act, it would require clear language to deprive the wife of her right to set up estoppel and the application is granted.

Statement

APPLICATION to strike out a paragraph of a petition for dissolution of marriage. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 28th of January, 1935.

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HARRAP v. HARRAP

Beckwith, for the application.
F. C. Elliott, contra.

11th February, 1935.

ROBERTSON, J.: On the 5th of December, 1934, Norman Wilfred Harrap filed a petition for the dissolution of his marriage with the respondent. Paragraph 6 of the petition reads as follows:

That on the 21st of March, 1931, the above-named respondent committed adultery with one Leslie Doney.

In May, 1933, the respondent took proceedings under the Deserted Wives' Maintenance Act, R.S.B.C. 1924, Cap. 67, Sec. 3, for an order, compelling the petitioner to pay to her, a sum sufficient for her maintenance.

Subsections (1) and (3) of section 6 of the said Act provide as follows:

(1.) No order for the payment of money shall be made in favour of a wife who is proved, to the satisfaction of the magistrate hearing the complaint, to have committed adultery, unless the adultery has been condoned.

(3.) A finding by any magistrate that adultery has been proved shall not be evidence of the adultery except for the purpose of proceedings under this Act.

Judgment

Upon the hearing before the magistrate the petitioner set up that he had not deserted his wife and that she had been guilty of the very same adultery which is now charged in said paragraph 6 of the petition, and called considerable evidence to support the latter defence. The magistrate found there had been no desertion, and no adultery, and dismissed the summons. The respondent appealed to the County Court and again the petitioner set up the same defences as before the magistrate. The learned County Court judge held that the petitioner had deserted the respondent, and that she had not committed adultery, and thereupon ordered the petitioner to make certain payments to the respondent. The hearing before the County Court judge was a "trial *de novo* on the merits": see *Rex* v. *Jordan* (1925), 35 B.C. 1 at p. 7.

The respondent now applies to strike out said paragraph 6 on the ground that the matter is *res judicata*, because of the findings of the magistrate, and the County Court judge, on the question of adultery, and the petitioner is therefore estopped from setting up this same charge of adultery in his petition.

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HARRAP v. HARRAP

The first paragraph of the head-note in *Conradi* v. *Conradi* (1868), L.R. 1 P. & D. 514, is as follows:

> A petitioner established his wife's adultery in a suit for dissolution of marriage, but the co-respondent established the petitioner's adultery, and on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-respondents. The Queen's Proctor intervened, and alleged the judgment against the petitioner in the previous suit, and further alleged the fact of the petitioner's adultery. The jury found that the petitioner was not guilty of the adultery charged. But the Court held that the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed.

In *Finney* v. *Finney* (1868), *ib.* 483, the facts were the wife petitioned for judicial separation on the ground of cruelty, and, the charges of cruelty being traversed by the husband, the Court found that they were not proved, and dismissed the petition. It was held that she was estopped from setting up the same charges of cruelty coupled with adultery, in a subsequent petition for dissolution. See also on this same principle *Flitters* v. *Allfrey* (1874), 44 L.J. C.P. 73, in which a County Court judgment was successfully pleaded as an estoppel.

Judgment

Counsel for the plaintiff, however, relied upon the case of *Sopwith* v. *Sopwith* (1861), 2 Sw. & Tr. 160, and *Bancroft* v. *Bancroft and Rumney* (1864), 3 Sw. & Tr. 597. In the *Sopwith* case, the husband petitioned for restitution of conjugal rights, and his wife, in her answer, alleged that the petitioner had been guilty of adultery. The husband, in his reply, set up, by way of estoppel, that the same charges had been put in issue in a suit for judicial separation brought by his wife against him in which she had failed to prove the adultery. The Court held the estoppel was good, and that the wife was not entitled to allege the same facts of adultery which she had failed to prove in the previous suit. The Judge Ordinary pointed out that if the issue of adultery had been tried by different evidence in the one case, and in the other, the doctrine of estoppel would not have applied. He said, at p. 169:

> The principle however upon which my judgment proceeds, may not be applicable in all cases, in consequence of the different rules of evidence that prevail in different suits; *e.g.*, in a suit instituted by the husband for divorce on account of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery, so as to bring her case within the latter part of the 31st section of the 20 & 21 Vict. c. 85; but she cannot be heard as a witness in support of such an allegation. In an inde-

pendent suit by her for judicial separation on the ground of cruelty or desertion, or for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, she may give evidence in support of her case; and inasmuch as the same identical issue in these two cases would be triable on different principles as to the admissibility of evidence, the doctrine of estoppel could not justly be applied. In the present case, my judgment on the demurrer is for the petitioner.

In *Bancroft* v. *Bancroft, supra,* the head-note sets out the facts as follows:

> Where there were cross suits, and the wife in her suit (which was for a judicial separation on the ground of cruelty), was by the verdict of the jury acquitted of the charges of adultery alleged in the husband's answer, the Court refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution in which the same acts of adultery were charged.

The Judge Ordinary said, at pp. 598-9:

> It seems to me that the law, by making the evidence of the parties admissible in one suit and not in the other, has virtually declared that in cases of this kind the issue as to the wife's adultery may be twice tried, the same issue being triable on different principles in the two suits; by one species of evidence in the one, and by another in the other. The Court is bound to administer the law as it exists. Upon the authorities cited, I think that the suit for dissolution must go on to trial.

Both the *Sopwith* and *Bancroft* cases were decided before the statute 32 & 33 Vict. c. 68, s. 3, which provided that the husband and wife should be competent witnesses in any proceeding instituted in consequence of adultery.

Judgment

There is, in my opinion, no difference in principle as to the evidence upon which the question of adultery would be tried under the Deserted Wives' Maintenance Act and the Divorce Act, R.S.B.C. 1924, Cap. 70.

One of the constituent elements of estoppel which must be established by the party setting it up is

> that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*:

(see Spencer Bower on Res Judicata, p. 9; *Anderson* v. *Collinson* (1901), 2 K.B. 107, and *Partington* v. *Partington and Atkinson* (1924), 41 T.L.R. 174.)

Now if the proceedings under the Deserted Wives' Maintenance Act were criminal, they would not be between the same parties as those under the Divorce Act, because in criminal proceedings the parties are the Crown and the accused. See *Petrie* v. *Nuttall* (1856), 11 Ex. 569 at 575; also *Caine* v.

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Palace Steam Shipping Company (1907), 1 K.B. 670 at pp. 677 and 683.

In my opinion the proceedings under the Deserted Wives' Maintenance Act are civil. They are very much like the proceedings under 7 & 8 Vict. c. 101, in which a single woman who may be with child, or "who may be delivered of a bastard child . . . may . . . make application to any one justice of the peace . . . , for a summons to be served on the man alleged by her to be the father of such child; . . , and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child . . . After a hearing, an order may be made against the man for payments to the mother of the child.

In *The Queen* v. *James Berry* (1859), 28 L.J.M.C. 86, the facts were that the mother of a bastard child obtained the issue of a summons under 7 & 8 Vict. c. 101, *supra*. The summons was heard, and, subsequently, criminal proceedings were taken against the man for perjury in connection with the evidence which he had given at the hearing of the summons. Certain objections were taken as to the jurisdiction of the magistrate to hear the summons and that certain necessary evidence had not been given, and Hill, J. reserved a case for the opinion of the Court for Crown Cases Reserved. Lord Campbell, C.J., who delivered the judgment of the Court said at p. 89:

Judgment

> The proceeding against the putative father of a bastard child to obtain an order of affiliation and maintenance is not a proceeding *in pœnam* to punish for a crime, but merely to impose a pecuniary obligation, and is a civil suit within the meaning of 14 & 15 Vict. c. 99, ss. 2, 3—See *the Queen* v. *Lightfoot* [(1856)], 6 El. & Bl. 822; 25 L.J. M.C. 115. For this reason the defendant was admitted as a witness on his own behalf. Then, what is the summons which we have to consider? Mere process to bring the defendant into Court in a civil suit.

It will be remembered that prior to 14 & 15 Vict. c. 99, the parties to a suit, action or proceeding were not competent witnesses. This statute provided that they should be competent and compellable witnesses.

In the Province of Manitoba there was an Act, called the Illegitimate Children's Act, R.S.M. 1913, Cap. 92, which provided that an unmarried woman "pregnant with child which is likely to be born illegitimate" might lay an information before a justice who might issue a "summons for service on the alleged putative father requiring his attendance before him." The

putative father might be required to enter into a bond conditioned for his appearance upon any warrant or summons issued under the Act after the birth of the child. After the birth of the child, the magistrate could issue a summons for service on the alleged putative father requiring his attendance before him, and upon the hearing, the magistrate might make an order for payment to the mother. The Court of Appeal in Manitoba had to consider this Act in the case of *Davis* v. *Feinstein* (1915), 25 Man. L.R. 507. The Court held that the proceedings were in the nature of a civil suit—see Richards, J.A. at p. 513; Purdue, J.A. p. 519 and Cameron J.A. p. 522.

Section 4 of the Deserted Wives' Maintenance Act provides that the magistrate may order the husband to pay weekly sums to the wife and that he should pay "the costs of and incidental to the summons, hearing, and order, including witness fees." Section 9 of the said Act provides that the order for payment may be registered under the Land Registry Act, and, when registered, it shall be deemed to be a judgment within the meaning of section 34 of the Execution Act; and that the wife may pursue the same remedies for the recovery of any amount due thereon, and all costs, as if it were a County Court judgment; and section 11 provides for the wife obtaining a garnishee order.

Judgment

For these reasons I think that the proceedings under the Deserted Wives' Maintenance Act were civil proceedings between the petitioner and respondent.

But then it is suggested that because subsection (3) of section 6 of the Deserted Wives' Maintenance Act, *supra*, provides that the finding by a magistrate that adultery has been proved shall not be evidence of the adultery except for the purpose of proceedings under that Act, the finding of the magistrate that adultery was not committed should likewise not be evidence except under the said Act. The subsection was intended to take away the right of the husband in other proceedings to rely upon a finding of adultery under the Act; but it would require clear language, in my opinion, to deprive the wife of her right to set up estoppel.

The application is granted with costs.

Application granted.

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ST. JOHN AND THE VANCOUVER STOCK & BOND COMPANY LIMITED v. FRASER AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

Securities Act — Investigation — Delegation of authority — Quasi-judicial powers—Right to cross-examine witnesses—Natural justice—B.C. Stats. 1930, Cap. 64, Secs. 10 and 29.

Authority was delegated by the Attorney-General under section 10 of the Securities Act to each of the defendants to conduct investigations to ascertain whether any fraudulent act or any offence against the Act or the regulations has been, is being or is about to be committed by Nicola Mines & Metals Limited, N.P.L., in the one case, and Wayside Consolidated Gold Mines Limited in the other, and for that purpose to examine any person, company or thing whatsoever.

The plaintiffs in each case were not directors or officers of said respective companies but had been engaged in transactions on a large scale with shares of stock of the companies in each case. These shares were purchased outright and the respective companies had no control over the manner in which the plaintiffs dealt with them. Upon the defendants in each case proceeding to enquire into all the dealings of the plaintiffs with said shares, the plaintiffs obtained *ex parte* injunctions in both cases restraining the defendants from proceeding further with the investigations in so far as it related to the conduct of the plaintiffs. Upon motion to dissolve the injunctions it was held in both cases that the investigations were within the authority delegated to the defendants by the Attorney-General and that he could investigate people dealing with shares in the companies other than said companies and their officials, and the injunctions were dissolved.

Held, on appeal, affirming the decision of LUCAS, J. in the first case and MORRISON, C.J.S.C. in the second (MARTIN and MACDONALD, JJ.A. dissenting), that the Attorney-General's powers or his delegate under the Securities Act is partly judicial and partly ministerial. He is not bound to follow the rules regulating proceedings in a Court of justice, and it is within his absolute discretion as to whether the privilege should be extended to counsel to cross-examine witnesses.

Statement

APPEAL by plaintiffs from the decision of LUCAS, J. of the 18th of December, 1934 (reported, *ante*, p. 274), in the first above-mentioned action, dissolving an *interim* injunction of the 6th of December restraining the defendant from proceeding further in connection with the investigation being held by him

into the affairs of the Nicola Mines & Metals Limited, N.P.L., pursuant to the authority delegated to him by the Attorney-General under the Securities Act, so far as the same directly or indirectly relates to the conduct or actions of the plaintiffs, and from making any finding or report to the Attorney-General in connection therewith until judgment in this action, and appeal by the plaintiffs from the decision of MORRISON, C.J.S.C. of the 30th of October, 1934, in the second above-mentioned action (reported, *ante*, p. 302) dissolving an *interim* injunction of the 22nd of October, 1934, restraining the defendant from proceeding further in connection with the investigation being held by him into the affairs of the Wayside Consolidated Gold Mines Limited, N.P.L., pursuant to the authority delegated to him by the Attorney-General under the Securities Act, in so far as the same either directly or indirectly relates to the conduct or actions of the plaintiffs, and from making any finding or report to the Attorney-General in connection therewith until judgment in this action. By agreement between counsel the two appeals were argued together.

Statement

The appeals were argued at Victoria on the 11th to 16th and the 25th to 29th of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Craig, K.C., for appellants Bartley & Co. *et al.*: First, the defendant as investigator went beyond the scope of the authority delegated to him by his appointment under the Securities Act. Certain shares in the company were sold outright to the plaintiffs who dealt with them as their own and entirely independent of the company. Mr. *Russell* assumed the right to investigate as to the plaintiffs' dealings with their own shares. The facts are properly stated in the judgment below but my submission is the words "and for such purpose" in section 10 of the Act are misconstrued. If the investigator goes outside the scope of the authority given him by his appointment, and under the Act he acts without jurisdiction, he is not protected by section 39 of the Act. What the brokers do with their own shares has nothing to do with the company. The second objection is as to the manner in which the investigation was carried on. The investigation is of a *quasi*-judicial nature and the defendant is bound

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to proceed in accordance with the principles of natural justice. There are certain fundamental rules under which the inquiry must be conducted to satisfy British fair play. The conduct of the investigation is contrary to the principles of natural justice. We are in danger of a report against us without knowing what the charge is. No cross-examination of witnesses was allowed. He was about to make his report. There is no charge against us and a report may be made against us without our having a chance to meet any charge. Parliament has not done away with the necessity of conducting the investigation in accordance with the principles of natural justice. (a) If the investigator acts without jurisdiction the curative section in the Act does not apply. (b) If a *quasi*-judicial body acts contrary to natural justice it acts in excess of jurisdiction. The essentials of natural justice have been violated: see *In re Low Hong Hing* (1926), 37 B.C. 295 at pp. 302-3; *Canadian Northern Railway* v. *Wilson* (1918), 29 Man. L.R. 193 at pp. 197 and 200; *In re Berquist* (1925), 35 B.C. 368. The person about whom a report is proposed to be made should be informed with meticulous conciseness the particulars of the charge against him: see *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180 at p. 187; *Russell* v. *Russell* (1880), 14 Ch. D. 471 at p. 478; *Innes* v. *Wylie* (1844), 1 Car. & K. 257; 174 E.R. 800; *Board of Education* v. *Rice*, [1911] A.C. 179 at p. 182; *Local Government Board* v. *Arlidge*, [1915] A.C. 120 at pp. 132-3; *The Queen* v. *Gosse* (1860), 3 El. & El. 277; 121 E.R. 446; Clarke's Magistrates' Manual, 4th Ed., 305. The learned judge below finds the shares were purchased outright.

Argument

J. W. deB. Farris, K.C., for appellant St. John *et al.*: I wish to establish two things. (1) This is a tribunal of a *quasi*-judicial nature where we are entitled as a matter of justice to a full defence. (2) There can be no proper defence without full opportunity to cross-examine. There are different grades of semi-judicial tribunals: see *O'Connor* v. *Waldron* [(1934), 104 L.J.P.C. 21; [1935] A.C. 76]; [1935] 1 W.W.R. 1; *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255; *Local Government Board* v. *Arlidge*, [1915] A.C. 120 at p. 132. The Courts assume Parliament is not unjust unless it is clear that Parliament so enacts. If I am charged of conspiracy to defraud the

public I am entitled to cross-examine as a matter of justice. *O'Connor* v. *Waldron* was on the question of privilege and anything short of a Court is not entitled to privilege. There is a clear distinction between that case and the present one: see *Barratt* v. *Kearns* (1905), 74 L.J.K.B. 318; *Shell Co. of Australia* v. *Commissioner of Taxation* (1930), 100 L.J.P.C. 55 at pp. 62-3; *Hearts of Oak Assurance Co.* v. *Attorney-General* (1932), 101 L.J.Ch. 177 at p. 180; *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281 at p. 287. On the failure to grant essential justice see *Errington* v. *Minister of Health* (1934), 51 T.L.R. 44 at p. 49; *In re Haigh's Estate: Haigh* v. *Haigh* (1862), 31 L.J.Ch. 420; *Attorney-General* v. *Davison* (1825), McCle. & Y. 160; 148 E.R. 366 at pp. 369 and 370; *Bonaker* v. *Evans* (1850), 16 Q.B. 162. The second point is, that lack of opportunity to cross-examine witnesses is contrary to essential or natural justice. His procedure must include all the essentials of a Court. *Canadian Northern Railway Co.* v. *Wilson* (1918), 29 Man. L.R. 193, is strongly in our favour. There is not a defence in the proper sense of the word unless there is an opportunity to cross-examine: see *Smith* v. *The Queen* (1878), 3 App. Cas. 614 at p. 625; *Fisher* v. *Keane* (1878), 49 L.J.Ch. 11; *Bonaker* v. *Evans* (1850), 16 Q.B. 162 at p. 171. A *quasi*-judicial tribunal must give the same natural justice as any Court: see *Allen* v. *Allen and Bell* (1894), 63 L.J.P.C. 120 at p. 123. If defendant fails to be governed by the provisions of the Act he has no jurisdiction and the curative section does not protect him: see *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1892), 61 L.J.Q.B. 409 at p. 414; *Andrews* v. *Mitchell,* [1905] A.C. 78; *Wayman* v. *Perseverance Lodge of the Cambridgeshire Order of United Brethren Friendly Society,* [1917] 1 K.B. 677; *Rex* v. *Lantalum* (1921), 62 D.L.R. 223 at p. 246. It is contrary to natural justice to deny a man a defence and right to cross-examine: see *In re Narain Singh* (1913), 18 B.C. 506; *Rex* v. *Barnstead* (1920), 55 D.L.R. 287. The defendant is going to find that St. John and another conspired to give false value of shares. We are about to be convicted of a violation of the Criminal Code without a chance to cross-examine. Either the statute is *ultra vires* or he is acting outside the statute: see

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McGee v. *Pooley* (1931), 44 B.C. 338 at pp. 341 and 344; *Lymburn* v. *Mayland,* [1932] A.C. 318; 101 L.J.P.C. 65; [1932] 1 W.W.R. 578 at p. 583. In so far as he may find a criminal conspiracy he is contravening the Criminal Code.

McCrossan, K.C., for respondent *Fraser et al.*: The appointment of *Fraser* is co-extensive with the Act. There is a misconception of the whole scheme of Part II. of the Act. This is a departmental investigation of inquisatorial character. The Act does not impose any powers on the investigator and the Attorney-General does not have to act on the report of the investigator. The powers given the Attorney-General by section 11 of the Act are not exercisable by the examiner. This is an investigation rather than a judicial proceeding, there is no right as of right to cross-examine: see *Hearts of Oak Assurance Co.* v. *Attorney-General,* [1932] A.C. 392 at p. 396. We are only dealing with the examiner. In answer to the first point see *O'Connor* v. *Waldron* [(1934), 104 L.J.P.C. 21; [1935] A.C. 76]; [1935] 1 W.W.R. 1 at p. 4; *Godson* v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36; *In re Gartshore* (1919), 27 B.C. 121 at p. 133; *Boulter* v. *Kent Justices,* [1897] A.C. 556 at p. 569; *Rex* v. *Howard,* [1902] 2 K.B. 363 at p. 373; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson,* [1892] 1 Q.B. 431 at p. 443; *Copartnership Farms* v. *Harvey-Smith,* [1918] 2 K.B. 405 at p. 412. It is not the examiner but the Attorney-General who can impose punishment. The *Hearts of Oak* case [*supra*] held that the inquiry should be a domestic and private matter. On the right to cross-examine see *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1921), 29 B.C. 333 at pp. 354-5, and on appeal, [1922] 1 A.C. 202 at pp. 212-3; *In re Low Hong Hing* (1926), 37 B.C. 295. The investigator has discretion as to how to conduct the inquiry: see p. 354 of the *Wilson* case, [*supra*] and in fact they were given ample opportunity to be heard. We must act honestly and in good faith: see *Everett* v. *Griffiths,* [1921] 1 A.C. 631 at pp. 660 and 696; *Local Government Board* v. *Arlidge,* [1915] A.C. 120 at pp. 132-3 and 150. Parliament has given the investigator the right to fix his own process. No right of audience is given counsel, therefore no right to cross-examine: see Halsbury's Laws of England, 2nd Ed., Vol. 2, p. 501, sec. 679; *Collier* v. *Hicks*

(1831), 2 B. & Ad. 663 at pp. 668-9 and 672; *In re Macqueen* (1861), 9 C.B. (N.S.) 793 at p. 796; *The Queen* v. *Williamson* (1890), 59 L.J.Q.B. 493 at p. 494. An analagous case is that of a coroner's Court: see *Agnew* v. *Stewart* (1862), 21 U.C.Q.B. 396. No one has a right to offer assistance to a tribunal and when things go against them to say there was no jurisdiction: see *Baker* v. *Dumaresq,* [1934] S.C.R. 665 at p. 673. Injunction is based on a violation of a legal right: see *North London Railway Co.* v. *Great Northern Railway Co.* (1883), 11 Q.B.D. 30 at p. 40. A mere surmise is not sufficient: see Kerr on Injunctions, 6th Ed., p. 16. The action is barred by section 29 of the Act. We are not dealing with the criminal law or purporting to make criminal findings. Civil fraud would be a breach of the Act: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 109; *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 130. This is a Provincial Act within section 92 of the B.N.A. Act: see *Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick,* [1892] A.C. 437 at p. 443; *Regina* v. *Wason* (1890), 17 A.R. 221 at p. 235; Clement's Canadian Constitution, 3rd Ed., 485; *Rex* v. *Horning* (1904), 8 O.L.R. 215; *Bedard* v. *Dawson,* [1923] S.C.R. 681 at p. 684. The Act gives a measure of protection to the public in matters leading to crime: see *Quong-Wing* v. *Regem* (1914), 49 S.C.R. 440 at pp. 447 and 462; *Lymburn* v. *Mayland,* [1932] A.C. 318; 101 L.J.P.C. 65; [1932] 1 W.W.R. 578 at p. 581.

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A. B. Macdonald, K.C., for respondent *Russell:* He is appointed under section 10 of the Act. His powers are not limited to the mere words of the appointment. The appointment includes section 10 of the Act and all persons dealing in shares are included. The learned judge was wrong in saying the plaintiffs were not officers of the Nicola Mines. On the material the plaintiffs have given the intimation that their dealings were in connection with the company. This is not a public investigation. He has control over his own procedure and they have no right to cross-examine: see *Wilson* v. *Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202 at p. 211. An injunction will not lie in this case and section 29 of the Act clearly applies.

Farris, in reply: We are not asking that the *Mayland* case be

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overruled; both the *Mayland* case and the *Wason* case are distinguishable. In his absence and without his knowledge there is an inquiry and a conclusion arrived at. It means destroying his reputation and business interests. He is in a position as if he had asked for cross-examination and was refused. The harm is done whether it is by the Attorney-General or by the investigator: see *Baroness Wenlock* v. *River Dee Company* (1887), 19 Q.B.D. 155 at p. 158. As to the right of injunction see Kerr on Injunctions, 6th Ed., pp. 16, 615 to 617; *Beddow* v. *Beddow* (1878), 47 L.J.Ch. 588; *Hickman & Co.* v. *Roberts* (1911), 82 L.J.K.B. 678 at p. 683; *Bristol Corporation* v. *John Aird & Co.* (1913), *ib.* 684 at p. 695.

Argument

Craig, in reply: They base an argument on the fact that under section 11 the Attorney-General does not have to act on the report, but this does not detract from the argument that this is a *quasi*-judicial proceeding. Suppose the Attorney-General conducts the investigation himself and in doing so departs from his jurisdiction by acting beyond the principles of natural justice, he is then subject to the restraining arm of the Court. He is acting in a *quasi*-judicial capacity. Because he does not have to act on the report makes no difference. As to the cases of *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202, and *O'Connor* v. *Waldron* [(1934), 104 L.J.P.C. 21; [1935] A.C. 76]; [1935] 1 W.W.R. 1, the difference is that in this case penal consequences may follow automatically. In all common fairness, if he is going to be implicated he is entitled to know what the charge is and be allowed to hear the evidence and cross-examine. In *Rex* v. *Amphlett (Judge)*, [1915] 2 K.B. 223 at p. 238, a County Court judge was acting ministerially but in so doing he must act in good faith and in accordance with the principles of natural justice. As a preliminary to investigating our dealing with the shares, he must first find out whether there is anything wrong with the issue of shares to us. When the investigator goes outside his jurisdiction by not proceeding in accordance with the principle of natural justice, section 29 of the Act does not apply and an injunction will lie: see *Canadian Northern Ry. Co.* v. *Wilson* (1918), 29 Man. L.R. 193 at p. 200. *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* is distinguishable. It proceeded on the ground that there is an

established practice on proceedings before the Lieutenant-Governor in Council, and it is to be assumed that when the Legislature grants powers to the Lieutenant-Governor in Council, Parliament intends that the powers so granted shall be exercised according to the accustomed practice. But there is no accustomed practice in proceedings by the Attorney-General under the Securities Act.

Cur. adv. vult.

5th March, 1935.

MACDONALD, C.J.B.C.: This is an appeal from a refusal to continue an injunction against the respondent from continuing in an investigation under the Securities Act, when it is alleged he has no jurisdiction to prohibit cross-examination of witnesses. The case falls, *inter alia*, under section 10 of the Securities Act and the neat question to be decided depends upon the character of the proceedings in question. Is the Attorney-General a judicial tribunal when conducting an inquiry and adjudication under that Act and in particular the inquiry in question in this appeal, or is he untrammelled by the practice and procedure of the ordinary Courts of law? This question it appears to me is the principal question to be decided in this appeal. Since it is claimed that if he is governed by the practice in Courts of law he has exceeded his jurisdiction in the inquiry in question by refusing the appellants' right to cross-examine witnesses. On this question I think it makes no difference whether the Attorney-General conducts the proceedings himself or delegates that branch of the inquiry which consists of the investigation of the facts to a delegate. It is the scope of the Attorney-General's powers which must determine the question not merely the powers of the delegate and on this footing I propose to determine the question whether he acts as a judicial tribunal or partly as such or partly as a mere investigator of the facts. I am driven to the conclusion that his powers are partly ministerial and partly judicial. I shall call them *quasi*-judicial powers. A tribunal of a purely judicial character is defined by Lord Esher, M.R., in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431 at 442, as quoted by Lord Atkin in *O'Connor* v. *Waldron* [(1934), 104 L.J.P.C. 21 at p. 23;

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[1935] A.C. 76 at p. 81]; [1935] 1 W.W.R. 1 at p. 3, as follows:

> In their Lordships' opinion the law on the subject was accurately stated by Lord Esher in *Royal Aquarium, Etc., Ld.* v. *Parkinson*, [1892] 1 Q.B. 431, at 442; 61 L.J.Q.B. 409, where he says that the privilege "applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. . . . This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act."

A similar definition was expounded by the Privy Council in *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275 at pp. 295-6, where Lord Dunedin said:

> What is "judicial power"? Their Lordships are of the opinion that one of the best definitions is that given by Griffith, C.J. in *Huddart, Parker & Co. Proprietary Ltd.* v. *Moorhead*, [1908] 8 C.L.R. 330, 357, where he says: "I am of opinion that the words 'judicial power' as used in sec. 71 of the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

At p. 297, Lord Dunedin continues:

> In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body.

Now in this case the Legislature of British Columbia has by statute authorized the Attorney-General to investigate the transactions of trust companies and other dealings in securities and if he sees fit to impose penalties for breaches of the Act. He is also authorized to delegate the duties of ascertaining the facts to an investigator who is to report to him and who makes an affirmative finding if he chooses on any matter investigated.

There are a number of decisions in the House of Lords and in the Privy Council touching the same matter but none of them inconsistent, I think, with the definitions I have cited. The case, however, from which this case cannot, in my opinion, be distinguished in particular and in some of its details is *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202. That was a case under the Settlers' Rights Act, where by that statute

the Lieutenant-Governor in Council was authorized to inquire into settlers' claims for a grant of land and to adjudicate upon them. There their Lordships pointed out that the powers of a tribunal may be partly administrative and partly judicial. In that case the question of the right to cross-examine witnesses arose and the Lieutenant-Governor in Council declined to permit it. The Privy Council held that the tribunal was not a judicial one and therefore that it did not fall within the terms of the definitions which I have cited and it was said there that (pp. 211-3)

> Their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in *Arlidge's Case*, [1915] A.C. 120, 150, "preserve a judicial temper" and . . . was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, [this question was involved also] and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received.

Their Lordships further say (pp. 213-4):

> Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application . . . their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in *Dunlop's* case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice. . . . His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

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That case is analogous to the present one. The Lieutenant-Governor in Council did have the power and duty to investigate the facts and also to decide the law and yet it was held that he was not a judicial tribunal. This case is even stronger in this respect that while the Attorney-General may impose penalties he may if he thinks fit decline to do so. He may accept the finding of the delegate or he may reject it. The proceedings have not reached such a stage that it can be said that a wrong has been done to the appellant or is threatened to be done. Again under the Securities Act there is provision for secrecy; inquiries to be kept secret except at the instance of the Attorney-General, his delegate or the registrar. This, of course, is inconsistent with the principles that govern Courts of law. Again the

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Attorney-General or the delegate has power to appoint persons to visit offices of suspected persons and investigate their books and accounts and report to the Attorney-General or the delegate without any proof by witnesses of the accuracy of the reports, which, of course, is contrary to proceedings in Courts of law.

Again in legal proceedings where a person is charged with an offence he has a right to notice of the time and place of hearing the evidence and the charge and the right to meet it if he can. Under the Securities Act, however, no provision is made for such a notice to the appellants or to other persons who may think they have the right to cross-examine. The relief claimed is an injunction as it was in the *Wilson* case, but if I am in error in holding that a tribunal under the Securities Act is not a judicial one the right to relief has not been established. No wrong has been committed against the appellants up to the present time unless the refusal to allow them to cross-examine witnesses amounts to that. An affirmative finding, if made by the delegate has not been acted upon, nor need it be acted upon except in the discretion of the Attorney-General but it is said he may act upon it and that this ought to be regarded as a potential threat to act upon it. I think not, but if I am right in the main question the appellants have no grounds of complaint, nor have they in any case since they have failed to shew an injury in being refused the right to cross-examine.

In support of his application for the injunction counsel for the appellants submitted that the refusal of the privilege of cross-examination amounted to an excess of jurisdiction on the part of the delegate and it was equally an excess of jurisdiction on the part of the Attorney-General and following out what I said in the beginning that the questions in the appeal required me to decide the question on the footing of the powers vested in the Attorney-General, I approach this question of jurisdiction in the same way. But on this footing it is still subject to the decision of the same issue, *viz.*, the character of the tribunal and having already held that the tribunal is not a judicial one nothing more may be said on this question. The constitutionality of the Act was also raised by counsel for the appellant, but not very strongly pressed. The decision in *Lymburn* v. *Mayland*, [1932] A.C. 318; 101 L.J.P.C. 65; [1932] 1 W.W.R.

578 sustains the constitutionality of the Act. The judges were doubtful only as to whether section 20 of the Act was *intra vires* of the Legislature of Alberta. That was not raised in this appeal. They left that point for further consideration should it arise in future. Section 20 is not an issue in the present appeal.

Some question was raised as to the scope of the investigation in *Hearts of Oak Assurance Co.* v. *Attorney-General,* [1932] A.C. 392. In the House of Lords, Lord Macmillan, referring to this question suggested to the House that it should be declared that the inspector appointed under section 17 (1) of the Industrial Act, 1923 (13 & 14 Geo. 5, c. 8), for the purpose of examining and reporting on the affairs of the plaintiff is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute. Under said section 17 (1) a commissioner was authorized to investigate the affairs of assurance companies and it was provided that the inspector appointed by him for the purpose "shall have power to examine into and report on the affairs" of the society or company and for that purpose may exercise the powers given by section 76 of the Friendly Societies Act, 1896 (59 & 60 Vict., c. 25). I refer to section 77 where it is declared that:

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> The chief registrar, or, ... , the assistant registrar for Scotland or Ireland, may—
>
> (*a*) if he thinks fit, at the request of a society, ...
>
> (*b*) . . . . on proof to his satisfaction that an acknowledgment of registry has been obtained by fraud or mistake, or that a society exists for an illegal purpose, or has wilfully and after notice from a registrar whom it may concern violated any of the provisions of this Act, or has ceased to exist, by writing under his hand cancel the registry of a society.

It, therefore, appears that the chief registrar has powers similar to those of the Attorney-General in this case.

I would dismiss the appeal.

MARTIN, J.A.: These two appeals were argued together for convenience since they involved (with one exception to be noted hereafter) substantially the same questions arising out of the Securities Act, 1930, Cap. 64, and the proceedings taken under section 10 thereof by the two respective defendants as the repre-

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sentative of the Attorney-General under his written delegations as follows:

Pursuant to section 10 of the Securities Act, I, Gordon McGregor Sloan, Attorney-General for the Province of British Columbia, hereby delegate authority to *G. L. Fraser*, barrister, of the City of Vancouver, as my representative to conduct an investigation under that Act in order to ascertain whether any fraudulent act or any offence against that Act or the regulations has been, is being, or is about to be committed by Wayside Consolidated Gold Mines Limited (Non-Personal Liability) and for that purpose to examine any person, company, property or thing whatsoever.

Dated this 15th day of August, 1934.

The delegation to the defendant *Russell* is in the same form, but relates to the Nicola Mines & Metals Limited, Non-Personal Liability, and bears date 31st October, 1934.

Now putting the matter as briefly as possible, owing to pressure of business, I regard the proceedings authorized under said section 10 as being dual in their nature, *i.e.*, that it is not right to view the "Investigation and Action by the Attorney-General" (to cite the caption) or his representative as being simply of an administrative and departmental character, because while it is true that up to a certain stage the investigation may be so, and aimed at presenting a mere "report" (subsection (2)) only, yet it may change its nature and become something of a quite different complexion involving the consideration of the acts of "persons" (section 2), corporate or otherwise, which would be fraudulent acts or offences against the statute as defined by section 2 thereby subjecting them to the very serious consequences of an "affirmative finding" (subsection (3) (*a*)) as distinguished from a "report," which would lay them instantly open to the grave penalties provided by section 11.

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Now, when the stage of the investigation advances to the point where it becomes apparent that the representative proposes to make "an affirmative finding" establishing the commission of "fraudulent acts" involving penal consequences, then the investigation must be regarded as something quite distinct from what it was before that stage was reached. For example, if in the course of the investigation of the affairs of a company it appeared that the representative thought that John Doe, a broker, had "committed" a "fraudulent act or any offence against this Act" (section 11) and that the representative proposed to "base an affirmative finding" ((3) (*a*)) which would subject Doe to the

aforesaid consequences, it would then become the representative's duty to formulate a charge against John Doe which would be certain in its nature and such that the accused could meet, and the inquiry then became a judicial or at least *quasi*-judicial one, and under those circumstances full opportunity should be given, in accordance with the requirements of the fundamentals of justice, to the accused to meet that charge; in so doing, while it is not necessary to say that in every case he should have an opportunity to cross-examine every one of the witnesses (*e.g.*, merely formal ones) whose evidence was relied upon to "base the finding" against him, yet as a general rule at least he should have that right, and he would also have the right in all cases to be informed of all the evidence affecting his conduct which had theretofore been taken against him and to take a copy of that evidence, and that those witnesses who had appeared against him should be recalled upon request for the purpose of enabling him to answer fully and understandingly the personal charge against himself; and it goes without saying that he should have the right to adduce evidence and to call such witnesses as he thought proper, and have the assistance of counsel.

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It is an unfortunate thing, and probably very largely the direct cause of these lawsuits, that the said representatives treated the plaintiffs throughout as being persons to whom favours might arbitrarily be "allowed," instead of their being entitled to fundamental rights when certain stages were reached.

In order to get the proper conception of the at least *quasi*-judicial and punitive scope and consequences of this act (of which the reference to Supreme Court procedure in section 10 is an indication) it is necessary to visualize a case where the Attorney-General himself is holding the investigation, as he has the right to do either originally or upon intervening at any moment, when his representatives are conducting an investigation, and take charge of the proceedings, if he is not satisfied with the way they were being conducted, or for any reason. Now, if the Attorney-General were so acting, he could "base an affirmative finding" of a fraudulent act or offence on the evidence he had collected, which finding must in all respects in the moral essentials of justice be regarded as one imputing criminality, arising out of fraudulent conduct by some person before, or not

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even before him, and thereupon he could instantly and without waiting for any further evidence, upon "finding that fraudulent act" (section 11) exercise the punitive powers conferred upon him by that section, and one of those powers is (*c*) that he "may in any case give notice of the fraudulent act to the public by advertisement or otherwise, or to any individual by letter or otherwise, whenever he deems it advisable," and by (*b*) he may also suspend registered brokers, etc., from registration for ten days for "any fraudulent act or offence."

Now, it is to be noted that these summary and drastic powers are after exercise beyond recall, and yet under them the Attorney-General would have the right instantly to proclaim in the British Columbia Gazette (which would be primarily the proper place to do so) as well as in the newspapers "or otherwise," said persons as being guilty of the commission of fraudulent acts and offences, and the usual result of that would be the paralysis, if not destruction, of their business and of their reputations without any provision in the statute for their loss or rehabilitation, and in the pages of that gazette would be found their permanent condemnation. It is only necessary to state such results to shew how entirely different this case is from any other of the many cases that have been cited which we have considered, and I have in the light of them, and one other case to be cited, reread the whole of the evidence in both cases no less than twice, and more often in certain portions, and after having done so, I can only reach the conclusion that in both of them the fundamentals of justice have not been observed. Matters were allowed to drag in both cases to the stage where these brokers concerned did not know, even at the time of the injunction which restrained further proceedings by said representatives, what definite charges were brought or to be brought against them, and they were not given proper particulars or opportunity to meet any charges.

Attention should also be drawn to another distinction between this case and the English cases, *viz.*, that no such constitutional question as to excess of jurisdiction by the investigator can arise in England, owing to the form of its constitution, as arose in this Province under this very Act in *McGee* v. *Pooley* (1931), 44 B.C. 338, which shews how very easy it is for the investigator to overstep his Provincial powers and do something which con-

flicts with the National jurisdiction over criminal law, and this element emphasizes the necessity of clearly formulating the charges so that their scope and validity may be ascertained. In *St. John's* case an illustration of this is to be found, because there the investigator and the counsel for the "accused" (I was going to say, but that is really what he is) became involved in a discussion as to whether or no what had been done was covered by certain sections of the Criminal Code. It is only necessary, I repeat, to consider such a situation to see that safeguards ought to be thrown about these loose and ill-defined proceedings, so that it can be assured that the accused person shall have that fair hearing which he is entitled to.

There is still another important particular wherein this case differs from the English ones, *i.e.*, that in them the proceedings were *ab initio* taken against some designated person and for a definite purpose, but the unusual and novel situation as created by this statute is that a wholly innocent person may, behind the scenes, be drawn into the net of investigation at any stage of it, though it was originally only directed, as stated in the present delegation, against "the fraudulent act or any offence" of the particular company therein specified. This creates a hazardous position, because while in the English cases the person concerned has notice from the beginning and, being duly put on his guard, can protect himself from the outset, yet in the present cases the plaintiffs did not know what really was happening, except that in general their actions were being investigated in some way more or less behind their backs—more in one of these cases than less—and therefore did and could not know the exact position that they were being disadvantageously placed in and consequently were unable to protect themselves from the most serious penal consequences which they had every reason to apprehend would be summarily inflicted upon them if and when an "affirmative finding" should be made against them.

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I have not overlooked the submission that the procedure to be followed is that of the special tribunal itself, which is undoubtedly correct and was applied by myself in *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (1921), 29 B.C. 333, at 353; [1922] 1 A.C. 202, at 213, relating to the procedure before the Lieutenant-Governor in Council and recently also in *The King*

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v. *The Minister of Finance,* [1935] S.C.R. 70 at 75, wherein the basic principles in *Local Government Board* v. *Arlidge,* [1915] A.C. 120 were adopted. But it must be understood that the observations by their Lordships in the last case were directed to a tribunal, which as Lord Haldane points out at p. 131, had for a period of 24 years (since 1890) an established "procedure which is its own," and therefore, as Lord Parmoor also pointed out, it is a proper thing to conform to the tribunal's procedure, and he went on to say (141) that "in the present case there are special provisions for procedure." But the point herein arising is that in regard to the tribunals now under consideration, they have no procedure and no history, and therefore we have to fall back upon the paramount principle of general application which is stated in, if I may say so, that same fine judgment of Lord Parmoor at p. 142, thus:

> Whether the order of the Local Government Board is to be regarded as of an administrative or of a *quasi*-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

The extent of this general principle was very recently recognized by the Privy Council in *O'Connor* v. *Waldron,* [1935] A.C. 76, at 82, their Lordships saying:

> On the other hand, the fact that a tribunal may be exercising merely administrative functions though in so doing it must act "judicially" is well established, and appears clearly from the *Royal Aquarium* case [[1892] 1 Q.B. 431, 442] above cited.

The English case which I referred to as being nearest to this one is the very late one of *Errington* v. *Minister of Health,* an advance report of which I first noticed in (1934), 178 L.T. Jo. 275, and later in 51 T.L.R. 44, and (1935), 104 L.J.K.B. 49; [1935] 1 K.B. 249, wherein the dual exercise of administrative and *quasi*-judicial powers came up for consideration and the general reasoning of the judgments affords so much support to the view I have expressed on the primary principles herein involved that I shall do no more than refer to those judgments.

The preceding views apply to both cases, with the exception I mentioned in opening, which relates to the *Bartley & Co. Inc.* case and the additional submission made therein that the representative was exceeding the scope of his delegation by making

any investigations at all into that plaintiff company's transactions with the impeached Nicola Mines Co., in view of the finding of fact by the learned judge below that the plaintiff had purchased its shares in the Nicola Co. outright and that company had no control over them; but under all the present circumstances that objection to that branch of the representative's jurisdiction is not tenable, in my opinion, because *qua* the plaintiff company the investigation may well in certain aspects still be within the merely inquisitorial stage in the manner pointed out by my brother M. A. MACDONALD, with which I am in accord, and may never ripen into the necessity of formulating a specific charge as aforesaid, and therefore it would, as matters now stand, be unwarranted and premature to interfere with the representative in *Bartley's* case in continuing this distinct branch of his investigation.

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It follows that for the purposes of the judgment that we should now pronounce the two cases stand upon the same footing, and so I would allow both appeals, set aside both judgments, and restore both injunctions, which do not, it is to be noted, interfere with the continuation of the investigations into the acts of the said designated companies apart from the plaintiffs.

MCPHILLIPS, J.A.: These appeals were heard together as they involve the same consideration and it was agreed by counsel that the decision of the Court should be deemed to be a final judgment in the respective actions. The principal sections of the Securities Act, Cap. 64, B.C. Stats. 1930, requiring consideration are 10, 11, 12 and 29: [His Lordship set out the sections and continued].

The appeals are from orders made by MORRISON, C.J.S.C. and LUCAS, J., each dissolving setting aside injunctions previously granted restraining the respective investigators appointed by the Attorney-General (Messrs. *Russell* and *Fraser,* both barristers-at-law) from proceeding further with their investigations in relation to the affairs of the Nicola Mines & Metals Limited, N.P.L., and the affairs of the Wayside Consolidated Gold Mines Limited, N.P.L.

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It is contended but not shewn, in my opinion, that anything took place at the investigations so far had which was contrary to

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law even if the investigations could be said to be judicial proceedings and the investigators were respectively acting judicially with which I do not agree. However, the argument was allowed to be proceeded with on the basis that cross-examination of witnesses called were not subject to cross-examination by counsel for the respective corporations. The question then becomes important to consider whether the investigators' functions are judicial or merely ministerial. In this connection it is material to give attention to the scope and nature of the Act. It is apparent to me that it is directed to ascertaining whether frauds have been committed or are about to be committed and to prevent any such happenings. No doubt the circumstances of the times warrant legislation in this direction and in any case the Court cannot in any way question the wisdom of the Legislature—it is supreme in the matter. It is apparent that the investigations authorized are in their nature inquisitions rather than determination of questions of law or rights of parties. The furthest extent to which the Attorney-General may go is well illustrated by the provisions of section 11—suspension of registered broker, company or salesman but for not more than ten days. If that is deemed inadequate proceedings under the provisions of section 12 which would be proceedings in Court. It is true that under subsection (*c*) to section 12 the Attorney-General may give notice of any fraudulent act to the public by advertisement or otherwise or to any person by letter or otherwise. Undoubtedly this would seem to be extreme powers but yet why not? The Legislature is attempting to, I assume, prevent the perpetration of frauds and expedition is thought to be a matter of necessity. The ordinary process of law might well be ineffective, the damage done, and no possible relief forthcoming. The policy of the Act, though, is not publicity without inquiry—it is after inquiry—and secrecy is an important element and is well safeguarded. See subsection (4) to section 10:

> (4) Disclosure by any person other than the Attorney-General, his representative, or the registrar, without the consent of any one of them, of any information or evidence obtained or the name of any witness examined or sought to be examined under subsection (1) shall constitute an offence.

Now counsel for the appellants, it would seem to me by a large citation of authorities, have endeavoured to press upon this Court that a grave injustice is being meted out to their clients

through the proceedings of the investigators being *in camera*—not that that has been established. I would consider that there is justice and reason in proceeding certainly with no undue publicity, as a trial in Court would be, yet that is what is being pressed—all the publicity of a Court of law. The Legislature never intended, I feel sure, to so enact and the language of the statute cannot, in my opinion, be so read. I do not consider it at all necessary to canvass the large number of cases that have been referred to by counsel as I think the matter here for determination is in small compass and fully covered by the judgment of their Lordships of the Privy Council in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202, where Mr. Justice Duff (now Sir Lyman Poore Duff, C.J., P.C.) delivering the judgment of their Lordships said at p. 213:

Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received.

Then we have at pp. 213-4 this further language:

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Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application.

The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in *Dunlop's* case

(The appeal *Esquimalt and Nanaimo Ry. Co.* v. *Dunlop* raised the same questions of law as the appeal here reported, and was heard at the same time. Their Lordships dismissed the appeal subject to the variation directed in the present case),

that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.

It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the

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absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

Here we have the investigators proceeding in pursuance of the statute, and it is the Attorney-General who will adopt, or not adopt, the findings of the investigators, and this is a security to those affected that only after careful study will steps be taken following the investigations had. The Attorney-General is of "the Executive Government of the Province directly answerable to the Legislature."

Then we have the insuperable obstacle in the way of the appellants in section 29 above quoted which constitutes a complete inhibition to any injunction or other extraordinary remedy being obtainable against

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any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying-out of the provisions of this Act or . . . his representative.

It will be seen to what length this enactment goes when we have the words "in respect of any act or omission."

I would consider that it would be a matter of absolute discretion in the investigators as to what would be the right or extent of the privilege accorded to counsel extending to cross-examination or otherwise—in fact there is no right of audience necessarily accorded. The investigation cannot be deemed in my opinion to be proceedings in all respects as in a Court of law. I have no doubt, though, that in practice counsel will be allowed all reasonable latitude before the investigators and we had assurance at this Bar of that. Still it is not possible for counsel to expect the same rules to obtain in these inquiries as would obtain in a Court of law. I would dismiss both appeals.

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MACDONALD, J.A.: Mr. *Craig* submitted that the Attorney-General's representative in inquiring into the affairs of the plaintiff company and the purchase by it of shares in the Nicola Mines & Metals Limited (the company undergoing investigation by Mr. *Russell*) acted *dehors* the authority conferred upon him by section 10 of Cap. 64, B.C. Stats. 1930 and of his appointment thereunder. He relied upon the finding of fact below that these shares were purchased outright and the company (*i.e.*, Nicola Mines

& Metals Limited) had no control over the manner in which the plaintiffs dealt with the same.

If this means that any investigation of the plaintiff company is irrelevant to an inquiry, as to whether or not any fraudulent act or any offence against the Securities Act "is being or is about to be committed" by Nicola Mines & Metals Limited, I cannot agree. The scope of Mr. *Russell's* authority is found, not in section 10 of the Act (that is its source) but in the terms of the appointment issued to him pursuant to that section. He is by the appointment, it is true, restricted to an inquiry into the affairs of Nicola Mines & Metals Limited, but he may examine any other person, company, property or thing for the purpose, or it may be in the belief, that such collateral examination may (because of secret agreements, joint acts or otherwise) disclose fraudulent acts or an offence against the Act or the regulations not by such other person or company but by Nicola Mines & Metals Limited. If for example, without exhausting illustrations, Nicola Mines & Metals Limited sold its stock to the plaintiff company at 10 cents a share and the latter by misrepresentation or fraud created a false market and sold to the public at 50 cents dividing by agreement the profits with the former company it would be proper to expose it when investigating the affairs of Nicola Mines & Metals Limited. It is impossible therefore to say before an inquiry is concluded that an investigation of the plaintiff company in the manner pursued by Mr. *Russell* cannot be relevant to an inquiry into the affairs of Nicola Mines & Metals Limited. If no connection is disclosed the Attorney-General's representative should in his report either say so or not refer at all to what turned out to be a fruitless investigation; if, on the other hand, fraud or participation in fraud on the part of Nicola Mines & Metals Limited is disclosed in its relations with such other persons or companies he should so find and report. A restraining order therefore cannot be made on this ground.

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To the main question as to the conduct of the inquiry by Mr. *Russell* I apply the principles outlined in my reasons for judgment in *St. John* v. *Fraser*. I think the facts, although possibly in one respect less decisive (there was no reference to the Criminal Code), warrant that conclusion.

Summarized they are as follows:

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Benson, the representative of Bartley & Company, on being told by Mr. *Russell* that he was appointed to inquire into the affairs of Nicola Mines & Metals Limited, said he would supply him with all the information in his possession affecting the plaintiff company and the distribution of shares by it. *Russell* examined Benson and advised him

> that if there would be any evidence adduced at any time affecting [him] and the other plaintiffs . . . he would promptly inform me . . . and give me every opportunity to answer any statement and to adduce such evidence as I would be advised.

Plaintiffs were not so informed. Since that date Benson received no intimation to appear although informed that other witnesses were called who gave evidence affecting the plaintiff. He should at least have been given the opportunity of listening to this evidence. He asked *Russell* for transcripts of the evidence and the names of witnesses called or expected to be called: also that his counsel should be informed of proceedings but *Russell* refused to give a transcript or offer to let him copy it. He was informed that *Russell* "is endeavouring to fix blame on me in connection with distribution of shares which may involve myself and other parties seriously," but he was "given no opportunity of meeting any of the evidence" submitted, notwithstanding its trend. He was informed that *Russell* intended to report "without having given the plaintiffs an opportunity of cross-examining the witnesses called to date by Mr. *Russell*." He received no notice as to evidence to be adduced. His solicitor telephoned and wrote to *Russell* soliciting the right on behalf of the plaintiffs to attend the inquiry and to be present when witnesses were examined and to cross-examine but no reply was made to this request save by one letter of November 23rd, 1934, in which he merely informed plaintiffs' solicitors of the points taken by their opponents in the petition asking for an investigation. In it he said:

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> All witnesses so far examined [*i.e.*, in the absence of plaintiffs] are subject to recall and further examination and cross-examination. Witnesses can, if they so desire, be accompanied by counsel. I am not sure of their legal right to this privilege.

But Mr. *Russell* added:

> In the interests of a full investigation and an unbiased report, I want to know all there is to know about this company and its activities.

He continued:

> If you can give me the names of any witnesses who can supply any useful information they will be promptly summoned.

Benson swore that he was informed by his solicitor that although *Russell* told him (the solicitor) several times that an opportunity would be given plaintiffs before the close of the inquiry to answer any statements made by witnesses yet up to 6th December, 1934, no request was made by the defendant *Russell* to Benson, Erdofy or others (apparently implicated by the evidence) to give evidence. He further said, based upon information and belief, that many witnesses were called by *Russell* and gave evidence fixing blame on the plaintiffs in reference to the sale and distribution of Nicola Mines shares without notice to it and without an opportunity to cross-examine. He impounded Benson's personal bank account and the bank accounts of the plaintiff and of another company, the Clifton Corporation. *Russell* informed his (Benson's) solicitor that he hoped to complete the inquiry on or before December 1st, 1934, but up to December 6th, no opportunity was given plaintiffs to appear. Benson also testified that the entire proceedings were designed to reflect upon the conduct and good faith of the plaintiffs

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> and at no time has notice been given to the plaintiffs of any specific allegation of wrong-doing, whether in contravention of the Securities Act . . . or otherwise, and at no time prior to the granting of the injunction herein was an opportunity given to the plaintiffs or their counsel to cross-examine any of the witnesses called . . . , and at no time prior to the 6th day of December, 1934, was any opportunity given to the plaintiffs to give an answer to the evidence of any witness called by the defendant [*Russell*].

I may say in passing that it was stated to us in argument in *St. John* v. *Fraser,* and it applies also to this case, that we should assume that the right to cross-examine adverse witnesses was refused. The position was taken, with all its implications, that, as of right, that privilege could not be claimed. In a letter from the plaintiffs' solicitor (November 19th, 1934) to *Russell* he stated that *Russell* intimated to him that an opportunity would be given to cross-examine and hear all witnesses before the inquiry but it was not given. He asked for a transcript of evidence given (not furnished) so that they might answer it; also the names of witnesses (not given) with a summary of their evidence. On December 5th plaintiffs' solicitors by letter protested to the Attorney-General about the manner in which the inquiry was conducted; that evidence was called without an

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opportunity to Benson or to Erdofy to answer and that they demanded in vain transcripts and particulars of the evidence given. He said further "these parties should be present at the examination of all witnesses and should be furnished with copies of all evidence."

The accountant on behalf of the investigator testified in his affidavit that Mr. *Russell* informed the plaintiffs' solicitor that the investigation was still proceeding and when completed Mr. *Campbell's* client (*i.e.*, the plaintiffs) and any witnesses they wanted to produce would be afforded every opportunity to testify and that he could attend with them as counsel. This of course was wholly unsatisfactory. It was equivalent to hearing charges *in camera* against someone and allowing him to appear only after all the evidence was given to make his answer and to do so without knowing the nature of the evidence against him. True he said that Mr. *Russell* told Mr. *Campbell* he could peruse a transcript of the evidence, evidently as the inquiry neared its close.

Mr. *Russell* in his affidavit, which I accept, said that he always tried to be just and fair.

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> I intend, and have always intended, before completing my said investigation, and as a necessary part thereof, to recall the plaintiffs Erdofy and Benson and will then give them and their counsel every opportunity of being heard and of making such representations, giving such evidence and submitting such argument as they or any of them may see fit and I have so advised . . . their solicitor.

It is self-evident that this right should have been given at an earlier date. It is quite clear from the foregoing that Mr. *Russell* (like Mr. *Fraser*) acted upon the assumption that no one affected adversely by the evidence had an inherent right to be heard. Mr. Justice LUCAS in his reasons states that defendant's counsel submitted that "as he was an inquirer and not sitting in any judicial capacity he was not required to give the plaintiffs access to information obtained by him or a right of cross-examination of witnesses so-called from whom he had acquired information," and I have no doubt this accurately discloses his position. The conclusion is obvious if my views outlined in *St. John* v. *Fraser* are sound. A situation arose where it was incumbent upon the investigator to give to the plaintiffs adversely affected by evidence notice of the alleged fraudulent act or acts and a reasonable opportunity to be heard and to defend.

I would allow the appeal.

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MCQUARRIE, J.A.: I agree that the appeal should be dismissed.

MACDONALD, C.J.B.C.: This case is similar to that of *Bartley & Co. et al.* v. *Russell* and my opinion is the same in both. I need not therefore refer to the particulars of it, which are contained in the judgment which I have handed down. The only variance was this that near the end of the argument counsel suggested that Mr. *Fraser* was not appointed in accordance with the Act, that is to say he was not appointed in writing. There is no evidence of this in the appeal book and from the manner in which this action and the appeal have been conducted I think we must assume that he was duly appointed as a delegate of the Attorney-General. The plaintiffs' whole case is founded on the assumption that Mr. *Fraser* was a duly-appointed delegate. The appellants' solicitor in his affidavit sworn on the 22nd of October, 1934, says:

> The defendant [respondent] was appointed under the provisions of the Securities Act by the Attorney-General to conduct an investigation in the Wayside Consolidated Gold Mines Limited, N.P.L.";

and in the notice of appeal one of the grounds of appeal is that,—

> The learned judge erred in not holding that the defendant *Fraser* acted without jurisdiction and contrary to the principles of natural justice in not allowing the plaintiffs to cross-examine the witnesses.

In other words their action in this appeal is founded upon the assumption that the respondent was the duly-appointed delegate of the Attorney-General. The *onus* of sustaining the appellants' action was upon them to shew the want of authority of *Fraser* which they have not shewn. It is, therefore, now too late to raise the question. So far as the two cases are parallel my reasons in the *Russell* case are applicable to this one.

I would dismiss the appeal.

MACDONALD, J.A.: In brief oral reasons on delivery of judgment I stated that, in my opinion, investigations under the Act (B.C. Stats. 1930, Cap. 64, Sec. 10) might in certain cases—and up to a certain stage in all cases—be purely administrative and departmental. When, however, a situation arises in the course of an inquiry, where persons or companies are drawn within its ambit and under the authority of the statute may suffer in person, reputation or property, the Attorney-General or his delegate must take cognizance of it and give to such person or

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company likely to be adversely affected notice of the alleged fraudulent act under consideration (which, if established, might be followed by a penalty of a serious nature) a reasonable opportunity to defend, not necessarily following the procedure of a Court of justice—there is no obligation to do so—but procedure of an appropriate nature, the investigator throughout maintaining a judicial attitude and acting in accordance with the principles of natural justice. So far as I know the principles applicable in these cases have not been discussed or applied to one of this character where in the course of an inquiry a dual role may be assumed by the investigator. It would follow, if my premise is right, that we must ascertain if under the law a situation calling for the creation, so to speak, of a tribunal exercising *quasi*-judicial functions (not of course a Court in the strict sense) did in fact develop in the course of the inquiry.

As we are concerned in determining this matter, in part at least, with a question of fact it is necessary to know precisely what occurred before the investigator to see if a situation arose calling for judicial treatment of the character referred to. I

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therefore recite the facts: St. John, a shareholder in and business manager of the plaintiff company, was examined by Mr. *Fraser,* the investigator, on four occasions with his solicitor or counsel present. Mr. *Fraser* then examined a number of other witnesses as to the connection of the plaintiff St. John and the plaintiff company with the Wayside Consolidated Gold Mines Limited, the company investigated under section 10 of the Act. The plaintiffs or their solicitors had no notice of these examinations and no opportunity to be present or to question them although adversely affected thereby. Mr. *Farris,* plaintiffs' counsel, applied to Mr. *Fraser* for a copy of the evidence of these witnesses but this was refused until after the examination of St. John was completed. The investigator evidently intended to call him again. *Fraser* advised *Farris* that he had under advisement (for finding and report) several matters touching the conduct of St. John and the plaintiff company as to which (unless plaintiff satisfied him) he might make an adverse report seriously affecting the reputation and business interests of the plaintiff company. In discussing it with counsel shewing the gravity of the allegations Mr. *Fraser* used the words "conspiracy

as it is used in the Code." He intended "if there is a doubt in the matter" to state the facts "as I see them (*i.e.*, to the Attorney-General) . . . and let others decide what should be done." He would he said make findings "but whether or not . . . . they come within the Criminal Code I have not yet decided." Clearly one likely to be placed in jeopardy, as indicated by these observations, should definitely know the nature of the alleged fraudulent act or acts and be given a reasonable opportunity to defend. Why this course was not followed is possibly explained by Mr. *Fraser's* statement to Mr. *Farris* that "you have no inherent right to be here." He added, as a concession, however, "on account of your having been allowed to attend it is only fair you should have a copy," *i.e.*, of the evidence so far adduced. This statement of the rights or the lack of rights of the parties is important. In my opinion, the plaintiff company with its solicitor had an inherent right to be present at that stage *a fortiori* where charges of such a nature were under advisement causing the investigator, although it was foreign to the inquiry, to discuss with counsel sections of the Criminal Code to find the appropriate charge and punishment. Where an inherent right is denied and audience given by grace only it is not likely to be full, fair and ample.

Resuming a narration of the facts, Mr. *Fraser* in his affidavit (which I accept—there is no real conflict with other evidence) states that before commencing the inquiry "St. John . . . voluntarily offered to give such evidence as he could and to afford me access to all relevant documents," etc. He (Mr. *Fraser*) gave the plaintiffs the fullest opportunity to state all such relevant facts as they might desire or "to give an explanation . . . to me either through the plaintiff St. John or their counsel as they . . . might deem expedient." He further permitted the solicitor and counsel for the plaintiff to be present "and to take part in the examination of the plaintiff St. John." It would be of more value to plaintiffs' counsel to have the right to take part, not in the examination of their own client, but of adverse witnesses but that right was not given. He extended to the plaintiffs' counsel fullest opportunity for argument on his clients' behalf which he said was taken full advantage of. The right to submit argument is of little value if the

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issue is not first properly tried. He stated also that he acted honestly and in good faith and of that I have no doubt whatever. His real view, honestly held and acted upon with slight concessions, was that they had no inherent right to be heard at all although his findings might subject them to penalties imposed by the Attorney-General without further notice to them.

In respect to the discussion of "conspiracy" and the Criminal Code, Mr. *Fraser* said he had in mind only possible breaches of the Securities Act and by way of academic illustration drew the attention of counsel to the definition in the Criminal Code. I think this unduly minimizes the significance of these references. Later the Code was introduced again in connection with "wash sales." Mr. *Fraser* said "he [St. John] wants to keep up the interest by washing" and "I had in mind the question of conspiracy; the V. S. and B. with R. S. and J., were spreading false propaganda on the development of the mill and mine" and "it occurred to me that it [wash sales] might be part of the scheme to keep the price up." There is I think no doubt from this and other evidence that Mr. *Fraser* had in mind violations of the Code. The discussion on this phase continued at great length. At one stage he said: "I could not see anything criminally wrong in S. getting advance information if it stood by itself." Its only significance is to shew the seriousness of the alleged breaches of the Act under consideration and the need for a proper hearing unless that common law right is taken away by the statute.

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The foregoing is a fair statement of the undisputed facts. Certainly St. John and the plaintiff company were drawn into the investigation and beyond question an issue arose between definite parties at least involving consequences set out in section 11 (*a*) and (*c*) of the Act and requiring investigation in a manner *quasi*-judicial. In my view Mr. *Fraser* was not willing to give and in fact did not give to plaintiffs a fair opportunity to reply to evidence of so serious a nature that it might be the basis of a criminal charge or permit its counsel to cross-examine witnesses giving evidence of that character. While not laying down rules I would, were I conducting the inquiry, regard it as a case where cross-examination should be permitted. Witnesses testifying adversely to the plaintiff were called and heard without

notice; and the plaintiffs do not yet know all the persons or documents examined by Mr. *Fraser*. To shew further, if that is necessary, how seriously Mr. *Fraser* viewed it he said to one of the witnesses examined "if you knew one-half of the misrepresentations that have been broadcasted, I think you would agree that the public feels bitter" and again "I have no objection to telling you . . . there has been a campaign carried on of misrepresentation by the underwriters and by the company, talking about mills and the construction of mills when the mine is not in a position," etc., and "the stock market was used in ways that are open to censure." All this may or may not be true; it should not however be the subject of an *ex parte* investigation unless of course the law permits it. I would not for a moment put difficulties in the way of the working of a useful Act. The Act should be valuable as an aid in suppressing fraudulent practices but dishonest traders engaged in rigging the market and in mining a credulous public may be exposed—as I hope they will —with greater certainty after obtaining a fair hearing and a reasonable opportunity to explain and to defend while at the same time the legitimate trader will be more surely protected.

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Principles applicable were discussed recently by the Judicial Committee in *O'Connor* v. *Waldron* [(1934), 104 L.J.P.C. 21; [1935] A.C. 76]; [1935] 1 W.W.R. 1 and viewed in the light of the Act considered (Combines Investigation Act) discloses the true line of inquiry. The new aspect of dual functions is not present but there is of course no reason why a body at one stage should not discharge administrative duties only, later changing its character when confronted with a new situation and when that occurs, these principles apply.

Lord Atkin, at p. 3, said:

> The question therefore in every case is whether the tribunal in question has similar attributes to a Court of justice or acts in a manner similar to that in which such Courts act.

The difficulty is not in propounding but in answering that question because

> the functions of some tribunals bring them near the line on one side or the other; and the final decision must be content with determining on which side of the line the tribunal stands.

In cases close to the line when they arise discrimination will be necessary in drawing fine distinctions and scientific accuracy

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will at least be difficult to attain. The present case however is not close to the line.

The Judicial Committee answered in the negative the question (pp. 3-4):

> Has then a commissioner appointed under the Combines Investigation Act attributes similar to those of a Court of justice; or does he act in a manner similar to that in which such Courts act?

They answered it by examining the provisions of the Act disclosing the duties and functions of the commissioner and any parts which might indicate

> that the sections dealing with the investigations by commissioners and others were merely administrative machinery for inquiring whether offences had been committed.

Approaching the Securities Act in the same way it is clear that some of the inquiries authorized by it would be purely departmental and administrative. For example the words "fraud," "fraudulent" and "fraudulent act" in addition to their ordinary meaning include (section 2 (*g*))

> The violation of any provision of this Act or of the regulations relating to a trade or trading.

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The Attorney-General might direct an inquiry limited to ascertaining if a breach of regulations occurred—a minor matter of a routine nature. In many cases an inspection only would disclose whether or not further investigations should be made. That inspection would be departmental.

On the other hand, if the facts warrant it, and where an issue between parties is raised the investigator is clothed with "attributes similar to those of a Court of justice." He has power to summon and enforce the attendance of witnesses; obtain production of documents on oath in the same manner as a judge of the Supreme Court; appoint experts to assist him; make or "base an affirmative finding concerning any fraudulent act" (section 10 (3) (*a*)); impose (*i.e.*, the Attorney-General if he conducts the inquiry or if his delegate makes a "finding" of fraud) a penalty of suspension for a period not exceeding 10 days (section 11 (*a*)); proclaim a fraudulent act by public notice (section 11 (*c*)); invoke the assistance of a Supreme Court judge (section 12) to enjoin from trading privileges; order funds to be sequestered (section 13); register a *lis pendens* (section 13, subsection (4)). All this is helpful as indicia only because as

frequently pointed out the fact that a body is clothed with some of the trappings of a Court is not conclusive.

In *O'Connor* v. *Waldron, supra,* the relevant sections of the Combines Investigation Act, R.S.C. 1927, Cap. 26, were considered, particularly I assume sections 16, 22, 27, 29, 30 and 31. A comparison with sections somewhat similar in the case at Bar explains the decision in that case. The decisive feature is that a commissioner under the Combines Act had authority to investigate only (section 16); not to impose penalties. Mr. *Fraser* could not impose a penalty either but that is not material. The Attorney-General might do so without further proceedings where any opportunity to explain and defend could be given. There can be no difference on this aspect between an inquiry held by the Attorney-General and one held by his representative. In the latter case it would be very much as if the Attorney-General sat with the investigator taking part only in imposing the sentence at the close of the inquiry. Clearly the same results follow where all the evidence upon which he acts is obtained through the medium of a delegate, his *alter ego.* If that is not so a different procedure would be followed where the Attorney-General investigated, if I am right in assuming that he at least would have to conduct the inquiry in the manner indicated, and that was not contemplated by the Act. The commissioner under the Combines Act, it is true, may take evidence on oath and call for the production of documents and impose penalties but not in respect to offences disclosed by the subject investigated. The only penalties he can impose are for the purpose of compelling attendance of witnesses and the production of documents (section 22). His sole duty is to report (section 27) not to punish. Hence his functions were found to be administrative only. He had nothing to do with the only remedy (sections 29, 30 and 31) which may, by entirely different proceedings, result from his report. These proceedings are instituted by the minister charged with the administration of the Act. He invokes the aid of the ordinary Courts of the land and in this, the only forum where a penalty can be imposed, a full right to defend is obtained.

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The judgment of the late Mr. Justice Hodgins in the Court below was referred to with approval by the Judicial Committee. (*O'Connor* v. *Waldron,* [1931] O.R. 608.) At p. 612 he quotes

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from the judgment of Lord Atkin in *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A.C. 310 at 325 saying that:

> It is noteworthy that no penal consequences follow directly from a report of either a commissioner or registrar that a combine exists. It is not even made evidence.

While under the Combines Act the offence as intimated must be proved "in due course of law" by new evidence where every opportunity to defend is given with all legal safeguards under section 11 of the Securities Act the Attorney-General receiving a report may act at once without any further hearing, suspend the broker for ten days and make a proclamation to the world of a fraudulent act. It would be difficult to conceive of a stronger case for the observance of procedure somewhat analogous to the procedure of the Courts.

After quoting from the judgment referred to Hodgins, J. at p. 612, states:

> The duty cast upon the commissioner [*i.e.*, under the Combines Act], according to the judgment of the Judicial Committee, is to make preliminary inquiries as to whether an offence under the Act has been committed and to report to the minister. No penal consequences follow directly from the report of a commissioner.

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It follows from these views approved by the Judicial Committee that if the minister under the Combines Act could impose a penalty based solely on the report of the commissioner, as in the case at Bar, without further inquiry where a defence might be entered, the decision in *O'Connor* v. *Waldron* would have been different. The minister's function, based on the report, was to decide "whether an offence has been committed and whether a prosecution should follow" (p. 612). As he could not impose a penalty no one was prejudiced up to that point by failure to hear a defence; hence the need for creating a court of a *quasi*-judicial nature did not arise. That opportunity was given at the trial that followed.

To the same effect in principle is Lord Macmillan's statement in *Hearts of Oak Assurance Co.* v. *Attorney-General* (1932), 101 L.J. Ch. 177 at 180, *viz.*:

> The commissioner can take effective action on the inspection and report only by means of an application to the Court, while in the case of a collecting society his action may be reviewed by the Court, so that in either case the inspection may ultimately be followed by judicial proceedings.

There, as in the case of a commissioner under the Combines Act, the inspection of the affairs of the society or company was of a preliminary nature to determine what, if any, action ought to be taken. Mr. *Fraser's* investigation was not preliminary; it was final and before him only could the right to defend be exercised.

Canadian Northern Ry. Co. v. *Wilson* (1918), 29 Man. L.R. 193 was discussed and attempts were made to distinguish it because of immaterial differences in fact based on the terms of the Act considered. The late Chief Justice Perdue, at p. 199, after discussing some decisions, where the rules under the Act considered required notice of hearing to be given, said:

> But, where the provisions of a statute do not expressly require notice to a party before taking proceedings against him under a statute and do not dispense with the giving of notice, it is a fundamental principle that the party must receive notice of the proceedings and that otherwise they do not bind him.

His judgment is based, not on special provisions of the Act, but upon the "elementary principle of law that a man shall not suffer in person or in property unless he has had an opportunity of being heard" (p. 200). "This principle" he continued "has been reiterated in case after case for the last three hundred years, not always expressed in the same words, but with the same force and meaning." He refers to many cases that may be usefully studied including *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180 where Byles, J. at p. 194 said of the board whose actions were considered:

> I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case, *The King* v. *Chancellor of Cambridge* (1723), 1 Str. 557; 2 Ld. Raym. 1334; 8 Mod. 148; Fort. 202, and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature.

Shell Co. of Australia v. *Commissioner of Taxation* (1930), 100 L.J.P.C. 55 was also referred to. It is discussed in the reasons for judgment of the Chief Justice which I have read in support of respondent's submission in this case but with deference it is in my view clearly distinguishable. The paragraph in the judgment of the Lord Chancellor, at p. 63, where a number

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of negative propositions are enumerated in the process of defining what constitutes a "Court," might mislead the reader who fails to apply them to the facts of the case. The question was not whether interested parties were fully and properly heard by this so-called Court, the board of review on assessments, but whether or not it was a Court at all in the highest and strictest sense of that term, in which event the judges under the Australian Constitution would have to be appointed for life, not for a term of years. It would appear that even before this board, regarded by their Lordships "to be in the nature of an administrative machinery" the taxpayer who resorted to it had "his contentions reconsidered" (p. 64) implying that he had full rights of audience. The decision is not concerned with the nature of the taxpayer's rights or the rights of parties affected before the board as in the case at Bar. The question, as shewn at p. 63, was this: Was this tribunal a Court "in the strict sense of exercising judicial power," *i.e.*, like the ordinary Courts of justice? The application of the negative propositions, already referred to, is clear from the recital of the first one, *viz.*: "a tribunal is not necessarily a Court in this strict sense because it gives a final decision." No one, of course, submits that the tribunal created by the Attorney-General under the Securities Act is a Court in this strict sense; it is not necessary that it should be to be under obligation in law to act judicially in the sense already discussed.

It was suggested that in the absence of any direction to the contrary in the statute the Legislature intended the investigator to follow its own procedure. My brother MARTIN properly explains in his reasons the observations of Lord Haldane in *Local Government Board* v. *Arlidge,* [1915] A.C. 120 containing a passage discussed by Sir Lyman P. Duff, Chief Justice of Canada, in *The King* v. *Minister of Finance,* [1935] 1 D.L.R. 232 at 236. The point is there is no procedure under the Act in question herein to preclude the adoption of methods somewhat similar to that followed in Courts of justice.

The clear conclusion from all these authorities and many others as a proposition of law long established and embedded in the common law is that a man (or company) cannot suffer loss of liberty or property or have his or its reputation sullied until

he or it have a fair opportunity of answering the charge unless the Legislature has expressly or impliedly taken away that salutary right. I have carefully considered all sections of the Act for indicia and cannot find that this right is destroyed by implication.

I may add that if, as I hold, the investigator proceeded in a manner not authorized by law nor sanctioned by the statute he acted without jurisdiction and may be restrained. It follows too that in such event section 29 has no application. I would allow the appeal.

MACDONALD, J.A.

McQUARRIE, J.A.: I agree that the appeal should be dismissed.

MCQUARRIE, J.A.

Solicitors for appellants: *C. W. Craig; S. H. Gilmour.*

Solicitors for respondents: *Macdonald & Prenter; McCrossan, Campbell & Meredith.*

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Criminal law—Count—Amendment of—Rape—Consent extorted by fear of bodily harm—Evidence of — Corroboration — Seduction—"Girl"—Unmarried woman—Criminal Code, Secs. 213 (b), 298 and 1014.

On a charge for rape and also for seduction of the same person as an employee under the age of 21 years, the complainant who was a married woman but under 21 years of age, in stating what happened after she had been a servant in accused's house for one week where they lived alone, said "he wanted me to go to his room with him and I did not want to; I was afraid he would hit me because he was acting kind of angry: Finally I obeyed as I was afraid and went to his room where he had sexual intercourse with me." This happened between 3 and 4 o'clock on an afternoon. Then telling what happened at about 7.30 the same evening she said "He said, 'You are going to sleep with me tonight' and I said 'No.' He made me lay down on his bed with him, he started feeling my legs and I pushed him away: He got up and fixed the fire and then he made me sit on his knees, then I got up to get away and he grabbed me and picked me up and was going to carry me to his room when I caught hold of a board above the door and told him to let me down: He let me down and pushed me on to the bed. I started to get up but he pushed me down again and said 'You stay right there, take off your clothes.' Then he had sexual intercourse with me again." The accused was found guilty by the jury on both counts and convicted.

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Held, on appeal, reversing the decision of ROBERTSON, J. (MARTIN and MACDONALD, JJ.A. would grant a new trial), that the convictions of the appellant should be set aside and that he be discharged.

Per MACDONALD, C.J.B.C.: It is not enough for a woman to say "I was afraid of serious bodily harm and therefore consented." She must prove in evidence that she had dire reason to be afraid and that she took every reasonable precaution to avoid the outrage.

Per MARTIN and MACDONALD, JJ.A.: On the charge no attempt was made to segregate the facts appropriate to each of the two separate occasions, as there was obviously so grave a distinction as clearly to put the case out of Court as regards the first one and the jury should have been so instructed. The accused suffered prejudice in not having the evidence segregated so as to apply it in particular only to the second offence which alone was supportable. This confusion brought about a substantial miscarriage of justice and there should be a new trial.

Per MARTIN, J.A.: The first count "unlawfully did assault Helen Raffa, a woman who was not his wife and did then and there have carnal knowledge of her without her consent" was amended to read "unlawfully did assault Helen Raffa, a woman who was not his wife, and did then and there have carnal knowledge of her with her consent extorted by fear of bodily harm," etc. The amendment was made contrary to the facts disclosed and the law governing the same and hence the first count of the indictment as amended cannot in law be upheld and the verdict founded thereupon should be set aside, but in view of the unusual circumstances of the case a new trial should be directed upon the first count as originally framed.

Per MARTIN, J.A.: The proper direction in sexual offences is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury if they are satisfied of the truth of her evidence may, after paying attention to that warning, nevertheless convict.

The word "girl" in section 213 (*b*) of the Criminal Code applies only to an unmarried woman, and as the complainant is a married woman the conviction on the second count must be set aside.

Statement

APPEAL by accused from his conviction by ROBERTSON, J. and the verdict of a jury at Victoria on the 19th of March, 1934, on two counts (1) that he unlawfully did assault Helen Raffa, a woman who was not his wife, and did then and there have carnal knowledge of her with her consent extorted by fear of bodily harm against the form of the statute, (2) that he unlawfully did have illicit connection with Helen Raffa, a girl of previously chaste character, and then being under the age of 21 years, and then also being in the employment of him the said William J. Jones, against the form of the statute. Accused was sentenced to three years on the first count and one year on the second, the two sentences to run concurrently.

The appeal was argued at Victoria on the 6th to the 12th of June, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Henderson, for appellant: There is not an indictment charging an offence known to the law. Neither count is an offence. In the first there is the word "assault." There cannot be an assault with the consent of the person upon whom it is made (Criminal Code, Sec. 290). The count does not come within section 298 of the Code. It is not an offence because it does not conform with the wording of the statute. The second count recites "a girl of previously chaste character." This woman had been married, and although under 21 years of age she does not come within the definition of "girl." Section 213 (*b*) of the Code has the word "chaste" alone. In the case of "previously chaste character" one may change from bad to good but in the case of "previously chaste" it means always chaste: see *Rex* v. *Stinson* (1934), 48 B.C. 92; *Magdall* v. *Regem* (1920), 61 S.C.R. 88. Penal statutes are construed strictly: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 497; *Stephenson* v. *Higginson* (1852), 3 H.L. Cas. 638 at p. 686; *Attorney-General* v. *Sillem* (1863), 2 H. & C. 431 at pp. 509-10; *Redpath* v. *Allan* (1872), L.R. 4 P.C. 511 at p. 517. He is entitled to the benefit of the doubt both on fact and law: see *London County Council* v. *Aylesbury Dairy Company* (1898), 1 Q.B. 106 at p. 109; Craies's Statute Law, 3rd Ed., 441. There was error in amending the first count at the conclusion of the evidence by substituting the words "without consent" for the words "with consent extracted by fear of bodily harm": see *Reg.* v. *Brickhall* (1864), 33 L.J.M.C. 156. You cannot substitute one offence for another, there must be a new charge: see *Reg.* v. *Cameron* (1898), 2 Can. C.C. 173; *Reg.* v. *Boyd* (1896), 5 Que. Q.B. 1; *Rumball* v. *Schmidt* (1882), 8 Q.B.D. 603 at p. 608; *Rex* v. *Leclerc* (1916), 26 Can. C.C. 242; *Rex* v. *Cohen* (1912), 19 Can. C.C. 428; *Rex* v. *Corrigan* (1909), 20 O.L.R. 99; *Rex* v. *Richards* (1934), 48 B.C. 381. On the charge the learned judge said he was going to read the complainant's evidence. He read the evidence in chief but not the cross-examination. He failed to charge the jury as

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to the danger of convicting on uncorroborated evidence: see *Rex* v. *Auger* (1929), 52 Can. C.C. 2.

Jackson, K.C., for the Crown: The jury pass upon the facts and the verdict should not be disturbed if the jury can reasonably so find on the evidence: see *Rex* v. *Riddell* (1912), 4 D.L.R. 662. There was in fact corroboration as to the first count but in law there was no need for corroboration: see *Rex* v. *De Bruge* (1924), 4 D.L.R. 496. The complainant is not bound to resist if overborne by bodily fear: see *Rex* v. *Berger* (1925), 2 D.L.R. 237 at p. 241; *Rex* v. *Wu* (1933), 48 B.C. 24 at p. 41; *Rex* v. *Smith* (1926), 37 B.C. 248 at p. 250; *Rex* v. *Berdino* (1924), 34 B.C. 142 at p. 146; *Rex* v. *Steele* (1923), 33 B.C. 197 at p. 201; *Rex* v. *M.* (1926), 46 Can. C.C. 80 at p. 84. He did not come forward to meet the case put up by the complainant: see *Magdall* v. *Regem* (1920), 61 S.C.R. 88. That corroboration is not necessary see *Rex* v. *Smith* (1919), 14 Cr. App. R. 81; *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81; *Hubin* v. *Regem* (1927), S.C.R. 442; *Rex* v. *Phillips* (1924), 18 Cr. App. R. 115. "Assault" is always an element in a charge of rape: see *Rex* v. *Muma* (1910), 17 Can. C.C. 285 at p. 289; Russell on Crimes, 8th Ed., Vol. I., p. 897. The word "girl" includes all females under 21 years of age, married or unmarried: see 28 C.J. 708; Words & Phrases, Vol. 4, p. 3094. "Previously chaste" and "Previously chaste character" are synonomous terms: see *Magdall* v. *Regem* (1920), 61 S.C.R. 88 at p. 90.

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Henderson, replied.

Cur. adv. vult.

2nd October, 1934.

MACDONALD, C.J.B.C.: The conviction is for rape, and also for seduction of the same person as an employee under the age of 21. The intercourse was consented to in both cases by the complainant.

MACDONALD, C.J.B.C.

It is not enough for a woman to say, "I was afraid of serious bodily harm and therefore consented"; she must prove in evidence that she had dire reason to be afraid, and that she took every reasonable precaution to avoid the outrage.

In this case she contents herself with saying, "I was afraid he

would strike me"—without even a semblance of evidence other than of her alleged fear, to shew that she had reason to fear violence, or that she took steps to avoid it.

She was not an unsophisticated girl: she was a married woman—young, it is true, but with no little experience of the ways of the world, as her own conduct discloses. Her failure to take obvious opportunities to escape and complain, both before and after the occurrences of which she complains, is some evidence of her complete presence of mind, and of her astuteness in looking after herself.

Therefore I think she has failed to make out a case calculated to convince a jury of reasonable men of the appellant's guilt and of her own innocence.

I think, also, that there was no corroboration of her evidence. The only decisive point in the case of alleged rape was whether or not her consent had been extorted through fear. The corroborative evidence relied upon was a couple of face cloths or towels which she says she used on her person after the alleged offences. She gave these to a constable, who took them to an analyst, who found evidence of male semen on them. This the learned judge charged the jury was corroborative of the complainant's evidence. But this so-called corroborative evidence is founded on her own statements and is valueless without them. It is not corroboration. Moreover, I would expect that some corroborative evidence would have been offered of her alleged fear, which was the crux of the case of rape. The analyst's evidence could have no bearing upon this point. I am convinced, therefore, that the Crown failed to make out its case on the charge of rape, the evidence being insufficient, and being uncorroborated, to prove that offence.

MACDONALD, C.J.B.C.

Coming then to the second count, that of seduction of the girl. Section 213 of the Criminal Code in my opinion applies only to an unmarried woman. The complainant in this case was a married woman. Originally the section was to be found in the Revised Statutes of Canada, 1906, of the same number. This section was applicable to a "woman or girl"; but in an amendment in 1920, Cap. 43, Sec. 5, the word "woman" was deleted from it. I think the Court cannot expand the present section to

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include what Parliament excluded by that amendment. Moreover, the word "girl" means an unmarried woman. Oxford Dictionary, Vol. 4, p. 178—and other standard dictionaries. Therefore the said section 213 has no application to the facts of this case; and the second count must fail also.

The convictions of the appellant and the judgment thereon should be set aside and the appellant discharged.

MARTIN, J.A.: Several questions are raised by this appeal from the conviction of the appellant upon both counts of an indictment charging that on the 10th of January, 1934, in the Municipality of Saanich he

> . . . unlawfully did assault Helen Raffa, a woman who was not his wife, and did then and there have carnal knowledge of her with her consent extorted by fear of bodily harm, etc.
>
> 2. . . . [that he] unlawfully did have illicit connection with Helen Raffa, a girl of previously chaste character, and then being under the age of twenty-one years, and then also being in the employment of him [appellant] . . .

With respect to the first count, it was originally and properly averred in the form of indictment given in Crankshaw's 1st (1894) Ed. of the original Criminal Code of 1892 (55-56 Vict. Cap. 29), for the offence of rape, as defined by section 266 (identical with present section 298) at p. 257, as follows:

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> RAPE. On at , A., in and upon B., a woman, who was not his wife, did unlawfully make an assault, and did then and there unlawfully ravish and have carnal knowledge of her the said B., without her consent.

For some reason the Crown counsel after the evidence was all in, none being called by the defence, moved to amend this unquestionably good indictment and it was, unfortunately, if I may say so with every respect, amended as it now stands and that amendment has given rise to an objection which I shall consider later.

But assuming for the present that the amended count is a good one on which to found a conviction for rape, it is, first, objected that there was no evidence to support that charge and therefore the conviction should be set aside.

The peculiarity of this case is that two distinct acts of sexual connection were proved to have taken place upon the day in question, the first in the afternoon between 3 and 4 o'clock, and

the second in the evening about 7.30. With respect to the first occasion I agree that the evidence in support of the complainant's consent is so overwhelming that, to use the words of section 1014 of the Criminal Code, "the verdict [of guilty] . . . cannot be supported." But on the second occasion the evidence shews a very marked change in the circumstances and is, in my opinion, sufficient to support the verdict upon a proper direction.

Putting her account of it very briefly, the complainant avers, and without contradiction, that the accused's conduct to her on the first occasion was so brutal that it caused not only repulsion but sickness and nausea, and also actual physical pain owing to uterine displacement and inflammation, and that after supper, when she was in the kitchen and had refused his repeated demands to go into his room and bed and tried to run away, he "grabbed hold of" her and after a struggle in which her wrist was bruised picked her up and carried her to his room and pushed her down on his bed repeatedly to frustrate her attempts to get away from him, and finally, in effect, wore down her will and overcame her resistance to connection, but she persists that she did not consent but only submitted to force and fear, and explains "I couldn't very well fight with him because I am not very strong and I was afraid of getting hurt." It was, to my mind, beyond question, necessary for the jury to pass upon such a state of circumstances, and decide as to whether or no there had been "a real consent"—*Cf. Rex* v. *Fick* (1866), 16 U.C.C.P. 379; and *Rex* v. *Salman* (1924), 18 Cr. App. R. 50-52; and *Rex* v. *Williams* (1922), 17 Cr. App. R. 56, 58; and the law has long been clear that, as *e.g.*, epitomized in 1 East, P.C. 444; and 1 Hawk. P.C., 8th Ed., 1824, p. 122, sec. 6:

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> Offences of this nature are not any way mitigated by shewing that the woman at last yielded to the violence, if such her consent was forced by fear of death, or of duress.

And this is confirmed by section 298 of the Criminal Code, *viz.*:

> Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which 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.

Much was made of her frank admission that she made no outcry, but the reason she gave for not so doing was that she was in

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fear of violence from him and was wholly in his power being with him alone in his house, which is described by the Chief of Saanich police as being "isolated in a field" and 115 yards distant from the nearest dwelling, and the reason she gave for not attempting to escape till early the following morning was that she was virtually his prisoner because he refused to allow her to go and was watching her, and she was afraid to make the attempt till early next morning when she escaped by a subterfuge and ran to the nearest highway where she asked a witness, Collinson, to take her into town, and he testifies that she then complained to him that she had been attacked by the appellant and that he had held her a prisoner for a couple of days, but she had just escaped and wished to report it to the police, and that he took her directly to the police station in Victoria for that purpose, which she carried out and preferred a formal complaint on which the appellant was arrested. She had no relatives or friends in Victoria to whom she might resort for assistance, having come on the 3rd of January from her home in Vancouver to work for the appellant as his housekeeper after correspondence shewing that she was on very friendly terms with him since staying in his house with his sister and another friend on a visit for four days in September, and in her final letter concluding the arrangement about her wages she said that she had in view a "certain purpose" which she explained to him on the night of her arrival as one to earn enough money to get a divorce from her husband, from whom she had been separated very shortly after their marriage on 18th May, 1931, when she was seventeen, because of his having infected her with venereal disease. Under all the circumstances it was open to the jury to find that she had made the complaint on the earliest reasonable opportunity—*Hill* v. *Regem* (1928), S.C.R. 156; *Reg.* v. *Cardo* (1888), 17 Ont. 11.

The lengthy evidence of the complainant was presented in detail by the learned trial judge to the jury in a way which was not only fair but too favourable to the accused, because they were, by an oversight, instructed that "Parliament" required her evidence to be "corroborated in some material particular by evidence implicating the accused," under section 1002 of the Code, but that is not the case because, by subsection (*d*), the only sections of Part VI. that are included are 301 and subsection 2

of 309. What the proper instruction is in sexual offences wherein corroboration is not required by law has often been laid down, *e.g.*, in *Rex* v. *Jones* (1925), 19 Cr. App. R. 40, at p. 41, *viz.*:

> The proper direction in such case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict.

Compare also *Rex* v. *Graham* (1910), 4 Cr. App. R. 219; *Rex* v. *Crocker* (1922), 17 Cr. App. R. 46; *Rex* v. *Lovell* (1923), *ib.* 163; and *Rex* v. *Salman, supra.*

But the fact that the learned judge, without objection, gave a wrong direction which was more favourable to the accused than a right one, is no ground for setting aside a verdict against him, and, if there were nothing more the appeal on the ground now under consideration would have to be dismissed.

There is, however, the grave difficulty that in presenting the facts to the jury relating to consent, and instructing them thereupon, no distinction was drawn between, nor any attempt made to segregate those appropriate to each of the two separate occasions, though, from the outline of the principal facts hereinbefore recited, there was obviously so grave a distinction as clearly to put the case out of Court as regards the first one, and the jury should have been so instructed.

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The result of this omission was that the jury must inevitably have considered the two occasions as being upon the same plane and subject to the same evidence and therefore the accused suffered prejudice by not having the evidence segregated so as to apply it in particular only to the second offence which alone was supportable, instead of its being left to apply in general to two conjoined offences one of which had broken down and he was not even called upon to answer. In my opinion this confusion brought about "a substantial wrong or miscarriage of justice" within section 1014 (2) of the Code and therefore the appellant is entitled to a new trial on the first count.

Since I have come to this conclusion it is proper to say in view of such new trial that I agree with the learned judge below (if it were essential, which it was not) that there was in law "some" corroborating evidence (referred to by him in his charge) which the jury were entitled to consider in accordance with his direction thereupon; but it must not be overlooked that at most,

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and even if section 1002 applied, corroboration is required only in "some material particular," not "all material particulars," otherwise there would seldom be convictions in rape or cognate cases—*Rex* v. *Baskerville* (1916), 2 K.B. 658, 665, 667.

There remains for consideration the objection to the amendment of the indictment, which it is submitted nullified it by disclosing no offence known to the law because of its self-contradictory averment of an "assault . . . with consent," which in rape cases is a legal impossibility since an assault is the whole basis of that peculiarly personal offence because it "is included in every case of rape as a necessary ingredient" and "rape necessarily includes assault"—*Rex* v. *Muma* (1910), 22 O.L.R. 225, 228, 229, 230 (C. A.); to which I add *Reg.* v. *Guthrie* (1870), L.R. 1 C.C. 241, 243, holding that "the statutory offence may be committed, although there is consent; but if there is consent there cannot be an assault," and from this follows the serious and unexpected consequence that upon this amended indictment none of the lesser verdicts of assault with intent, or indecent assault, or aggravated or common assault, could be found though they all are open on the ordinary properly framed indictment for rape *solus, e.g., John* v. *The Queen* (1888), 15 S.C.R. 384, 387-8; and *Rex* v. *Laurin* (1920), 36 Can. C.C. 28; 31 Que. K.B. 386.

That there is much in said decisions to support the present objection in cases of rape (to which I confine my remarks) cannot be gainsaid, and it receives further support from the unanimous decision of the Court of Criminal Appeal (on a Crown case reserved) in *Reg.* v. *Wollaston* (1872), 12 Cox, C.C. 180, wherein the Court held, on an indictment for indecent assault (p. 182):

> It is clear that, upon the circumstances of the case, there is nothing which constitutes an assault in law. If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality. We should be overturning all the principles of law to say that in this case there was any assault in law.

In Crankshaw, *supra*, at p. 257, is given a second and correct

form of indictment covering cases which the present impeached amendment was apparently intended to meet, but this amended one, however regarded, is wrongly framed to meet any case because it improperly inserts the word "assault" which is properly omitted in Crankshaw's form, as being inapplicable to a case where, for any reason, consent has in fact been given. The result is that the present amendment is defective in any aspect of it, and in view of the evidence adduced when the Crown's case was closed there was no occasion to make any amendment whatever, for that uncontradicted evidence disclosed one case only, *viz.*, that there had been no "real" consent at all and therefore this offence of rape must have been committed as averred in the primary and usual indictment which was exactly applicable to the evidence adduced by the Crown. It is worthy of note that the decision of the English Court of Appeal in *Salman's* case, *supra,* and in *Rex* v. *Williams* (1922), 17 Cr. App. R. 56, 58, that the question is one of "real" consent, is in exact accord with the unanimous decision of the Common Pleas *in banco* nearly 70 years ago in *Reg.* v. *Fick, supra,* where it was held, p. 384, that the jury

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must, also, be satisfied that there was evidence of "some resistance on the part of the woman to shew that she really was not a consenting party."

Furthermore, it was overlooked below that there is a great difference between "consent" and "submission" as I recently pointed out in *Rex* v. *Stinson* (1934), 48 B.C. 92, at pp. 94-5, on the authorities there cited to which I refer, especially *Reg.* v. *Day* (1841), 9 Car. & P. 722; followed in *Reg.* v. *Cardo, supra,* to which I add *Reg.* v. *Wollaston, supra;* and *Reg.* v. *Case* (1850), 1 Den. C.C. 580, 583; *Rex* v. *Williams, supra;* and *Reg.* v. *Jones* (1861), 4 L.T. 154; and it is to my mind beyond question that it was abundantly open to the jury, in considering this case in all its special surrounding circumstances, to regard it, on the said second occasion, as one of submission and not consent, if they decided to give credit to the complainant's testimony, which they did.

In my opinion, therefore, the amendment was made contrary to the facts disclosed and the law governing the same, and hence the first count of the indictment, as amended, cannot in law be upheld and the verdict founded thereupon should be set aside,

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but in view of all the unusual circumstances of the case the proper judgment to pronounce in the exercise of the power conferred upon us by section 1014 (3) of the Code is that a new trial should be directed upon the said first count as originally framed.

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There remains for consideration the second count, and it is objected that the verdict thereupon cannot stand because it is admitted that the complainant is a married woman and that once a female person of any age is married she is no longer a "girl" within the meaning of section 213 which, it is submitted, was designed to apply only to those females under 21 who had not entered the matrimonial state and therefore presumably required a special protection which was not necessary for those experienced females who had acquired sexual knowledge, and also presumably wisdom and caution from their marital experiences, and many authorities, and the statutory history of the legislation on the point were cited, and many arguments advanced in support of this submission, and also against it, and there is, doubtless, much to be said in favour of both submissions, and I have found it impossible, after a careful review of the matter, to reach a conclusion which is wholly satisfactory. The nearest approach to it, is that there is not enough to enable us to hold with any certainty, after Parliament in 1920 by Cap. 43, Sec. 5, had deliberately struck out the word "woman" from the expression "woman or girl" in section 213 of R.S.C. 1906, Cap. 146 (taken from section 183 of the original Criminal Code of 1892), that no change in the scope of the Act was brought about by that change in its language. Now while it must be conceded, I think, that as a modern popular, not to say colloquial expression, "girl" would in many cases in ordinary conversation be taken to include young married women, yet that popular usage is not the ordinary primary one, as given in, *e.g.*, both the Oxford and Standard dictionaries as "a young unmarried woman," but the question is, what is its meaning as used in section 213? Apart from that section, and its said history I find myself unable to derive little if any assistance from the varying use of more or less similar expressions in other sections in Part V., *e.g.*, of "unmarried female" in section 212, which is precise; of "female passenger" in section 214; of "girl or woman" in section 215, which is a reversion to "woman or girl" in the said original Code section

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183; and of both the same in section 216; of "girl" only in section 217; of "woman" only in section 218; and again "woman or girl" in section 219; and of "Indian woman" in section 220, and it is to be noted that defining section 210 does in effect recognize some distinction between "girl or woman" as used in sections 211-3: and in Part VI., we find "woman" in section 298; "girl" in sections 301-2; and "woman" in sections 303-5.

After giving very careful consideration to the question the best conclusion to be reached is that weight should be attached to the history of the section and the said change therein, with the result that in my opinion the meaning of "girl . . . under the age of twenty-one years," must for the purposes of the section be restricted to unmarried women, and therefore as the complainant is not of that class the verdict and conviction on the said second count must be set aside, and the appeal allowed to that extent thereupon, and to a new trial on the first count.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

McQUARRIE, J.A.: I do not think the charge of rape is substantiated by the evidence and I would allow the appeal as to the first count in the indictment.

MCQUARRIE, J.A.

I would also allow the appeal as to the second count.

Appeal allowed; Martin and Macdonald, JJ.A. would grant a new trial.

MURPHY, J. (In Chambers)

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REX *EX REL.* THRELKELD v. SMITH AND STEWART.

Damages—Dogs killing sheep—Sheep Protection Act—Summary Convictions Act—Civil proceeding — Certiorari — Amendment of order — R.S.B.C. 1924, Cap. 245—B.C. Stats. 1926-27, Cap. 64, Sec. 13.

REX *v.* SMITH AND STEWART

One Threlkeld laid an information under the Summary Convictions Act charging the defendants, the owners of a Spitz dog and a mongrel Airedale dog respectively, with allowing the dogs to kill and injure a number of lambs and ewes contrary to section 13 of the Sheep Protection Act. The magistrate found the defendants guilty and gave judgment against them for $93 compensation and $1.25 costs each. On application by way of *certiorari* to quash the order:—

Held, by MURPHY, J., that said section 13 does not create an offence but imposes on the owner of a dog liability for damages occasioned by the dog, and the proceedings, although taken under the Summary Convictions Act, are purely civil in character. The magistrate pronounced both defendants guilty but what he really meant was that he found the two defendants were the owners of the two dogs that killed or worried the sheep. Under the Summary Convictions Act there are wide powers of amendment of convictions or orders conferred upon reviewing tribunals, and in a case purely civil in character these powers should be exercised to their fullest extent when the record shews that such exercise will carry out the real adjudication of the magistrate when such adjudication was just and proper. The evidence proves that the defendants owned the dogs that did the damage. The order should therefore be amended to conform with the judgment. The order states that the injured sheep belonged to Threlkeld and McMorran, but the evidence shews they belonged to Threlkeld alone. The order should be so amended and that payment be made to Threlkeld alone. The portion of the order dealing with levy and distress should be amended so as to read that such distress be made solely on the goods and chattels of the defendant who failed to pay the damages imposed, and all reference to "conviction" should be eliminated from the order, as the defendants should not have it of record that they have been "convicted" which imports guilt of an offence.

Statement

CERTIORARI proceedings to quash an order for payment of damages under the Summary Convictions Act pursuant to section 13 of the Sheep Protection Act. The facts are set out in the reasons for judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 11th of March, 1935.

Maitland, K.C., for the application.
Christopher Morrison, contra.

15th March, 1935.

Judgment

MURPHY, J.: Application by way of *certiorari* to quash an

order for payment of damages made by a magistrate under the Summary Convictions Act pursuant to section 13 of the Sheep Protection Act, B.C. Stats. 1926-27, Cap. 64. Said section 13 does not create an offence. What it does do is to impose upon the owner of any dog liability for damages occasioned by such dog killing or injuring, *inter alia,* sheep whether or not the owner of the dog knew that it was vicious or accustomed to worry sheep, goats or poultry.

The owner of any sheep, goats or poultry so killed or injured by any dog is by section 13 given two remedies against the dog's owner. He may bring an action for damages in a Court of competent jurisdiction or he may proceed summarily before a justice of the peace under the Summary Convictions Act and somewhat peculiarly proceedings under this Act are made applicable to such claim for damages.

The proceedings in question herein were taken by Joseph Threlkeld who laid information under the Summary Convictions Act before A. W. Jarvis, a stipendiary magistrate for the Counties of Yale and Cariboo, charging that Sam Smith and T. Stewart on December 12th, 1934, at Bates Springs in the County of Yale, unlawfully being the owners of a white Spitz dog and a mongrel Airedale dog respectively, did allow the aforementioned dogs to kill and injure four lambs and kill and injure 34 ewes, the property of Threlkeld and McMorran: contrary to section 13 of the Sheep Protection Act. Because of the provisions of section 13 these proceedings, although taken under the Summary Convictions Act, are purely civil in character. What the Legislature has done by said section 13 is to create a civil liability and to confer jurisdiction to adjudicate upon such civil liability on magistrates who have jurisdiction under the Summary Convictions Act and such magistrates are to proceed in the manner provided by the Summary Convictions Act. Inasmuch as these proceedings are entirely civil in character, and inasmuch as an appeal is given under the Summary Convictions Act—which was actually taken herein but failed not because the Court appealed to did not have inherent jurisdiction to hear such appeal but because applicant herein failed to comply with some requirements of the Act as to such appeal—it seems to me doubtful whether in the exercise of judicial discretion *certiorari*

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proceedings to review what has been done should be entertained by the Court. It might be urged, however, that, inasmuch as under the Summary Convictions Act the party against whom the order had been made is required to deposit in Court the amount ordered by the magistrate to be paid as a condition precedent to the appeal being entertained, no adequate remedy by way of appeal exists. If the application for this or any other reason should be entertained I am clear that in reviewing the proceedings by way of *certiorari* the principles of civil law and not of criminal law are to be applied.

I have read a transcript of the evidence. Stewart, one of the defendants, pleaded guilty, that is he admitted that he was the owner of one of the dogs that did the damage and he did not question the assessment of such damages. Smith, the other defendant, appeared at the hearing and pleaded not guilty, that is, he put in issue the only two points involved, whether or not he was the owner of the dog that did some of the damage and, if so, what was the amount of the damage done. The transcript shews that the damage was done within the territorial jurisdiction of the magistrate who presided. Evidence was given shewing that Threlkeld was the owner of certain sheep; that a number of said sheep were either killed or worried by two dogs to such an extent that they had to be destroyed. Evidence was also given that Smith was the owner of one of the dogs that did this damage. Since there was evidence upon which the magistrate could come to the conclusion that Smith was such owner I do not think that it is open to me on *certiorari* proceedings to say whether or not such evidence should have been held sufficient by the magistrate, but if such course is open to me I agree with him that the evidence, as set out in the transcript, proves that Smith owned one of the dogs that did the damage. Having heard this evidence the magistrate pronounced both defendants guilty. What he really meant was that he found that the two defendants were the owners of the two dogs that had killed or worried the sheep in question. He then proceeded to assess the damages. Evidence was called on this issue and defendants did not question such evidence. The magistrate then gave judgment against Stewart for $93 compensation and $1.25 costs and against Smith a like sum of $93 compensation and $1.25 costs and ordered that

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if not paid within seven days then distress to be levied. The Sheep Protection Act authorizes the apportionment of damages by the magistrate. I see no flaw in these proceedings. The defendants were given clear notice of the nature of the claim against them, one of them admitted liability, the other, Smith, who is the applicant here, denied such liability. The trial then proceeded. Smith was given full opportunity to cross-examine witnesses and he did so. He was given an opportunity to testify on his own behalf which he declined to take advantage of. The magistrate weighed the evidence and gave judgment. It is true that when he came to put his judgment formally in writing he fell into errors, which is not surprising, as he is a layman and as there are no forms in the Summary Convictions Act definitely applicable to the exercise of the jurisdiction conferred by section 13 of the Sheep Protection Act. Under the Summary Convictions Act there are wide powers of amendment of convictions or orders conferred upon reviewing tribunals. In a case purely civil in character I think these powers should be exercised to their fullest extent when the record shews that such exercise will carry out the real adjudication of the magistrate which adjudication, as the record in my opinion also shews, was just and proper. I would therefore amend the formal order so as to make it conform with the judgment. The order states the injured lambs and ewes to be the property of Threlkeld and McMorran. The evidence shews they are the property of Threlkeld and I would change the order to so read and would direct the payment to be made not to Threlkeld and McMorran but to Joseph Threlkeld, the complainant.

Judgment

I would further amend that portion of the order dealing with the levy by distress in default of payment so as to read that such distress be made solely on the goods and chattels of the defendant who had failed to pay the damages and costs imposed and would eliminate therefrom all reference to "conviction." The defendants should not have it of record that they have been "convicted" since that word imports that they have been guilty of some offence cognizable by the law. This is not the case. The Summary Convictions Act empowers the magistrate to either convict or make an order against the defendant. What he in fact did in this case was to make an order and it was only because he used

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one of the forms appended to the Act that the word "conviction" crept into his formal embodiment in writing of his adjudication.

The application is dismissed without costs.

Application dismissed.

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Feb. 12.

FREEMAN v. FREEMAN

FREEMAN v. FREEMAN.

Practice—Alimony action—Written demand for conjugal rights not required.

In an action for alimony there is no rule in this Province requiring a written demand for restitution of conjugal rights prior to the issue of the writ.

Statement

MOTION to dismiss an action for alimony on the ground that the plaintiff did not allege a written demand for restitution of conjugal rights prior to issue of the writ. Heard by MCDONALD, J. at Vancouver on the 11th of February, 1935.

Coulter, for the motion.

Fleishman, and *C. F. MacLean, contra.*

12th February, 1935.

Judgment

MCDONALD, J.: The plaintiff sues for alimony under Order LXXA. r. 1 (*c*) which rule was held in *Rousseau* v. *Rousseau* (1920), 3 W.W.R. 384 to be *intra vires*. Defendant moves to have the action dismissed upon the ground that the plaintiff did not allege a written demand for restitution of conjugal rights prior to the issue of her writ. Defendant's counsel relies upon the decision in *Scott* v. *Scott* (1930), 1 D.L.R. 53. That decision is based upon a rule passed in England in 1865 and coming into force in 1869, it being held, as I understand the decision, that such rule was in force in Ontario. Such is not the case in this Province for the English rules of practice are not in force here: *Davy* v. *Davy* (1921), 30 B.C. 365. There is no rule in this Province requiring a demand prior to the issue of the writ nor was such demand a condition precedent, prior to 19th November, 1858, when the law of England was introduced into British Columbia. In my opinion, therefore, the motion must be dismissed and the action will proceed.

Motion dismissed.

THOMPSON v. THOMPSON.

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Practice—Divorce—Decree absolute—Order for maintenance—Failure of respondent to pay—Issue of garnishee order—Application to set aside—R.S.B.C. 1924, Cap. 17, Sec. 3—Divorce Rules 79 (a) and 79 (b).

In May, 1933, the petitioner in a divorce action obtained a decree absolute, and in the following month an order was made that the respondent do pay the petitioner during their joint lives or until further order, maintenance in the sum of $5 per week, payable weekly. On the 4th of February, 1935, at which time the respondent was in default in his payments in a sum amounting to $355, the petitioner obtained a garnishee order. On an application to set aside the garnishee order on the grounds that an order for payment of alimony or maintenance is not a judgment or order for payment of money within the meaning of the Attachment of Debts Act, and that said order was made without jurisdiction:—

Held, that Divorce Rule 79 (*a*) so far as orders for payment are concerned, provides that such orders shall be enforceable in the same manner as final judgments and orders of the Supreme Court, and the application was dismissed.

APPLICATION by the respondent in a divorce action to set aside a garnishee order obtained by the petitioner. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 19th of February, 1935. Statement

Whittaker, for the application.
C. H. Tait, contra.

5th March, 1935.

ROBERTSON, J.: On the 19th of May, 1933, the petitioner obtained a decree absolute for divorce from her husband and on the 26th of June, 1933, with the consent of the respondent, the following order was made:

THIS COURT DOTH ORDER, ADJUDGE AND DECREE that the respondent do pay or cause to be paid to the petitioner during their joint lives or until further order as from the date of the decree absolute for divorce pronounced between the said petitioner and respondent on the 19th of May, 1933, maintenance in the sum of $5 per week to be paid on Wednesday of each and every week. Judgment

The respondent failed to make payments amounting to $355. Divorce Rule 79 was repealed on the 25th of January, 1935, and the following substituted in lieu thereof:

79. (*a.*) All decrees and orders made by the Court or a judge in any cause or matter within the scope of these rules may be enforced in the same manner as judgments, orders, and decrees of the Supreme Court in other causes or matters may be enforced.

(*b.*) A decree or order requiring a person to do an act thereby ordered

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other than the payment of money shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a memorandum in the words or to the effect following, *viz.*: "If you, the within-named (A. B.) neglect to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

Section 3 of the Attachment of Debts Act, Cap. 17, R.S.B.C. 1924, provides that a judge or registrar upon the *ex parte* application of any plaintiff or judgment creditor or person entitled to enforce a judgment or order for payment of money may make a garnishee order.

On the 4th of February, 1935, the petitioner obtained a garnishee order, and the respondent now applies to set it aside,

on the ground that an order for payment of alimony or maintenance is not a judgment or order for the payment of money within the meaning of the Attachment of Debts Act, and on the further ground that the said order dated February 4th, 1935, was made without jurisdiction.

The order herein is not a final order because it may be varied —see Divorce Rules 63 and 70—but, in my opinion, this makes no difference. Rule 79 (*a*), *supra,* includes orders for payment of money as is shewn by rule 79 (*b*) which requires an endorsement on the order requiring a person "to do the act thereby ordered, other than the payment of money." The intention of the rule, therefore, was to provide, *inter alia,* a means of enforcing these interlocutory orders for payment. Accordingly rule 79 (*a*) provides that these orders may be enforced in the same way as judgments and orders of the Supreme Court, etc. If the rule meant that these orders could only be enforced in the same way as interlocutory orders of the Supreme Court for payment of money, which orders could not be enforced by garnishee proceedings, the effect would be to deprive the person, in whose favour the order was made, of a way of enforcing compliance with orders of this type which is often the readiest and most effective. The vast majority of orders for payment of money, made by the Court under divorce rules, are for the payment of alimony and maintenance and I should think the rule was intended to give the person, in whose favour such an order was made, the benefit of garnishee proceedings.

Judgment

I think, therefore, that the rule so far as orders for payment are concerned, provides that such orders shall be enforceable in the same manner as final judgments and orders of the Supreme Court.

The application will be dismissed with costs.

Application dismissed.

BRUCE v. WILSON.

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BRUCE v. WILSON

Practice—Trial by jury—Onus—Discretion—Rule 427.

On an application for trial by jury the pleadings shewed that the action was one in which the equitable jurisdiction of the Court was invoked and therefore falls under the last clause of rule 427, namely, "All causes or matters other than those specified in this Rule, in which the equitable jurisdiction of the Court is invoked, unless the Court or judge shall otherwise order, shall be tried by a judge without a jury."

Held, that a party whose case falls within the above rule has the *onus* cast upon him, when asking for a trial by jury, to satisfy the Court that the trial should be by jury rather than without. As the affidavit in support merely states that the plaintiff is desirous that the issues of fact be tried by a judge with a jury, this does not satisfy the *onus* cast upon him, and the application is dismissed.

Jenkins v. *Bushby* (1891), 60 L.J.Ch. 254 applied.

Statement

APPLICATION by plaintiff for trial by jury. Heard by MURPHY, J. in Chambers at Vancouver on the 16th of April, 1935.

Paul Murphy, for the application.
Reid, K.C., contra.

17th April, 1935.

Judgment

MURPHY, J.: Application for trial by jury. The pleadings shew that the action is one in which the equitable jurisdiction of the Court is invoked and therefore it falls under the last clause of rule 3 of Order XXXVI. The effect of the rules with regard to mode of trial is elaborately discussed in *Jenkins* v. *Bushby* (1891), 60 L.J. Ch. 254. The rules discussed in that case are the Rules of Supreme Court, 1883, in force in England at the time the case was decided. Rule 7 (*a*) therein discussed is our present rule 2, Order XXXVI. Rule 2 spoken of in that decision is our present rule 2A, Order XXXVI. The case decides that in applications under rule 7 (*a*) of the Rules of Supreme Court, 1883 (our rule 2, Order XXXVI.) the *onus* is upon the applicant to shew why an order for a jury should be made. As stated the present application, in my opinion, falls under the last clause of rule 3, Order XXXVI. The corresponding rule now in force in England states:

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Causes or matters assigned by the Act to the Chancery Division shall be tried by a judge without a jury, unless the Court or a judge shall otherwise order.

The change in language between our rule 3 and the English rule 3 was probably caused by the fact that our Court is not divided into King's Bench and Chancery Divisions. The White Book, p. 601, states that in cases within the English rule 3 the *onus* is upon the party applying for a jury and cites *Jenkins* v. *Bushby, supra,* and *Coote* v. *Ingram* (1887), 35 Ch. D. 117. The White Book adds:

> If the case falls within this rule trial with a jury is seldom ordered.

In the *Jenkins* case, in dealing with rule 7 (*a*), (our rule 2, Order XXXVI.) Lindley, L.J. said (p. 256):

> Rule 7 (*a*) is so worded that in all cases to which it applies the mode of trial is to be without a jury, unless otherwise ordered, and it is for those who ask for trial by jury to satisfy the Court that the trial should be by jury rather than without.

I think the same construction must be put upon our rule 3, Order XXXVI. The language of our rule 3, Order XXXVI., whilst not identical, has to my mind the same result, *viz.,* that a party whose case falls within its provisions has the same *onus* cast upon him, when asking for a trial by jury, to satisfy the Court that the trial should be by jury rather than without. The affidavit filed in support of this application merely states that the plaintiff is desirous that the issues of fact be tried by a judge without a jury. This, in my opinion, does not satisfy the *onus* which I hold is upon the applicant herein. I have read the pleadings and find nothing in them which, in my view, satisfies such *onus.* The case apparently is one that could be tried equally well either by a judge alone or by a judge with a jury. I have not exercised any discretion in this matter. In my opinion the question of exercising discretion cannot arise until material is before the Court which shews that the *onus* which I hold to be upon the applicant is sufficiently satisfied to justify the Court in proceeding to consider whether or not, on the facts put forward to satisfy such *onus,* the Court in the exercise of proper judicial discretion should order trial by jury. The application is dismissed.

Application dismissed.

ROBERTSON *ET AL.* v. BATCHELOR *ET AL.*

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April 16.

ROBERTSON v. BATCHELOR

Practice—Pleadings—Statement of defence—Application to amend—Withdrawal of admissions.

On an application to deliver an amended statement of defence on the ground that the statement of defence was delivered by inadvertence, that it was a mere draft and was intended to be submitted to and passed by counsel before being delivered, the plaintiff contended that the defence as delivered contained admissions and that leave should not be given to amend without evidence that the admissions were inadvertently made and that they were not correct.

Held, that the application should be granted, first on the ground that the decision of the Full Court in *Halpin* v. *Fowler* (1907), 12 B.C. 441, should be followed, and secondly the original statement of defence is unskilfully drawn and it is difficult to say whether it makes admissions or not. To allow the pleadings to stand would embarrass the trial judge in interpreting the inartistic language used, and the real issues would become clouded by contentions as to what construction should be put upon the language of the statement of defence which it is now proposed to amend.

APPLICATION to deliver amended statement of defence. Heard by MURPHY, J. in Chambers at Vancouver on the 15th of April, 1935.

Statement

J. E. Bird, for the application.

J. W. deB. Farris, K.C., contra.

16th April, 1935.

MURPHY, J.: Application to deliver amended statement of defence.

Counsel for defendants states that the statement of defence was delivered through inadvertence, that it was a mere draft and was intended to be submitted to and passed upon by counsel before being delivered. Plaintiff contends that the statement of defence as delivered contains admissions and that no leave to deliver an amended statement of defence should be granted unless evidence is produced to the Court that the admissions were inadvertently made and further that the admissions are not correct, citing *Gesman* v. *City of Regina* (1907), 7 W.L.R. 307 and *Hollis* v. *Burton*, [1892] 3 Ch. 226. The latter case is not so much an authority with regard to delivering amended

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pleadings withdrawing admissions as it is an authority that terms may be imposed as a condition to granting leave to deliver amended pleadings. *Gesman* v. *City of Regina* is a Saskatchewan case. In *Steiman* v. *Gordon,* [1933] 1 W.W.R. 315, a Manitoba case, Montague, J., after reviewing the authorities, declined to follow the Saskatchewan practice and allowed an amendment where a clear admission had been made without requiring proof that the admission was incorrect. In *Halpin* v. *Fowler* (1907), 12 B.C. 441 at p. 445, HUNTER, C.J. sitting as a member of the old Full Court said:

> In the next place, I cannot understand why a solicitor should be held to a pleading which he at once notifies the other side was filed without full consideration, and in a hurry to get the pleading in in time for the next sitting of the Court when it is not pretended that there was any *mala fides*, or that any legal prejudice had been occasioned to the plaintiff which could not be compensated for by costs.

MORRISON, J., then a member of the Full Court, now C.J.S.C., concurred in the judgment of HUNTER, C.J. This is a binding authority upon me. There is no suggestion that any legal prejudice has been occasioned to the plaintiff in this case.

Judgment

The application is granted upon two grounds: First: I think I am bound to follow the decision of the Full Court rather than the practice enunciated by a single judge in Saskatchewan. Second: I have read the original statement of defence and the proposed amended statement of defence. The original statement of defence is unskilfully drawn. It is difficult to say from a perusal of it whether it makes admissions or not. To allow this pleading to stand will, in my opinion, embarrass the trial tribunal because it will lead to argument as to what interpretation is to be put upon the inartistic language used in it. The real issues in the case will become clouded by contentions as to what construction is to be put upon the language of the statement of defence which it is now proposed to amend. The application is granted. All costs thrown away as a result of this order are to be plaintiff's in any event of the cause.

Application granted.

APPENDIX.

Cases reported in 48 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

REX v. J. G. WU *alias* WU CHUCK (p. 24).—Affirmed by Supreme Court of Canada, 6th June, 1934. See (1934), S.C.R. 609; (1934), 4 D.L.R. 459.

THE KING v. THE MINISTER OF FINANCE (p. 412).—Affirmed by Supreme Court of Canada, 20th November, 1934. See (1935), S.C.R. 70; (1935), 1 D.L.R. 232.

Case reported in 47 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

FERGUSON v. WALLBRIDGE *et al.* (p. 518).—Affirmed by the Judicial Committee of the Privy Council, 1st February, 1935. See (1935), 1 W.W.R. 673; (1935), 3 D.L.R. 66.

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CRIMINAL LAW—*Count—Amendment of—Rape—Consent extorted by fear of bodily harm—Evidence of—Corroboration—Seduction—"Girl"—Unmarried woman—Criminal Code, Secs. 213 (b), 298 and 1014.*] On a charge for rape and also for seduction of the same person as an employee under the age of 21 years, the complainant who was a married woman but under 21 years of age, in stating what happened after she had been a servant in accused's house for one week where they lived alone, said "he wanted me to go to his room with him and I did not want to; I was afraid he would hit me because he was acting kind of angry: Finally I obeyed as I was afraid and went to his room where he had sexual intercourse with me." This happened between 3 and 4 o'clock on an afternoon. Then telling what happened at about 7.30 the same evening she said "He said, 'You are going to sleep with me tonight' and I said 'No.' He made me lay down on his bed with him, he started feeling my legs and I pushed him away: He got up and fixed the fire and then he made me sit on his knees, then I got up to get away and he grabbed me and picked me up and was going to carry me to his room when I caught hold of a board above the door and told him to let me down: He let me down and pushed me on to the bed. I started to get up but he pushed me down again and said 'You stay right there, take off your clothes.' Then he had sexual intercourse with me again." The accused was found guilty by the jury on both counts and convicted. *Held*, on appeal, reversing the decision of ROBERTSON, J. (MARTIN and MACDONALD, JJ.A. would grant a new trial), that the convictions of the appellant should be set aside and that he be discharged. *Per* MACDONALD, C.J.B.C.: It is not enough for a woman to say "I was afraid of serious bodily harm and therefore consented." She must prove in evidence that she had dire reason to be afraid and that she took every reasonable precaution to avoid the outrage. *Per* MARTIN and MACDONALD, JJ.A.: On the charge no attempt was made to segregate the facts appropriate to each of the two separate occasions, as there was obviously so grave a distinction as clearly to put the case out of Court as regards the first one and the jury should have been so instructed. The accused suffered prejudice in not having the evidence segregated so as to apply it in particular only to the second offence which alone was supportable. This confusion brought about a substantial miscarriage of justice and there should be a new trial. *Per* MARTIN, J.A.: The first count "unlawfully did assault Helen Raffa, a woman who was not his wife and did then and there have carnal knowledge of her without her consent" was amended to read "unlawfully did assault Helen Raffa, a woman who was not his wife, and did then and there have carnal knowledge of her with her consent extorted by fear of bodily harm," etc. The amendment was made contrary to the facts disclosed and the law governing the same and hence the first count of the indictment as amended cannot in law be upheld and the verdict founded thereupon should be set aside, but in view of the unusual circumstances of the case a new trial should be directed upon the first count as originally framed. *Per* MARTIN, J.A.: The proper direction in sexual offences is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury if they are satisfied of the truth of her evidence may, after paying attention to that warning, nevertheless convict. The word "girl" in section 213 (*b*) of the Criminal Code applies only to an unmarried woman, and as the complainant is a married woman the conviction on the second count must be set aside. REX v. JONES. - - - - - - **537**

2.——*Homicide — Constable — Resisting arrest—Knowledge of cause of arrest—Criminal common law — Accomplice — Evidence of acts subsequent to killing—Admissibility—Criminal Code, Sec. 40.*] On the 23rd of May, 1934, one of the accused, Eneas George, an Indian, committed an assault upon his wife with a knife on the Canford Indian Reserve, severely wounding her. At the instance of the Indian agent at Merritt, about twelve miles away, constable Gisbourne with a doctor was sent to the reserve, and finding the woman severely injured, took her to the hospital at Merritt. Gisbourne, with constable Carr, then drove back to the reserve to arrest Eneas, arriving there between 11.30 and 12 at night. Eneas was not in the village but receiving an intimation from others there that he was on a road which led to the back of a row of Indian houses, Gisbourne went over to this road where he saw Eneas with his three

CRIMINAL LAW—*Continued.*

brothers, Richardson, Alex and Joseph coming towards him. Gisbourne advanced with an electric flash-light in his hand and said "I want Eneas." One of the brothers then said "Who sent you?" He answered "Barber" (the Indian agent). Gisbourne then said "Nobody can stop me: I am going to perform my duty." He then grabbed Eneas, saying "I am going to take this man to Merritt." Anticipating resistance Gisbourne then called for Carr who was some distance away. Richardson then said "Get hold of the policemen. We are going to fight them." The Indians then attacked Gisbourne and threw him down, Richardson snatching the flash-light from Gisbourne and hitting him over the head with it. Gisbourne managed to get to his feet and he ran some 60 or 70 yards back of the houses and towards the entrance to the reserve, closely followed by the Indians. He then turned and fired his revolver. Joseph fell, and at the same time Eneas and Richardson attacked him with sticks, Richardson hitting him on the head with a heavy stick killing him. The medical testimony was that Joseph's wound in the head may have been caused by a glancing blow from a bullet, but the loss of hearing and concussion from which it subsequently appeared he suffered was due to striking his head when falling or some other blow. Constable Carr then came to Gisbourne's assistance, but on the three men then attacking him he ran through the entrance gate, but they caught up to him just beyond the gate and killed him. They then put the two bodies in the police car, and forcing another Indian to drive it, drove to the main highway between Merritt and Spence's Bridge where they tried to push the car into the Nicola River, but the car stuck against a tree on the way down, and as they could not move it they took the two bodies out and threw them into the river. On the trial for murder the three accused were found guilty and sentenced to be hanged. On the hearing of the appeal counsel for the defence was allowed to call Joseph as a witness, as he was in the hospital very ill at the time of the trial. Joseph admitted that he and his brothers knew why Gisbourne was about to arrest Eneas. *Held*, on appeal, that there should be a new trial, MACDONALD and MCQUARRIE, JJ.A. dissenting. *Per* MACDONALD, C.J.B.C.: The arresting officer failed to perform the statutory duty imposed on him by section 40 of the Criminal Code, to notify Eneas of the crime of which he was charged. The statute should be strictly construed and on a proper direction the jury might have found that the duty imposed by section 40

CRIMINAL LAW—*Continued.*

of the Code was neglected without justification, and the arrest was unlawful. There being no instruction to the jury on this pivotal point there should be a new trial. *Per* MARTIN, J.A.: That the constable in making the arrest of Eneas without a warrant did so on lawful authority, because it was for an offence which the constable had "reasonable and probable grounds" for believing had been committed by said accused, and for which he could be arrested without a warrant, and as the evidence shewed since, Eneas already knew of the cause of the arrest. It was not a breach of the duty of the constable to refrain from going through the form of repeating that "notice" to him upon arresting him. There was compliance with section 40 of the Criminal Code, but the new evidence of Joseph George is of such substantial weight in determining the crucial facts constituting the commission of the offence charged that "justice requires" that another jury should give their verdict upon it before the sentence imposed can safely be carried into effect. *Per* MCPHILLIPS, J.A.: That the conviction should be quashed; but owing to the various views of the members of the Court, would agree that justice will be done by ordering a new trial. *Per* MACDONALD and MCQUARRIE, JJ.A.: That there was a common intention to prevent the arrest of Eneas. There was substantial compliance with section 40 of the Criminal Code on the part of Gisbourne on his attempt to arrest Eneas, and no jury acting reasonably would accept the evidence of Joseph in the face of all the established facts. REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE. - - **345**

3.——*Libel — Evidence — Accomplice—Corroboration—Charge—Warning to jury.*] The accused Clayton and his partner one Walsh conducted a literary bureau and published a paper called the "Daylight." They prepared a defamatory article on one Victor Spencer, and on November 14th, 1933, sent a proof sheet of it by messenger to Spencer with a letter telling him that a denial by him of any part of it would be deleted from the article. Spencer did not reply, and on the 20th of November following another copy of the article was sent to him. On November 24th Clayton was arrested and then let out on bail. A witness one Downs had previous to this visited Clayton and Walsh in their office when Walsh told him "they were going to get money out of Spencer." On December 5th following the accused Davidson and Williams came to Vancouver and took a room in the Austin Hotel where

CRIMINAL LAW—*Continued.*

brought one Lundy to their rooms, Clayton having in the meantime visited the rooms. They then told Lundy "they were going to put a man on the spot for twenty grand," but they needed $300 for financing the publication. Lundy said he could get the money, and on leaving the hotel went to Spencer, told him of the plot, and Spencer's solicitor gave Lundy $100 with which he went back to the hotel and gave it to Williams. Later Davidson and Williams were arrested and the money was found on Williams. Clayton, Williams and Davidson were convicted on a charge of conspiring to publish a defamatory libel. The accused appealed mainly on the ground that Lundy was an accomplice and that the jury was not warned of the danger of convicting on the evidence of an accomplice. *Held*, affirming the decision of MORRISON, C.J.S.C., that as Lundy's evidence discloses that he simply took a pretended part in the plot with the object of exposing it, and the other evidence on the trial is not seriously inconsistent with this view of his conduct, the learned judge below was justified in finding that he was not an accomplice, and the appeal should be dismissed. REX v. WILLIAMS, CLAYTON AND DAVIDSON. - - **379**

4.——*Narcotic drugs—Habeas corpus—Application for order nisi—Jurisdiction of magistrate — Whether poppy heads "morphine" — Criminal Code, Sec. 767 — Can. Stats. 1929, Cap. 49.*] The accused having had poppy heads in his possession, was convicted of having in his possession a drug, to wit, morphine. On an application for an order *nisi* for a writ of *habeas corpus*, it was contended that poppy heads are not morphine within the meaning of The Opium and Narcotic Drug Act, 1929, and the magistrate acted without jurisdiction. *Held*, that this is a question of fact and not a matter going to the magistrate's jurisdiction. He could try such a charge under the summary conviction provisions of the Code, and the application should be dismissed. REX v. BERU. - - - - - - **22**

5.——*Obtaining money by false pretences—Sale of shares in company—Representation that shares sold were treasury shares—Shares in fact owned by one of accused—Criminal Code, Sec. 407 (a).*] At the instance of the accused J., a company called System Service Limited was incorporated in British Columbia, and by agreement between J. and the company of May, 1933, in which he described himself as president of System Service Incorporated, a company incorporated under the laws of the State of Delaware, he, as agent of the American company transferred to the Canadian company the right to use and operate in Canada a patent being a new and useful improvement in vouchers, also two registered trademarks, in consideration for which the Canadian company agreed to issue to J. all its capital stock less directors' qualifying shares, J. agreeing at the same time to pay the obligations of the company until it was in a position to declare dividends. The complainant C. was introduced by the accused M. to J., and after two certain interviews with J., C. was induced to invest $6,250, for which she received ten shares in System Service Limited from J. On a charge by C. against J. and M. for obtaining her money by false pretences, of several false representations alleged by C., it was held that they represented to her that she was buying stock owned by the company and that her money was going into the treasury of the company and they were convicted. *Held*, on appeal, affirming the conviction by ELLIS, Co. J., that from complainant's evidence it is apparent that there is no proof that she knew she was buying the shares of Jones and not treasury shares, and the appeal should be dismissed. REX v. JONES AND MANLOVE. - - **422**

6.——*Practice — Murder — Conviction—Appeal—Majority of Court conclude there should be a new trial—Judges granting new trial do so on different grounds—Effect of—Criminal Code, Sec. 1014, Subsec. (c).*] On appeal from a conviction for murder, two of five judges held that the appeal should be dismissed and the remaining three decided there should be a new trial, but two of them gave different grounds in their reasons for judgment why there should be a new trial. *Held*, that it is not necessary that the collective decision of the majority should be based on the same reasons which lead to the conclusion that there has been a miscarriage of justice in order to bring the case within subsection (*c*) of section 1014 of the Criminal Code. REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE. (No. 2.) - - **393**

7.——*Statement to police — Lack of warning—Threatening witness with charge of perjury—Ejecting counsel from Court room—Miscarriage of justice.*] Where, on a charge of stealing an automobile, the magistrate intimidates a witness for the Crown by stating that he does not believe the witness and that the witness is perjuring himself and liable to fourteen years'

the plaintiffs made statements shortly after the accident to a witness that the defendant crossed the intersection at from fifteen to twenty miles an hour, that they did not see the other car until immediately before the collision and that the defendant was not to blame. In an action for damages for negligence:—*Held*, that under the circumstances the defendant should have stopped when he saw the other driver and allowed him to pass, as in deciding not to do so he "took a chance" which he ought not to have taken, and must therefore he held liable. GROH AND JEFFREY v. RITTER. - - **272**

3.——*Damages—Collision at intersection—Right of way—Substantial prior entry on intersection—Contributory Negligence Act, B.C. Stats. 1925, Cap. 8.*] The plaintiff, who was driving his car north on Blenheim Street in Vancouver, on reaching 14th Avenue, looked to his right and saw the defendant's truck about 100 feet away from the intersection and coming towards it. He proceeded to cross the intersection and when nearing the opposite side the rear of his car was struck by the defendant's truck. The action was dismissed. *Held*, on appeal, reversing the decision of FISHER, J. (MARTIN, J.A. dissenting and MACDONALD, J.A. dissenting in part), that the plaintiff was some twenty feet on the intersection before the defendant reached it, and the rule applies that where one party is substantially in the intersection at the time the other reaches it the party in possession should be allowed to proceed without interference. *Per* MACDONALD, J.A.: That the Contributory Negligence Act applies and the plaintiff should be assessed 60 per cent. of the damages. WILLS v. SWARTZ BROS. LIMITED, AND HUDSON. - - **140**

4.——*Damages—Collision between motor-car and bicycle—Contributory negligence—Costs—B.C. Stats. 1925, Cap. 8.*] In the morning the defendant was driving his automobile north on Main Street in Vancouver. He turned to the left on reaching 6th Avenue, and when nearly beyond the intersection the right rear of his car was struck by the plaintiff who was riding a bicycle north on Main Street. The plaintiff was coming down hill and had an uninterrupted view of the street in front. He was thrown from his bicycle and injured. It was held that the Contributory Negligence Act applied and the damages assessed were divided equally between them. *Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that it would appear in the circumstances that both parties were equally to blame and the appeal should be dismissed. *Per* MARTIN, MACDONALD and MCQUARRIE, JJ.A.: That the joint total costs should be on the same footing of apportionment as the joint total damages. *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214, followed. WEGENER v. MATOFF AND FUR SALES LIMITED. - - - - - - **125**

5.——*Damages—Fall from stairs—Defective railing—Concealed danger—Death of owner prior to accident—Agent continuing to act—Ratification by executors—Evidence of.*] On the 12th of June, 1933, the plaintiff, a nurse, while lawfully using a rear staircase on the defendant's premises, fell from a landing owing to the railing giving way, and was severely injured. The former owner of the premises, Sarah J. McGuinness, died in Australia on the 17th of May, 1933, and for about 20 years previous to her death she employed one Bennett as her agent in connection with the premises. On receiving notice of her death in the latter part of May Bennett continued of his own accord to collect the rents and make necessary repairs until late in June and after the accident, when he heard from the executors who received the rents collected, and paid for the repairs that were ordered by him. In an action for damages for the injuries sustained by the plaintiff:—*Held*, that the railing which appeared to be safely in position constituted a trap or concealed danger, that the danger had existed for some months prior to the accident, that there had been no real hiatus in the agency and in any case the defendants were liable for negligence as they ought to have known of the danger. HAUSER v. MCGUINNESS *et al.* - - - - - - - - **289**

6.——*Damages—Parking of cars on street—Accident to wayfarer—Nuisance—City authority—Liability—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320; 1928, Cap. 58, Sec. 38—City By-law 1874.*] Section 320 (1) of the Vancouver Incorporation Act provides that "Every public street, road, square, lane, bridge, and highway in the city shall, . . . be kept in reasonable repair by the city" and city By-law 1874 provides that it shall be unlawful for any person in charge, control, or in possession of a vehicle to permit same "to stand or remain stationary for any period of time on the school side of any street fronting or immediately adjacent to any school grounds on school days during school hours." Workmen engaged in building an addition to a school in the City of Vancouver parked

PRACTICE—*Continued.*

trustees and continued to act with the third until he died in October, 1917, the company then continuing to act as sole trustee. The defendant Haynes was at all times manager of the company and the defendant *Innes* was its solicitor. In 1919 a petition was launched to transfer the trusts from the company to Haynes and *Innes*, but shortly after this was abandoned and a transfer of the trust property to Haynes and *Innes* was effected by deed under the Trustee Act. The trustees realized from the sale and getting in of the estate, about $203,000 and of this sum about $195,000 was let out on mortgages between 1911 and 1917. A large portion of the properties upon which the loans were made were as time went on sold for taxes without principal or interest being paid. In an action by the beneficiaries in September, 1932, the learned trial judge found the company guilty of breaches of trust in respect of improvident investment and careless supervision of mortgage securities. The Statute of Limitations pleaded by the company constituted a good defence as to a considerable portion of the breaches unless incidents arose subsequently to the impugned transactions which amounted to fraudulent concealment and prevented its operation. On the trial the question arose as to whether the beneficiaries were represented by solicitors on the application to change the trustees by deed under the Trustee Act in 1919. Haynes advised the beneficiaries that the change would be effected by petition and that Mr. *Shandley*, a solicitor, would represent them on the application, but it was found by the trial judge that Haynes did not instruct *Shandley* to act for the beneficiaries and that in fact, as *Shandley* testified, he acted on instructions for the company, and the beneficiaries were not represented. The defendants now apply before the judgment is entered for a rehearing and to introduce new evidence to shew that *Shandley* was mistaken in his recollection and that he did in fact appear for the beneficiaries. The evidence sought to be introduced includes that of Mr. *Maunsell*, a solicitor, who deposed that although *Shandley* prepared the petition, he (*Maunsell*) acted for the company and *Shandley* appeared for the beneficiaries. A bill of costs of *Innes* (now deceased) and one of the firm of *Elliott, Maclean & Shandley* were exhibited to support this contention, also Chambers Court records shewing appearances. Leave is asked also to cross-examine *Shandley* in the light of the suggested new evidence. The trial judge concluded he should reopen the trial and allow

PRACTICE—*Continued.*

the defendant company to adduce further evidence. *Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. and MARTIN, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C. and MARTIN, J.A.: The burden of proving due diligence has not been discharged, and apart from and in addition to lack of diligence if the learned judge below had applied his mind to the relevant material only, before him, he should have come to the conclusion that it could not be said that the proposed further evidence might probably have altered the judgment, and the motion to reopen should have been dismissed. *Per* MCPHILLIPS and MACDONALD, JJ.A.: Before entry of judgment the trial judge has power to reopen the trial unfettered by any rules as to diligence, conclusiveness or otherwise and the Appellate Court cannot review that decision. *Per* MACDONALD, J.A.: That even if the rules as to diligence and conclusiveness applied the lack of diligence on the part of the solicitor for the respondent company in not (after hearing Mr. *Shandley's* evidence in the witness box with reference to the Court records) pursuing enquiries in quarters plainly indicated, should be excused on the ground of surprise, as owing to the unique situation he could not reasonably be expected to take issue with a colleague acting in similar interests. *Per* MCQUARRIE, J.A.: As the order was not drawn up the learned judge below could rehear the case and if there were material facts which were not brought to his attention at the trial, he should hear them. CLAYTON *et al.* v. BRITISH AMERICAN SECURITIES LIMITED. - **28**

14.——*Judgment—Minutes not settled—Appeal—Final judgment to be included in appeal book — Postponement — Rules 718d and 934 — Court of Appeal Act, R.S.B.C. 1924, Cap. 52, Sec. 14.*] On an appeal coming on for hearing the respondent raised the preliminary objection that the final judgment pronounced had not been perfected in the Court below, and submitted that hence there was no jurisdiction to hear the appeal. *Held*, that the appellant is not bound to perfect a final judgment before giving his notice of appeal therefrom but it must be included in the appeal book when the appeal comes on for hearing; it was ordered that this appeal be set at the foot of the list to come on for hearing after the judgment is perfected. TATROFF v. RAY. (No. 2). - **321**

15.——*Legal Professions Act—Taxation of solicitor's costs — Form of summons—R.S.B.C. 1924, Cap. 136, Secs. 79, 80 and*

STATUTES—*Continued.*

STATUTES—*Continued.*