THE 35

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.

VOLUME L.

1914

VICTORIA, B. C.
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1936.

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.
THE HON. ALEXANDER MALCOLM MANSON.

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,	Victoria, 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.

MEMORANDA.

On the 24th of September, 1935, the Honourable Frederick George Tanner Lucas, a Puisne Judge of the Supreme Court of British Columbia, died at the City of Vancouver.

On the 27th of November, 1935, Alexander Malcolm Manson, one of His Majesty's counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia.

On the 18th of September, 1936, Herbert Howard Shandley, Barrister-at-Law, was appointed Judge of the County Court of the County of Victoria and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Peter Secord Lampman, resigned.

TABLE OF CASES REPORTED

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"COURT OF APPEAL ACT."

HIS HONOUR the Lieutenant-Governor has been pleased to order that, pursuant to section 2 of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and amending Acts, and pursuant to section 33 of the "Court of Appeal Act," being chapter 52 of the "Revised Statutes of British Columbia, 1924," and amending Acts, the following rules be added to the "Court of Appeal Rules, 1924":—

"(1.) SITTINGS OF COURT.

"2A. (1.) The Court of Appeal for the hearing of all appeals or other matters and the disposal of all business which may be lawfully brought before it shall sit at the City of Victoria and at the City of Vancouver, and shall hold six sittings in each year commencing on the days following, and continuing in each of the said cities until the business before the Court is disposed of or until the next sitting of the Court; that is to say:—

"The first sitting on the second Tuesday in January at the City of Victoria;

"The second sitting on the first Tuesday in March at the City of Vancouver;

"The third sitting on the second Tuesday in April at the City of Victoria;

"The fourth sitting on the third Tuesday in May at the City of Vancouver;

"The fifth sitting on the second Tuesday in September at the City of Victoria; and

"The sixth sitting on the first Tuesday in November at the City of Vancouver.

"(2.) Except by consent or unless the Court shall otherwise order, appeals remaining undisposed of at the end of a sitting shall be heard at the next sitting.

"(3.) The Court may order that all appeals remaining undisposed of on or after the fourteenth day of a sitting be heard at the next sitting.

"(2.) FACTUMS.

"14A. Where the appeal is from a final judgment, order, or decree of the Supreme Court in cases where the amount involved exceeds $1,500, or where the costs of the appeal would be taxable under Columns 2, 3, or 4 of Appendix N, the appellant and the respondent shall each deposit with the Registrar at least two days before the first day of the sitting at which the appeal is to be heard, for the use of the Court, six copies of his factum.

"14B. The factum shall consist of three parts as follows:—

"Part I.—A concise statement of the facts:

"Part II.—A concise statement setting out clearly in what respect the judgment, order, or decree is alleged to be erroneous. When the error is alleged with respect to the admission or rejection of evidence, the evidence admitted or rejected shall be set out in full. When the error alleged is with respect to the charge of the Judge to the jury, the language of the Judge and the objection of Counsel shall be set out in full:

"Part III.—A brief synopsis of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the appeal-book and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance, or by-law is cited or relied on, so much thereof as may be necessary to the decision of the case shall be set out at length, except where the statute, regulation, rule, ordinance, or by-law exceeds ten folios, and in such case it shall only be necessary to give the appropriate reference.

"14C. The Court may in its discretion, and upon such terms as it considers just, permit counsel to use arguments, raise points of law, and cite authorities not mentioned in the factum.

"14D. The factum may be printed or typewritten; the size of paper to be the same as the appeal-book, and the provisions of Rule 12 with regard to the form and manner of printing appeal-books shall, *mutatis mutandis,* apply to printing the factum, and in cases where the factum is printed it shall be sufficient if it is prepared in the manner and form required by the rules of the Supreme Court of Canada.

"14E. The factum shall not contain irrelevant matter nor reproduce matter which appears in the appeal-book where reference to it will reasonably suffice.

"14F. If the appellant does not deposit his factum within the time prescribed by Rule 14A, the respondent, if he shall have duly filed his factum, shall be at liberty to move to dismiss the appeal.

"14G. If the respondent fails to deposit his factum within the time prescribed by Rule 14A, the appellant shall have the right to have the appeal heard *ex parte;* provided, however, that the Court may permit the respondent to file his factum within such time and on such terms and conditions as the Court may order.

"14H. In default of compliance by any party with these rules the Court may refuse to hear him or may impose such terms upon him as it may deem just.

"14I. The factum and copies first deposited with the Registrar shall be kept by him under seal, and shall not be communicated to the opposite party until the latter shall himself deposit his factum.

"14J. So soon as the factums of both parties have been deposited with the Registrar, each party shall, at the request of the other, deliver to him two copies of his factum.

"14K. The parties to the appeal or their counsel may by written consent filed with the Registrar dispense with the deposit of factums by either or both parties, or may vary the time for the deposit of factums.

"14L. The Registrar shall not accept any factum unless the requirements of these rules are substantially complied with.

"14M. Where an appeal involves matters of constitutional law or intricate questions of law or fact, the Court or a Judge may at any time at or after the hearing of the appeal and before taxation of costs order an increase in the fee provided for the factum in tariff item No. 25A in Appendix N."

And that Rule 2A of the "Court of Appeal Rules" do come into force on the 31st day of December, 1935, and that Rules 14A to 14M, inclusive, of the said "Court of Appeal Rules" do apply to all appeals heard after the close of the June sitting of the Court of Appeal at Victoria in the year 1935.

GORDON MCG. SLOAN,
Attorney-General.

Attorney-General's Department,
Victoria, B.C.

"COURT OF APPEAL ACT."

WHEREAS by Order of the Lieutenant-Governor in Council No. 723, approved on the 10th day of June, A.D. 1935, Rules 14A to 14M, inclusive, were added to the "Court of Appeal Rules, 1934," and by the said Order said Rules 14A to 14M, inclusive, were made applicable to all appeals heard after the close of the June sitting of the Court of Appeal at Victoria in the year 1935:

And whereas it is desired to postpone the application of the said Rules 14A to 14M, inclusive, until after the close of the October sitting of the Court of Appeal at Vancouver in the year 1935:

Therefore, His Honour the Lieutenant-Governor in Council has been pleased to order that, pursuant to section 2 of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and amending Acts, and pursuant to section 33 of the "Court of Appeal Act," being chapter 52 of the "Revised Statutes of British Columbia, 1924," and amending Acts, that portion of Order in Council No. 723 aforesaid making the said Rules 14A to 14M, inclusive, apply to all appeals heard after the close of the June sitting of the Court of Appeal at Victoria in the year 1935 be rescinded, and that the said Rules 14A to 14M, inclusive, do apply to all appeals heard after the close of the October sitting of the Court of Appeal at Vancouver in the year 1935.

GORDON McG. SLOAN,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., September 10th, 1935.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to sections 2 and 3 of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and amending Acts, and pursuant to section 33 of the "Court of Appeal Act," being chapter 52 of the "Revised Statutes of British Columbia, 1924," and amending Acts, "The Court of Appeal Rules, 1924," be amended by striking out Rule 11 therein, and substituting therefor the following:—

"11. The party appealing from a judgment or order shall leave with the Registrar a copy of the notice of appeal to be filed, together with a præcipe for hearing the appeal, fourteen days before the day for hearing in the case of appeals where factums are required to be deposited, and two days before the day for hearing in cases where factums are not required to be deposited or where the parties have filed a consent with the Registrar dispensing with the filing of factums pursuant to Rule 14K; and the officer shall thereupon set down the appeal to be heard, and the party appealing shall at the time of the filing of the præcipe deliver to the Registrar twelve copies of the Appeal-book, if printed, or six copies, if written, and shall forthwith thereafter deliver one copy of the Appeal-book to the other party to the appeal."

GORDON MCG. SLOAN,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., November 14th, 1935.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

REX v. SCHWARTZENHAUER.

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Jan. 17, 23.

Criminal law—Abortion—Counselling — Dying declaration—Accomplice—Corroboration—Charge—Warning to jury—Criminal Code, Secs. 69 (d), 259 (d) and 303.

On a charge of counselling or procuring a person to commit an abortion on a girl, resulting in her death, the only evidence was a dying declaration of the girl which included statements made by accused to the girl some time previous to the abortion, advising her where to go for the operation and giving her money for that purpose. On the submission that this part of the dying declaration relating to "counselling" not being part of the *res gestæ* was inadmissible, and that the declaration should be confined to the cause of death and the circumstances immediately surrounding it:—

Held (McPHILLIPS, J.A. dissenting), that it is part of the *res gestæ* as appears from a perusal of sections 69 (*d*), 259 (*d*) and 303 of the Criminal Code. "Counselling" was in part the cause of death and in the true sense associated with it and part of the event. By law "counselling" leading to death creates a criminal offence and is necessarily included in the circumstances surrounding it.

The charge to the jury as to convicting on the uncorroborated evidence of the deceased girl who was an accomplice recited "it may be that you may say to yourselves if there ever was a case where a jury, having the power to convict, ought to convict, this is the case. It is within your

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power to do it, keeping in mind everything I have tried to say to you. If keeping all those things in mind, the dangers, and the law as I have tried to give it to you, you say 'Well, I have thought this over carefully, the judge has told us we can do it if we see fit to do it. He has warned us of the danger, and warned us we ought not to do it, still we think in this case if there ever was a case we ought to convict.' If you feel that way, gentlemen, then it is your duty to convict, but be very, very careful." On objection to the phrase "then it is your duty to convict":—

Held (MCPHILLIPS, J.A. dissenting), that it must be read in the light of the context and it is not misdirection to tell a jury that if they go through the mental progress outlined based upon a proper charge, they are, notwithstanding proper warnings, absolutely convinced of the guilt of the accused, that in such an event it would be their duty to convict.

APPEAL by defendant from his conviction by MCDONALD, J. at Vernon on the 9th of November, 1934, on a charge that he did counsel or procure one Grietje Sundquest to commit an indictable offence, namely to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva, which offence the said Grietje Sundquest did commit and did thereby kill the said Veronica Kuva.

The appeal was argued at Victoria on the 17th of January, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

van Roggen, for appellant: Accused was convicted of manslaughter. The charge was that he did counsel or procure one to commit an abortion. The only evidence is the dying declarations of the girl Veronica Kuva. The circumstances of all transactions resulting in death should be allowed in but that is all. The words "Mrs. Sundquest procured an abortion on me by means of an instrument" sums up all the admissible evidence in the dying declarations: see *Rex* v. *Louie* (1903), 10 B.C. 1. "Counsel" is a necessary ingredient and evidence as to this in the dying declaration is not admissible: see Phipson on Evidence, 7th Ed., 308. Dying declarations are restricted to the cause of death and the circumstances immediately surrounding same and is strictly confined to that. This is a "previous transaction" and is not admissible: see *Ashton's Case* (1837), 2 Lewin, C.C. 147; *Rex* v. *Mead* (1824), 2 B. & C. 605. Accused

never saw the girl after September 10th, 1934, the operation was on September 15th, and the dying declaration was on October 4th, 1934: see *Reg.* v. *Hind* (1860), Bell, C.C. 253. The words "Carl handed me $20 and told me to go and see Mrs. Sundquest" in the dying declaration are not admissible: see *Rex* v. *Laurin (No. 1)* (1902), 5 Can. C.C. 324. "Counsel" cannot be proved by a dying declaration: see *Reg.* v. *Newton and Carpenter* (1859), 1 F. & F. 641; *Rex* v. *Christie,* [1914] A.C. 545 at p. 548; *Reg.* v. *Bedingfield* (1879), 14 Cox, C.C. 341 He cannot be included in the *res gestæ* unless present when the crime was committed: see *State* v. *Graham* (1923), 117 S.E. 699 at pp. 700-1. The evidence of the girl was that of an accomplice and there was no corroboration. There was misdirection in the charge to the jury on this question: see *Gouin* v. *Regem* (1926), S.C.R. 539 at p. 541; *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22; *Vigeant* v. *Regem,* [1930] S.C.R. 396 at p. 399; *Boulianne* v. *Regem* (1931), S.C.R. 621.

Kelley, K.C., for the Crown, was not called upon.

Cur. adv. vult.

23rd January, 1935.

MARTIN, J.A.: At the Vernon Assizes, last November, *coram* MCDONALD, J., the appellant was convicted of manslaughter, on a charge of murder for having caused the death of Veronica Kuva by counselling or procuring Grietje Sundquest unlawfully to use instruments upon her between the 29th of August and 16th of September last with the intent to procure her miscarriage contrary to the combined effect of sections 259 (*d*), 303, and 69 of the Code.

Many grounds of appeal are set out in the notice, but upon opening his case the appellant's counsel informed us that he abandoned his notice of motion for leave to appeal "on grounds of fact or mixed law and fact" as therein set out, and confined his grounds to two only, *viz.,* first: that the dying declaration was objected to, and for this reason only, because it contained statements which were for the greater part inadmissible, though without them the charge failed; and, second, that there was misdirection respecting the evidence of the deceased as being an accomplice.

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It should here be noted (as in *Rex* v. *Starkie* (1922), 2 K.B. 275, 279) that after the argument had proceeded for some time, the form of the indictment came to our attention, though no objection had been raised to it either below or in argument here, or in the notice of appeal, and thereupon *ex abundanti cautela,* we asked appellant's counsel if he wished to raise any objection to it, but he said he did not because under the circumstances it amounted to one of murder if the said declaration had been properly admitted in evidence—*Cf. Vigeant* v. *Regem* (1930), S.C.R. 396, 401. It should be observed that it was specially necessary to ascertain the exact grounds of appeal because owing to their restriction the appeal book is unusually, though properly curtailed, and none of the evidence is before us except that contained in the said declaration.

Coming then to the first ground, the statements objected to in the said declaration (which consists of three statements, the first one including and affirming a prior one of the same day made to the deceased's mother on the 3rd and 4th of October, and the last being made *in extremis*) are, as counsel put it, those which relate to "previous or subsequent transactions," apart from those which "prove the cause and the circumstances of the transaction resulting in death." It is difficult to apply this indefinite objection to the facts of this case or to understand what is meant by "transactions" but as appellant's counsel applies it (and as he was good enough to indicate in my copy of the appeal book for greater particularity, which is filed for reference) it would exclude all her statements concerning events prior to the 29th of August, 1934, but would include her bare statement that on that day Mrs. Sundquest "laid me down and used a glass pump to bring on a miscarriage"; and that the same thing was done for the second time on the 2nd of September; and for the third time on the 5th of September; and for the fourth time on the 13th of September; and for the fifth time on the 14th; and for the sixth time on the 16th; and for the seventh time on the 16th when

she used the button hook and said she was sorry she worked on me as she had a hard time to get it away and around 3 o'clock September 16th the baby came away. Mrs. Sundquest described its size to me and said it could not of been more than six or seven weeks old.

It is conceded that the following statements were admissible, *viz.*: that on the first occasion she

told Mrs. Sundquest, "My boy friend had sent me." She mixed up some soap and something in a small bottle and put [it] in a glass pump which she put inside me. . . . I remained in the house one hour.

But it is submitted that the statements of the following kind are inadmissible, *viz.*: all her statements of her sexual relations and connections with the accused; or that he was the cause of her pregnancy; or had told her to go from her home at Grand Forks to Mrs. Sundquest at Greenwood, on all of said occasions, and submit herself to that person's operations "to get rid of the baby," after the accused had ineffectually "given her lots of pills and made me take them" to get rid of it when she discovered and told him she was pregnant by him, after her last period on 28th June; or that he had given her money to pay Mrs. Sundquest and taken her to Greenwood repeatedly for that purpose, or given her directions, and stage fare, how to get there unobserved by stage, under promise of marriage later on "if [she] got rid of it"; and it was finally submitted, in general, that all such and other statements respecting matters of any kind (miscalled in the notice of appeal, and treated in argument as detached, "previous or subsequent transactions") which had occurred at any time, however short or long before the first and after the last operation, were inadmissible and should have been excluded.

The only authorities that were cited, in support, even ostensibly, of such a sweeping submission were *Rex* v. *Laurin* (*No. 1*) (1902), 5 Can. C.C. 324, and *Reg.* v. *Horsford,* referred to in *Reg.* v. *Rowland* (1898), 62 J.P. 459. As to the former, upon close examination it is against the submission, for Mr. Justice Wurtele came, after some general expressions, to the right conclusion, saying (p. 326):

The gist of these authorities is: that dying declarations may mention all the circumstances which led to the death, but must not go beyond them.

As to *Horsford's* case, on which appellant's counsel particularly relied, if the very meagre and incomplete report of it is correct (which obviously, I think, is not the case) it is contrary to law, and without any weight because the whole decision in *Rowland's* case, in which it was cited by Hawkins, J. as a precedent of his own in support of a certain unsound view he expressed on *Lillyman's* case, [1896] 2 Q.B. 167; 60 J.J. 536 has been swept away by the decision of the Court of Criminal Appeal in *Rex* v. *Osborne,* [1905] 1 K.B. 551, as pointed out in

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Russell on Crimes, 8th Ed., Vol. I. 905, note (*i*) and Phipson on Evidence, 7th Ed., 111, wherein it is said to be "not now law," so therefore it does not merit further consideration, being, indeed, one of those only too numerous loose and unsatisfactory illustrations which do not expound but confound the criminal law—*Cf.* our decision in *Rex* v. *Louie* (1903), 10 B.C. 1, 9: followed in *Rex* v. *Magyar* (1906), 12 Can. C.C. 114.

Numerous cases, however, both ancient and modern, to the contrary are readily found, *e.g., Rex* v. *Reason* (1722), 1 Str. 499; and *Rex* v. *Tinckler** (1781), 1 East, P.C. 354; 1 Den. C.C. v-vii, wherein Nares, J. admitted a long and repeated statement of the "transaction," covering a period of about two weeks, and its circumstances leading up to the death of the woman by the accused resulting from the insertion of pieces of wood into her womb after she had gone to the accused, at the instigation of the man who had got her with child, in order to get rid of it, and on the opinion of all the judges being taken in, Michaelmas Term, 1781, his judgment was unanimously upheld on that very question, as pointed out by that great criminal judge, Mr. Justice Stephen, in *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537 at 543.

Regina v. *Murton* (1862), 3 F. & F. 492, 495-6, wherein the statements were admitted, made to two separate witnesses, the tenth day after the assault upon her by her husband that "that wicked man has caused my death" and added that her being turned out of her house was the cause of it; and also "that wicked man has broken my heart."

Regina v. *Sparham et al.* (1875), 25 U.C.C.P. 143, a case of the same nature as the present one, wherein it was unanimously held, *in banco,* that two statements in narrative and "lengthy" (144) forms connecting both accused with the whole transaction respecting medicines and operations up to the time of the death. It is worthy of note that the Court, at p. 155, said, in answer to the objection at p. 149:

> The deceased gave very full details of a course of treatment both by medicines and mechanical means, to procure, as she says, a miscarriage; and she attributes her death to both.

*Note.—*Cf.* Lord Dennison's correcting note in 1 Den. C.C. v-vii on this leading case respecting new trials under the old system, and Mr. C. E. Greave's note on the same point in, also, 13 East 416 (*b*), in Taschereau's Criminal Code, 2nd Ed. (1888), 1015-6.

The substantial question for trial was, whether the prisoners caused the death by all or any of these unlawful means.

We think it quite unimportant that the deceased may have attributed her death to both medicines and mechanical means, when in truth it may have been only the latter means that produced the fatal result.

In *Rex* v. *Inkster* (1915), 8 Sask. L.R. 233, for manslaughter, under section 303, a statement covering sexual relations and their consequences, for a period of over three months ending in the death of the declarant from medicine given to her by the man who had got her with child, was unanimously admitted on the first count for manslaughter, though it was rejected on the 2nd and 3rd counts, which were not for homicide, and to which it had been improperly applied as well as properly to the first count.

In *Rex* v. *Perry* (1909), 2 Cr. App. R. 267, the Court of Appeal admitted a statement containing particulars of an operation performed a week before even though it was inconsistent with a final statement made about one and one-half hours later; and see also *Reg.* v. *Goddard* (1882), 15 Cox, C.C. 7, and *Rex* v. *Cowle* (1907), 71 J.P. 152, wherein, despite the deceased's expression of a hostile wish, her statement was admitted.

In *Edwards* v. *State* (1925), 204 N.W. 780, an instructive case, the Supreme Court of Nebraska followed (p. 783) our decision in *Rex* v. *Louie, supra,* and admitted a long statement containing a narrative of events covering about two and one-half months similar to, but wider in scope than, the present one, the Court saying, p. 782:

> In homicide cases it seems that the rule has long prevailed that the strict rules which are ordinarily applicable to the admission in evidence of the spoken word do not always apply with the same strictness to dying declarations. . . .

and, p. 783, that the "violation of some technical rule" would not preclude admission. This is doubtless an inevitable concession to the rapidly ebbing physical and mental powers of a dying person, but as was recently pointed out in *Chapdelaine* v. *Regem,* [1935] S.C.R. 53, by the Chief Justice of Canada at p. 58:

> . . . a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

The appellant's counsel went to the length of submitting that even though certain parts of the declaration were in favour of the accused they could not be admitted because they preceded the date of the seventh and at last successful, attempt made upon

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her person to bring about the abortion. It is only necessary to say that not only was no case cited to support such a submission, but it is contrary to the practice existing for over two centuries at least, as is shewn, *e.g.*, by *Rex* v. *Reason* (1722), 1 Str. 499, 501-2; *Oneby's* case (1744) cited in *Omychund* v. *Barker* (1744), 1 Atk. 21 at 38; *Rex* v. *Scaife* (1836), 1 M. & Rob. 551; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 450; *Reg.* v. *Murton, supra,* at p. 500; and no less an authority than the Supreme Court of the United States as decided in *Mattox* v. *United States* (1892), 146 U.S. 140, at 151, that

> Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favour of the defendant as well as against him.

And it is well said in Wigmore on Evidence, Vol. 2 (Can. Ed. 1905), sec. 1452:

> Owing to the present peculiar limitation of this evidence to public prosecutions for homicide, and the tenor of the declarations usually made by the dying person, it has sometimes been argued that the declarations cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated.

That author is entirely in accord with the opinion of that very eminent authority, the late Mr. C. S. Greaves, Q.C., who is thus cited in Russell on Crimes, *supra,* Vol. II., p. 1931, note (*a*):

> The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed, almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *prima facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true; as it is not probable that a person should make a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary.

In the present case the learned judge properly pointed out to the jury certain portions of the evidence because he correctly thought they would help the accused, and after the accused without objection thus took at his trial the very considerable benefit of that evidence and direction he cannot now be permitted to repudiate it—*Cf. Rex* v. *Boak,* [1925] S.C.R. 525, 530; *Rex* v. *Collins* (1917), 13 Cr. App. R. 6; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, 108, 127-8; and *Rex* v. *Evans* (1934), 48 B.C. 223, 230.

Considering, then, the present charge respecting the admission of these declarations, I see nothing of substance that is objectionable or that has occasioned any substantial wrong or miscarriage of justice entitling the appellant to a new trial. It was a difficult, indeed practically an impossible thing to segregate the various statements, some of them merely matters of inducement, and others though irrelevant quite innocuous, without confusing or misleading the jury, and so he left it to them in a way that adequately met the unusual circumstances of the case.

There remains the ground of misdirection, which is based only upon the assumption that the deceased was an accomplice, and she was so treated below, but in my opinion that is a wrong assumption and contrary to law as laid down by *Tinckler's* case, *supra,* which is clear on this point, and is a decision by a majority of all the judges (at Serjeant's Inn on the 1st day of Michaelmas Term on a case reserved) affirming the judgment of Nares, J., p. 355, that

> the deceased was not willingly or knowingly an accessary to her own death; and therefore it was like the common case of any other murder.

And the report proceeds, p. 356:

> Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis;* as she considered herself to be dying at the time, and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of the confirmatory evidence.

And it is to be observed that in Lord Denman's note in 1 Den. C.C. vii, *supra,* it is said: "The judges were unanimously of opinion that the conviction is right" which judgment could not have been pronounced if "confirmation" of the deceased's declaration had been necessary. This decision has never been questioned to my knowledge after a very diligent search, nor was it even suggested in any of the cases cited herein that the "victim" (as the deceased herein with her prolonged and harrowing sufferings assuredly was) of the operation was an accomplice, except in *Perry's* case, *supra,* at p. 269, but the Court apparently disregarded the objection entirely—*Cf.* also *Rex.* v. *Crocker* (1922), 17 Cr. App. R. 46, 48; *Rex* v. *Hargrave* (1831), 5 Car. & P. 170; *Rex* v. *George* (1934), 49 B.C. 345, 364; *Rex* v. *King* (1914), 10 Cr. App. R. 117; *Rex* v. *Pickford* (1914),

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ib. 269; and, as to "attempts [for connection] . . . on a whole series of occasions" extending over four years, as distinguished from "isolated incidents," *Rex* v. *Hewitt* (1925), 28 Cox, C.C. 101, 103.

The result, therefore, is that in my opinion the charge herein, viewed as it ought to be as a whole, was not only not prejudicial to the appellant but too favourable to him and I so would overrule this ground of appeal also, because the cases cited on the proper direction respecting the evidence of accomplices do not apply to the deceased, and that was the sole ground of objection for misdirection. As a whole the charge comes within the language very recently employed by the Supreme Court in *McLean* v. *Regem,* [1933] S.C.R. 688, at 693-4 and 690; and also within, *e.g., Murton's* case, *supra,* p. 501; and *Rex* v. *Laurin* (1920), 36 Can. C.C. 28, at 31-2.

In conclusion I only add that the fact that the accused "did not avail himself of the opportunity that the law affords him of going into the witness-box" (*Reg.* v. *Woods* (1897), 5 B.C. 585, 589) has always been a circumstance that the Courts of Criminal Appeal of this Province have properly taken into consideration in deciding the final, and now, indeed, paramount question (since 1923, section 1014, subsection 2) as to whether or no a "substantial wrong or miscarriage of justice has actually occurred" so as to entitle the appellant to a new trial.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.: In my opinion the conviction herein must be quashed. Without the dying declaration there is no evidence upon which the jury could found their verdict and my view is that the dying declaration is inadmissible in law. The reasons as I see them for its non-admission are the following:

It is by no means clear that Veronica Kuva made the declaration when in extremity and at the point of death. It is made upon questions and answers and refers to a long narrative of events extending over a long time extracted from her by her mother which cannot be said to have been made when in extremity, and I would refer to what Eyre, C.B., said, in *Woodcock's Case* (1789), 1 Leach, C.C. 500 approved in *Rex* v. *Perry*

(1909), 2 K.B. 697, 701; 78 L.J.K.B. 1034. As it has been stated,—

> There must be an expectation of impending and almost immediate death, from the causes then operating. The authorities shew that there must be no hope whatever:

Reg. v. *Jenkins* (1869), L.R. 1 C.C. 187 at p. 193; 38 L.J.M.C. 82; 11 Cox, C.C. 250. We have Byles, J., "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious care"; and see *Reg.* v. *Brooks* (1843), 1 Cox, C.C. 6; *Reg.* v. *Dalmas* (1844), *ib.* 95; *Reg.* v. *Peel* (1860), 2 F. & F. 21; *Reg.* v. *Mooney* (1851), 5 Cox, C.C. 318; *Reg.* v. *Nicolas* (1852), 6 Cox, C.C. 120. Now it was not shewn by the prosecution that the deceased when she made the statements was under the impression that death was impending and she believed that she then was at the point of death—*Reg.* v. *Forester* (1866), 4 F. & F. 857; 10 Cox, C.C. 368; *Reg.* v. *Smith* (1887), 16 Cox, C.C. 170; *Reg.* v. *Mitchell* (1892), 17 Cox, C.C. 503; *Reg.* v. *Whitmarsh* (1898), 62 J.P. 680, 711; *Reg.* v. *Perry, supra.* It is to be noted that in Archbold's Criminal Pleading, Evidence & Practice, 29th Ed., 379-80, this is said:

> So upon an indictment for administering savin or using instruments to procure abortion, or for using instruments with intent to procure miscarriage, the woman's dying declarations are not admissible, though they relate to the cause of her death. *Rex* v. *Hutchinson* [(1822)], 2 B. & C. 608 (n.); *Reg.* v. *Hind* [(1860)], Bell, C.C. 253; 29 L.J.M.C. 147; 8 Cox, C.C. 300.

It is to be noted that this question was put to Veronica Kuva and is set forth in the dying declaration:

> What is your sickness? In getting rid of the baby.

It is further to be noted that Veronica Kuva was actuated with a desire for revenge upon the appellant in the last words of the long narrative extracted from her by her mother wherein she says "I wish Carl punished"—no doubt induced to say this by her mother—an unlikely statement emanating from one who really believed she was at the point of death. The law would seem to be somewhat unsettled upon the question of the form of the dying declaration and here certainly the appellant was prejudiced by the introduction of the dying declaration incorporating all that was written down by the mother and not in the actual words of the deceased. Upon this point I would refer to Archbold, *supra.* At p. 381 we find this:

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It was formerly held to be no objection against a declaration which had been reduced into writing that it was made in answer to questions put to the deceased, and was not a continuous statement made by him, *Rex* v. *Fagent* [(1835)], 7 Car. & P. 238, nor, apparently, that it was made in answer to leading questions. *Reg.* v. *Smith* [(1865)], L. & C. 607; 34 L.J.M.C. 153; 10 Cox, C.C. 82. In *Reg.* v. *Mitchell* [(1892)], 17 Cox, C.C. 503, Cave, J. held that a statement which had been reduced into writing must, to be admissible as a dying declaration, be in the actual words of the deceased, and if questions are put the questions and answers must both be given. But in *Rex* v. *Bottomley* (1903), 38 L.J. Newsp. 311; 115 L.T. Jo. 88, Lawrance, J., ruled that a dying deposition in the form of question and answer was admissible, although the answers only and not the questions had been taken down. In *Rex* v. *Corbett* (1903), Queensland St. Rep. 246, Griffith, C.J., said that *Reg.* v. *Mitchell* unsettled what had before been the law, and followed *Reg.* v. *Smith*, saying, further, that it was not essential that a dying declaration should be proved by writing. In *Reg.* v. *Mann* [(1885)], 49 J.P. 743, Denman, J., is reported to have held that a statement, although not admissible as a deposition or a dying declaration, was admissible as a statement made by the deceased in the presence of the prisoner; but in *Reg.* v. *Mitchell* (*supra*), Cave, J., expressly dissented from *Reg.* v. *Mann* (*supra*), saying that he thought Denman, J., must have been misreported.

If it could be said successfully that the dying declaration is receivable in evidence all reference to counselling should be excluded from the declaration: see *Reg.* v. *Horsford* referred to in *Reg.* v. *Rowland* (1898), 62 J.P. 459. Further, admittedly it is the evidence of an accomplice and, whilst it may well be said that the learned trial judge did give at first the proper warning to the jury, he, with great respect, went on and said this, which, to my mind, constituted a fatal error:

> If keeping all those things in mind, the dangers, and the law as I have tried to give it to you, you say "Well, I have thought this over carefully, the judge has told us we can do it if we see fit to do it. He has warned us of the danger, and warned us we ought not to do it, still we think in this case if there ever was a case we ought to convict." If you feel that way, gentlemen, then it is your duty to convict, but be very very careful.

This amounted to a direction to the jury that if they believed the evidence of the accomplice although uncorroborated it was their duty to convict the appellant. This course of action on the part of the trial judge was in effect to render nugatory the safeguard of the law, that is, he in the end failed to give the proper warning to the jury as to the danger of convicting on the evidence of the accomplice without corroboration in a material particular implicating the appellant. That being the case the conviction should be quashed—*Rex* v. *Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 1 Cr. App. R. 39; *Rex* v. *Basker-*

ville, [1916] 2 K.B. 658; 12 Cr. App. R. 81; *Rex* v. *Charavanmuttu* (1930), 22 Cr. App. R. 1.

I would allow the appeal.

MACDONALD, J.A.: The accused indicted for murder was convicted of manslaughter, the charge being:

> That he did . . . counsel or procure a certain person, to wit, Grietje Sundquest, to commit an indictable offence, namely, to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva which offence the said Grietje Sundquest did commit and did thereby kill and slay the said Veronica Kuva against the form of the statute, etc.

As Veronica Kuva was an accomplice it was submitted that the learned trial judge in his charge (to quote from the notice of appeal) "although warning the jury of the danger of convicting the appellant on the uncorroborated evidence of an accomplice, erred in further instructing the jury, that if they believed the accomplice's evidence, although not corroborated, it was their duty to convict the appellant, and that the learned judge should have refrained from giving such advice to the jury." That, however, is not a fair summary of the charge on this point. The uncorroborated evidence, in respect to which the usual warning should have been (and I think was) given is contained in the dying declaration of Veronica Kuva.

A perusal of *Rex* v. *Baskerville* (1916), 2 K.B. 658; *Gouin* v. *Regem,* [1926] S.C.R. 539; and *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22, discloses the elements of a proper charge on this question; although what may, in some respects be regarded as a new element (as will presently appear) is introduced into the charge now under consideration, not considered in the cases referred to. It has long been a rule of practice now virtually equivalent to a rule of law as pointed out by Lord Reading, C.J. at p. 663 in *Rex* v. *Baskerville,* that the judge should warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice. In his discretion the trial judge may advise against convicting on such evidence; he should also say that it is within their power to do so. In *Rex* v. *Beebe, supra,* a case arising out of an abortion, Lord Hewart, C.J. interprets the judgment in *Baskerville's* case, and is quoted with approval by Rinfret, J., at p. 542, in *Gouin* v. *Regem, supra.* Lord Hewart

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states that it is a rule of universal application and must be generally observed. A warning of the danger of convicting is a duty and the trial judge may in his discretion advise them not to convict. He adds at p. 26:

> It is quite clear when one looks at that enumeration of the various courses that nowhere is to be found direct or indirectly any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict.

It is wrongly attempted to apply this language (*viz.*, that in no case may the judge tell the jury that they ought to convict) to the charge herein. In my view it has no application to the situation placed before the jury in a conjectural way in the case at Bar.

After discussing the cases I have referred to, the trial judge said to the jury (and the extracts I quote are not qualified by other expressions elsewhere in the charge):

> There is no law which says a jury cannot convict in a case such as we have today without any corroboration whatever, but what the judge must tell the jury is this, you may convict if you see fit. You can. It is within your power, but you *must not* unless you feel *absolutely sure in your own conscience* [the italics are mine] that the accused is guilty.

At an earlier stage after using an illustration he said:

> The books lay it down that a jury ought not to convict on the evidence of an accomplice unless that evidence is corroborated by some other evidence implicating the accused.

Later in the charge, he said:

> . . . it may be, having in mind everything that I have said, I am not suggesting whether you should or not—it is for you to do one way or the other as you see fit—it may be that you may say to yourselves if there ever was a case where a jury, having the power to convict, ought to convict, this is that case. It is within your power to do it, keeping in mind everything I have tried to say to you. If keeping all those things in mind, the dangers, and the law as I have tried to give it to you, you say "Well, I have thought this over carefully, the judge has told us we can do it if we see fit to do it. He has warned us of the danger, and warned us we ought not to do it, still we think in this case if there ever was a case we ought to convict." If you feel that way, gentlemen, then it is your duty to convict, but be very very careful.

As already foreshadowed, objection is taken to the phrase "then it is your duty to convict" at the end of the extract. That must be interpreted in the light of the context. It will be observed that the learned trial judge is indicating to the jury a process of mental reasoning which might properly be used by them in their deliberations leading them finally to the conclusion that it would be their duty to convict. That mode of reasoning

he is careful to point out should only be followed after "keeping all those things in mind" which he previously referred to, *viz.*, "the dangers and the law as I have tried to give it to you," including the statement that they "must not [convict] unless you feel absolutely sure in your own conscience," and the further *sine qua non* to this supposititious method of reaching a conclusion, *viz.*, that they should remember that he "warned us we ought not to do it." The trial judge then in effect tells them that if they should use this method of logic in the jury room and successfully surmount all the hurdles mentioned, erected for the protection of the accused, and finally reach the conclusion that "if ever there was a case we ought to convict it is this case," then clearly it is the jury's duty to convict and it is not error to say so. All objection, in my view, disappears when, it is put to the jury, as a possible mode of reasoning on their part. While the question in this form was not considered in the cases referred to the trial judge in principle at all events is within one of the rules laid down, *viz.*, that the judge in all cases "should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence" (*Rex* v. *Baskerville, supra,* p. 663). It may be stated another way. It is not misdirection to tell a jury that if after they go through the mental process outlined based upon a proper charge (in which so far as that stage of the case is concerned they were not told that it was their duty to convict) they are notwithstanding proper warnings absolutely convinced of the guilt of the accused—that in such an event it would be their duty to convict. That, of course, is what an honest jury at the end of that mental process ought to do. It would be their duty to convict and it cannot be misdirection to advise them to do their duty. While, therefore, I do not necessarily commend this form of address it is impossible to say that error in law is disclosed. Indeed, it is rather startling to suggest that it is misdirection to tell a jury absolutely convinced of guilt (and having the right to convict) that it is their duty to record their conviction. It is, in reality, a superfluous observation and legal principles are not violated by an act of superrogation. I have no doubt also that in the absence of any explanation the jury were convinced beyond doubt of the truth of the

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statements contained in the dying declaration of this eighteen-year-old girl.

The further point was raised that parts of a dying declaration made by Veronica Kuva properly within the rule in other aspects was inadmissible in so far as it referred to "counselling" on the part of the accused. Such phrases in the dying declaration as "he [the accused] gave me $20 to give to Mrs. Sundquest to get rid of the baby," and "he told me to go to Greenwood to Mrs. Sundquest or to Dr. W. to get rid of it," and "he took Mrs. G. and I up to Greenwood in his car" and "handed me $20 to give to Mrs. Sundquest," also he "told me if this wasn't enough he would give me more later to give her," were, it was submitted, not properly admissible as part of the declaration. Following the "counselling" referred to an attempt to bring about a miscarriage was made by Mrs. Sundquest. About a week later the accused took her again to the same place in Greenwood for further treatment. The third and last visits, also at the suggestion of the accused, and after which death ensued, were some days later.

The submission that this part of the dying declaration relating to "counselling" is not admissible is wholly untenable. It is part of the *res* as appears from a perusal of sections 303, 259 (*d*) and 69 (*d*) of the Code. The latter section provides that "Everyone is a party to and guilty of an offence who (*d*) counsels or procures any person to commit the offence." The submission is that "counselling" was not part of the *res gestæ* because it took place some time before the act of abortion resulting in death; also that the declaration should be confined to the cause of death and the circumstances immediately surrounding it. The fact is that "counselling" was, in part, the cause of death and in a true sense associated with it—part of the one event. It is not irrelevant on the alleged ground that it relates to a prior transaction. It is true that "counselling" is only established by the dying declaration and if Mr. *van Roggen's* view is right, *viz.*, that this part of the declaration should be rejected, the conviction must be quashed. I can conceive, however, of no rational ground for this submission. The death of the declarant was the subject of the inquiry and the actual circumstances of the death (includ-

ing the counselling) were the subject of the declaration. The appellant falls into error in assuming that the illegal operation only and the circumstances immediately surrounding that isolated act could be included in the statement. If that is so the accused would not be convicted at all although by law "counselling" leading to death creates a criminal offence and is necessarily included in the circumstances surrounding it. He referred to *Rex* v. *Laurin (No. 1)* (1902), 5 Can. C.C. 324, to shew that the dying declaration must be restricted to the transaction from which death ensued and may include "all facts immediately connected therewith." The word "immediately" does not refer to point of time or indicate that the two events, *viz.*, "counselling" and "the death" must synchronize or take place as successive events closely connected in time. It is the "connection therewith" that must be "immediate." Wurtele, J., at p. 326, rightly states that "any circumstances which occurred before or after and which are independent to that transaction itself must be excluded" but the "counselling" is not an independent act.

Mr. *van Roggen* relied on a case briefly referred to in the report of *Reg.* v. *Rowland* (1898), 62 J.P. 459, *viz.*, *Reg.* v. *Horsford,* where it is stated without disclosing all the facts that:

> In a recent case, *Reg.* v. *Horsford*, tried before him at Huntingdon assizes, the question arose as to the admissibility of the following statement as a dying declaration, "I have taken poison, H. sent it to me." The question arose as to whether the statement formed part of the *res gestæ*, but the poison having been sent some little time previously, it was obviously not part of the *res gestæ*. The difficulty was, however, got over by admitting the former part and rejecting the latter. Had, however, the words, "I have taken poison" been used to support a defence of suicide the whole statement would have become admissible to rebut that defence. The whole question of "dividing statements" had been carefully considered by him, and the result at which he had arrived was an important development of what was decided in *Reg.* v. *Lillyman* [(1862), 2 Q.B. 167; 60 J.P. 536].

The "counselling" is contained in the statement "H. sent it to me" and presumably it was rejected as part of a dying declaration. It may be that the evidence disclosed that "H. sent it to me" for a perfectly legitimate purpose and if so it would be immaterial and innocuous. If, however, it is, as contended, an authority for appellant's submission in the case at Bar, it is not good law. The "counselling" we are concerned with was part of a prearranged plan in pursuit of an unlawful object leading to the death of a young girl.

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Objection was taken to other portions of the declaration as containing irrelevant references, but not seriously pressed. Even if meritorious the accused was not prejudiced nor did substantial wrong ensue.

I would dismiss the appeal.

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

Appeal dismissed, McPhillips, J.A. dissenting.

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HALL v. WEST COAST CHARCOAL AND WOOD PRODUCTS COMPANY LIMITED.

Negligence—Contributory negligence—Night driving—Truck left on highway—Distracting head-lights of third car—Finding of jury—Appeal.

About 5.30 p.m. on the 21st of December, when P. was driving the defendant's motor-truck with a load north-westerly on Pacific Highway, having a flat tyre he stopped on the right edge of the paved portion of the road which was eighteen feet wide. There was about six feet of solid ground to the right of the paved portion of the road and a slightly used cross-road about 30 yards beyond where he stopped. P., leaving the lights on, then hailed a passing car and went to the nearest garage about one mile away. He returned with a wrecking car, fixed the tyre and then went back to the garage with the wrecking car to telephone for funds. Shortly after P. left the car the plaintiff, driving his car north-westerly on Pacific Highway, ran into the rear of the truck. As he was nearing the truck another car was passing it in the opposite direction with its head-lights facing the plaintiff. In an action for damages a jury found the defendant guilty of negligence in leaving the car unattended and not moving the car from the paved portion of the road, and that the plaintiff was not negligent.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the jury properly found the defendant guilty of negligence and that owing to the beam of light thrown by a third car there was enough evidence to support the jury's finding that the plaintiff was not guilty of negligence.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. and the verdict of a jury in an action for damages resulting from a collision between the plaintiff's Ford coupe and the

defendant's motor-truck. At about 5.30 in the evening of the 21st of December, 1933, one Peters was driving the defendant's motor-truck with a load of charcoal north-westerly on Pacific Highway, and when nearing Frost Road he suddenly found he had a flat tyre. The paved portion of the road was 18 feet wide and he turned into the edge of the road, but not off it. He then hailed a car going by and was driven to the nearest garage about one mile away. He then came back with the garage man in a wrecking-car, and on the tyre being fixed they put on the lights and left the truck there, going back to the garage as Peters had to telephone for funds. The plaintiff driving his car north-westerly on Pacific Highway drove into the back of the truck, claiming there were no lights and he did not see the truck until it was too late to stop. As he neared the truck another car going in the opposite direction passed the truck with its head-lights facing the plaintiff. The jury found the defendant guilty of negligence in leaving his car unattended and making no effort to remove the car from the pavement of the highway, and that the plaintiff was not guilty of negligence. The jury assessed special damages at $650 and general damages at $1,500.

The appeal was argued at Victoria on the 30th of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bull, K.C., for appellant: The accident was at about 6 o'clock. It was dark but not misty. There is no question that the lights of the truck were on. The lights of a car going in the opposite direction may have had some effect on the plaintiff, but he should have slowed down when passing the other car and should have seen the tail-light of the truck. There was negligence on his part that amounted to ultimate negligence: see *Tart* v. *G. W. Chitty & Co.*, [1933] 2 K.B. 453 at p. 459; *Baker* v. *E. Longhurst & Sons Ld.*, *ib.* 461; *Ristow* v. *Wetstein*, [1934] S.C.R. 128 at p. 131. This is a matter of law and it makes no difference whether there was a jury or not. He must have such control as to avoid any object coming on to the road: see *Anderson* v. *County of Bruce* (1922), 22 O.W.N. 534, and on appeal (1923), 23 O.W.N. 634; *Crow* v. *Brennan* (1923), 24 O.W.N. 400; *Leggo* v. *Shatford*, [1927] 2 D.L.R. 265; *Ballantine* v. *Inter-*

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national Railway Co. (1927), 61 O.L.R. 273 at p. 291. The finding against the defendant was wrong, he could not move and he left his lights on. The machine was mechanically disabled and it was impracticable to move it. The learned judge did not put the law to the jury as he should have and as shewn in the *Baker* case.

A. B. Macdonald, K.C., for respondent: The evidence is that there was no tail-light on the truck: see *Tidy* v. *Battman*, [1933] W.N. 276; *Evans* v. *Downer and Co. Limited* (1933), 149 L.T. 264 (foot-note). In this case the jury decided in the same way as the case at Bar. We have the finding of the jury and that is all that is necessary: see *Tidy* v. *Battman*, [1934] 1 K.B. 319. There was six feet of solid ground beyond the paved portion where he could have parked the car when he found he had a flat tyre, and the cross-road was within 30 yards where the truck would have been in a safe place: *Northern Electric Co. Ltd.* v. *Kelly*, [1931] 3 W.W.R. 527; *Crosbie* v. *Wilson and Langlois* (1933), 47 B.C. 384 at pp. 388-9; *Turpie* v. *Oliver*, [1925] 3 W.W.R. 687; *Ellis* v. *Zimmerman*, [1933] 1 W.W.R. 550; *Comrie* v. *Fisher* (1925), 58 O.L.R. 228. This is a highly travelled highway.

Bull, in reply: The law is laid down in the *Baker* and *Tart* cases, and *Evans* v. *Downer and Co. Limited* (1933), 149 L.T. 264 is in our favour as there is no question the tail-light was on and the plaintiff should have seen it.

Cur. adv. vult.

5th March, 1935.

MACDONALD, C.J.B.C.: I would dismiss this appeal. The case was fairly tried before a jury who heard the evidence that the plaintiff's vision was blinded by the head-lights of a car coming in the opposite direction and that he did not therefore see the truck parked on the public road. The jury heard all the evidence on both sides and I think their decision is not open to question.

MARTIN, J.A.: In this appeal from the verdict of a special jury, which found the defendant guilty of negligence in leaving its car unattended upon the paved portion of a highway, and absolved the plaintiff from negligence, a question arises upon

the application of the recent decision of the Supreme Court of Canada in *Ristow* v. *Wetstein,* [1934] S.C.R. 128, which, it is submitted, controls this case because the alleged effect of it is that the plaintiff cannot recover because he gave no reasonable explanation for having run into the defendant's car when it was stationary, and therefore (p. 132) he was "faced with the dilemma that either he was driving at an undue speed or he was not keeping an adequate look-out, unless there is some other factor causative of the collision."

Now if *Ristow's* case clearly lays down a general rule of law it is our duty to enforce it, but before coming to that conclusion it must be examined carefully to ascertain exactly what it does decide.

It is to be observed, first, that, on its facts (to which the decision must be restricted—*Quinn* v. *Leathem,* [1905] A.C. 495) it differs in a most important particular from the case at Bar because the driver of the offending motor-car had (p. 132) "run off the travelled highway and into the post without seeing it at all," whereas the present defendant's temporarily partly disabled truck, owing to a flat tyre, was admittedly left standing wholly on the paved (18 foot) portion of the highway, close to its edge, thus obstructing it to the truck's full width of at least six feet, while the driver was away at a garage a half a mile off concerning its repair.

Second, as I understand them, the observations of Mr. Justice Smith (*per curiam*) in *Ristow's* case were not intended to be a complete adoption and approval of the two cited judgments of the Divisional Court and Court of Appeal respectively in *Tart* v. *G. W. Chitty & Co.* (1931), 102 L.J.K.B. 568; [1933] 2 K.B. 453; and *Baker* v. *E. Longhurst & Sons, Ltd.* (1932), 102 L.J.K.B. 573; [1933] 2 K.B. 461 (citing *Evans* v. *Downer & Co., Ld.* (1933), at 465); 149 L.T. 264, note (*b*); but a recital of the effect of their holdings, followed by the statement of the said important and distinguishing fact of running over the highway which necessitated a direction on the "most vital part" of the evidence, which had been omitted, and therefore the said cases were to be distinguished on the facts, assuming they were properly decided, which Mr. Justice Smith did not commit himself to saying, and it was not necessary to do so; and, if I may

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be permitted to say so, it was fortunate he was cautious, because both those cases have been explained and restricted by the same Court of Appeal in *Tidy* v. *Battman* (1933), 150 L.T. 90; 103 L.J.K.B. 158 (decided on 10th October, 1933, about two and one-half months before the *Ristow* case on 22nd December, 1933, and reported in the Weekly Notes for 9th December, 1933, p. 276) wherein a lorry was left drawn across a road at night and the plaintiff's motor-cycle ran into it, and the Court unanimously held that the law had not been altered by a supposed new rule of law laid down in *Tart's* and *Baker's* cases, and that every case still stood upon its own facts, Lord Wright saying (L.T. 90-1):

> I think it is a pure question of fact. The cases which have been cited here, and which are reported in the Law Times Reports, indicate quite clearly that no one case is ever like another. I do not think that any principle of law can be extracted from those cases. I think it is very unfortunate that matters that are purely matters of fact should be confused by importing into them principles of law which I am sure very properly have been applied to helping in the decision of other cases on other sets of facts.

And Slesser, L.J. said:

> The principles of law which are laid down in such old cases as *Butterfield* v. *Forrester* ([(1809)], 11 East 60), *Tuff* v. *Warman* ([(1858)], 5 C.B.N.S. 573), and *Grayson Limited* v. *Ellerman Line Limited* (123 L.T. 65; [1920] A.C. 466) are unaffected so far as I know by any recent observations in the Court of Appeal or any other tribunal. I agree with my Lords that each of these cases must depend upon its facts, applying to those facts the principles laid down in the authorities dealing with the matter.

Though it does not refer to *Ristow's* case, the judgment of the Court of Appeal of Manitoba in *Brockie* v. *McKay*, [1934] 1 W.W.R. 725; [1934] 2 D.L.R. 690; merits attention because it notes and gives effect to the decision in *Battman's* case, and also p. 730, accepted the "interference with [the driver's] vision by the lights of [an approaching] car" as an excuse, under the circumstances for his colliding with a parked car without a tail-light: and *Cf.* also *Irvine* v. *Metropolitan Transport Co. Ltd.*, [1933] O.R. 823.

Turning, then, to the facts herein it was much pressed upon us that the jury should have found the plaintiff negligent in any event in not stopping his car in time to avoid the collision, and it was submitted that he had either not proper control of it or was not keeping a proper look-out. But his uncontradicted evidence, briefly put, was that he was proceeding in the darkness on his proper side of the road at a moderate pace, between 25-30 miles

per hour, when he saw the lights of an approaching car and thereupon slowed down to about 20 miles per hour, and just as he passed that car he was momentarily blinded by its lights so that he did not see the truck parked ahead of him on his own side without, he persists, any tail-light burning, with the result that when it suddenly loomed up in front of him he had no time to avoid crashing into it though he applied his brake immediately upon seeing it. This question of temporary blinding by lights and negligent action arising, or not, therefrom is not a matter of law but of fact for the jury under all the circumstances of each particular case—*Northern Electric Co., Ltd.* v. *Kelly,* [1931] 3 W.W.R. 527; *Beardsley* v. *Clark* (1932), 40 Man. L.R. 449; and *Brockie's* case, *supra,* and herein there was evidence which entitled the jury to take the view they did that the plaintiff was blinded at the crucial moment, and therefore should be absolved from negligence.

It would, to my mind, have been better and more satisfactory under the circumstances if the jury had been specially instructed to answer a question as to whether or no the tail-light was burning properly at the time of the collision (*i.e.,* brightly, or dimly, or at all) because there is room for some uncertainty on that important contested point, and in answering the said second question—that "defendant left car unattended," etc.—it is not quite clear to me whether the jury took the view that the "unattendance" was culpable partly or wholly because no light was properly burning, or culpable even if it was.

Now the verdict must be considered in the light of the evidence and upon the charge, which was not objected to, and after a careful review thereof it would, in my opinion, be open (if not indeed necessary) to the jury to consider the particular question of the tail-light in connexion with the general question of unattendance, which in its larger and proper aspect included all the facts which would make it culpable to have the truck unattended at the time of night and in the position it occupied on a main highway; and it is strange that this important fact of the light, though referred to disjointedly several times in the charge, was not given that prominence or co-relation which it should have received for the full elucidation of the case, but no objection has been taken to the charge on this point. So if the

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jury did so consider the tail-light, and I think they must and should have, there is ample evidence to justify the conclusion, involved in said general question, that it was not burning in, at least, a proper way, if at all, and if that be the case, and to that be joined the further finding that the defendant "made no effort to remove the car from pavement or highway" (though the evidence is more than ample that this could easily and safely have been done), then, however the evidence might be regarded otherwise, no good reason exists for disturbing the verdict, and therefore the appeal should be dismissed.

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

MACDONALD, J.A.: Appeal by defendant from the verdict of a jury awarding respondent $2,150 damages for injuries sustained by him when his motor-car ran into appellant's stationary truck, illegally parked on the pavement of the Pacific Highway near New Westminster. The collision occurred about 6 p.m. December 21st, 1933; it was "pitch dark."

The truck-driver, carrying about two tons of coal, was compelled to stop by a puncture in a rear tyre. He left his truck unattended on the paved roadway (18 feet in width) with the outer wheels a foot and a half from the edge and walked to a garage half a mile away for assistance. During his absence, respondent met another car at or near that point and apparently in the confusion caused by the beams from the head-lights of the approaching car ran into the rear of appellant's truck stationed on the right side of the pavement.

It was submitted that appellant negligently left his derelict truck unguarded creating an obstruction to traffic, whereas without any difficulty he might have driven it off the pavement on to an area of level ground, described by a witness as "solid" extending six and a half feet from the pavement (width of truck six feet) or in the alternative moving in reverse, back the truck, also without the slightest difficulty, off this much travelled highway into a side road near by. A police officer said "he was just about ten feet past the Frost Road 20 feet wide where there was no traffic (side road) and he could have backed right up and gone into the Frost Road." There is some conflict as to the distance

but it is not material; this haven of safety could be easily reached.

The jury in answer to a question submitted found appellant guilty of negligence

to the extent that defendant left car [truck] unattended and made no effort to remove car from pavement of highway.

I think this finding of negligence is so obviously just that it is really not debatable. He did not even drive to the extreme edge of the pavement or stop for a moment to investigate the situation. Had he done so he would have found "solid" ground to his right (*i.e.,* solid enough for the purpose in view) and a little-used side road close at hand. He should, too, be familiar with the *situs* from long experience driving over this highway. The truck-driver's evidence in fact supports this finding of negligence. He admitted that he did not examine the side of the road or look for the cross-road. There was a dwelling-house 40 or 50 yards away where at least he might have secured an assistant to protect his truck while he, with darkness approaching, went to the garage. He devoted all his attention to procuring repairs and none at all even of the most cursory nature to protecting the public. Had a fatality occurred his position would be precarious.

Appellant, however, submitted at the trial and on appeal that respondent sustained injuries solely because of his own negligence in driving at an excessive speed (not borne out by the evidence) or to put it compendiously by running into appellant's truck when by keeping a proper look-out and by driving carefully he might have stopped before doing so or have passed safely around the obstruction. The jury in answer to a question negatived this contention. They found that respondent was not guilty of negligence. On ultimate negligence in answer to the question "Notwithstanding the negligence of the defendant, if any, could the plaintiff by the exercise of reasonable care have avoided the accident?" the answer was "Under the circumstances no." This finding absolving respondent of negligence was vigorously combatted. I refer therefore to the evidence which the jury might and doubtless did consider in arriving at a conclusion on this point.

The question as to whether or not the tail-light on appellant's truck was burning was not a factor in the minds of the jury in

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finding original negligence on its part. That finding was based upon his failure to remove it from the danger zone. As, however, it may have been treated as an element in deciding the point now under consideration I will outline the facts available to the jury. A police officer who arrived on the scene a half hour after the crash said: "I saw no tail-light burning"—although he particularly looked for one—and "there were dim head-lights on the truck, shewing that the tail-light at best would likely be dim also." True the impact might have put the tail-light out "if there was a loose connection"—but "there was nothing broken there that I could see." Another witness who proceeded at once to the scene said "When I got there there was no light on the truck." He also found a loose connection. The impact, he said, should not put out the tail-light "if there was no loose connection," and "the glass was not broken: it was not damaged in any way." The witness Hall, who examined it, said the impact would not affect the tail-light as it was not exposed: it was a foot and a half underneath the body of the truck.

As respondent approached the point where the derelict truck was stationed having, as he said, "no warning that there was any truck there at all," another car properly equipped with head-lights approached from the opposite direction. For "just about two seconds" he said this on-coming car "obstructed my view of anything in front" (including the truck) and in that interval "I ran completely into the truck." He further said "It [the truck] was not visible to me in the distance," *i.e.*, before he was blinded (or at least partially so) by the head-lights of the on-coming car and "there was no tail-light whatsoever visible." It is only in this connection that the importance of the evidence in respect to the tail-light on the truck arises. If not burning, or if obscured in any way or burning dimly respondent would not obtain knowledge before meeting the other on-coming car that a car or truck was ahead of him either stationary or as one might think moving slowly. He was driving between 25 and 30 miles an hour and (as prudent drivers do) "slowed up when the car coming toward me came quite close to me—I couldn't say how much but approximately five miles an hour possibly—I slowed down to about 20 miles an hour." He further said he was "keeping a proper look-out" and his "wind-shield was in good

condition"; also the "brakes were relined two days before." He continued "the first thing I knew there was something, a grey menace loomed up in front of me. I immediately put my foot on the brake but I was too late to try to save myself at all and I was smashed immediately after—probably not more than two seconds." He said he could stop his car in approximately eight or ten feet but on re-examination qualified that statement, saying that upon further reflection he found that it required a longer distance but he "could not say any definite distance." I examine this evidence, however, on the basis either that he could stop within, say, 10 feet or in the greater distance stated by another witness of about 30 feet. It might properly be submitted to the jury (and it was urged before us) that if he saw the "grey menace" when about 25 feet away, he might have stopped his car within that distance and avoid the collision. The jury in deciding this point would realize that travelling at the reduced speed of 20 miles an hour he would go 29½ or 30 feet in one second. Part at least of a second would elapse in reaching for the foot-brake and in its resultant application. He would, therefore, be too close to the truck when the brake was applied to avoid the collision. Such a view might properly be accepted. But the decisive factor is that a diversion was created by the approaching car. Respondent did not stop his car sooner "for the simple reasons that the lights of the approaching car happened to come at that particular moment and after that time the lights were such that I could not see what was in front of me"; also although he applied the brakes he "had no time" to avoid the collision. He could see 50 feet ahead of him with his head-lights under ordinary conditions but that of course would not be possible when blinded by beams of light from the other car. The difficulty then is to see at all. The on-coming car passed him when he was within 25 feet of the truck. It was at that crucial point (and necessarily for some distance before reaching that point) that his vision was obscured. A police officer testified to this common experience known to all motor-drivers. After stating that the head-lights on respondent's car would throw a beam and disclose objects 50 or 60 feet in front he added "if there were no cars coming the other way to bother it." It was clearly open to the jury to acquit respondent of

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negligence in not seeing the truck in the last 50 or 60 feet traversed by him under the conditions referred to. Such a finding is fully supported by the evidence. He said "he was blinded for an instant by the car coming the other way." He thought he travelled "less than 30 feet" after he saw what appeared like a "grey menace." That was doubtless true. He would see it only after he passed the on-coming car. At that time he would be free from the confusion referred to but quite unable to stop. When it is said that while this is true he might have noticed this truck before he reached that point the jury could negative this view by finding as an inference from the evidence that the tail-light on the truck was, if not out, so dim or obscured as to be useless. This is the only value of that evidence in the case as the jury viewed it.

On the foregoing evidence the jury's finding of no negligence on the respondent's part in failing to see the truck in time to stop or swerve cannot possibly be interfered with. The point was properly placed before them in the charge. The trial judge said to the jury "Do not forget you have to be satisfied that the plaintiff could not by taking reasonable care have avoided the truck." That was the inquiry. He then referred, based upon the evidence, to "the distracting condition in front—that is of some other car coming on." Then placing fairly alternative positions before them, he said:

> Even if there were other cars coming on then he would be confronted with this, could he have stopped within the ambit or range covered by his head-lights, 50 or 60 feet—could he have stopped and turned one way or the other? In other words, could he have avoided that truck under the circumstances of the case?

The circumstances of the case included the distraction caused by the lights of the approaching car. Again he said:

> You come down to what distracting or intervening conditions existed that would excuse a man running into a truck of that size with head-lights that gave a clear vision for 50 or 60 feet. He said there was an approaching car. Mind you the approaching car had passed the truck but very shortly and the driver of the other car gave this evidence, which you no doubt know if you drive a car, that when a car is approaching you and when passing it really the vision is blanked out and after you emerge from that and have time to get away from the glare you get you are apt to run into anything.

True the trial judge added that he did not think there was evidence of that kind. In that he was in error as is quite appar-

ent from the evidence I referred to. If there was no such evidence the part of the charge just quoted would be meaningless and unnecessary. Viewing the phrase in the light of the context and the whole charge I do not think he meant to say literally that there was no evidence on that point. Later he said "There was no reason in the world why he should run into the truck unless there was something intervening." It was, of course, for the jury to say whether or not because of the "something intervening" the respondent was not negligent in failing to stop or swerve.

The trial judge properly placed the facts before them and in his final word on this phase said:

> Is not the case resolved to this fact? that that car passed him and for the moment he was blinded and this thing was in the way.

Not only were the jury justified in exonerating the respondent: it is difficult to see how they could avoid doing so and I have only referred to the evidence fully in deference to the strong, but to my mind hopeless submission that we should regard such a finding as unsupportable. With therefore the findings of negligence on appellant's part and no negligence on the part of the respondent, no other question remains.

I may add that Mr. *Bull* relied on *Tart* v. *G. W. Chitty & Co.*, [1933] 2 K.B. 453. It is only necessary to say that the absence of any intervening agency distracting the attention of the man on the motor-cycle, preventing him from seeing the lorry wholly distinguishes it. Quite true in that case one of two things happened; either the boy on the motor-cycle was not keeping a proper look-out or was travelling at such a speed that he was unable to stop or swerve. In the case at Bar as the jury had a right to find from abundant evidence, no look-out would enable respondent to see the truck when as witnesses testified he was blinded by the lights of the on-coming car at the crucial moment, or before that time if the tail-light on the truck was dim or out, and far from driving at an excessive speed he reduced it, as he should, and as most drivers do, not to avoid the obstruction in the road, not known to exist, but to enable him to pass the other car safely. No assistance can be obtained from the first part of the statement of Swift, J., at pp. 457-8, as applied to the facts of that case, *viz.*:

> It seems to me that when a man drives a motor-car along the road, he is

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bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees [and I would also add should see] after he has seen it. If there is any difficulty in the way of his seeing, as, for example, a fog, he must go slower in consequence.

This, of course, is true, and the distracting head-lights were in effect similar to the fog, but the respondent did reduce his speed from an original pace that was not excessive. It is not necessary to discuss *Baker* v. *E. Longhurst & Sons, Ld.,* [1933] 2 K.B. 461, also relied upon, a case of a similar nature, unless to repeat the obvious truism of the late Lord Justice Scrutton that "every case must depend upon its own facts." It is of no assistance to appellant to point out that these two decisions have been referred to with approval by the Supreme Court of Canada in *Ristow* v. *Wetstein,* [1934] S.C.R. 128. The statement of Smith, J. at p. 132, however, correctly refers to the important qualification applicable to the case at Bar at the end of the following quotation:

> A person driving at night must drive at such a speed that he can pull up within his limits of vision; accordingly, on his colliding with anything, he is faced with the dilemma that either he was driving at an undue speed or he was not keeping an adequate look-out, unless there is some other factor causative of the collision.

We have that other causative factor in this case.

Tidy v. *Battman,* [1933] W.N. 276; [1934] 1 K.B. 319 does bear some resemblance to the case at Bar. There Lord Wright said:

> This is a pure question of fact. *Tart* v. *G. W. Chitty & Co.* and *Baker* v. *E. Longhurst & Sons, Ld.*, shew that no one case is exactly like another case, and no principle of law can be extracted from those cases. It is unfortunate that questions of fact should be confused by importing into them principles of law, which have no doubt been properly applied in deciding other cases where the facts were different.

A case very similar to the one at Bar is referred to in a foot-note to the report of *Baker* v. *E. Longhurst & Sons, Ld.,* in (1932), 149 L.T. 264, where *Evans* v. *Downer and Co. Limited* heard by the Court of Appeal in July, 1933, is referred to by the reporter. There, as here, the driver of the plaintiff's lorry said, he was unable to see the defendant's vehicle owing to a beam of light thrown by a third lorry. A verdict for the plaintiff was upheld, Scrutton, L.J., saying "that he thought there was just

enough evidence to support the verdict of the jury, namely, that as to the beam of light thrown by the third lorry." In the case at Bar the evidence on this aspect does not, if at all, fall far short of being conclusive.

I would dismiss the appeal.

MCQUARRIE, J.A.: This is an appeal from the judgment of MORRISON, C.J.S.C. pursuant to the findings of a jury.

The action arose out of a collision on the Pacific Highway, about two miles west of Fry's Corner in the Municipality of Surrey, at about 6 o'clock on the afternoon of December 21st, 1933, between the plaintiff's Ford coupe, which was proceeding towards New Westminster, and the defendant's Chevrolet truck, which its driver had left with one tyre off and jacked up on the side of the pavement, facing in the same direction as the plaintiff's car. The jury, in answer to questions, found the defendant guilty of negligence which consisted of leaving the truck unattended and making no effort to remove it from the pavement of the highway, also that the plaintiff had not been guilty of negligence. The jury was clearly right in finding the defendant guilty of negligence as the leaving of the truck on the highway, as indicated, and under the conditions prevailing at the time, could not be justified. The jury's finding that there had been no negligence on the part of the plaintiff might be open to grave doubt and I must confess that if I had been trying the case I might have come to a different conclusion. However, this was essentially a case for the decision of a jury as to the facts and for the reason that I cannot say that the jury's finding was clearly wrong or that there was no evidence to support it I am reluctant to disturb the verdict.

I would, therefore, dismiss the appeal.

Appeal dismissed.

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

Solicitors for respondent: *Macdonald & Prenter.*

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REX v. SING (OTHERWISE KNOWN AS NG SHONG GIP).

Criminal law—Indictment—Names of witnesses on back of—Prosecution not bound to call them—Accused may call them as his own witnesses.

Counsel for the prosecution is not bound to call witnesses merely because their names are on the back of the indictment. He may use his own discretion but he ought to have all such witnesses in Court, so that they may be called for the defence if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses.

ON a criminal prosecution counsel for the Crown did not call certain witnesses whose names were on the back of the indictment. Counsel for accused raised the point that counsel for the Crown is bound to call all witnesses on the indictment, or if not the Court will call them. Argued before MACDONALD, J. at Vancouver on the 30th of September, 1932.

Wood, K.C., for the accused, referred to *Rex* v. *Bodle* (1833), 6 Car. & P. 186.

Bull, K.C., for the Crown.

MACDONALD, J.: I have already decided the point raised, some years ago. I ruled that unless the Crown saw fit to do so, that it was not necessary to call all the witnesses whose names appeared on the back of the indictment. I take it the same rule would apply in the situation where we have a charge as distinguished from the indictment. It is quite apparent from the depositions that there are two other witnesses, called at the preliminary, whom counsel for the defence contend should now be called, or at any rate submitted in order that he may cross-examine them. The same text-book to which counsel for the defence referred in support of his contention also contains a reference to some other cases with which I happen to be familiar on account of my previous ruling. One of those cases is *Regina* v. *Woodhead*, 2 Car. & K. 520; 175 E.R. 216. That case was decided in 1847, being a number of years after the case to which counsel referred in support of his application.

I think the matter is so important that it is not out of place for me to say a word or two in supporting my ruling in the matter. In the case of *Regina* v. *Woodhead,* the prisoner was indicted for manslaughter and the counsel for the prosecution did not deem it necessary to call all the witnesses whose names were on the back of the indictment. Alderson, B., instead of directing that they should be called, gave the following judgment:

> You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule.

Then Tindal Atkinson, for the prisoner, said this:

> Am I to understand, my Lord, that if I call them I make them my own witnesses?
>
> Alderson, B.—Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to shew them unworthy of credit, however falsely the witnesses might have deposed.

Now, that decision was followed by a very distinguished judge, Parke, B., in *Regina* v. *Cassidy,* 1 F. & F. 79, where the same point arose, in 1858, over ten years afterwards. The question being raised as to whether the prosecutor was bound to call all witnesses whose names appeared on the back of the indictment, he said:

> Certainly the usual course was for the prosecutor to call the witness, and if he declined to examine, the prisoner might cross-examine him. He thought, however, the practice did not stand upon any very clear or correct principle, and was supported only on the authority of single judges on criminal trials, and he should therefore follow what he considered the correct principle, that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in Court for the prisoner to examine them, as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpœnaing them. He would, therefore, follow the course said to have been pursued by Campbell, C.J., in a case before him the last time he was at Lancaster, who ruled that the prosecutor was not bound to call such a witness, and that if the prisoner did so the witness should be considered as his own.

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Then in that case of *Regina* v. *Cassidy,* the remark was made by prisoner's counsel that "Cresswell, J., had, he believed, acted differently."

And Baron Parke said he would go and obtain the opinion of his brother Cresswell:

> On his return into Court, the learned Baron said, that Mr. Justice Cresswell informed him he had always allowed the prosecutor to take his own course in such circumstances, without compelling him to call the witness if he did not think fit to do so, and that he entirely agreed with what he, Mr. Baron Parke, proposed to do. Therefore, the witnesses, if called by the prisoner, must be considered his witnesses, as much as though subpœnaed and called by him.

It is not necessary to add anything further, except that about ten years afterwards, in *Reg.* v. *Wiggins* (1867), 10 Cox, C.C. 562, Mr. Justice Lush is reported to have followed a similar course (p. 563):

> At the conclusion of the case for the prosecution, Ribton, upon the authority of *Reg.* v. *Holden* [(1838)], (8 Car. & P. 610) wished the Court to call a witness who had been examined before the coroner, but had not been called by the prosecution. The Court refused to do so.

That was a trial of a very serious offence, being a charge of murder. The accused was found guilty, death sentence was imposed and executed.

Under the law there is no necessity to read my decision to the jury. It is of record in the notes. Call in the jury.

WITT v. DAVID SPENCER LIMITED.

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March 28; *April* 5.

Negligence—Store—Dangerous premises—Invitee—Slipping in pool of water at head of stairway—Drippings from umbrella—Injury from falling down stairs—Liability.

The plaintiff, a customer in defendant's stores, alleged that she stepped into a pool of water at the head of a stairway and slipping fell down a few steps and was injured. It appeared from the evidence that the moisture referred to was drippings from an umbrella. No one was seen at the spot with an umbrella from which the water could have fallen, but there was no suggestion that the water could have come from any other source. In an action for damages for negligence:—

Held, that the plaintiff must prove affirmatively by reasonable evidence that the defendant was negligent, and that owing to such negligence the accident occurred. It would be unreasonable to expect the defendant to employ help throughout the stores to mop up any dampness, moisture or drippings from umbrellas. The plaintiff has failed to prove the defendant had committed a breach of its duty to her to take reasonable care under the circumstances existing at the time and place alleged.

Comment on cases as to the measure of the duty an occupier owes to an invitee.

ACTION for damages for injuries sustained by the plaintiff in slipping on a wet floor at the top of a stairway and falling down the stairs in the defendant company's store. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 28th of March, 1935.

Bray, for plaintiff.

Bull, K.C., for defendant.

Cur. adv. vult.

5th April, 1935.

MORRISON, C.J.S.C.: The plaintiff was a customer in the defendant's stores and, when approaching the steps leading to the ground floor on Cordova Street, she slipped and fell down a few steps and was injured.

There was no question of structural defect or lack of lighting or hand-rails or guards in the present case. The submission is that the pool referred to by the plaintiff was water from an umbrella. In my opinion it would be unreasonable to expect the defendant to employ a corps of people to be strewn through-

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out their shop to mop up any dampness or moisture or drippings from umbrellas. No one saw exactly how the plaintiff came to fall. She herself does not know. The water which she says must have caused her to slip, pointed out to her by another person, was first observed by her after she had slipped down a few of the steps. No one was seen at the point complained of who had an umbrella from which water could have fallen. It is not suggested that the water, if there was any at that point, could have come from any other source. The only evidence of any positive kind as to the condition of the floor is that of Mrs. Burgoyne and that was couched in language of exaggeration with emphasis. I find she was entirely mistaken as to the identity of Mr. Allen. I regret I cannot accept her description of the condition of the floor as being slimy, slippery or slushy and strewn with slips of paper. In my opinion the point at which the accident happened was too far from the street entrance for customers to bring in from a cement sidewalk any foreign matter which would render the floor in the condition described by her. The one alleged pool of water seems to be what was at first fixed in the plaintiff's mind. I think this is a case of a pure accident, the plaintiff missing her step, in a manner for which I cannot bring myself to find the defendant is in any way liable. Even if there had been a pool there as described by and on behalf of the plaintiff, and I find there was not, it was not a danger such as the defendant ought to know of.

The plaintiff must prove affirmatively by reasonable evidence that the defendant was negligent and that owing to such negligence the accident occurred.

This question of reasonable evidence is to be decided not by weighing the evidence of the plaintiff against that of the defendant, but by disregarding altogether the evidence of the defendant, and by asking whether that of the plaintiff is, *per se* and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable mind:

Salmond on Torts, 8th Ed., 464; *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41.

The plaintiff was an invitee, that is, one invited to the premises by the owner and occupier for purposes of business or material interest. Lord Buckmaster in *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74 at p. 80. Then the question arises what is the measure of the duty which an occupier owes to

an invitee? The case of most frequent occurrence seems to be that of a customer in a shop, which is only one of a class.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact:

Willes, J. in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 at p. 288; (1867), L.R. 2 C.P. 311. The learned editor of the 8th edition of Salmond on the Law of Torts makes this comment, at pp. 513-4, on the passage from which I have taken the above extracts:

The foregoing passage contains an unfortunate ambiguity which has not been resolved by the later authorities and as to which indeed those authorities are in direct conflict. Is the duty of an occupier to an invitee a duty to use care to make the premises reasonably safe, or is it merely a duty to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence? If the latter alternative is correct, the fact that the danger is actually known to the invitee is an absolute bar to any action by him; for if the duty of the occupier is merely one of warning, he owes no duty at all in respect of dangers already known by the invitee. If, on the other hand, the duty of the occupier is the higher duty of taking care to make the premises safe, he commits a breach of this duty when he invites persons to enter premises which he knows or ought to know to be dangerous, even though those persons are themselves aware of the danger. To take a concrete illustration: Is a shopkeeper who invites the public into his shop bound to use due care to provide a stairway reasonably safe for their use, or does he fulfil his whole duty to his customers by supplying a stairway which is visibly and obviously unsafe? On the authorities as they stand it is impossible to answer this question, for these authorities are in direct conflict with each other. The Court of Appeal in *Brackley* v. *Midland Railway* (1916), 85 L.J.K.B. 1596, following a *dictum* of Lord Atkinson in *Cavalier* v. *Pope*, [1906] A.C. p. 432 definitely adopted the restricted interpretation of the duty imposed on occupiers towards invitees, and this has been described by Scrutton, L.J. (*Hillen* v. *I. C. I. (Alkali), Ld.*, [1934] 1 K.B. 466), as "the generally accepted view."

On the other hand, in *Norman* v. *Great Western Railway*, [1915] 1 K.B. 584 the Court of Appeal took the opposite view and held that the rule in *Indermaur* v. *Dames* imposed upon the occupier towards an invitee the duty of taking care to make the premises reasonably safe, and not merely a duty to warn the invitee that they were dangerous. (This also appears to have been

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the view of the Judicial Committee in *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 732, and is supported (*obiter*) by Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. p. 365). *Norman* v. *Great Western Railway and Brackley* v. *Midland Railway* are therefore in direct conflict with each other as to the nature of the duty imposed on an occupier towards an invitee by *Indermaur* v. *Dames* (Cp. *per* Scrutton and Lawrence, LL.J. in *Hillen* v. *I. C. I. (Alkali), Ld.*, [1934] 1 K.B. pp. 466-7, 470). In practice the difference of view is seldom important, for no doubt has been cast upon Willes, J.'s statement that an invitee must use reasonable care on his own part for his own safety, and in general if he does he will come to no harm if he has been warned. But see [Salmond] s. 132 (4), *per* Phillimore, L.J., in *Norman* v. *Great Western Railway*, [1915] 1 K.B. 584.

This again is a question of fact. The cases in which the question arose, where it was held the danger was unusual, were such as an unsafe gangway on ship: *Smith* v. *London and St. Katharine Docks Co.* (1868), L.R. 3 C.P. 326. An open cellar flap at the foot of a ladder by means of which the plaintiff was invited to go on board a ship: *John* v. *Bacon* (1870), L.R. 5 C.P. 437. The case of a defective hand-rail: *Willoughby* v. *Horridge* (1852), 12 C.B. 742. All these cases depend upon their particular facts and could be multiplied. Through them all runs the thread of the principle that

an invitor is liable for danger on his premises of which he knew, unless (a) the danger is open and obvious, or (b) though not obvious to all the world, it is well-known to that particular invitee; as to dangers of which he has no knowledge, he is only liable if they are discoverable by the exercise of reasonable care. The *onus* of proof is on the plaintiff who must prove affirmatively that the defect was one of which the occupier ought to have known:

Charlesworth's Liability for Dangerous Things, 247.

The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it:

Per Lord Justice Buckley in *Norman* v. *Great Western Railway*, [1915] 1 K.B. 584, as quoted in the course of Lord Justice Scrutton's judgment in *Hall* v. *Brooklands Auto-Racing Club* (1932), 48 T.L.R. 546 at p. 550.

It was contended by Mr. *Bray* that the circumstances that no accident had occurred in these premises hitherto should not weigh against the plaintiff as was submitted by Mr. *Bull*. However, Lord Justice Scrutton in *Hall* v. *Brooklands Auto-Racing Club, supra,* in answer to a similar plea, that the fact an accident

of the kind in question in that case had not occurred for 23 years had this to say (p. 551):

I cannot think that reasonable care required a strengthening of the barrier against a danger which had never happened in 23 years.

The cases in our Courts, to which my attention has been called, are really, with deference, merely decanted from *Indermaur* v. *Dames, supra,* with totally different facts from those of the present case, and indeed one of the learned counsel went so far as to read to the Court a portion of a charge to a jury, which of course does not appear in reports:

No inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for the propositions of law they contain; and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case.

Still less, of course, does the decision of a jury in one case bind another tribunal dealing with somewhat similar facts in another case (*Carpenter* v. *Haymarket Hotel, Ld.,* [1931] 1 K.B. 364 at p. 371, *per* Swift, J.)

I find that the plaintiff has failed to prove the defendant had committed a breach of its duty to her to take reasonable care under the circumstances existing at the time and place alleged.

Action dismissed.

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Dentistry—Making false teeth—Charge under the Dentistry Act—Impressing and fitting by practitioner in adjoining room—Separate fee charged therefor—R.S.B.C. 1924, Cap. 77, Sec. 71.

The School of Mechanical Dentistry Limited was convicted on a charge of unlawfully carrying on the practice of dentistry in that it did take impressions of the gums of persons and fit thereto artificial dentures for gain, contrary to section 71 of the Dentistry Act. Said school had offices adjoining a member of the College of Dental Surgeons, and advertised in the daily papers that it made and repaired false-teeth plates. When customers came to its offices they were told to first obtain an impression from a qualified dentist and were advised of the practitioner in the adjoining room. When the impression was made it was given to the defendant who made the plate to fit. The plate was then given to the customer who paid for it and he then had the practitioner fit it into his mouth, for which the practitioner charged a fee. Plates were advertised at $7.50, but better classes of plates were made at higher prices.

Held, on appeal, reversing the decision of LENNOX, Co. J. (MARTIN and MACDONALD, JJ.A. dissenting), that the appellant did not make the impression nor fit the plate, its business being solely confined to making false teeth. There was no violation of the Dentistry Act and the conviction should be quashed.

APPEAL by defendant from its conviction by LENNOX, Co. J. of the 8th of November, 1934, on a charge of unlawfully practising the profession of dentistry, in that it did between the 19th of March, 1934, and the 22nd of April, 1934, take impressions of the gums or jaws of persons and did fit thereto artificial dentures for gain, contrary to section 71 of the Dentistry Act. The School of Mechanical Dentistry Limited has offices on the first floor of the building at the south-west corner of Granville and Robson Streets in Vancouver, and Charles J. Coultas, a member of the College of Dental Surgeons of British Columbia, has an office in said building with a door leading from his office into that of the defendant. The School of Mechanical Dentistry Limited advertised in two of the daily papers in Vancouver that they made and repaired false-teeth plates, and when customers came to their offices they were told that they must first obtain an impression from a qualified dentist, and they were advised of

Doctor Coultas's office next door, who would take the impression for a nominal fee. As a rule they were conducted into his office where he took an impression, for which he charged a nominal fee, and the impression was then given to the defendant who made the plate to fit the impression. The plates were advertised at $7.50, but they sold better classes of plates at higher prices. Their work was confined solely to the making and repairing of plates. The defendant was convicted and fined $200.

The appeal was argued at Victoria on the 22nd and 23rd of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Stuart Henderson (*Patton,* with him), for appellant: There is no evidence that the defendant practised dentistry. All it does is to make false teeth. An impression is made by a qualified dentist, and it then makes the false teeth from the impression. Dentistry is defined by section 23 of Cap. 15, B.C. Stats. 1931. A customer selects the class of plate he wants, he then goes to a dentist for an impression, and the impression is sent to the School of Mechanical Dentistry where the plate is made to fit the impression. All we do is the mechanical work. The definition of dentistry does not include our work. The mechanical and professional work is distinctly separated. There is no evidence to support the charge that the company took impressions. The dentist does all the fitting. All we do is work on a plate.

Maitland, K.C. (*Remnant,* with him), for respondent: The Legislature contemplated a scheme of this kind. Taking indentures is practising dentistry. The dentist saying he charged a nominal fee for making an impression is an incident in the scheme whereby they are carrying on the general practice of dentistry. As to the words "directly or indirectly" in section 62 of the Act see *Rawlinson* v. *Clarke* (1845), 14 M. & W. 187; *Anderson* v. *Ross* (1907), 14 O.L.R. 683; *Cade* v. *Calfe* (1906), 22 T.L.R. 243. These cases hold that to do for another that which one is prohibited from doing himself is doing it indirectly. These words used in section 62 of the Act must be read in conjunction with section 71, which prohibits a corporation from practising and prohibits a member of the College from assisting

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it: see also *Dales* v. *Weaber* (1870), 18 W.R. 993; *Whimster* v. *Dragoni* (1920), 28 B.C. 132; *Rex* v. *Simmons* (1934), 48 B.C. 398; *Farmers' State Bank of Mineola* v. *Mincher* (1924), 267 S.W. 996; *Attorney-General* v. *New York H.R. & H.R. Co.* (1908), 84 N.E. 737 at p. 742; *Floyer* v. *Edwards* (1774), 1 Cowp. 112. There is ample evidence upon which the learned judge could draw the inference of practising dentistry: see *Rex* v. *Johnston* (1910), 16 Can. C.C. 379.

Henderson, in reply, referred to *Floyer* v. *Edwards* (1774), 1 Cowp. 112; *Coxe* v. *Employers Liability Assurance Corporation Limited,* [1916] 2 K.B. 629 at p. 634; *Rawlinson* v. *Clarke* (1845), 14 M. & W. 187.

Cur. adv. vult.

5th March, 1935.

MACDONALD, C.J.B.C.: The charge laid was that the appellant did at the said City of Vancouver between the 19th day of March, 1934, and the 22nd day of April, 1934, unlawfully carry on the practice of the profession of dentistry in the Province of British Columbia in that it did between the dates last aforesaid take impressions of the gums or jaws of persons and did fit thereto artificial dentures for gain, contrary to section 71 of the Dentistry Act, Cap. 66, R.S.B.C. 1924.

This charge was made by R. L. Pallen, a qualified member of the College of Dental Surgeons and president of the College of the Province of British Columbia.

It will be noted that the appellant is charged with having taken impressions of the gums or jaws of persons and of fitting artificial dentures for gain. There is not a word of evidence to support either of these charges. The appellant did not take impressions. It did not fit artificial dentures either for or without gain. No evidence was given by the appellant and no proof was furnished by the respondent of these charges.

While this is so it was contended by counsel for the respondent that the statute provides a penalty for incorporated companies practising dentistry directly or indirectly and it is said that while there is no direct evidence of violation of the Act, there is some indirect evidence. The indirect evidence relied upon was the publication of an advertisement in these words:

The original office to offer low-priced plates. Our $7.50 plate is exceptionally well made of finest materials . . . beautiful, natural appearance. Made by Experts . . . fully guaranteed.

Plates repaired, burnished, sterilized, . . . $1.00. We make and Repair Plates Only.

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It is also alleged that it conducted its business next door to a registered dentist and that when a customer decided to buy a plate, which means a set of artificial teeth, he was directed by the appellant to the office of this dentist, in fact was in some cases conducted there through a door which connected the appellant's workshop with the dentist's office. This dentist was a qualified member of the profession. It was also contended that this dentist organized the appellant company, and for a time acted as one of its directors. Therefore, it was argued, that the true inference to be drawn from these facts is that the appellant was practising dentistry. Now there was nothing illegal in the said dentist incorporating the company. There was nothing illegal in the work the appellant was to do, or was doing. It was admitted that the making of dentures or artificial teeth is not part of the business of a qualified dentist. The informant himself Dr. Pallen gave evidence that he was in the habit of taking impressions of the gums or jaws of his patients and taking the impression to what is called a dental laboratory, that is to say, the dental laboratory does the mechanical work, just as the appellant did it; that the said laboratory was not next door to his office but was on the next floor of the building in which he practised. There is a large sign in the workshop of the appellant declaring that it does not practise dental surgery and that its customers must go to a dentist to have the impression made and the teeth fitted. There is, of course, nothing illegal in having the appellant's shop next door to a dentist's premises, and there is nothing illegal in making the dentures and advertising them for sale, but taking all these things into consideration, it was argued, that the Court ought to infer that the appellant was carrying on an illegal business because of the use of the word "indirectly." I am unable to agree with the respondent's contention. I think this prosecution was founded on mere suspicion and when the informant failed to prove what was specifically set out in the charge, the charge should have been dismissed. The case of *Anderson* v. *Ross* (1907), 14 O.L.R. 683, was referred to by respondent's counsel. That was a case of a covenant not

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to carry on business directly or indirectly in the town of Port Arthur to compete or interfere with the business of the plaintiff. After the dissolution of the partnership of the defendant and his wife the husband entered into employment as manager of a jewelry business in Port Arthur. It was held that this was a breach of the agreement, but I can see no analogy between that case and the present one.

In *Dales* v. *Weaber* (1870), 18 W.R. 993, the learned judge said:

> I am of opinion that this is a very plain case indeed. . . . Now, the words "with the assistance of any other person" mean nothing at all if they do not mean "as assistant to any other person," for the other words cover everything else. Therefore these words exactly cover this case, for it is "with the assistance of" another person when the other person supplies the stock-in-trade and the lease of the premises.

Neither of these two things appears in this case. The appellant rented its workshop from the dentist aforesaid. It was not supplied by him and the dentures as made by him were purchased independently by the customers and the price thereof was paid to the appellant. The dental work of the dentist was done independently and his bill paid independently to himself so that that case has no bearing on the present one.

Again *Whimster* v. *Dragoni* (1920), 28 B.C. 132, a decision of my brother MARTIN was cited to us. This, I think, offers no assistance in the present case.

The appeal should, therefore, be allowed.

MARTIN, J.A.: This is an appeal from the judgment of His Honour Judge LENNOX of the County Court of Vancouver, whereby he allowed an appeal from the dismissal, by *Geo. R. McQueen*, Esquire, deputy police magistrate of Vancouver, of an information laid against the appellant company for an alleged infraction of section 71 of the Dentistry Act, Cap. 66, R.S.B.C. 1924, by unlawfully carrying on the practice or profession of dentistry, as defined by section 62, in taking impressions of the gums or jaws of persons and fitting thereto artificial dentures for gain.

On the appeal to the said county judge much more evidence was taken than before the magistrate below, it being a trial *de novo* under our Summary Convictions Act as we have often

decided—*e.g.*, *Rex* v. *Perro* (1924), 34 B.C. 169, 172-4, with the result that the judge was of opinion that the evidence disclosed the commission of the offence charged and consequently convicted the appellant and fined it $200.

It is submitted, as a point of law under our statute (Court of Appeal Act, Cap. 52, Sec. 6, R.S.B.C. 1924), that there is no evidence to support that finding, and the evidence was elaborately reviewed by counsel *pro* and *con.* and with the assistance of their arguments I have carefully considered all of it and can reach no other conclusion than that there was enough to justify the magistrate in making the finding he did make (without wholly adopting his reasons) and therefore we are not warranted in law in disturbing it even though we might not feel personally disposed to take the same view of the evidence that he took. No useful purpose would, in my opinion, be served by attempting to recite at great length and with complete fairness to both parties, and precision, all the many intricate and complicated facts which the county judge had before him for consideration, and so I refrain from doing so, because every case of this description stands by itself and must be decided upon its particular and ever varying circumstances, and consequently can form no precedent for future guidance.

But I think it well to draw attention to the unusual provision, in penal statutes, in said section 62 which declares the offence is committed when the prohibited acts are done "either directly or indirectly," and this wide language must in this case be considered in connexion with said section 71, which extends even to the "attempt" of a corporation to practise dentistry, but with such an attempt we are not at present concerned.

Now whatever may be intended to be covered by said additional word "indirectly," it is obvious that it enables magistrates and judges to take a broader and more critical view of the activities of a corporation than if its "direct" ones are alone to be considered, and the present case is peculiarly one, from its unusual nature, where this unusual provision is of substantial weight in its reasonable application. This construction is supported by the unanimous decision of the King's Bench *in banco, per* Lord Mansfield, C.J. in *Floyer* v. *Edwards* (1774), 1 Cowp. 112 (cited and properly relied upon by the learned judge below)

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which was a case arising on the construction of the Usury Act of 12 Ann. Stat. 2, Cap. 16, providing that "no one shall take directly or indirectly for loan of money, &c., above five pounds for the forbearance of 100*l.* per annum"; and the Court held, p. 114:

> Therefore in all questions in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction: . . . and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan . . . any other contrivance, . . . will come under the word "indirectly."

Fortunately we have also the benefit, in the same direction, of the very recent judgment of the Supreme Court of Canada in *Angrignon* v. *Bonnier,* [1935] S.C.R. 38, on a section in the charter of the City of Montreal which provided that:

> No person may be nominated for the office of mayor or alderman nor be elected to nor fill such office: (*g*) If he is directly or indirectly a party to any contract or directly or indirectly interested in a contract with the city, whatever may be the object of such contract.

And it was unanimously held that an alderman was disqualified under this section as being "directly or indirectly interested" in a lease, in which his name did not appear, given by his daughter to the City of Montreal, under circumstances which were no more "indirect" than those now before us. The Chief Justice of Canada at p. 45 relied upon the decision of the Privy Council in *Norton* v. *Taylor,* [1906] A.C. 378, and gave this citation from p. 380:

> There are many ways in which a person holding a civic office might be brought within the Act 2 Edw. 7, No. 35, as for instance if he had a share in the original contract, or if he were employed by way of subcontract to execute the original contract or part of it; or it might be perceived by the Court that an arrangement had been made under which he was to be the person to supply the materials for the original contract. In those cases, whether it was done directly or indirectly, he might be liable, and no device to conceal the real nature of the transaction would prevail. . . .

This language is very appropriate to the present case, and in my opinion the "devices" that have been resorted to in order to conceal the real nature of this transaction cannot prevail, and therefore this appeal should be dismissed.

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

MACDONALD, J.A.: The appellant was convicted by LENNOX, Co. J. for the offence

that the said The School of Mechanical Dentistry Limited being a corporation incorporated under an Act of the Province of British Columbia regulating or respecting joint-stock companies, to wit: the Companies Act, 1929, did at the said City of Vancouver between the 19th day of March, 1934, and the 22nd day of April, 1934, unlawfully carry on the practice of the profession of dentistry in the Province of British Columbia, in that it did between the dates last aforesaid take impressions of the gums or jaws of persons and did fit thereto artificial dentures for gain contrary to section 71 of the Dentistry Act, chapter 66, Revised Statutes of British Columbia, 1924, contrary to the form of the statute in such case made and provided.

Section 71 of Cap. 66, R.S.B.C. 1924, provides that:

71. No corporation incorporated, registered, or licensed under any Act of the Province regulating or respecting joint-stock companies shall carry on, or attempt or purport to carry on, the practice of the profession of dentistry or dental surgery in the Province, and no member of the College shall assist or enter the employ of any such corporation to carry on, or attempt or purport to carry on, such practice in anywise howsoever.

The appellant is an incorporated company. Section 62 of the Act, as re-enacted by B.C. Stats. 1931, Cap. 15, Sec. 23, enacts that:

62. Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act who, for a fee, salary, reward, or commission paid or to be paid by an employer to him, or for fee, money, or compensation paid or to be paid either to himself or an employer, or any other person, diagnoses or advises on any condition of the tooth or teeth, jaw or jaws of any person, or who either directly or indirectly takes, makes, performs, or administers any impression, operation or treatment or any part of any impression, operation, or treatment of any kind of, for, or upon the tooth or teeth, jaw or jaws, or of, for, or upon any disease or lesion of the tooth or teeth, jaw or jaws, or the malposition thereof, of any person, or who fits any artificial denture, tooth, or teeth in, to, or upon the jaw or jaws of any person, or who holds himself out as being qualified or entitled to do all or any of the above things.

As the precise charge is that the accused practised dentistry by taking "impressions" and by "fitting" artificial dentures, we are only concerned with the evidence in so far as it is relevant directly or indirectly to infractions of the Act in these two aspects. Appellant is not charged with practising dentistry in any other way. The trial judge made a finding of fact, *viz.*, that appellant did practise dentistry within the terms of the charge. As this appeal can only be based upon questions of law (and if there is no evidence to support the conviction that is a question of law) we have only to find whether or not if a judge or jury convicted it should be treated as perverse, or wholly unsupported by evidence. We must keep in mind that if there is some

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evidence, the question as to whether or not the finding is reasonable is not a question of law. (*Rex* v. *Johnston* (1910), 16 Can. C.C. 379.) We cannot therefore allow the appeal on the ground that the finding is in our view not reasonable. The conviction may stand even if we thought that the judge ought not to have convicted, or that we, if trying the case, would have arrived at a different conclusion.

The evidence should be viewed in two aspects. If it shews that appellant "directly" did take "impressions" of "fit" artificial dentures the conviction must stand. If, however, the evidence fails to shew direct action the further inquiry remains, *viz.*, did it do one or both of these acts "indirectly"?

It was not suggested by counsel, nor was it necessary to charge in the information that these acts were done "indirectly." It is enough to charge "practising" in these two aspects. Practising by a corporation is an offence and may be carried on "indirectly" as well as "directly."

I will outline all the material evidence that a judge or jury might properly consider. Dr. Coultas, a qualified dentist, a director of appellant company, occupied as tenant room No. 6, adjoining appellant's premises, rooms 4 and 5 in the same office building. He first rented the whole area before incorporation and suggested dividing the rooms, 4 and 5 for appellant, and 6 for his office. After the company was formed, Miss Bentley, Dr. Coultas's nurse (now Mrs. Haskins) moved into appellant's quarters. The company was incorporated in 1931 with Dr. Coultas a director along with his assistant Miss Bentley and a solicitor, Mr. *Patton*. The objects of the company so far as material were:

(*a.*) To establish, conduct, and maintain, both in the City of Vancouver and at any other place or places, whether in or out of the Province of British Columbia, schools (whether boarding, day, or general) for instruction in making of dentures, bridges, crown, gold castings, and other mechanical restorations and appliances for the teeth, and the repairing of any of said articles, and make rules and regulations for the conduct of same, and of admittance, conduct, and release of scholars and students:

(*b.*) To provide educational facilities of all kinds with reference to the above, and to supply books and other necessary material, and arrange for examinations in such institutions or with such examination board or boards as the company may decide:

(*c.*) To make such contracts for skilled assistance or employees as the company may decide:

(*d.*) To enter into mutual arrangements with any other scholastic educational or training institution either by way of partnership, mutual assistance, or co-operation:

(*e.*) To provide scholarships, fellowships, and any other grants or any other means of assistance to students and others:

(*f.*) To provide living-quarters, accommodations, board, facilities for sports, games, and pastimes and all other conveniences for students and others.

These objects were never carried out. What appellant did was something entirely different. It made or procured artificial dentures and directed customers from among the public coming to its office in search of plates, in answer to advertisements, to the office of Dr. Coultas for the more important work of dentistry (taking impressions and fittings) necessary in completing the work of supplying the customer with the finished product.

Mr. Pallen, a dentist testified—and this is material evidence—that "the mechanical part of dentistry cannot be separated from the physician's part." All dentists have work done by non-professional mechanical men in laboratories but (unlike appellant) "these laboratories are not in any way connected with the public." They do work, not for the public, but for the profession. Before a denture, commonly referred to as false teeth, is supplied it is necessary for a dentist to "make a very thorough examination of the mouth" because:

> The soft tissues have a great bearing on the successful wearing of a denture or a false set of teeth and only a man trained in the anatomy of the mouth can make or is qualified to make that examination, of the soft and hard places, and the different stresses of muscles and so forth that the plate would have to contend with.

Again, from the standpoint of health the mouth

> must be in every way free of irritation in any way whatsoever. Any prolonged irritation of the soft tissues of the mouth, particularly against the hard palate is a preponderant cause of a good many serious diseases.

The dentist, he testified,

> makes a thorough examination of the soft tissues of the mouth, and only a man qualified in his knowledge of anatomy of the mouth could do that.

It is obvious that under the Act—and as this evidence shews—only a qualified dentist may make such an examination and give the necessary treatment. A corporation is prohibited from doing so (section 71). It is also true that a denture cannot be supplied without an impression. By evidence, therefore, which the judge was entitled to accept, certain parts of the work necessary in the furnishing and fitting of a denture must be done by a dentist

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including "getting [*i.e.*, fitting] the false teeth into a person's mouth."

Dr. Lee visited appellant's premises on the 20th of March, 1934. He saw an advertisement in the "Daily Province" of March 12th, 1934, reading as follows: [already set out in the judgment of MACDONALD, C.J.B.C.].

Mrs. Haskins displaying a tray of false teeth asked "what particular kind I would like and what I was prepared to pay." He selected a set costing $10. She then drew his attention to a sign saying in effect that

> It was illegal for anyone other than a qualified dentist to take impressions or fit teeth and there was a doctor in the adjoining suite who would do this work for a nominal fee.

This should be recalled when considering the word "indirectly." The doctor in the adjoining room was Dr. Coultas—director and originator of the company. Dr. Lee did not ask her to secure a dentist for him: she took him to the adjoining office. A door to Dr. Coultas's office led from appellant's premises. A dentist appeared and said "he understood I was from The School of Mechanical Dentistry and that I wished to have a plate, fitted for a plate . . . he took a plaster of paris impression." He paid him $2.50 and received a receipt. He was then ushered back to appellant's premises and paid Mrs. Haskins $2.50 on account of the $10 purchase. He returned next day to appellant's office and Mrs. Haskins again directed him to Dr. Coultas's office. An impression for a set of teeth was taken and an appointment made for the next day when the work was completed, Dr. Simmons, an employee with Coultas, fitting the teeth. He then paid Mrs. Haskins the balance due, $7.50, and left.

About a month later he returned for a lower set, first visiting the dentist for the necessary work and selecting the teeth from Mrs. Haskins. Later visits were made and the same procedure followed shewing concerted action on the part of Dr. Coultas and his former nurse, Mrs. Haskins now in charge of appellant's office.

Howard Dayman, like Lee employed by a secret service agency, visited appellant's premises on April 13th, 1934. He told Mrs. Haskins that he "wanted to see about getting a set of teeth" and she shewed him different kinds. He told her he

wanted a set advertised at $7.50, but "she advised me to get the $10.50 set." Only a dentist could properly advise. There was no suggestion that he should go to a dentist to see what kind of denture he should get. She professed ability to decide that point and did so. He decided to take that set. She looked at his mouth and again advised the $10.50 set because of the position of two teeth in his head. "With these two teeth that I had she thought that the $10.50 set would be better. She examined his mouth—a further act of dentistry—and after doing so recommended the $10.50 set. Then "she asked me to follow her, to come along with her and she rapped on a door—leading between the mechanical dentistry and into another office" where he met Dr. Simmons. Again he did not ask Mrs. Haskins to take him to any dentist he simply followed her directions. Dr. Simmons asked him if he "had made arrangements with the school about teeth" shewing again concerted action between the two branches of Dr. Coultas's system. The inference a judge or jury might draw was that an "arrangement" with appellant was a necessary prelude to further work by the dentist. Dr. Simmons then took an impression. Dayman paid $2.50 and got a receipt. He went back to appellant's office the same afternoon. Mrs. Haskins produced a set of teeth and escorted him again to Dr. Coultas's office where Dr. Simmons fitted plates in his mouth.

Mrs. Haskins giving evidence for the defence said that she kept a key to the door leading into Dr. Coultas's office. She stated in cross-examination that "impressions" could be received from other dentists. "I never ask where they have had their impressions taken" and "I don't know where they come from." She couldn't give the names of other dentists who took impressions. She testified that "they go and get an impression somewhere and come back," and "I don't really take them in to Dr. Coultas. They go any place." This evidence was not accepted. She said that she got back lots of "impressions" that were not good and turned them down. She did not therefore confine herself to the mechanical business of selling chattels.

The forgoing are the material facts, all relevant to a finding as to whether or not appellant practised dentistry under the terms of the charge (1) directly or (2) indirectly. We must regard the specific findings of fact made by the trial judge to

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ascertain, not if we would come to the same conclusion, but rather whether or not there is any evidence to support it. If there is any evidence no question of law is left for determination. First he said that he did not believe Mrs. Haskins when she said she did not do any "advising," in other words, he held that in respect to "fitting" (the fitting of artificial dentures) she did advise—an act of dentistry. He found that the appellant "Holds out that [it] guarantees the fit." As to practising "indirectly" he finds that appellant "indirectly obtained the taking of the impression" also that "the actual acts done through the qualified dentist were an indirect carrying on of the transactions of the school." He further finds that appellant's actions bring it within the mischief of the words in the Act (section 62):

> or who fits any artificial denture, tooth, or teeth in, to, or upon the jaw or jaws of any person, or who holds himself out as being qualified or entitled to do all or any of the above things.

He bases this "holding out" on the advertisement carried in the press.

Whatever may be said as to a direct finding that appellant took "impressions" or "fitted" dentures—and I do not base my judgment on this branch of the charge—I find it impossible to say that the finding that these acts were done by appellant "indirectly" should be set aside. The fact that appellant is a company does not on this inquiry necessarily absolve it from all association with Dr. Coultas. The company's history may be considered. It was incorporated by Dr. Coultas. He was a director, president and shareholder, the remaining shareholders being employees. A jury could draw inferences from the fact that adjoining rooms were used and that customers were directed to Dr. Coultas's office by appellant through a "funnel" as Mr. *Maitland* called it —a door connecting the two offices. A jury might infer that appellant received its clientele to a large extent because of its connection with Dr. Coultas. A plate is of no value without necessary dental work in fitting and taking impressions and appellant company while not doing this work itself (or at least very little) clearly did it "indirectly" through one of its directors and shareholders. It is obvious that much of appellant's revenue was derived from this relationship. Customers do not get dentures to carry them away as a chattel. They must be fitted.

Mrs. Haskins was not believed when she suggested that customers could get their impressions from any other dentist. The evidence shews that without any expression of a desire to select on the part of the customer they were directed to and ushered into the office of Dr. Coultas doubtless for the necessary dental work. The company did all it could legally (and perhaps more) under the Act, and did indirectly what the Act forbade. If "indirectly" (as it does) means doing a thing by other means or through other agencies all doubt is removed. If, for example, Dr. Coultas sold his practice and goodwill to another dentist and covenanted not to practise in the neighbourhood for a limited time "directly" or "indirectly" and then proceeded to form and operate the company in question directing his customers in search of dentures to another dentist (under an arrangement with him) probably next door to his late purchaser would there be any doubt that he was practising "indirectly" and in breach of his covenant? I think not. Each customer sent to his associate dentist would be a potential interference with the business of his successor. A judge or jury have the right to sweep aside subterfuges and evasions and find the real facts as a fair, if not unavoidable, inference. They are not prevented from doing so by the ruse of separate offices or by the separate collection of pay for work done by each of the parties concerned. I see, therefore, no escape from the view, not only that the finding of fact in this latter aspect cannot be interfered with but that as there is evidence to support it no question of law arises. I would dismiss the appeal.

McQUARRIE, J.A.: The College of Dental Surgeons of British Columbia laid an information against the appellant in the police Court at the City of Vancouver, therein charging that the appellant

being a corporation incorporated under an Act of the Province of British Columbia regulating or respecting joint-stock companies, to wit: the Companies Act, 1929, did at the said City of Vancouver between the 19th day of March, 1934, and the 22nd day of April, 1934, unlawfully carry on the practice of the profession of dentistry in the Province of British Columbia in that it did between the dates last aforesaid take impressions of the gums or jaws of persons and did fit thereto artificial dentures for gain, contrary to section 71 of the Dentistry Act, chapter 66, Revised Statutes of British Columbia, 1924, contrary to the form of the statute in such case made and provided.

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Said section 71 reads as follows [already set out in the judgment of MACDONALD, J.A.].

The charge was tried before His Worship Deputy Magistrate *McQueen* who dismissed same. An appeal was taken from that decision to the County Court of Vancouver by the College of Dental Surgeons of British Columbia which appeal was heard by His Honour Judge LENNOX who allowed the appeal convicting the appellant and imposing a fine of $200 together with costs which he fixed at $75. This appeal is from the decision of Judge LENNOX. The information limits the prosecution to the specific acts alleged therein to have been committed by the appellant, *viz.*, that it did take impressions of the gums or jaws of persons and did fit thereto artificial dentures. So far as the evidence is concerned it shews that the appellant did not do the things charged against it or either of them and that the taking of impressions and the fitting of dentures were done by a qualified dentist. Consequently there was nothing illegal on the part of the appellant.

The evidence also revealed the fact that it was common practice for dentists to have dentures manufactured by persons or corporations who were not qualified as dentists. It even appeared that Dr. Pallen, the president of the College of Dental Surgeons of British Columbia, made a practice of having his mechanical work done by dental laboratories where persons who were not dentists did the work. It was attempted on behalf of the college to shew that because a dentist was employed to take impressions and to make the dentures the appellant did that work "indirectly" and consequently came under section 62 of the Dentistry Act. I cannot see, however, how it could possibly be an offence when everything which was essentially a dentist's work was done by a duly-qualified dentist.

In the appeal *In re Dentistry Act and the College of Dental Surgeons of British Columbia* v. *Coultas*, [(1935), 49 B.C. 459] which was also heard at the last sittings of this Court we held that the taking of impressions and manufacturing of dentures by a qualified dentist for the appellant was not unprofessional conduct and, in view of that decision, I think we must allow this appeal.

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With all deference to the opinion of the learned County Court judge I would allow the appeal and restore the judgment of the deputy police magistrate dismissing the charge.

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

Solicitor for appellant: *Stuart Henderson.*

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

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Feb. 13; *April* 1.

Damages—Trespass—Assault—Lien agreement—Bailiff instructed to make seizure — Warrant — Collection Agents' Licensing Act — Bailiff not licensed—Effect of—B.C. Stats. 1930, Cap. 31, Secs. 2, 4, 5 and 8 (1) and (2).

The defendant company held a lien agreement against a divanette which was in the possession of the plaintiff, A. Shadin, on his premises. The company employed one Chapman as a bailiff to make a seizure of the divanette, and signed a warrant addressed to Chapman and his bailiffs. Chapman employed the defendant McMichael to execute the warrant, and on his entering the plaintiffs' premises to execute the warrant, the plaintiffs claim he assaulted Mrs. Shadin and her two children. Neither Chapman nor the defendant McMichael was licensed at the time under the Collection Agents' Licensing Act. In an action for damages for trespass and assault:—

Held, that the Act forbids a person to act as a bailiff while unlicensed and the agreement and warrant did not give a person a legal right to do something which was forbidden by statute. McMichael's entry and subsequent acts were illegal acts; he was a trespasser *ab initio* and guilty of assault.

Held, further, that the clear intention of the Act to protect persons in the position of the plaintiffs must be given effect to and both the unlicensed person acting as bailiff and any person who has authorized him so to act must be deemed to have committed a trespass. The defendant company therefore having employed and authorized an unlicensed person to act as bailiff must be deemed to have committed the acts of trespass and assault of which the defendant McMichael was found guilty, and the defendant company is therefore responsible for the damages suffered by the plaintiffs.

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ACTION by plaintiff A. Shadin for damages for trespass and for loss of services and consortium of his wife owing to an assault by the defendant McMichael upon the plaintiff Mrs. Shadin, and by the remaining plaintiffs for damages for assault by the defendant McMichael upon Mrs. Shadin and the two infant plaintiffs, William George Shadin and Cora Georgina Shadin. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 13th of February, 1935.

Gordon M. Grant, for plaintiffs.
Burns, K.C., and *Lundell,* for defendant David Spencer Ltd.
Dickie, for defendant McMichael.

Cur. adv. vult.

1st April, 1935.

FISHER, J.: The defendant company held a lien agreement against a divanette, which was in the possession of the plaintiff, Mr. A. Shadin on his premises in the City of Vancouver. The company employed Albert Chapman as a bailiff to make a seizure of the divanette, the warrant (Exhibit 3) signed by the defendant company and addressed to the said Chapman and his bailiffs reading in part as follows:

> You are hereby authorized to seize and take possession of the goods and chattels described in a certain lien agreement dated the 23rd day of July, 1928, and made between Mr. M. Shadin 2120 E. 3rd Ave. and David Spencer Limited, Vancouver, B.C., a copy of which is hereunto annexed, which said goods and chattels consist of mdse. as per attached invoice.
>
> You may give up possession of the said goods and chattels upon payment of the sum of $53.70 together with interest as therein mentioned, and your proper fees and charges, and for so doing this shall be your warrant and authority.
>
> Dated at Vancouver, B.C. this 10th day of July, A.D. 1934.

The said Chapman employed the defendant Robert McMichael to execute the warrant and in the execution thereof the plaintiffs claim that the said McMichael did wrongfully and unlawfully enter the premises of the said plaintiff and commit an assault upon the plaintiff Mrs. Shadin and the two infant plaintiffs William George Shadin and Cora Georgina Shadin. The claim of the plaintiff A. Shadin is for damages for trespass and for loss of services and consortium of his wife by the said assault and the remaining plaintiffs' claim is for damages for assault.

It may first be noted that counsel on behalf of the plaintiffs submits that even on the assumption that the said defendant McMichael had a legal right to enter on the said premises as a bailiff for the purpose aforesaid, he nevertheless in any case wrongfully and unnecessarily used force and committed an assault. As to this submission I have only to say that, my view of the whole matter being as hereinafter set out I do not think it is essential to the determination of this case that I should form or express an opinion as to whether or not such submission of counsel on behalf of plaintiffs is well founded. Undoubtedly his submission goes much further and is based upon the contention that the entry and subsequent acts of the said McMichael were illegal *ab initio*. It is admitted by the defendant company that neither the said Albert Chapman nor the said Robert McMichael was licensed at the time under the Collection Agents' Licensing Act. The plaintiffs contend that the acts complained of were done and performed by the defendant company and said company's agents and servants, Albert Chapman and Robert McMichael, whilst illegally engaged in the business of a collection agent, as defined in the said Act, and that the said company "requested, intended and authorized the acts so complained of." The acts of trespass and assault were denied but the defendant company also contends that in any event it is not responsible for the illegal acts of either Chapman or McMichael; that they were neither their servants nor their agents but independent contractors, that the said Collection Agents' Licensing Act does not alter the *status* of independent contractor and that therefore it is not responsible for the trespass and assault if any. *Roman* v. *Motor-car Loan Co.* (1930), 42 B.C. 457; *Milligan* v. *Wedge* (1840), 12 A. & E. 737 and other cases are relied upon by counsel for the company.

With reference to the said Collection Agents' Licensing Act, B.C. Stats. 1930, Cap. 31, I have to say in the first place that I think that it is applicable to the work that was being done here by the said Albert Chapman and Robert McMichael. Section 2 of the Act reads in part as follows:

2. In this Act, unless the context otherwise requires:—

"Business of a collection agent" means the business of collecting debts for others, and includes the offering or undertaking to collect debts for

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others, the soliciting of accounts for collection, and the business of doing such work, either in whole or in part, as is ordinarily done by bailiffs:

Section 4 of said Act reads in part as follows:

4. (1.) No person shall within the Province engage in or advertise himself as engaged in the business of a collection agent in this Province, or in any way hold himself out as so engaged, unless he is the holder of a collection agent's licence under this Act.

(2.) No person shall within the Province act as a member or employee of or on behalf of a partnership, or as an official or employee of or on behalf of a corporation, which partnership or corporation engages in or advertises itself as engaged in the business of a collection agent or in any way holds itself out as so engaged, or act as an employee of or on behalf of a person who so engages, advertises, or holds himself out, unless the partnership, corporation, or person so engaging, advertising, or holding out is the holder of a collection agent's licence under this Act.

Upon the evidence before me I therefore find that the said Albert Chapman and Robert McMichael were guilty of a violation of said section 4 in entering upon the said premises for the purpose aforesaid and the questions arise whether the entry and subsequent acts of the said McMichael are illegal *ab initio* and, if so, whether the defendant company, as well as McMichael, is responsible for the acts of trespass and assault complained of.

On the first question it is submitted by counsel on behalf of the plaintiffs that the test is whether or not the effect of the said Act is that engaging in the business of a collection agent as the said Chapman and McMichael did is prohibited so as to be rendered illegal. *Victorian Daylesford Syndicate, Limited* v. *Dott*, [1905] 2 Ch. 624; *Cope* v. *Rowlands* (1836), 2 M. & W. 149 and *Wilson* v. *Tumman* (1843), 6 Man. & G. 236 are cited by counsel in support of his submission. In the *Victorian Case*, at pp. 629-30 Buckley, J. said:

The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope* v. *Rowlands*, [(1836)] 2 M. & W. 149; 46 R.R. 532 and *Fergusson* v. *Norman*, [(1838)] 5 Bing. (N.C.) 76; 50 R.R. 613. Parke, B. in the former case (2 M. & W. 158) says the question to determine is whether the Act is "meant merely to secure a revenue to the city, and for that purpose

to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers?" If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. I desire to point out that the present case is one that is upon this point abundantly plain. There is no question of protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal.

Counsel for the defendant company contends that the Collection Agents' Licensing Act does not operate to affect civil rights and before dealing further with the question as to the effect upon the present case of the failure of Chapman and McMichael to comply with the requirements of the statute, reference might be made to the case of *City of Vancouver* v. *Burchill,* [1932] S.C.R. 620 relied upon by counsel for said defendant. As this case refers to *Boyer* v. *Moillet* (1921), 30 B.C. 216 and *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338 cases, also relied upon by counsel for the defendant company, I would like to set out a considerable portion from the judgment of Rinfret, J. who at pp. 622-626 says in part as follows:

The particular section of the Act relied on by the appellant reads in part as follows (Motor-vehicle Act Amendment Act, 1930, c. 47 of S.B.C., 1930, s. 2, ss. 2):

"No chauffeur shall within any municipality drive, operate, or be in charge of a motor-vehicle carrying passengers for hire unless he is the holder of a permit therefor issued to him by the Chief of Police of the municipality; and every chauffeur to whom a permit is so issued shall comply with all such regulations as may be made by the municipality and are not repugnant to the provisions of this Act or the regulations made thereunder."

The by-law referred to by the appellant is known as the "Vehicle Licence By-law" (No. 1510 as amended by No. 1537) of the city of Vancouver. It provides for the licensing of certain trades and businesses; auto liveries, expressmen, automobiles used for purposes of business, vehicles used for hire for the carriage of passengers, etc.

[His Lordship then quoted from "The question is as to the effect upon this case of Burchill's failure," etc., at p. 623 down to the end of the paragraph at the top of p. 624, and from "The appellant draws a distinction," at p. 625, down to "not a trespasser in the sense in which that word is strictly and technically used in law" on p. 626, and continued].

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In the excerpts from the judgment in the *Burchill* case, as above set out, may be found I think the basis of the distinction which it appears to me must be made between the present case and the cases relied upon by counsel on behalf of the defendant company. In the present case the plaintiff Alexander Shadin being rightfully in possession of the premises, is in the position of an "ordinary landowner" and has the absolute right to exclude anyone. The unlicensed bailiff has no right on his premises similar to the right to be on the highway which the unlicensed chauffeur, as a member of the public, was held to have in the *Burchill* case. Therefore no such right of the unlicensed bailiff to be on the premises of the said plaintiff, as a member of the public, can be relied upon in the present case and he must be deemed never to have had any legal right to be there unless the defendant can establish the proposition that the legal right to enter upon such premises as a bailiff was given to him by the said agreement and warrant notwithstanding the said statute. It seems to me however that it is quite impossible to establish such a proposition. In my view the statute forbids a person to act as a bailiff while unlicensed and it seems to me also that it cannot be reasonably contended that the agreement and warrant gave any person a legal right to do something which was forbidden by the statute. The situation therefore really is that McMichael never had the legal right to be on the premises of the said plaintiff as a bailiff and in my view it necessarily follows that his entry and subsequent acts were illegal acts and he was a trespasser *ab initio* and undoubtedly guilty of assault under such circumstances.

Having thus reached the conclusion that the defendant McMichael was guilty of trespass and assault I now come to consider the question as to whether or not the defendant company is in any better position. Holding, as I do, that the defendant company employed and specifically authorized the said Chapman and his bailiffs (one of whom was McMichael) to enter upon the said premises and make a seizure of the divanette as aforesaid and having held that the said McMichael in making such entry and seizure was a trespasser *ab initio* I do not think the real issue as between the plaintiffs and defendant company is whether or not the said Chapman was an independent contractor.

I think the real issue is whether or not the defendant company having employed and authorized such an unlicensed bailiff as aforesaid must be taken to have committed trespass and assault.

As already intimated, counsel for the defendant relies upon *Roman* v. *Motorcar Loan Co., supra,* and the said case of *Milligan* v. *Wedge* therein referred to and followed. It must be noted however that in the *Milligan* case the drover employed by the defendant butcher was a licensed drover and in the *Roman* case the bailiff employed by the defendant company was a licensed bailiff. In this respect I think the said cases are distinguishable from the present one and that they therefore do not assist the defendant company which admittedly did not employ a licensed bailiff. Whether he was an independent contractor or not therefore seems to me to be beside the question or perhaps I should say that it seems to me that the unlicensed bailiff cannot properly be regarded as an independent contractor so as to exempt the defendant company from liability for surely it cannot escape liability on a plea that in effect amounts to this, *viz.*: that it employed an unlicensed bailiff as an independent contractor and authorized him to do what he is forbidden by the said statute to do.

Counsel for the defendant company points out that our Collection Agents' Licensing Act contains no such clause as is contained in the last paragraph of section 7 of the Law of Distress Amendment Act, 1888 (51 & 52 Vict., c. 21), Imp., reading in part as follows:

> From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing under the hand of a county court judge; . . .
>
> If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass.

It is argued therefore that in the absence of any similar clause in our Collection Agents' Licensing Act the said Act must be interpreted as meaning that one can authorize an unlicensed bailiff to enter upon the premises of another person and make a seizure for the purposes aforesaid contrary to the provisions of said Act and therefore illegally without being deemed to have

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committed a trespass and without incurring any liability. Such an interpretation however would result in defeating the clear intention of the Act for it would mean that a person financially responsible could employ and authorize another person, not licensed and not financially responsible, to act as a bailiff whereby a third person would suffer serious damages and yet not be able to recover any damages. The intention of the Act undoubtedly is to make sure that no person shall act as bailiff or collection agent until he shall have deposited with the inspector of municipalities security for the protection of any person to whom he might be liable in damages in connection with his business of a collection agent. See sections of said Act, reading in part as follows: [His Lordship set out sections 5 and 8 in part and continued].

I pause here to point out that in its counterclaim the defendant company includes in its claim against one of the plaintiffs the fees of the unlicensed bailiff as well as the amount due for the divanette under the said agreement.

In the absence of any conclusive authority to the contrary I hold that the clear intention of the Act to protect persons in the position of the plaintiffs in the present case must be given effect to and that the result of the legislation is that both the unlicensed person acting as bailiff and any person who has authorized him so to act must be deemed to have committed a trespass. The defendant company therefore having employed and authorized an unlicensed person to act as bailiff as aforesaid must be deemed to have committed the acts of trespass and assault of which I have found the defendant McMichael guilty and the defendant company is therefore responsible for the damages suffered by the plaintiffs. I have to add that in reaching my conclusions I have not considered any of the evidence of the defendant McMichael given on discovery as evidence against the defendant company as some question was raised as to its admissibility under certain circumstances and I have grave doubt as to its admissibility in any event. As to damages I assess them as follows:

Alexander Shadin: Special damages, $12; general damages: (a) for trespass, $100; (b) for loss of services and consortium of his wife by the assault, $150.

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The other plaintiffs: General damages for assault: Helen Shadin, $500; William George Shadin, $50; Cora Georgina Shadin, $100.

There will be judgment accordingly in favour of the plaintiffs against both defendants with costs. The defendant company will have judgment on its counterclaim against the plaintiff Helen Shadin for the sum of $47.15 together with the additional carrying charges as claimed and costs until the defence to counterclaim was delivered with the right to set-off. The items for bailiff fees are disallowed.

Judgment for plaintiffs.

McGILVRAY AND PRITAM SINGH v. QUEENSBORO SAWMILLS LTD.

C. A.

1935

Mar. 25, 26.

Practice—Woodmen's liens—Assignment of—Two assignees as joint plaintiffs—County Court—Writ of attachment—Want of jurisdiction—Prohibition—R.S.B.C. 1924, Cap. 53, Sec. 30; Cap. 276, Secs. 7 and 32.

Forty lienholders filed their respective liens for wages against the defendant company. Twenty-six of them then assigned their liens to one lienholder, and twelve of them to another. The two claimants holding the liens then brought action in the County Court under their respective assignments and also for their personal claims, and caused a writ of attachment to issue to cover $1,246.68, being the total amount of the liens. The defendant moved for a writ of prohibition on the ground that the County Court had no jurisdiction to determine the writ of attachment, as the amount claimed was in excess of the jurisdiction of the County Court. The application was dismissed.

Held, reversing the order of LUCAS, J., and granting prohibition, that section 32 of the Woodmen's Lien for Wages Act is a procedural one, and once the claims are joined they constitute one suit and that suit is covered by section 7 of the Act. The appropriate section of the County Courts Act (section 30) then comes into operation restricting the jurisdiction of the County Court and providing that claims which do not exceed $1,000 may be brought in the County Court, but those over that amount in the Supreme Court.

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APPEAL by defendant from the order of LUCAS, J. of the 20th of February, 1935, dismissing the defendant's application for a writ of prohibition prohibiting further proceedings in the action on the ground that the County Court at New Westminster had no jurisdiction to determine a writ of attachment, as the amount claimed in said writ was in excess of the jurisdiction of the County Court. The plaintiffs were employees of the defendant company to whom certain sums were due and owing for wages for labour performed. Twenty-six other employees assigned their claims to the plaintiff McGilvray under the Woodmen's Lien for Wages Act, and twelve employees assigned their claims to the plaintiff Pritam Singh under said Act. The total amount claimed in the writ of attachment was $1,246.68.

The appeal was argued at Vancouver on the 25th of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Cosgrove, for appellant: They proceeded under writ of attachment claiming in all $1,246. This is in excess of the County Court jurisdiction. The action is brought under section 7 of the Woodmen's Lien for Wages Act. He has the right to join the claims but the writ must be in the proper Court. Where want of jurisdiction is apparent on the face of the proceedings prohibition should be granted: see *In re Nowell and Carlson* (1919), 26 B.C. 459.

Lidster, for respondents: Section 32 of the Woodmen's Lien for Wages Act is misleading if two constructions can be placed upon it. Each lienholder's claim is within the jurisdiction of the Court. They join in taking proceedings under said section and each obtains judgment for the amount of his claim: see *Montreal Trust Co.* v. *Canadian Lumber Yards Ltd.* (1928), 39 B.C. 325 at p. 331; *Douglas* v. *Mill Creek Lumber Co.* (1923), 32 B.C. 13 at p. 17. The individual claims continue and they are all under $1,000.

Cosgrove, in reply: The action is taken in the names of the assignees for a specific sum over $1,000.

Cur. adv. vult.

26th March, 1935.

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MARTIN, J.A. (oral): In this case, since the argument yesterday, we have gone very carefully into the matter, involving as it does the rights of a large number of lien claimants, 40 in all, and when we came to examine it we found there was a substantial difference in the facts of the case from those which had been submitted to us by counsel, because it now appears that there has been overlooked the fact that this is not a case of assignees only suing, but also of two assignees representing two distinct groups of claimants, and suing in their own right as well as assignees.

One of the two plaintiff claimants is McGilvray, who is the assignee for one group of 26 lienholders, and the other plaintiff claimant, Singh, is assignee for the other group of 12 lien plaintiffs, making, with themselves, 40 claimants in all represented by the two plaintiffs in two distinct capacities.

Now the importance of this is that we have to take cognizance, under section 32 of the statute, not simply of the claims of assignees, but also of the joint claims of two assignees who represent two distinct groups, as well as themselves, so the statute must be considered as regards both classes. While in one way this is not of very much practical consequence, owing to the view we have taken, yet it was material in helping us to reach a clear conclusion on the application of said section, and we are of opinion that it is a procedural and not jurisdictional section, and is governed by section 7, and once the claims are joined they constitute one "suit," which "suit" is controlled by that section 7, the result of which is that the appropriate section 30 (*a*) of the County Courts Act, then comes into application by limiting the jurisdiction of the County Court thus:

(*a.*) In all personal actions where the debt, demand, or damages claimed do not exceed one thousand dollars.

Then section 7 comes into operation by enacting:

(1.) Any person having a lien upon or against any logs or timber may enforce the same by suit in the County Court where the statement of lien is filed, provided the sum claimed is within the jurisdiction of such Court, otherwise in the Supreme Court; . . .

Now the "suit" in the County Court for these joint claims is for over $1,000 and therefore in accordance with said proviso it should have been brought in the Supreme and not the County Court, and we have no power to sever the joint claim so as to bring it within the latter jurisdiction.

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It follows that the appeal should be allowed and prohibition granted.

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McPHILLIPS, J.A. (oral): I may say I concur in the judgment of my learned brother, the president of the Court. The question of want of jurisdiction is one that the Court cannot add any terms to. It is regrettable, but that is the situation.

The appeal in my opinion must be allowed.

MACDONALD, J.A. (oral): I agree with the president and my learned brother.

McQUARRIE, J.A. (oral): I have nothing further to add.

Appeal allowed.

Solicitor for appellant: *Mark Cosgrove.*
Solicitors for respondents: *Lidster & Allison.*

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April 10, 17.

ROMANO v. MAGGIORA.

Practice — Foreign judgment — Order XIV. — Summons for judgment — Defence of non-service of process or notice thereof—Proceedings contrary to the principles of natural justice.

The plaintiff, having obtained judgment against the defendant in an action brought in the State of Washington, applied under Order XIV. for leave to sign judgment thereon. On the application the defendant swore that he had a *bona fide* defence to the plaintiff's claim, that he was not served with process in the Washington action, and had no knowledge of said alleged proceedings in the Washington Courts until apprised thereof in the course of the proceedings in this action.

Held, that the failure to serve the defendant or give him notice of the proceedings in the Washington Courts was a substantial injustice committed against him, and such a defence, if made out would be an answer to the foreign judgment. This is a triable issue that must be tried out in the ordinary way, and the defendant should be given leave to defend.

APPLICATION for leave to sign judgment under Order XIV. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 10th of April, 1935.

H. W. R. Moore, for plaintiff.
Finland, for defendant. *Cur. adv. vult.*

17th April, 1935.

ROBERTSON, J.: This is an application under Order XIV. for leave to sign judgment. The plaintiff's claim is on a judgment for $3,312.49 obtained by her against the defendant in the State of Washington, one of the United States of America, on the 20th of October, 1934. The writ was issued on the 13th of December, 1934, appearance entered 22nd December, 1934, defence filed 11th January, 1935, and reply filed 16th January, 1935. On the last-mentioned date the plaintiff took out her summons for judgment.

It should be remembered that applications under Order XIV. should be made before defence is delivered "in the ordinary course," and if an application is made, as it may be made, after defence, the *onus* is on the plaintiff to shew that the delay was justifiable under the circumstances. This was not done here. See *McLardy* v. *Slateum* (1890), 24 Q.B.D. 504 at pp. 506-7, followed by our Court of Appeal in *Motorcar Loan Co.* v. *Warner* (1932), 45 B.C. 456. However, the defendant did not take this point, and as I have come to the conclusion that the defendant should be allowed to defend, it is not necessary for me to give effect to it.

Order XIV. provides that an order may be made empowering the plaintiff to enter judgment "unless the defendant by affidavit, by his *viva voce* evidence, or otherwise, shall satisfy him [*i.e.,* the judge] that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend." In his defence, the defendant sets up that he was not served with any process in the Seattle action and took no part in the "alleged proceedings therein" and says he did not defend the action because he had no opportunity to do so because he was not personally "served" with any process or notice thereof. This would not be sufficient as a defence; in addition, it is necessary for the defendant to shew, as he does by his affidavit hereinafter referred to, that the proceedings did not come to his knowledge or notice. See judgment of Mr. Justice MARTIN in *Richards* v. *Williams* (1905), 11 B.C. 122 at p. 127; also *Pemberton* v. *Hughes,* [1899] 1 Ch. 781 at pp. 796-7, *infra.*

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The Washington judgment recites that it appeared to it that the plaintiff was duly served with a summons and copy of the complaint and non-appearance of the defendant. This statement is primarily based upon an affidavit of Kenneth Hanna who swore that he served the defendant with these papers "by personally delivering to and leaving with the said John Maggiora at Seattle on the 28th of September, 1934" the summons and copy of complaint.

The defendant made an affidavit on the 28th of January, 1935, in answer to the said summons herein in which, *inter alia,* he said that he had a *bona fide* defence going to the whole of the plaintiff's claim herein; that he was a British subject at all material times, resident in British Columbia; that he was not served personally or otherwise with any process in the said alleged Washington action and had no opportunity to take part, and did not take part, in the alleged proceedings and that he had no knowledge of the said alleged proceedings in the Washington Courts "until apprised thereof in the course of the proceedings in this action." The defendant was cross-examined upon his affidavit and I quote that part of the transcript relating to this point as follows:

Do you know a man called Kenneth Hanna? Yes.

Kenneth Hanna made an affidavit that he personally served you with the summons complaint in that action brought against you by the plaintiff in Seattle, at the plant of the National Wine Company at 319 Nicholson Street on the 28th September, 1934.

Finland: Is that on the affidavit, is it there and the copy of the exhibit?

Moore: No, the facts of service are.

He has sworn that he served you in Seattle on the 28th September, 1934, with the summons and copy of the complaint in action Number 275989 brought against you by this plaintiff. Do you swear he did not serve you? Well this is just what happened. On the date I was busy picking up things, I had left old shoes—

You were at the plant? I was at the plant several times, the other man was working and I was going to leave him instructions. I went to the other side and was looking for a hammer and went to the office where Mr. Cam—

Leave those other things. I went there, I forget if I asked if he had seen some overalls or hammer. I said at the time did the mail come?

Said to whom? To this boy.

I am talking about Kenneth Hanna? He said it should be in soon. I have a letter from Mary Payne, I do not know what it is.

That is the plaintiff in this action? Yes, he said I do not know what it is but she asked me to give it to you. I do not know what it is. Well my hands were dirty and I said I have not got my glasses, I was going to ask

him to read it and then I said without my glasses I could not read it, but you could see in the corner of it Mr. *Martin's* address.

That is the lawyer for the plaintiff? I had received several letters from him some time in June. I said I think I know what it is about, this letter. I said I will come back tomorrow because I will bring my glasses and I put it in the pigeon-hole on the shelf where there was some advertising about 8 to 6" wide and put it there between those papers and I took the hammer and went out and finished my job. After I came back, I came back to see if there was any mail, the place was locked, it was too late and since then I never went back to the place because for the reason of not coming back is because I told them that if I leave I will never come back. If they wanted me to stop there and do the work I must get my living.

So Mr. Maggiora, you admit you received a communication in an envelope with the name of the plaintiff's attorney on it and you say you put it in a pigeon-hole and never examined it? No.

What steps did you take to find out from Mr. *Martin* what it was about? No, no steps to find out about it.

No steps whatever? No.

So if Kenneth Hanna swears, as he has sworn, that he served you with the summons of complaint, you are not prepared to say he did not? You did not look at these papers? When Mr. Kenneth Hanna says what he cannot serve on me anything, he said "I do not know what it is but I was told to give you it." I received a similar letter after I had been in Victoria, they asked for money, and I was disgusted and I said I may be I would go and see her myself. If I had had my glasses I would know about that letter, if I had read it, if it was like anything else, but when I used to get my mail I would wait until the end of the day before I did anything.

In *Pemberton* v. *Hughes, supra,* part of the head-note is:

A judgment or decree pronounced by the Court of a foreign country will be treated and acted upon here as final, notwithstanding any irregularity of procedure under the local law, provided that the foreign Court had jurisdiction over the subject-matter and over the persons brought before it, and the proceedings do not offend against English views of substantial justice.

In that case the facts were, that a decree for divorce had been made by a Court having jurisdiction in Florida and it was contended that the Florida judgment was void because of an alleged irregularity in service of process. The wife, who was the respondent, in the Florida divorce proceedings, did not suggest that she did not know of the proceedings, nor that she had not time to enter an appearance on or before the time fixed for her appearance; nor that she had no opportunity of defending herself. Lindley, M.R. said at pp. 790-1:

But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts

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never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

Vaughan Williams, L.J. said at pp. 796-7:

Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether *in personam* or *in rem*, of a superior Court having jurisdiction over the person, must be treated as valid till set aside either by the Court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant: *Buchanan* v. *Rucker* [(1808)], 9 East, 192; *Ferguson* v. *Mahon* [(1839)], 11 A. & E. 179; Bullen & Leake's Precedents of Pleadings, 5th Ed., p. 748.

Pemberton v. *Hughes* was followed and approved by the Court of Appeal in *Jacobson* v. *Frachon* (1927), 44 T.L.R. 103, and by the House of Lords in *Salvesen or von Lorang* v. *Administrator of Austrian Property*, [1927] A.C. 641.

The failure to serve the defendant or to bring to his attention the fact that the proceedings had been taken against him would appear to be "contrary to the principles of natural justice"—see quotation from judgment of Vaughan Williams, L.J. at pp. 796-7 in *Pemberton* v. *Hughes, supra.*

Lord Justice Atkin in *Jacobson* v. *Frachon, supra,* said at p. 105, speaking of a foreign judgment:

It could only be impeached if the proceedings, the method by which the Court came to its final decision, were "contrary to the principles of natural justice"—principles which were not always easy to define, or to invite everybody to agree about. Those principles seemed to him (his Lordship) to involve, first, that the Court, being a Court of competent jurisdiction, had given notice to the litigant that they were about to proceed to determine the case, and, secondly, that he should be afforded an opportunity of substantially presenting his case before the Court. The rule had been expressed in Professor Dicey's Conflict of Laws (rule 107) somewhat too narrowly.

In *Robinson* v. *Fenner,* [1913] 3 K.B. 835, at pp. 842-3, Channell, J. said:

. . . and whatever the expression "contrary to natural justice," which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does. So far as I can see, all the instances given of what is "contrary to natural justice" for the purpose of preventing a foreign judgment being sued on here are instances of injustice in the mode of arriving at the result, such as deciding against a man without hearing him or without having given him any notice or the like.

In *Rudd* v. *Rudd,* [1924] P. 72, the facts were, that a husband domiciled in England had acquired a new domicil, leaving his wife in England and thereafter took proceedings for divorce in the Courts of his new domicil, and it was held that his wife was not bound in England by the proceedings for divorce of which she had in fact had no knowledge and no notice. Horridge, J., after referring to *Pemberton* v. *Hughes,* at p. 796, above quoted, said that the petitioner in the *Rudd* case, having no knowledge of the American proceedings, the American decree could not stand against her. In *Wanderers Hockey Club* v. *Johnson* (1913), 18 B.C. 367, the plaintiffs sued upon a foreign judgment and it was proved before the learned trial judge that the defendant was not served with any process of the foreign Court nor had he any knowledge that proceedings had been taken against him. He therefore held that the defendant was entitled to defend the action on the merits.

Under these circumstances it is clear to me that if the defendant's submission is correct, the failure to serve him or give him notice of the proceedings in the Washington Courts was a substantial injustice committed against him, according to English notions, and it is clear that such a defence if made out would be an answer to the foreign judgment. This is a triable issue which must be tried out in the ordinary way. See *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T. 262; *Codd* v. *Delap* (1905), 92 L.T. 510; *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180; *Auld* v. *Taylor* (1915), 21 B.C. 192; and *Wilson* v. *B.C. Refining Co.* (1914), 20 B.C. 209, in which MORRISON, J., as he then was, said, referring to *Jacobs* v. *Booth's Distillery Co.*:

According to which the defendant is entitled to unconditional leave to

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defend whenever he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim.

Accordingly the defendant is given leave to defend, costs of the application to be in the cause.

Application dismissed.

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April 29.

IRVINE v. MUSSALLEM.

Negligence — Damages—Collision — Motor-car and bicycle—Intersection—Families' Compensation Act—Apportionment of fault—Parents suing for death of son—R.S.B.C. 1924, Cap. 85—B.C. Stats. 1925, Cap. 8.

At about 5 p.m. on the 21st of March, 1934, the plaintiff's son (ten years old) was riding his bicycle easterly on Kingsway about three feet from the south curb and about one and a half blocks west of the intersection of Royal Oak Avenue, when the defendant was driving his Chevrolet sedan in the same direction on Kingsway about half a block behind him and about seven feet from the south curb. The automobile was travelling at from 25 to 30 miles an hour and it gradually caught up to the boy. When the boy was about 10 feet from the intersection of Royal Oak Avenue, according to the evidence of two witnesses, he put out his left hand and when three feet from the intersection he turned to his left to cross the road and in front of the defendant's car which was from 35 to 40 feet west of the intersection. The defendant did not see any signal, but on seeing the boy turn to the left, did not put on his brakes but turned sharply to the left with the intention of going around in front of him, but he struck the boy about the middle of the intersection and went over on to the curb on the north side of Kingsway.

Held, on the evidence that the boy did put out his hand a few feet from the intersection and the defendant was not keeping a proper look-out in not seeing the signal. The defendant's speed was excessive and he did not have his car under control in approaching the intersection, as there was sufficient space to stop after the boy turned to the left if he had had his car under control. The defendant was guilty of negligence but the boy was guilty of contributory negligence, as his hand was put out for such a short time that the signal would not be effective and the boy's degree of fault was 25 per cent.

ACTION for damages brought by the parents of Hughie Irvine under the Families' Compensation Act for the loss of their son, who was killed by an automobile driven by the defendant. The

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facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 29th of April, 1935.

Stockton, for plaintiffs.
Bull, K.C., and *Ray,* for defendant.

ROBERTSON, J.: This is an action for damages, under the Families' Compensation Act, brought by the parents of Hughie Irvine, aged 10 years, who was killed about 5 p.m. on the 21st of March, 1934, at the intersection of Kingsway and Royal Oak Avenue in Burnaby District, by an automobile, driven by the defendant. The day was bright and sunny, and the pavement dry, in fact, as the defendant says, the conditions for driving were ideal. Kingsway is slightly "crowned" in the centre and is surfaced from curb to curb. The distance between the curbs is 30 feet. Royal Oak Avenue is 40 feet from curb to curb. Hughie was riding his bicycle easterly on Kingsway. The defendant was driving his automobile easterly along Kingsway and was overtaking Hughie. It was a new Chevrolet sedan which had been driven about 300 miles and had mechanical brakes which were in perfect condition. The defendant says that at a speed of 30 miles per hour he could stop his automobile in a distance of from 25 to 30 feet with his foot brakes. The defendant first saw "the young lad" when Hughie was east of the intersection of Blenheim Street and Kingsway opposite the Royal Oak service station which is "one and a half blocks" west from the Kingsway and Royal Oak intersection and Hughie was then about a "half a block" ahead of him and travelling at "a fair bike speed"; that his automobile was travelling at from 25 to 30 miles per hour; that its speed did not exceed this as he was breaking in a new car and for that reason was keeping down the speed. Hughie's bike was travelling about 3 feet from the south curb of Kingsway and the defendant's motor about 6 to 7 feet therefrom. The defendant says he never changed his speed, or his distance from the curb, until he swerved his car just before reaching the intersection of Kingsway and Royal Oak Avenue; that Hughie when he reached a point, about two and a half to three feet from the southwest corner of the intersection, and when the defendant's automobile was 15 feet behind him,

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suddenly, without any signal, swerved to the left, in front of his automobile, and the defendant in an endeavour to avoid the collision swung his automobile sharp to the left. The automobile however struck Hughie just about the centre of the intersection and then proceeded diagonally, across the intersection, and struck the curb at the northeast corner of Kingsway and Royal Oak, then ran along off the highway, striking the fence at point "B" on Exhibit 1 and then back to the highway and to a stop at point "A" on Exhibit 1, which is over 200 feet from the point of impact. The defendant further says he did not put on his brakes or decrease his speed up to the time of the impact; that when Hughie turned out he was not startled as he did not think that there was going to be an accident as he thought by swerving he could avoid him; that when Hughie turned out he was too late to do anything else to avoid the accident except to swerve, as he did; that he did not sound his horn at any time; that he does not recollect what took place after the impact. At the inquest he said if he had seen Hughie he would have applied the brakes.

Bagley was in the defendant's automobile. He says its speed was 25 to 30 miles per hour. He first saw Hughie between 200 to 300 feet ahead. He was "just a boy on a bicycle," riding two or three feet from the south curb. He was not looking at Hughie when the defendant's automobile swerved but he estimates the distance the defendant's car was behind the bicycle at 10 to 15 feet. He did not see any signal given. He says the automobile's speed was about twice that of the bicycle.

Now there were two eye-witnesses of the accident. Birchell, 16 years of age, was called by the plaintiff. This boy was in the pantry of a house about 100 yards north of Kingsway and says he saw Hughie when he was standing by his bicycle in the Royal Oak gas station; that he saw him come out and bicycle along Kingsway and, when, some considerable distance west of the intersection, he looked behind and held out his hand and then rode on towards the intersection and again put out his hand and immediately turned north, and was just taking the turn when he was struck by the automobile, which had been four car lengths behind the bicycle, that is about 60 feet, when Hughie began to turn north. The other witness, Albert Moss, 16 years of age,

was called by the defendant. He was standing in the middle of Royal Oak Avenue 40 to 50 feet south of Kingsway and could only see about 100 feet west on Kingsway, so that he could not see Hughie when he was where Birchell says he first signalled. He says he saw Hughie riding the bike at a point when he was about 10 feet west of Kingsway and Royal Oak and the automobile was then 15 to 20 feet behind him; the bike being 3 to 4 feet and the automobile 6 to 7 feet from the curb. He saw Hughie put out his hand when he was about 3 feet from the southwest corner of Kingsway and then turn north. At the inquest however he said Hughie put out his hand when he was 10 feet from the intersection; that he did not slow up; and that the speed of the automobile was about 30 to 35 miles per hour. It is clear however from the evidence of these two witnesses that Hughie did put out his hand before he got to the intersection. Under these circumstances I now consider the evidence of the position of the bicycle and automobile when the automobile began to swerve as shewn by the marks upon the highway. As has been pointed out, Birchell says the automobile was 60 feet behind the bicycle and Moss says it was 15 to 20 feet behind. There are two witnesses as to the marks upon the pavement. Bushell, coming out of a store at the southeast corner of the intersection, heard "the screeching of brakes" and looking across the street saw the automobile just after the impact. He says it was going very fast. He saw it strike the curb and follow the course which I have before described. He first went to where the boy lay, and seeing nothing could be done for him, he followed the automobile's track from the boy to the curb at the northeast corner of the intersection and then back to a point where the right wheel left the traffic 6 feet from the south curb of Kingsway and that point was 13 of his paces or 30 to 40 feet west of the intersection. He pointed out these marks to the plaintiff Irvine who also examined them and paced them and he says they were 18 paces, or about 54 feet west of the intersection. He says they were clearly defined skid marks. He says he did not tell the police about the marks as he thought they knew. As against this the defendant called Jeffrey who at the time of the accident was a police officer on duty, and who reached the scene of the accident, very shortly after it happened. He was an experienced officer

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Robertson, J.

and he searched for skid marks and did not see them but then he admits that afterwards on the same day the skid marks were there, as they were shewn to him by the witness Bushell. He suggests that they were caused either by the doctor's car or the ambulance. The doctor was called as a witness but this was not suggested to him in cross-examination. The driver of the ambulance was not called.

From this evidence I conclude that the boy did put out his hand a few feet before he turned north; that the defendant was not keeping a proper look-out and did not see the signal and that at this time the defendant's automobile was at least 35 to 40 feet west of the intersection. If the defendant's automobile was 30 feet from the intersection and there is added to this, half the width of Royal Oak Avenue, *viz.*, 20 feet, the defendant had a distance of 50 feet within which to stop his car. He says he could have stopped his car going at 30 miles an hour within 25 to 30 feet with his foot brake. From the fact that Bushell heard the screeching of the brakes and from the skid marks on the pavement I think the defendant is wrong when he says he did not put on his brakes. The defendant was an experienced driver and if he had had his car under control there would have been no difficulty in stopping his car or slowing down and passing to the right behind the bicyclist. I, therefore, think the defendant's speed was excessive and that he did not have his automobile under control as he approached the intersection. Further than this I think he was negligent in not slowing down his speed so as to have his automobile under such control that he could avoid any situation which might be created by Hughie turning north. The defendant says that he expected that any bicyclist, who proposed to turn north, would ride his bicycle close to the centre line of Kingsway. I should think that the natural place for a bicycle, which moves much more slowly than an automobile, would be close to the curb until near the intersection.

I also think the boy was guilty of contributory negligence. It is clear from his conduct that he appreciated the necessity of giving a signal as he approached the intersection. I think that Hughie put out his hand when about 10 feet from the intersection and then commenced to turn at 3 feet from the intersection. It is clear that his hand would have been out for such a short

time that the signal would not be effective. I think the death of the boy was caused by the fault of the boy and the defendant and that the boy's degree of fault was 25 per cent.

Then as to damages, the plaintiffs can only recover for their pecuniary loss. The father is 43 years of age; he is a pensioner, having lost his left arm in the Great War. His right arm is crippled, to some extent, with neuritis. He is a poultryman, keeping about 800 chickens. Hughie intended to be a poultryman; he was a bright lad and assisted his father in his business by feeding the chickens, cleaning the dropping boards, candling the eggs and in other ways. On holidays he assisted his father in retailing the eggs. The father says that since the boy's death he has had to give up retailing eggs and sell by wholesale, and thereby, he has suffered considerable loss. Unfortunately he has kept no books and it is difficult to say what his loss has been. The boy also assisted his mother in the work of the garden and otherwise. Under the circumstances I think a fair amount to allow for damages would be $600 from which I deduct 25 per cent. for the boy's contributory negligence. There will, therefore, be judgment for the plaintiffs for $450 and costs in accordance with section 4 of the Contributory Negligence Act.

Judgment for plaintiffs.

In Chambers
1935
April 23, 26.

PORTEOUS v. BOARD OF SCHOOL TRUSTEES OF THE DISTRICT OF NORTH VANCOUVER. (No. 2).

Practice—Municipal Act—Judgment delivered but not signed—Amendment to Act on which judgment was based—Application to review—R.S.B.C. 1924, Cap. 179, Secs. 467, 468 and 472—B.C. Stats. 1935, Cap. 51, Sec. 32.

In an action brought against the Board of School Trustees of the District of North Vancouver, the commissioner appointed for said District under section 467 of the Municipal Act applied for an order to set aside the writ of summons and service thereof which was granted on the ground that the defendant corporation ceased to exist when the commissioner was appointed, and the commissioner was not successor in office of the Board of School Trustees. Before the order was signed the Legislature passed an amendment to the Municipal Act whereby it was declared that "the Commissioner shall be deemed for all purposes to be the successor in office of the trustees for the Municipal School District in which the municipality is comprised." On the plaintiff's application for a review of the previous decision, owing to the amendments to the Act:—

Held, that because of the amending legislation the previous decision should be reversed and the original application dismissed.

APPLICATION for a rehearing after judgment was pronounced (reported, 49 B.C. 476) but before the order was signed, on the ground that in the meantime the Legislature repealed the sections of the Municipal Act upon which the judgment was based. Heard by MURPHY, J. in Chambers at Vancouver on the 23rd of April, 1935.

Donaghy, K.C., for plaintiff.
Nicholson, for defendant.

Cur. adv. vult.

26th April, 1935.

MURPHY, J.: On the previous hearing I held that the application to dismiss this action must be granted because, in my view, the defendant named had ceased to exist as a legal entity. Before the order was signed the Legislature, which was then in session, repealed the sections of the Municipal Act upon which my judgment was based and re-enacted amended sections. One of the

amending sections, section 32 of the Municipal Act Amendment Act, 1935, B.C. Stats. 1935, Cap. 51, declares that

> the Commissioner shall be deemed for all purposes to be the successor in office of the trustees for the municipal school district in which the municipality is comprised, and shall constitute the Board of School Trustees for the municipal school district within the meaning of section 35 of the Public Schools Act.

Subsection (2) of said section 32 makes the enactment retrospective in its application and declares that it

> shall be deemed for all purposes to have had effect from and shall be construed as if it had been enacted on the 11th day of April, 1932, being the date of the original enactment. . . ."

The present application is for a review by me of my previous decision because of the change in the law made by the above-mentioned amendments. The first objection taken to my doing so is that judgment has been handed down and consequently I am *functus officio*. Inasmuch, however, as the judgment has not been passed and entered I think I not only have the power but am in duty bound to review the matter in the light of the recent amending legislation. The second ground of opposition is that as the cause of action was incomplete at the time the writ was issued—as I held it was at the first hearing—no subsequent event could cure the situation, and *Evans* v. *Bagshaw* (1870), 5 Chy. App. 340; *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 and *Pilkington* v. *Wignall* (1817), 2 Madd. 240 are cited in support. In my opinion, however, the present case is not one of the happening of a subsequent event but one of a substantive change in the law. The Legislature when acting within the ambit of its authority, as it undoubtedly was in this instance, is sovereign. If it has decreed that a person who in law had no cause of action at the time he issued a writ shall nevertheless be deemed to have had a cause of action at that time the Court, in my opinion, must give effect to such legislation by holding that the action is properly founded. In my view this is the effect of the amendments made. The third objection is that the commissioner, who was served with the writ in this action, is not the commissioner originally appointed but succeeded a commissioner whose appointment had been cancelled by the Lieutenant-Governor in Council and that in consequence this matter falls to be decided under section 472 of the Municipal

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Murphy, J.

Act as enacted by section 19 of Cap. 39, B.C. Stats. 1932. The facts upon which this contention is based are admitted. Said section 472 says:

> The Lieutenant-Governor in Council may at any time cancel the appointment of the Commissioner, whereupon all the powers vested in him under this Act shall cease and determine, and may appoint another Commissioner for the municipality in his place, who shall have all the powers and authority vested in a Commissioner by this Part.

The phrase "this Part" refers to Part XXIII. of the Municipal Act.

The argument put forward is that a commissioner whose appointment falls under 472 derives his *status* and powers from that section exclusively and is not affected by section 468 as amended because the Legislature in said section 472 has dealt with a specific instance to which the amendments embodied in the present section 468 have not in terms been made applicable. In my opinion this contention is erroneous. Section 468 as amended deals with "the appointment of a commissioner for a municipality under this Part," *i.e.,* Part XXIII. and makes any commissioner so appointed a successor in office of the displaced school trustees. The effect is, I think, to cut away the ground upon which the decision originally handed down herein was based and to continue the legal existence of defendant corporation. Section 472 appears in said Part XXIII. and therefore I think section 468 applies to a commissioner appointed thereunder since he is a commissioner for a municipality "appointed under this Part." Because this is my view of the effect of the amending legislation I feel compelled to reverse my previous decision and to dismiss this application.

As to the costs the commissioner is entitled to the costs other than the costs of the rehearing. These latter costs are to be costs in the cause.

Original application dismissed.

NEON PRODUCTS OF WESTERN CANADA LIMITED v. BANCROFT.

In Chambers
1935
May 3.

Practice—Garnishment—Affidavit in support—Sworn before action begun—Intituled in the action—Incorrect statement—Effect of.

An affidavit in support of a garnishee summons sworn before the action was begun purported on its face to be made in the action and the first paragraph thereof read: "I am the secretary-treasurer of the above-named plaintiff." On an application to set aside the garnishee summons:—

Held, that the summons should be set aside on the grounds that it is incorrectly intituled and contains a vitally incorrect statement, as there is no plaintiff until the commencement of the action.

APPLICATION to set aside a garnishee summons. Heard by MURPHY, J. in Chambers at Vancouver on the 3rd of May, 1935.

O'Dell, for the application.
H. I. Bird, contra.

Cur. adv. vult.

3rd May, 1935.

MURPHY, J.: Application by defendant to set aside a garnishee summons. The garnishee has paid the money into Court. Objection is taken that the affidavit upon which the garnishee order is based was made before the writ was issued but purports on its face to be made in the action. Subsection (2) of section 3, of Cap. 17, R.S.B.C. 1924, the Attachment of Debts Act, authorizes the making of a garnishee order before action provided that such order is based on an affidavit in or to the effect of Form A in the Schedule to the Act. Form A shews that the affidavit must be made "In the matter of [blank] Action." The practice in the Registry office has been to insert the word "intended" in the blank left in the form. This is the usual manner in which an affidavit sworn before an action has been commenced is intituled. In *McParland* v. *Seymour*, [1925] 3 W.W.R. 666 it is pointed out that where an affidavit is used to procure the performance of a ministerial act, such as the issue of a garnishee summons by the registrar, the actual hour is regarded; whereas in a judicial

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1935

NEON PRODUCTS OF WESTERN CANADA LTD. v. BANCROFT

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proceeding no notice is taken of portions of a day. The writ herein was actually issued on the day on which the affidavit was sworn. In *Joe* v. *Maddox et al.* (1920), 27 B.C. 541 the Court of Appeal held that the strictest compliance with the statute is required in garnishee proceedings taken under the Attachment of Debts Act. The affidavit filed herein is not in fact what it purports to be on its face. It is not an affidavit in the action since the action was non-existent at the time that it was sworn. The Criminal Code prohibits by penalty the taking of an affidavit not authorized by law. In my opinion the affidavit herein is not so authorized. Subsection (2) of section 3 of the Attachment of Debts Act, *supra,* when read in conjunction with Form A, authorizes, I think, not an affidavit in the action, but an affidavit prior to the commencement of the action, and requires that such an affidavit must shew in the manner in which it is intituled that it is made in the matter of an action about to be commenced. Further paragraph 1 of the affidavit filed herein reads:

> I am the secretary-treasurer of the above-named plaintiff and am aware of the facts hereinafter deposed to.

As pointed out in the *McParland* case, *supra,* until an action is begun there is no plaintiff, consequently paragraph 1 of the affidavit filed herein is incorrect. In view of the principle laid down by the Appeal Court in the *Joe* case, *supra,* I am bound, I think, to set aside the garnishee order herein on two grounds. First: because it is incorrectly intituled and, secondly, because it contains a vitally incorrect statement. The principle referred to, I think, precludes me from making any amendments to cure the defects.

The application is granted with costs.

Application granted.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF GEORGE HENRY RAMSEY, DECEASED.

In Chambers
1935
April 15;
May 1.

Testator's Family Maintenance Act—Will—Husband and wife—Application for relief by wife—Daughter and adopted son—Application of Act—Sask. Stats. 1922, Cap. 64—R.S.B.C. 1924, Cap. 256, Secs. 3 and 9.

A testator made his will in February, 1923, and died on February 22nd, 1935, survived by his wife, a daughter nineteen years of age, confined to a mental hospital, and a son nine years old who was adopted by the testator and his wife under the laws of the Province of Saskatchewan, whereby he had the same rights as though the adopting parents were his natural parents. At the time of making his will the testator's estate amounted to about $50,000, but on his death it had decreased in value to about $23,000. Under the will the wife received real and personal property valued at about $4,000 and a life interest in the balance of the estate less legacies to two sisters of the testator of $2,000 each. The will further provided that the wife should provide for the maintenance and education of the daughter. On the application of the wife for relief under the Testator's Family Maintenance Act it was held that the application should be treated as made on behalf of the petitioner and the daughter and son. The sisters of the testator, though duly served, did not appear on the application.

Held, that the testator did not make adequate provision for the proper maintenance and support of the petitioner and their daughter and son, and the following order was made:

(1.) In addition to the property left her by the will the applicant is to have until further order a monthly income of $120 for the use of herself, her daughter and son, the payment of the amount to be charged against the whole of her estate.

(2.) The capital of the estate to be charged to meet any payments to be made under any further order which the Court may make upon the application of either the daughter or son.

(3.) The further consideration to be reserved so that the Court may be in a position to deal with any contingency that may arise.

APPLICATION by the widow of the late George Henry Ramsey, who died on the 22nd of February, 1935, for further provision 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 15th of April, 1935.

In Chambers

1935

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF G. H. RAMSEY, DECEASED

A. D. Crease, for petitioner.

Colvin, for Attorney-General and Official Guardian.

Cur. adv. vult.

1st May, 1935.

ROBERTSON, J.: This is an application under the provisions of the Testator's Family Maintenance Act, Cap. 256, R.S.B.C. 1924. The late George Henry Ramsey died on the 22nd of February, 1935, leaving him surviving his wife, who is the applicant, and also a daughter born on the 23rd of December, 1916, who is now in the Provincial Mental Hospital at Essondale, B.C., and a son aged nine years whom the testator and petitioner adopted on the 29th of June, 1926, under the laws of the Province of Saskatchewan, namely, the Adoption of Children Act, 1922, Cap. 64, Sask. Stats. 1921-22. By that statute the natural parent is divested of all legal right in respect of any child of his who may be adopted; is free from all legal obligations and duties as to the maintenance of such child. The child has the same right to any claim for nurture, maintenance and education upon his adopting parents that he would have, were the adopting parents his natural parents. The child is entitled to the benefits of our Act. See *In re Mary Ann McAdam* (1925), 35 B.C. 547.

Under section 9 of the Testator's Family Maintenance Act where an application has been filed on behalf of any person, it may be treated by the Court as an application on behalf of all persons who might apply and I treat this application as an application made on behalf of the petitioner and the said daughter and son.

The testator left a will dated the 20th of February, 1923, reading as follows:

This is the Last Will and Testament of me, George Henry Ramsey, of the City of Moose Jaw, in the Province of Saskatchewan, Physician.

I REVOKE all former Wills, Testamentary Dispositions at any time heretofore made by me.

I APPOINT Isabella Ramsey, my beloved wife the Executor and Trustee of this my Last Will and Testament.

I DIRECT my said Executor to pay all my just debts, funeral and testamentary expenses.

I FURTHER DIRECT my Executor to provide for the maintenance and proper education of my daughter, Florence Isabel Ramsey, out of my estate according to her station in life and that out of my Estate she shall be maintained and educated until she is of the age of twenty-one (21) years.

I BEQUEATH to my wife, Isabella Ramsey, the proceeds of an Insurance

Policy for One Thousand ($1,000.00) Dollars in the Sun Life Assurance Company, Seven Hundred ($700.00) Dollars worth of Stock in the Saskatchewan Life Insurance Company, all Bills Receivable, Accounts Receivable, and all cash in Bank at the time of my death and Ten Thousand ($10,000.00) Dollars in Victory Bonds and War Stamps at present on deposit in the vaults of the Union Bank, Moose Jaw.

I BEQUEATH to my wife, Isabella Ramsey, the house in which I at present live, at 506 Saskatchewan St. West, Moose Jaw.

After that part of my personal property, consisting of Farm Lands, Bank Building, and private residence at Pense have been sold and converted into cash I bequeath to my brother, William James Ramsey, residing at 700½ Gerrard St. East, Toronto, the sum of Four Thousand ($4,000.00) Dollars, and should he predecease me I bequeath to his widow, Minnie May Ramsey the sum of Two Thousand ($2,000.00) Dollars.

AFTER that part of my personal property, consisting of Farm Lands, Bank Building, and private residence at Pense, have been sold and converted into cash, I bequeath to my sister, Lillian Maude Ressor, now living at Markham, Ontario, the sum of Two Thousand ($2,000.00) Dollars, which said sum is to be invested in Victory Bonds or other good security, the interest on which is to be paid to her during her lifetime and the principal sum to be paid as she so directs upon her death.

SUBJECT TO THE BEQUESTS hereinbefore set out and the provisions for the maintenance of my daughter, I devise and bequeath all my property, both real and personal to the use of my wife, Isabella Ramsey, during her lifetime and from and after her death to my daughter, Florence Isabel Ramsey, her heirs and assigns for ever.

IN WITNESS WHEREOF I have hereunto set my hand this 20th day of February, A.D. 1923.

SIGNED, published and declared by the above named George Henry Ramsey, Testator as and for his Last Will and Testament, in the presence of us both present at the same time, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.
Helen Mackay
Arthur L. Martin

G. H. Ramsey.

At the time of the making of the said will the testator had about $50,000 of realizable assets. Since making the will the testator sold the $10,000 of Victory bonds and mortgaged the life insurance left to the petitioner, and because of these facts, and the decrease in the value of the other assets left to her, the petitioner takes under his will, real and personal property, to the value of only $4,004.03. The net value of the whole estate of the testator has so decreased that his executors have sworn it to be $23,022.47 and it is doubtful whether some of the assets are worth the values placed upon them in arriving at this figure.

In Chambers

1935

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF G. H. RAMSEY, DECEASED

Robertson, J.

W. J. Ramsey, mentioned in the will predeceased the testator. His widow, and the testator's other sister, Lillian Maude Ressor, maintain their claims under the will. They have been served with notice of these proceedings but have filed no material to shew their circumstances nor have they appeared. The solicitors for Mrs. Ressor have written the solicitors for the petitioner, under date of 27th March, 1935, pointing out that the testator lived for about nine years with Mr. and Mrs. W. J. Ramsey, when he was completing his education at the University; that he paid nothing to them and that evidently the legacy was intended to have reference to this obligation; that under the circumstances, and as Mrs. Ramsey had been ill for about a year, and is having a difficult time from a financial point of view, she did not feel disposed to waive any interest in the estate. The petitioner says that the testator had no one depending upon him except herself and their two children.

In making the enquiries to which I refer in *In re Morton, Deceased* (1934), 49 B.C. 172 at 173, I find the facts to be as follow:

The petitioner, who was in Court, is 57 years of age and apparently in good health. The girl is confined in the Mental Hospital but I have no information as to how long she will be there. The widow, however, is by virtue of sections 40 and 41 of the Mental Hospital Act, R.S.B.C. 1924, Cap. 158, if she is able to do so, compelled to pay for her maintenance in the said hospital, and, in any event, under the terms of the will she is to provide for the "maintenance and proper education" of the girl until she is 21, and, of course, under our law she has to provide for the maintenance and education of the boy. The testator was a doctor and several years ago purchased a home in Victoria for $8,500 cash. Neither the petitioner nor the children have any real or personal property whatsoever and, as I have said, the testator's estate at the time of his death was sworn at $23,022.47. If the two sisters were to receive what the will left to them then the estate would be reduced to some $19,000 and if it were possible to reduce the whole of this estate into cash and to invest the moneys and to net 5 per cent. on it, which I think is too optimistic, the result would be that the widow would have an income of less than $100 a month. She, however, only

receives about $4,000 under the will and a life interest in the balance after the two sisters have received their share. Under these circumstances I am of the opinion that the testator did not make adequate provision for the proper maintenance and support (which "cannot be limited to bare necessities of existence"—see *Walker* v. *McDermott,* [1931] S.C.R. 94 at p. 96) of the petitioner and their daughter and no provision at all for his son (evidently because the son was adopted some years after the will was made). Then, being of this opinion my next duty is laid down in *Walker* v. *McDermott, supra,* at p. 96, as follows:

> 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.

Counsel for the petitioner suggested that the petitioner should be given a lump sum of $15,000 and a life interest in the balance of the estate, which balance the children should receive at her death.

Counsel for the Attorney-General and for the Official Guardian did not oppose this disposition of the matter, providing that provision were made for the maintenance of the girl in the hospital and of the son. It costs $1 a day in the hospital. This would entirely cut out the testator's sisters and would in effect be making a new will, which the Court is not permitted to do as was pointed out in *Allardice* v. *Allardice,* [1911] A.C. 730.

So far as the girl is concerned, at the present time it will only be necessary, if there is sufficient money for that purpose, for the petitioner to provide $30 per month for her maintenance at the hospital; but she may recover, in which case the duty will rest with the petitioner to maintain and educate her in accordance with the will until she is 21 years of age, at a probable cost of more than $30 per month. Further, while the petitioner's duty to the girl is only until she reaches the age of 21, yet, it is likely, that she will always require financial help. The petitioner also must provide for the son. In view of the fact that the estate is providing practically no income and the nature of the assets, which are probably not readily saleable, it is altogether likely that from time to time part of the assets will have to be sold in order to provide moneys upon which the petitioner and her chil-

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF G. H. RAMSEY, DECEASED

Robertson, J.

dren may live. I have also to consider the rights of the sisters of the testator, but there is no evidence that they are or were dependent upon the testator. I think it likely that the whole estate must be used for the benefit of the petitioner and the children but there may be, at any time, a change in the circumstances which will alter the whole situation.

The New Zealand statute is not in our library but from the reported cases appears to be very similar to ours. In *In re Birch*, [1929] N.Z.L.R. 463 the facts were that a testator failed to make any provision for an unmarried daughter who was barely able to earn her living. An application upon her behalf was made under the New Zealand Act. The Court held that she had shewn a present right to some relief and then said there were two courses open (a) to make a present order to take effect in the future or (b) to charge the estate with a view to the making of a future order for payment. Smith, J. said at pp. 464-6:

> Now, if I impose a charge and then reserve leave to move for an order for payment at a later date, I shall be making what is termed by Salmond, J. in *Welsh* v. *Mulock*, [1924] N.Z.L.R. 673; G.L.R. 169 "a suspensory order." . . .
>
> In this conflict of judicial authority it is necessary that I should arrive at my own conclusion. The Court is authorized to make, by order, such provision as it thinks fit: s. 33 (1). It may attach such conditions to that order as it thinks fit: s. 33 (2). In making an order the Court may, if it thinks fit, order that the provisions may consist of a lump sum, or a periodical or other payment. I do not think that the word "provision" in subs. 1 must be so necessarily interpreted by the provisions of subs. 3 as to require that the "provision" can only be an immediate order for payment, whether taking effect presently or in the future. In my opinion the word "provision" in subs. 1 is wide enough to cover a charge on the estate with a view to a future order for payment. Subsections 4, 5 and 6 apply only where the Court has actually ordered a payment or payments. Subsection 8 is wide enough to include an order merely charging the estate. So also is subs. 12. Subsection 13 applies only to the discharge or variation of an order where the Court has ordered periodic payments or has ordered a lump sum to be invested. It is significant that the term "provision" and not "payment" is used in subs. 1; that subs. 3 does not in terms require that the "provision" must be a "payment," and that subs. 12, nullifying charges on a provision under the Act, refers only to an order for provision and not to an order for payment. I think, therefore, that the literal terms of the Act do not prevent the construction adopted in the earlier cases; and it is clear that the imposition of a charge would be useless unless it could fructify at a later date in an order for payment.
>
> If the meaning of the statute be obscure it is permissible to apply the argument *ab inconvenienti*. It is admitted by Salmond, J., that the Court

may take account of "the reasonable probabilities of future changes of circumstances." I think it reasonable in the present case to consider that Daisy Louisa Birch might marry before the death of the widow. It is equally reasonable to suppose that she might not. If she married, she might marry a man of much means or of little means. There being more than one reasonable probability, it is surely better that the Court's discretion should wait upon future events, provided the terms of the statute permit it. If the Court were required in every case to make an immediate order to meet anticipated consequences, even although such order does not take effect presently in possession, the Court would in many cases but see "through a glass darkly." If the Court can make an immediate order charging the estate with a view to a subsequent order based on the actual course of events, the Court can see by the light of day, and act more justly to all who are within its discretion. There may be a danger, as stated by Salmond, J., that a suspensory order may prejudice the administration and winding-up of the estate, and the final ascertainment of the rights of the beneficiaries under the will. I think, however, that this danger might be even more serious if the Court could not delay its order for payment.

These views of Smith, J. were adopted by Blair, J. in *Orr* v. *Public Trustee,* [1930] N.Z.L.R. 732 at p. 736.

In view of all the circumstances, I propose to make an order along the lines of the order made in the *Birch* case and accordingly order the following provision:

1. In addition to the property left her by the will the applicant is to have, until further order, a monthly income of $120 for the use of herself, her daughter and son, the payment of the amount to be charged against the whole of her estate.

2. The capital of the estate to be charged to meet any payments to be made under any further order which the Court may make upon the application of either the daughter or son.

3. The further consideration to be reserved so that the Court may be in a position to deal with any contingency that may arise.

The petitioner's costs out of the estate.

Order accordingly.

C. C. J. C. C.
1935
April 1, 4.

REX v. KLEIN.

Criminal law—Second-hand dealer—In possession of boom-chains—Stamped with mark "J. H. B." — Whether sufficiently distinctive — "Or other mark"—Meaning of—Criminal Code, Sec. 431, Subsec. 4—B.C. Stats. 1921 (Second Session), Cap. 5.

By section 431 subsection 4 of the Criminal Code: "Everyone who being a dealer in second-hand goods of any kind trades or traffics in or has in his possession for sale any boom or other chains, lines or shackles for the use of rafting . . . logs, . . . which has upon it the trade mark duly registered or other mark or name of any persons, without the written consent of such person, . . , is guilty of an offence," etc. The appellant being a dealer in second-hand goods was convicted under said subsection for unlawfully having in his possession five boom-chains for the use of rafting logs, and which had upon them the mark "J. H. B." The chains in question did not have upon them a trade mark duly registered but a certificate from the registrar under the Boom-chain Brands Act, B.C. Stats. 1921 (Second Session), Cap. 5, certified that boom-chain brand "J. H. B." was registered under said Act in the name of Bloedel, Stewart & Welch Corporation Ltd.

Held, that the meaning of the words "or other mark" as used in subsection 4 of section 431 of the Criminal Code can only be ascertained by reference to the words coupled with them, namely "the trade mark duly registered." The letters "J. H. B." used in the charge against the appellant are not sufficiently distinctive to make them registerable and the appeal should be allowed.

Quære, Whether the Boom-chain Brands Act, being a Provincial statute, can be invoked to inflict a penalty under a statute of Canada, *i.e.*, the Criminal Code.

APPEAL by accused from his conviction by the police magistrate at Vancouver on a charge that being a dealer in second-hand goods unlawfully had in his possession for sale five boom-chains for the use of rafting logs, and which had on them the mark "J. H. B.," being the mark of Bloedel, Stewart & Welch Corporation Ltd., contrary to the provisions of section 431, subsection 4 of the Criminal Code. Argued before ELLIS, Co. J. at Vancouver on the 1st of April, 1935.

J. W. deB. Farris, K.C., and *Kerr*, for appellant.
Orr, and *H. I. Bird*, for the Crown.

Cur. adv. vult.

4th April, 1935. C. C. J. C. C.

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REX v. KLEIN

ELLIS, Co. J.: The appellant was charged in the police Court in the City of Vancouver that between November 1st and December 31st, 1934, being a dealer in second-hand goods unlawfully had in his possession for sale five boom-chains for the use of rafting logs and which had upon them the mark "J. H. B." being the mark of Bloedel, Stewart & Welch Corporation Ltd. without the written consent of the said Bloedel, Stewart & Welch Corporation Ltd. He was convicted and fined $25 and appeals to this Court from the said conviction.

The charge is laid under section 431, subsection 4 of the Criminal Code, which reads as follows: [already set out in head-note.]

The chains in the possession of the appellant did not have upon them a trade mark duly registered, but did have the letters "J. H. B." stamped on them and a certificate was put in evidence by the Crown, although strenuously objected to by counsel for the appellant, from the registrar under the Boom-chain Brands Act, Cap. 5, B.C. Stats. 1921 (Second Session) certifying that boom chain brand "J. H. B." was registered under authority of the Act on the 15th day of January, 1923, in the name of Bloedel, Stewart & Welch Corporation Ltd. and was in good standing on the date of the certificate, *i.e.*, January 17th, 1935.

The language used in the Criminal Code is not particularly happy and the guilt of the appellant depends entirely on what construction is to be given to the word "mark" in the subsection.

It was argued by Mr. *Farris* on behalf of the appellant that the mark must be characteristic and distinctive as is necessary in the case of a duly-registered trade mark and that, in construing the statute, the maxim *noscitur a sociis* should be applied rather than the *ejusdem generis* rule as urged before the magistrate.

Was it the intention of Parliament when passing the Criminal Code that the words "or other mark" coupled in the same subsection with the words "the trade mark duly registered" were to be understood in the same sense? If so, the subsection presents no difficulties.

Under section 5 of the Trade Mark and Design Act, R.S.C. 1927, Cap. 201 the essential element necessary to a mark to

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enable it to be registrable is that it shall be distinctive. The statute uses the word "distinguishing."

The judgments of Lord Shaw and Lord Parker in *Registrar of Trade Marks* v. *W. & G. Du Cros, Lim.* (1914), 83 L.J. Ch. 1 on the principles involved are very illuminating. The head-note is as follows:

> The proper time for considering whether a mark is registrable as a trade mark, or whether, having regard to the interests of the public, it ought to be accepted or rejected, is when the application for registration first comes before the Registrar. . . . The Registrar then has a discretion, to be exercised in a judicial spirit, as to whether the mark is "distinctive."
>
> A mark consisting simply of the initials of the applicant, whether in block type or in script, should not generally be registered, not being sufficiently "distinctive."
>
> In order to determine whether a mark is "distinctive" it must be considered quite apart from the effects of registration.

It is very clear from the judgments of both Lord Shaw and Lord Parker that the letters "J. H. B." used in the charge against the appellant are not sufficiently distinctive to make them registrable.

The Crown, however, relies on the Boom-chain Brands Act, a Provincial statute.

In the interpretation section of that Act,

> "Brand" means any character or mark which may be impressed on a boom-chain for purposes of identification.

The procedure for registration under the Act is very simple. The registrar is a designated official of the forest branch. His duties are not difficult and consist in approving and registering a brand that is not identical with any registered brand and does not so closely resemble any registered brand as to be calculated to deceive. Sections 7 and 8 of the Act are as follow:

> 7. Every registered brand shall be personal property, and shall devolve as such, and the proprietor of a registered brand shall have the exclusive right to its use.
>
> 8. The fact that any boom-chain is impressed with a brand registered under this Act shall be *prima facie* evidence in all Courts that the proprietor of the brand is the owner of the boom-chain.

It must be borne in mind that the Criminal Code is a statute of general application and the Boom-chain Brands Act is a Provincial statute, the real purpose of which is to confer ownership of a particular brand on the person or firm registering it and enabling them to prove ownership in our Courts. The question, therefore, naturally arises, can such a Provincial statute so

designed and passed be invoked to inflict a penalty under a statute of Canada, namely, the Criminal Code? I very much doubt it.

In construing this statute I am asked by Mr. *Orr* on behalf of the Crown to apply the Golden Rule as laid down in *Fowell* v. *Tranter* (1864), 3 H. & C. 458 at 461:

> The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some cogent reason of convenience in favour of a different interpretation.

With this there can be no quarrel.

The statute under consideration, however, is a penal statute and I must, I think, rather give effect to the principle as enunciated by Pollock, C.B. in *Parry* v. *Croydon Commercial Gas Co.* (1863), 15 C.B. (N.S.) 568 at 575:

> It appears to me, that, in construing a penal statute of any kind, we are bound to take care that the party is brought strictly within it, and to give no effect to it beyond what it is clear that the Legislature intended. If there be any fair and legitimate doubt, the subject is not to be burthened. Though, no doubt, in modern times, the old distinction between penal and other statutes has in this respect been discountenanced, still I take it to be a clear rule of construction at the present day, that, in the imposition of a tax or a duty, and still more of a penalty, if there be any fair and reasonable doubt, we are so to construe the statute as to give the party sought to be charged the benefit of the doubt.

And in *Graff* v. *Evans* (1882), 8 Q.B.D. 373 the Court said at p. 377:

> In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section.

One other case from among the very many decisions on the rule of construction in penal statutes may be cited.

In *London County Council* v. *Aylesbury Dairy Co.* (1897), 67 L.J.Q.B. 24 at p. 26 Wright, J. says:

> I have certainly always understood it to be the rule that where there is any enactment which may entail penal consequences, the Court ought not to do violence to the language in order to bring people within it, but ought to take care that no one is brought within it who is not within it in express language.

I cannot, therefore, come to any other conclusion than that the meaning of the words "or other mark," as used in subsection 4 of section 431 of the Criminal Code, can only be ascertained by

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reference to the words coupled with them and therefore, for the reasons stated above, the appeal must succeed.

Appeal allowed.

C. C. 1935 *April* 26; *May* 20.

JONES v. SIMONSON.

County Court—Action for specific sum and for damages—Jurisdiction.

In an action in the County Court the plaintiff claimed "(a) Return of the sum of $170, paid to the defendant by the plaintiff; (b) damages." On defendant's objection to the jurisdiction of the Court:—

Held, that although the claim for damages is not stated, *ex facie* the Court has jurisdiction, must hear the action and exercise its powers to amend, if so invoked.

ACTION to recover $170 and for damages. Tried by ELLIS, Co. J. at Vancouver on the 26th of April, 1935.

Burton, for plaintiff.

Adam Smith Johnston, for defendant.

Cur. adv. vult.

20th May, 1935.

ELLIS, Co. J.: Counsel for the defendant on the opening of the case objected to the jurisdiction of the Court.

The plaintiff's claim is: "(a) Return of the sum of $170 paid to the defendant by the plaintiff; (b) damages; (c) such other and further relief as to this Honourable Court may seem meet; (d) costs of this action."

Counsel for the plaintiff abandoned the claim for damages after the commencement of the trial but it is still contended that (a) the claim for unstated damages does not shew the claim to be within the jurisdiction of the Court. (b) The Court has no power to amend where it has no jurisdiction in the first instance.

The question raised on the point of jurisdiction is important.

This Court is a Court of limited jurisdiction. The tendency of the decisions in the early cases was to hold a tight rein over Courts so constituted and to establish most rigorously the principle that everything necessary to give jurisdiction should appear upon the record. The later trend is more towards giving full

effect to the intention of the Legislature in establishing those Courts—a trend that is in unison with public policy, that is, that a more liberal interpretation should be given.

This is a Court of Record. It is bound by the common law and by the statute law as effectively as the higher Courts.

These are all reasons why we may suppose that the Legislature designed every reasonable intendment to lie in favour of their jurisdiction, and they warrant us in extending to them the most liberal construction which can be applied to their proceedings, consistently with sound legal principles:

Robinson, C.J. in *Jordan* v. *Marr* (1847), 4 U.C.Q.B. 53 at p. 59. In the very elaborate judgment of the learned justice in that case the question of jurisdiction is exhaustively dealt with and I have paraphrased some of his conclusions here in order to briefly shew the attitude of our Courts in 1847 when that judgment was delivered.

In *Powley* v. *Whitehead* (1859), 16 U.C.Q.B. 589 cited to me it was held that as the title of land was brought into question, and as the County Court under the statute "shall not have cognizance of any action where the title of land shall be brought in question" the Court should not have non-suited. It should have refused to entertain the case at all. In other words the Court never had jurisdiction and could not therefore entertain it in any way.

Cleveland Press v. *Fleming* (1893), 24 Ont. 335 was also cited. The head-note reads as follows:

Where a claim for an account beyond the jurisdiction of the Division Court, is brought in that Court, the judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction.

MacMahon, J. who delivered the judgment quotes from *Sherwood* v. *Cline* (1888), 17 Ont. 34 at p. 37:

It is a little difficult to see how a judge who upon looking at the record sees that the claim is beyond his jurisdiction has anything further to do with the matter except to refuse to try it. He sees that the parties have endeavoured to bring into Court a claim which the statute prohibits. If he allows an amendment he is asserting jurisdiction at a moment when he has none, and by a physical act is changing the face of the record so as to present an entirely different claim.

The section of our Act allowing an abandonment in the suit is 35 and reads:

. . . . but any plaintiff having cause of action for more than one thousand dollars, for which a plaint might be entered under this Act if not for more than one thousand dollars, may abandon the excess; . . .

It is obvious that the abandonment of the excess must be set

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out in the plaint before it is issued, thus giving the Court jurisdiction.

In *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448, MURPHY, J., on an application for a writ of prohibition, said:

> It is undoubted law that the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.

And further on:

> In my opinion, the absence of jurisdiction is apparent on the face of the proceedings when the proposition of law first laid down is borne in mind.

In *In re Nowell and Carlson* (1919), 26 B.C. 459 MACDONALD, J. follows MURPHY, J., the head-note reading in part as follows:

> Where the want of jurisdiction is apparent on the face of the proceedings, waiver or acquiescence cannot create jurisdiction; . . .

In *Neary* v. *Credit Service Exchange* (1929), 41 B.C. 223, the question is again considered by MURPHY, J. on an application for a writ of prohibition. His judgment is as follows:

> The plaint herein asks for an account. The case is not therefore *ex facie* beyond the jurisdiction of the County Court since that Court has jurisdiction in actions of account up to $1,000. This application is accordingly premature as this Court ought not to assume that the inferior Court will go beyond its competency and jurisdiction and, therefore, ought not to intervene at the present stage of the proceedings, the more so since counsel informed the Court that plaintiff has now filed a waiver of any claim in excess of $1,000. *Hallack* v. *Cambridge University* (1841), 1 Q.B. 593; *The Queen* v. *Twiss* (1869), L.R. 4 Q.B. 407. The case of *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448 is clearly distinguishable. There the plaint failed to shew on its face any jurisdiction whatever in the Court to which the writ of prohibition was directed.

The County Courts in this Province have jurisdiction to try actions for damages up to $1,000. In the case at Bar the claim for damages is not stated but *ex facie* the Court has jurisdiction and is bound to hear it. Counsel for the plaintiff has since the trial opened abandoned all claim for damages.

This, in my opinion, does not alter the situation.

The two claims sued on shew on their face jurisdiction and this being so the Court must hear the action and may exercise its powers to amend, if so invoked.

Objection overruled.

THE KING v. THE SHIP "EMMA K."

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Jan. 3, 17; *Feb.* 18-20; *May* 23.

Admiralty—Ship—Forfeiture—False declaration touching owner's qualification to own ship—Unlawfully cause the ship to fly the British flag and assume a British character—Mortgage of ship—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Secs. 67 (2), 69 and 76.

The collector of customs at Vancouver seized the ship "Emma K." on the 19th of April, 1934, for alleged infringements of the provisions of sections 67 (2) and 69 of the Merchant Shipping Act, and later on the same day the ship was arrested by the marshal at the instance of certain seamen for wages. On the 25th of April the ship was handed over to the marshal to be sold by order of the Court, and after satisfying the wage claims there remained a balance of about $2,500 which the Crown claims as being forfeitable in lieu of the ship. Upon the hearing one Barrett applied for leave to come in as a defendant as being a "person interested" as the unregistered transferee on December 10th, 1934, of a registered mortgage to secure $5,000, given on the 23rd of March, 1933, by the owner to one Allender. The motion was granted, and leave was given Barrett as transferee and agent representing the interest of Allender in the ship, to be heard in support of his principal's interest.

It was held that the evidence adduced for the Crown clearly established the charge against the owner that he did wilfully make a false declaration touching his qualification to own the ship, contrary to section 67 (2), but the mortgage of which Barrett was transferee must be regarded as a *bona fide* transaction entered into without knowledge of the offence.

On Barrett's claim as transferee of the mortgage that he is entitled to retain and protect his individual "interest" in the ship as mortgagee, and that it is not subject to forfeiture because subsection (2) declares that the "ship or share shall be subject to forfeiture under this Act to the extent of the interest therein of the declarant" and that such interest does not "extend" to include that portion of it which he has parted with under the said mortgage:—

Held, that the mortgagee and transferee are, as regards this forfeiture in just as favourable a position under said subsection (2) as though they were in possession of the ship, and therefore that interest should be protected in the order that should be made under section 76, and the balance of the proceeds of the sale of the ship should be paid to the intervener to be applied in reduction of said mortgage.

The Annandale (1877), 2 P.D. 218, distinguished.

On the claim for forfeiture under section 69 of the Act because the owner "used the British flag and assumed the British national character on board a ship owned" by him "for the purpose of making the ship appear to be a British ship" although he was not qualified to own her, it was submitted that the owner getting himself registered as a British owner by fraudulent means under said subsection (2) is sufficient to establish a constructive use and assumption of flag and character for the prohibited purpose.

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Held, that the subsection is obviously directed to matters occurring "on board a ship" and of such a kind as to "make the ship appear to be a British one" as the result of something done "on board" of her in the course of her use as a ship and not something done in a registry in relation to the "Procedure for Registration" of her and this charge must be dismissed.

ACTION under section 76 of the Merchant Shipping Act for the forfeiture of the ship "Emma K." on the grounds that the owner wilfully made a false declaration touching his qualification to own the ship, being a British one, contrary to section 67 (2) of said Act, and that he did unlawfully cause the said ship to fly the British flag and assume a British character contrary to section 69 of said Act. Tried by MARTIN, Lo. J.A. at Victoria on the 3rd and 17th of January, and the 18th to 20th of February, 1935.

W. C. Thomson, for intervener: Mr. Barrett, the intervener, admittedly has no personal interest in the ship, but he is the local representative of the mortgagee, Mr. Allender, who has assigned the mortgage to him. He is therefore entitled to intervene as mortgagee: see *The Two Ellens* (1871), L.R. 3 A. & E. 345. He has testified that he knows all about the mortgagee's business, and is informed both by the mortgagor and the mortgagee that nothing has been paid on the mortgage. The former Act provided that the interest of a person making a false declaration "shall be forfeited." Under the present Act such interest is said to be "subject to forfeiture." *The Annandale* case (1877), 2 P.D. 179, was decided under the former Act. It was there held that the property of the offender was divested on commission of the offence, but it is submitted that the change in the Act has the effect of conferring a discretionary power to protect innocent purchasers and mortgagees, and the condition of title to the ship at the time forfeiture is declared is looked to and not the condition of title at the time the offence was committed. See *The S.S. Maori King,* [1909] A.C. 562. In this case the decision of the Shanghai Court was reversed by the Privy Council on a different ground. The amount in Court, being less than the amount of the mortgage, all the money in Court should be paid out to the intervener in part payment of his mortgage, the owner having no longer any interest therein. It is submitted that the

intervener's mortgage constitutes an interest in the ship or shares within the meaning of the section. As to the charge that the ship flew the British flag and assumed a British character, there is no evidence that the "Emma K." ever flew the British flag, or any other flag.

H. W. R. Moore, for the Crown: The Court being satisfied that a false declaration has been made, it is submitted that the question of the intervener's right to share in the money in Court depends on the meaning of the word "interest" in section 67 (2). It is submitted that this word does not mean or include "equity of redemption" as it might be construed to do if the Act were dealing with real property. The words "extent of the interest" are used to cover the case of a declarant who is registered as the owner of a fractional interest in a share, or shares, under section 5 of the Act, which provides for registration of fractional interests of not less than one-fifth in any share. In this case Purdy owned all 64 shares, and that is the extent of his interest which is liable to forfeiture. The fact that that interest was security for a loan does not affect the forfeiture. The interest is forfeited whether mortgaged or not. The mortgagee of a ship is not the owner of the ship unless he takes possession, and he has no interest in the ship in the legal sense of the word. The ship is merely available to him as a security. This view of a mortgaged interest is taken in all statutes dealing with confiscation of property to the Crown for offences, and if it were not so the effect of these statutes could be nullified by collusive mortgages. Where the confiscated chattel is mortgaged the mortgagee loses his security under the decisions on all other statutes decreeing confiscation: see *The King* v. *The Sunrise* (1930), 43 B.C. 494; *The King* v. *Krakowec,* [1932] S.C.R. 134; *The Marie Glaeser,* [1914] P. 218; *The Seaway* (1880), Y.A.D. 267 at p. 270. In this view the change in the Act is not material, but in any event no evidence has been led to shew that the mortgagee was an innocent mortgagee. On the contrary, the evidence shews that both owner and mortgagee were non-resident Americans, and that they gave the same address in Vancouver, being a place where neither of them had ever resided. Further, Barrett's evidence that he had been told no money has been paid on the mortgage is hearsay evidence, and does not amount to proof that

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the mortgage relied on is a subsisting security. A foreigner is not capable of owning a British ship or share, and, therefore, it is submitted he is unable to give a valid mortgage thereon, and it is submitted that there is no mortgage in this case upon which the intervener can rely as against the Crown in proceedings such as these, his title being fatally defective. It is not disputed that this ship was given a British register and cleared as a British ship. It is the duty of a British ship to fly the British flag, and it is submitted that the fact that she was registered as a British ship and cleared as a British ship is sufficient evidence of use of the flag and assumption of a British character within the meaning of section 69 of the Merchant Shipping Act.

Cur. adv. vult.

23rd May, 1935.

MARTIN, LO. J.A.: This action, raising a new and very important question, is brought under section 76 of the Merchant Shipping Act, 1894, for the forfeiture of the defendant ship on the ground that the owner thereof, Manuel Purdy, did wilfully make a false declaration touching his qualification to own the said ship, being a British one, contrary to section 67 (2) of the said Act, *viz.*:

> If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanour, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

The ship was originally seized by the collector of customs at Vancouver on the 19th of April, 1934, and later in the same day was arrested by the marshal at the instance of certain seamen, for wages, and on the 25th of that month the collector, who had remained in possession under his seizure, handed her over to the marshal to be sold by order of this Court (of 12th of June) to satisfy the said wage claims, and, after satisfying, with the Crown's consent, those claims from the proceeds of that sale duly paid into Court, there remains a balance of about $2,500 which the Crown claims as being forfeitable, in lieu of the ship, for the reason aforesaid, and for the further reason, pursuant to

amendment granted, that "the said Manuel Purdy did unlawfully cause the [said] ship to fly the British flag and assume a British character contrary to section 69" of said Act, which added ground will be considered later.

Upon the case coming on for hearing a motion was made, under rule 30, on behalf of John Barrett for leave to "come in . . . as a defendant" as being a "person interested" as the unregistered transferee, on 10th December, 1934, of a registered mortgage to secure $5,000 and interest, given on the 23rd of March, 1933, by the said Manuel Purdy, as owner, to Percy J. Allender, and after a lengthy hearing and strong opposition the motion was granted and leave given to Barrett as transferee and agent representing in this Province the interest of Allender (of San Francisco) in the ship to be heard in support of his principal's alleged interest: *The Two Ellens* (1871), L.R. 3 A. & E. 345, 354-5; *The St. George,* [1926] P. 221, 230; *The Cathcart* (1867), L.R. 1 A. & E. 314; Maclachlan on Merchant Shipping, 7th Ed., 33, 37, 39; section 57 Merchant Shipping Act, 1894, and section 37—*Cf.* Temperley's Merchant Shipping Acts, 4th Ed., 33.

Apart from Barrett's claim the case presents no real difficulty because the evidence adduced for the Crown clearly establishes the said charge against Purdy of making a false declaration of British ownership under said section 67 (2) and therefore the usual judgment of forfeiture of the entire ship (or the proceeds of its sale in lieu thereof) would follow, he being the sole owner. But it is submitted on behalf of Barrett that, as the transferee of said mortgagee and standing in his shoes, he is entitled to retain and protect his individual "interest" in the ship as mortgagee and that said interest is not subject to forfeiture because subsection (2) declares that the "ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant," and that such interest does not "extend" to include that portion of it which he has parted with under said mortgage, and consequently that no judgment can be pronounced which does not recognize and protect that interest.

The question that falls to be determined, therefore, is, what is the meaning of the expression "subject to forfeiture . . . to the extent of the interest therein of the declarant" as used in

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the section? and its history, and that of cognate sections, is of assistance in answering it. In the Merchant Shipping Act of 1854, Cap. 104, the 4th subsection of section 103 corresponds in general to the present subsection (2) the main difference being in its conclusion, as follows:

> . . . and the ship or share in respect of which such declaration is made, . . . , shall, to the extent of the interest therein of the person making the declaration, and, unless it is shewn that he had no authority to make the same, . . , be forfeited to Her Majesty.

So the only change, effected by subsection (2), is that the ship or share shall be "subject to forfeiture" instead of being absolutely "forfeited," and the procedure to secure that forfeiture is provided by said section 76 under which this ship is "brought for adjudication."

It was submitted that this change conferred a discretionary power upon the Court to protect innocent purchasers and mortgagees and the effect of the decision of the Court of Appeal in *The Annandale* case (1877), 2 P.D. 179, 218; 3 Asp. M.C. 383, 489, was relied upon, wherein it was decided, not on said subsection (4) of section 100 of the Act of 1854, but on a distinct offence under subsection (2) of that Act (*viz.*: concealment of the British character of the ship or assumption of a false character, etc., now in part section 70) that the forfeiture of the ship became complete and immediate upon the commission of the prescribed offence because the said subsection declared that "such ship shall be forfeited to Her Majesty" and therefore it was immediately divested from its former owner and vested in the Crown, and the result was that the claim to the ship of a *bona fide* purchaser thereof for valuable consideration on the 6th of July, 1876, and without knowledge of the commission of the prior offence on the 18th of July, 1874, was rejected, James, L.J., saying, p. 220:

> According to the view of the law which has been taken upon the cases I have referred to, the property of the rightful owner may be divested the moment a person has committed the offence for which it is to be forfeited, and being divested he cannot vest it in anybody unless there be a statutory provision to that effect, a provision like our law with regard to the sale of stolen goods in market overt, where a person who has no title does give a title to a purchaser. Without such a provision the person whose title is divested cannot give a title to any other person, however innocent that person may be. However, if there is any case of hardship, no doubt the Crown will always take that into its merciful consideration.

And Baggallay, L.J., said pp. 220-1:

It appears to me that the opposite construction of the 2nd subsection of the 103rd section of the Act would substantially render that section a dead letter; for the claim for protection is based upon this, that there is no actual forfeiture until adjudication, or at any rate until seizure; and if that were the true construction of the Act no distinction could be drawn in the case of a purchaser for value with or without notice. If that be the case, as in almost every instance where any act is done, which is made punishable under the 2nd subsection, it is done in secret, it would not be impossible to make a sale of the ship before the time when any seizure could be made, or before the time when an adjudication could be brought about.

And he went on to say, p. 221:

Reliance has been placed on the provision in the latter part of the section in which directions are given as to the process by which the ship is seized, and by which adjudication is obtained, but it appears to me those provisions are for the benefit of the shipowner, in order to afford him the opportunity to shew that the seizure was improper. If he can shew that the vessel was not liable to forfeiture at the time, then it could not be treated as a forfeiture, and in that case if the officer of the customs had not good ground for making the seizure, the officer is to be subjected to make amends as the Court may think fit to direct.

And Cotton, L.J., said, p. 221:

That second subsection is to the effect that if a master shall so offend the ship shall be forfeited, and not as has been contended, that it shall on adjudication be forfeited. The forfeiture results immediately on the offence being committed, and if there is any argument raised as to the construction of the words, "the ship which has become subject to forfeiture," then I say those words are not sufficient to alter what in my opinion is the true construction of the 2nd subsection of the 103rd clause, which is that the forfeiture takes place when the act is committed.

These reasons affirmed the view of Phillimore, J. very clearly expressed at p. 185:

. . . the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the Annandale related back to the time of the wrongful act committed by the then owners.

Now while this decision is, as already noted, on a different section of the old Act of 1854, yet it is of much assistance on the present one because its *ratio decidendi* is that the absolute forfeiture brought about an immediate divesting of ownership and vesting in the Crown which necessarily excluded the consideration of all subsequent transactions, and it is to my mind fairly clear that if the forfeiture had not occurred "until adjudication, or at any rate until seizure" (pp. 185, 220) then, the claim of the innocent purchaser would have been allowed, and this is important because the said subsection (2) has been altered by said

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section 70 of 1894 to declare that "the ship shall be subject to forfeiture under this Act" instead of "shall be forfeited" as theretofore, and the following opinion on the effect of that change was expressed by the Supreme Court of China and Corea at Shanghai (*per* Sir Havilland de Sausmarez) in *The S.S. Maori King,* [1909] A.C. 562, at 565; 11 Asp. M.C. 249, 250; 100 L.T. 787, 789; *viz.*:

> For the defendants it is urged that the change of the words in the Act from "shall be forfeited" to "shall be subject to forfeiture" must indicate an intention of the Legislature that the Court should exercise its discretion as to whether it would give weight to questions of hardship which under the Act of 1854 could, as James, L.J. points out in *The Annandale,* [*supra*] be taken into the merciful consideration of the Crown. I am bound to say that this consideration weighed heavily with me, but on mature consideration I have come to the conclusion that the object of the change in the Act is to defer the forfeiture until judgment so that a possibly unwitting breach of the law may not imperil valuable property in a ship, or that an innocent *bona fide* purchaser may not lose his property, because the ownership has been divested by operation of law. The *Annandale* was decided on the words of the statute of 1854; this case must be decided on the words of the statute of 1894. There have been no cases under section 76, but a consideration of the words of that section has led me to the conclusion that I must make the order prayed for by the Crown.

It appears from this citation, and from the pages above cited in Aspinall and the Law Times (*i.e.,* 250 and 789) that the learned judge decided that he had no discretion to relieve from hardship, but that the statute itself operated to protect "innocent *bona fide* purchasers" and this opinion stands because the Privy Council did not upset his judgment on that opinion or give it consideration because it held that his Court had no jurisdiction to entertain a suit for forfeiture for breach of section 76 of the said Act of 1894.

It is passing strange that apart from this judgment there is no other judicial decision (that I, at least, have been able to find after a long and diligent search) on a question of such great and far-reaching importance, but that some change at least in the law has been effected by said change in the language is recognized by all the leading text-books on the subject, *e.g.,* Mayers's Admiralty Law and Practice (1916), 197; Williams & Bruce's Admiralty Practice, 3rd Ed., 223-4; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 105; Maclachlan on Merchant Shipping, 7th Ed., 55; Temperley's Merchant Shipping Acts,

4th Ed., 51; and Abbott on Shipping, 14th Ed., 112-3; in which last and high authority it is said, note (*o*):

> The wording of the corresponding section (70) in the Act of 1894 may be construed to mean that the forfeiture will not operate until condemnation, and that the offence would therefore impose no such disability on a purchaser taking before condemnation.

That it was the settled intention of Parliament in the new consolidated Act of 1894 to depart in general from the peremptory and absolute forfeitures imposed by the old Act of 1854 is further shewn by the use of the new expression "subject to forfeiture" in sections 16, 28 (4), 67 (2), 69 and 71 as well as in said section 70, in substitution for the imperative expressions in the old corresponding sections 52, 64, and subsections (3) and (4) of 103 of 1854, as well as in subsection (2) thereof, and after a very long and careful consideration of all the relevant sections of the Act I am impelled to the opinion that if *The Annandale* case were now being decided the said change in the Act would compel the Court to come to the same conclusion as that of the Supreme Court of China in *The S.S. Maori King* case, *i.e.*, that the right of the innocent purchaser would be upheld because "there is no actual forfeiture until adjudication, or at any rate until seizure."

That the principle embodied in such a decision under present section 70, in favour of a *bona fide* purchaser without notice, should extend to such a purchaser under subsection (2) of 67, now in question, there seems no good reason to doubt, and so if the present intervening claimant were such a purchaser he would be entitled to judgment in his favour because he had acquired "the interest of the declarant" in the ship to the full "extent" thereof. I can see no good reason why such a purchaser is not just as fully entitled to protection where he buys from an owner (who derives title from a lawful registered owner) who has got on the register by deception under section 67 as where he buys from one who after getting on the register rightfully has resorted wrongfully to deceptions concerning the "National Character and Flag" under section 70: the offences to my mind are *pari passu*, though it might ponderably be argued that the latter is the more serious.

This intervener, however, is not a purchaser but the transferee of a mortgage, covering the sole owner's entire interest, and

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upon the evidence I find that the objections taken to said mortgage as being a sham proceeding were not sustained, and it must be regarded as a *bona fide* transaction entered into without knowledge of any offence against section 67 and overdue both as to principal and interest, and that the intervener stands in the said mortgagee's shoes and is entitled to assert his interest. Such being the case, the second difficult question arises as to whether or no he is entitled to the same protection as an innocent purchaser?

The former position of a mortgagee is well explained in Abbott on Shipping, *supra,* pp. 41, 85, and 101 *et seq.,* and at the first page it is said:

> It seems proper in this place to take notice of what was formerly an important question, and on which persons of eminent talents differed in opinion, *viz.*, whether the mortgagee of a ship was to be deemed in law the owner of it, entitled to the benefits and liable to the burthens, which belong to that character before he took possession of the ship. It will, however, be sufficient briefly to refer to the cases in which decisions have taken place on the subject, as by recent Acts of Parliament, when a transfer is made only as a security for the payment of debts by way of mortgage, or of assignment to trustees for sale, on a statement being made in the book of registry, and in the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, is not to be deemed the owner nor is the person making such transfer to be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship transferred available, by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made.

This refers to section 34, *viz.*:

> Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

Abbott then proceeds:

> When the fifth edition of this work was published there was no provision for registering mortgages as such, and as no rights in a ship could then be acquired except on registration, mortgages were usually effected by means of an absolute transfer of the ship or shares mortgaged, with the indorsement above mentioned. The Act of 1894 now provides for the registration of mortgages of ships and shares in ships, and a mortgagee is still protected as he is not by reason of his mortgage to be deemed owner, nor is the mortgagor to be deemed to have ceased to be owner.
>
> Nevertheless, as a mortgagee may by the act of taking possession, whether of a ship or shares as will be seen hereafter, put himself into the position of the legal owner, it becomes necessary to deal more fully with the relative positions of mortgagor and mortgagee.

And at p. 102:

The effect of this provision, coupled with other provisions of the Act, is, shortly, that whilst a registered mortgagee has rights in priority to all other persons not registered before him, unregistered mortgages may be enforced as between their holders and a mortgagor.

It flows from this that, in my opinion, if an innocent mortgagee has taken possession of his security then he is in just as strong a position, whatever his exact *status* may be (whether it is regarded as a "beneficial title" under section 5 (iii.) or "beneficial interest" under section 57, or otherwise), to resist a forfeiture as if he were an innocent purchaser and therefore it is "necessary" to "deem" him to be the owner *ad hoc* in order to "make [the] mortgaged ship or share available as a security for the mortgage debt."

And in *Liverpool Marine Credit Co.* v. *Wilson* (1872), 7 Chy. App. 507; James, L.J., in delivering the judgment of the Court said, p. 512, respecting the right of "a legal first mortgagee in possession" of a ship, that:

He has the paramount legal title, there is nothing to affect his conscience, and we are unable to find either on principle or authority any sound distinction between his case and that of the legal mortgagee of any other kind of property who has made farther advances on the property itself, or on the timber or growing crops, without notice of intervening equitable charges or interests.

Then why is a mortgagee not in possession in a worse position as regards forfeiture of this kind? Having regard to the language and operation of the section I find it very difficult to hold that he is, because the section does not require him to take any step in order to become entitled to its benefits, but simply says, in effect, that when it is necessary to make the mortgaged ship "available as a security" then he is to be deemed to be the owner thereof, and it is in practice more necessary for that purpose to "deem" him to be an owner when out of possession than in it.

This view is supported in an instructive case on the section, *Kitchen* v. *Irvine* (1858), 28 L.J.Q.B. 46, wherein it was held by the Court of Appeal that a creditor who has got judgment against the registered owner of a mortgaged ship could not take the ship into execution because that would defeat the right of the mortgagee to make the ship available as a security under the section, even though the mortgagee had not taken possession, Lord Campbell, C.J., saying, p. 47:

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I am of opinion that the ship, under those circumstances, cannot be taken in execution as against the mortgagee. It is his property *prima facie*, unless his rights are restrained by the Act of Parliament. Now, by section 70 of the Merchant Shipping Act the mortgagee is not to be deemed owner of the ship, nor is the mortgagor deemed to have ceased to be owner of the mortgaged ship, "except in so far as may be necessary for making such ship available as a security for the mortgage debt." It cannot be said to be consistent with that provision that the ship should be taken in execution at the suit of a creditor of the mortgagor. Section 70 protects the mortgagee in everything necessary to make the mortgage available.

And Crompton, J. said:

I think the word "mortgagee" passes the legal property. That does not appear to me to be affected by the provision that he shall not be deemed owner, for that means, I take it, that he shall not be affected by the debts of the ship. We cannot alter the position of the parties and make the creditor a trustee for the mortgagee against his will. The mortgagee has the property in the ship for all the purposes of rendering it available as a security for his debt.

This clear reasoning is specially applicable to the present case, and there is nothing in it which conflicts with the decision in *The St. George*, [1926] P. 217, that the same section does not (p. 231),

extinguish the powers of a ship's master to bottomry a distressed ship in case of need or to subject a damaged ship to a possessory lien in order that she might be repaired. The language used is not apt for the purpose if it was meant to deprive masters of ships of powers which they notoriously had. Acts in the exercise of those powers seem to me not to be dealings by the mortgagor. Nor is it obvious that they impair, or are calculated to impair, the security of the mortgagee. They are perhaps rather calculated to preserve it.

In *The Blanche* (1887), 6 Asp. M.C. 272, also on this section, Butt, J. said (p. 273):

I am prepared to hold that the mortgagee was not entitled to take possession before the money secured by the mortgage is due. True the property in the ship is his, but the equities interfere and prevent his taking possession. If, however, I saw any attempt to impair the security, so that it would not be available, I should say he was justified in doing what he has done.

In support of the forfeiture the Crown cited the decision of this Court in *The King* v. *The Sunrise* (1930), 43 B.C. 494, and of the Supreme Court of Canada in *The King* v. *Krakowec*, [1932] S.C.R. 134, but they are on different statutes, the latter being one wherein the expression is "shall be forfeited to the Crown" (p. 141) and therefore on all fours with *The Annandale* case, *supra;* and as to *The Marie Glaeser*, [1914] P. 218, that is a Prize case; *The Polzeath*, [1916] P. 241, 243, 254, is on section 51 of the Shipping Act of 1906, and throws no light upon

the present question because it did not arise therein, nor was *The Annandale* case considered (p. 254), and Bankes, L.J., said (p. 255) that the only question that arose for decision was one of fact, *viz.*, what was the principal place of business of the company that owned the ship?

It was submitted that since the ship had got upon the register unlawfully by the fraud of her then owner the original taint of that registration is carried into all subsequent transactions, but the consequences of that fraud are only those which are prescribed by the statute imposing specific penalties of forfeiture and for personal misdemeanour, which brings the question back to the effect of the change in the law since *The Annandale* case. There might, possibly, be more to be said in favour of this submission if the ship had been unlawfully put upon the register the first time, under section 101, but as that is not the case here I refrain from expressing any opinion upon it.

It is worthy of note that a similar submission of a taint of piracy was, under circumstances largely involving the same principles, rejected by the Privy Council in the instructive case of *The "Telegrafo" or "Restauracion"* (1871), L.R. 3 P.C. 673, at pp. 688-9, *viz.*:

> There is no authority, their Lordships think, to be derived either from principle or from precedent for the position that a ship duly sold, before any proceedings have been taken on the part of the Crown against her, by public auction to a *bona fide* and innocent purchaser can be afterwards arrested and condemned, on account of former piratical acts, to the Crown. The consequences flowing from an opposite doctrine are very alarming. In this case, six months have elapsed between the sale and the arrest; but, upon the principle contended for, six or any number of years and any number of *bona fide* sales and purchases, would leave the vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners.

And after assuming that the ship had been "piratically navigated" previous to her transfer the report proceeds:

> . . . Their Lordships have arrived at the conclusion, that the Court ought not to have arrested the ship, which for many months had been in the undisputed possession of a *bona fide* purchaser by public auction, on account of piratical acts alleged to have been committed from on board of her before the sale took place.

The "taint of piracy" is one requiring a thorough purge, it

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might well be thought, because, as Blackstone says, Book 4, Lewis's Ed., 71:

> The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

It is significant that there is still one offence against the "National Character and Flag" for which Parliament has departed from its general intention above noted and continued unchanged the penalty of immediate and absolute forfeiture imposed by the Act of 1854, Sec. 106, the present corresponding section in the Act of 1894 being 73 (3), which declares that certain specified officers

> may board any ship or boat on which any colours or pendant are hoisted contrary to this Act, and seize and take away the colours or pendant, and the colours or pendant shall be forfeited to Her Majesty.

And the same absolute penalty is also imposed upon emigrant ships for violation of section 319, which preserves the original provision of The Passengers Act Amendment Act, 1863, Cap. 51, Sec. 13, and it is to be observed that a mitigating power is by subsection (2) conferred upon the Board of Trade to "release, if they think fit, any such forfeited ship, on payment, to the use of the Crown," of a sum not exceeding £2,000.

After giving very careful and prolonged consideration to this exceptionally difficult question in all its aspects and having special regard to the principles laid down in *Kitchen's* case, *supra,* I find myself unable to reach any other conclusion than that the present mortgagee and transferee are, as regards this forfeiture, in just as favourable a position under said subsection (2) as though they were in possession of the ship and therefore that interest should be protected in the order that should be made under section 76.

If the ship were before the Court that order would, under present circumstances, take the form that she should be "adjudged with her tackle, apparel, and furniture to be forfeited to His Majesty" to the extent of the interest therein of said

Manuel Purdy, but with the necessary addition (in pursuance of the subsequent and further power to "make such order in the case as to the Court seems just") of a declaratory order that the forfeited interest of said Manuel Purdy does not extend to include the interest that he as mortgagor has transferred to said Allender as mortgagee, and which is now lawfully asserted by the intervener on Allender's behalf, to the amount and extent of the principal and interest now due under the mortgage.

Though the result of such an adjudication in the present case would be that the declaration of forfeiture would be an empty formality, yet if this ship had sold for a larger sum, or the mortgage been for a less one, the result would have been of substantial difference.

As the matter now stands, the only order that can appropriately be made is that the balance of the proceeds of the sale of the ship, now in Court in lieu of her, be paid out to the intervener to be applied in reduction of said mortgage.

There only remains for consideration the said claim for forfeiture under section 69 because Purdy "used the British flag and assumed the British national character on board a ship owned" by him "for the purpose of making the ship appear to be a British ship," though he was "not qualified to own" her. No evidence was given in support of this charge other than the bare fact that Purdy had got himself registered as a British owner by fraudulent means under said subsection (2), but it was submitted that this is sufficient to establish a constructive use and assumption of flag and character for the prohibited purpose.

These submissions extend the section to great, and, I think, in the absence of any authority, unwarranted length, because it is directed obviously, to my mind, to matters occurring "on board a ship" and of such a kind as to "make the ship appear to be a British" one as the result of something done "on board" of her in the course of her use as a ship, and not something done in a registry in relation to the "Procedure for Registration" of her—section 4 *et seq.*—and confirmation for this practical view is to be found in the section itself, in the proviso justifying the use for another "purpose," *viz.*:

> unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.

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The only case I have found of a forfeiture on this section is *The Queen* v. *Schooner S. G. Marshall* (1870), 1 P.E.I. 316, but no exposition of the section was there attempted because it was unnecessary to do so since the ship was seized at sea after she had "hoisted the British ensign" (p. 318).

It follows that this charge must be dismissed.

With respect to costs, leave is given to speak to them, and also to the exact form in which this judgment should be entered.

Action dismissed.

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Slander—Privileged communication—Malice—Burden of proof.

The plaintiff was employed in the years 1931 and 1932 as a salesman in the Mainland Cigar Store Limited in Vancouver, the defendant being a shareholder and manager of the store. During this time and previously the Mainland Cigar Store Limited purchased goods in a wholesale way from Canadian Tobaccos Limited in Vancouver, of which one Drew was the manager. The plaintiff left the employ of the Mainland Cigar Store Limited, and in October, 1933, became a salesman in Canadian Tobaccos Limited where he remained until June, 1934, when he was discharged. In May, 1934, Drew went to the Mainland Cigar Store Limited where he had a conversation with the defendant, during which the defendant asked Drew whether he wondered why business relations had fallen off between them, and the defendant then said "So long as Anderson remains in your employ we will place no business with you, and other concerns will also refuse to do business with you. While in our employ Anderson got away with about $3,500." In an action for slander it was held that the words were spoken on a privileged occasion, but the defendant had no honest belief in the statements he made, and acted with malice. Judgment was given for the plaintiff for $3,000.

Held, on appeal, reversing the decision of MCDONALD, J., that the facts of the case taken at the worst against the defendant, who was acting in "a common interest," do not go further than to be equally consistent with the presence or absence of malice and therefore the action should have been dismissed.

APPEAL by defendant from the decision of MCDONALD, J. of the 21st of December, 1934, in an action for damages for slander.

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The defendant is a shareholder and director of the Mainland Cigar Store Limited, carrying on business in Vancouver. For about one year prior to October, 1933, the plaintiff was employed as a salesman in the Mainland Cigar Store Limited. He then left there and became a salesman in the employ of Canadian Tobaccos Limited, where he remained until June, 1934. One Ray Drew was manager of Canadian Tobaccos Limited. Prior to June, 1934, the defendant on behalf of his company purchased tobaccos in a wholesale way from Canadian Tobaccos Limited, but the sales fell off after Anderson became a salesman there. In May, 1934, Drew went to the store of the Mainland Cigar Store Limited, where he had a conversation with Smythe who asked him whether he wondered why business relations had fallen off between them. The conversation continued and Smythe used words to this effect:

So long as Anderson remains in your employ we will place no business with you, and other concerns will also refuse to do business with you. While in our employ Anderson got away with about $3,500.

In the following month Drew discharged the plaintiff from his employ. Judgment was given for the plaintiff for $3,000 in damages.

The appeal was argued at Vancouver on the 20th and 21st of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C., for appellant: Smythe would not buy goods from Drew when Anderson was in his employ and Smythe told Drew that Anderson got away with $3,500 when Anderson was in his employ. This was a privileged occasion and the trial judge so found, but he found that there was express malice. It was the defendant's duty to warn and this was a discussion between two men in a matter in which they had a common interest. There was moderation in the language used and the burden is on the plaintiff to shew the defendant was guilty of malice: see *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237 at p. 243; *Hart* v. *Von Gumpach* (1873), 42 L.J.P.C. 25 at p. 33; *Jenoure* v. *Delmege* (1890), 60 L.J.P.C. 11 at pp. 13-4; *Somerville* v. *Hawkins* (1850), 20 L.J.C.P. 131 at p. 133; *Spill* v. *Maule* (1869), 38 L.J. Ex. 138; Gatley on Libel & Slander, 2nd Ed., 231. The question is, did he honestly suspect

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Anderson? See *Taylor* v. *Hawkins* (1851), 20 L.J.Q.B. 313. He introduced evidence of special damages in addition to general damages. We wished to put in evidence of other acts of dishonesty and he excluded it on the ground that it referred to acts after the present libel. This is error: see Gatley on Libel & Slander, 2nd Ed., 746; *Thompson* v. *Nye* (1850), 16 Q.B. 175. On the effect of examination for discovery put in by one of the parties to the action see *Kiervin* v. *Irving Oil Co.* (1935), 4 Fort. Law Jour. 244.

C. L. McAlpine, for respondent: There was extravagance of language upon which the learned judge found express malice. As to proof of malice see *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237. The circumstances here shew express malice: see *Dickson* v. *The Earl of Winton* (1859), 1 F. & F. 419 at p. 427; Gatley on Libel & Slander, 2nd Ed., 236. That you can infer malice from extrinsic evidence see Gatley, 693-4; *Sapiro* v. *Leader Publishing Co. Ltd.* (1926), 20 Sask. L.R. 449 at p. 453; *James* v. *Baird,* [1916], S.C. (H.L.) 158 at pp. 163-4. The motive in this case was to get Anderson fired. As to assessment of damages see *Trache* v. *Canadian Northern Railway Co.,* [1929] 1 W.W.R. 100 at pp. 105-7; *McLeod* v. *Boultbee* (1931), 44 B.C. 375 at p. 379; Gatley on Libel & Slander, 2nd Ed., 746 and 751; *Scott* v. *Sampson* (1882), 8 Q.B.D. 491; *Geddie* v. *Rink,* [1935] 1 W.W.R. 87 at p. 98; *Watson* v. *Smith* (1899), 15 T.L.R. 473.

Farris, in reply: On privileged communication see *Toogood* v. *Spyring* (1834), 3 L.J. Ex. 347. On the inclusion of discovery evidence see Gatley on Libel & Slander, 2nd Ed., 212 and 256; *Hayhurst* v. *Innisfail Motors Ltd.,* [1935] 1 W.W.R. 385.

Cur. adv. vult.

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MARTIN, J.A.: It was conceded during the argument that in view of the finding of privilege actual malice must be shewn, the *onus* of which is upon the plaintiff—*Clark* v. *Molyneux* (1877), 3 Q.B.D. 237, 244-5, 247, 252, adopted by the Privy Council in *Jenoure* v. *Delmege* (1890), 60 L.J.P.C. 11; and *Wren* v. *Weild* (1869), L.R. 4 Q.B. 730, 737; and it was submitted by the respondent that the learned judge's finding of malice is supported

by the evidence. The case is unusual because the evidence for the plaintiff consists of one Drew, to whom the defendant made the statement sued on, and part of the examination on discovery of the defendant: the plaintiff did not give evidence, and no evidence was adduced for the defendant who relied upon the alleged insufficiency of the plaintiff's evidence to establish his cause of action. The result is that in essentials there is no conflict of evidence in the ordinary sense, and so we are just as well able to form an opinion upon it and make deductions therefrom as the learned judge below, and after considering it very carefully I can only reach the conclusion, after giving full effect to Drew's evidence, that the plaintiff has not discharged the *onus* upon him, and I adopt the language of Lord Justice Cotton in *Clark's* case, *supra,* pp. 251-2, as appropriate to this one, *viz.*:

I think that there was no evidence of malice to be left to the jury. I am of opinion that in this case the evidence does not raise any presumption of malice on the part of the defendant, according to the law as laid down in *Somerville* v. *Hawkins* (1850), 10 C.B. 583; 20 L.J.C.P. 131.

In *Somerville's* case, it was unanimously held by the Court *in banco, per* Maule, J., *viz.,* p. 590:

It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shewn in evidence; so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

Now the facts of the present case, taken at the worst against the defendant, who was acting in "a common interest"—Gatley on Libel & Slander, 2nd Ed., p. 256 *et seq.,* do not go further than to be equally consistent with the presence or absence of malice and therefore the action should have been dismissed. It follows that this appeal should be allowed.

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McPHILLIPS, J.A.: In approaching this appeal we have the rather extraordinary circumstance that neither the plaintiff nor the defendant were witnesses at the trial. One witness only was called for the plaintiff and plaintiff's counsel put in practically the whole of the evidence of the defendant upon discovery; and in my opinion that discovery evidence of the defendant wholly displaced the alleged case for the plaintiff. Upon this point of the introduction of discovery examination I note a reference to *Kiervin* v. *Irving Oil Co.* reported in the current volume (4) of the Fortnightly Law Journal, p. 244, relative to the binding effect of an examination for discovery and the learned Chief Justice (Barry, C.J.K.B.), of the Court of New Brunswick, said—and I am of the like opinion, and it is applicable to this case—

> that the plaintiff having accepted as her own and put in the whole of the evidence of the defendant's witnesses, although a large portion of that evidence was unfavourable to her own contention, she is bound by that evidence unfavourable though it may be; and if that be so then it is clear that the weight of evidence is against the plaintiff and in favour of the defendant.

In this case we find the defendant denying the use of the words alleged to have been spoken by him. There is the requirement of proof upon the part of the plaintiff to establish the words used and they must carry the defamatory meaning and in my opinion that was not established. In any case the learned trial judge found that what was said was privileged, that is that the occasion and what was said was one of privilege. Upon this point I would refer to what Parke, B. said in *Wright* v. *Woodgate* (1835), 2 C.M. & R. 573 at p. 577:

> "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference [of malice] *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact —that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made" *per* Parke, B., in *Wright* v. *Woodgate* (1835), 2 C.M. & R., at p. 577; cited with approval by Maule, J., in *Somerville* v. *Hawkins* (1850), 10 C.B., at p. 583, and by Lord Macnaghten in *Jenoure* v. *Delmege*, [1891] A.C. at p. 78: Gatley on Libel & Slander, 2nd Ed., 214, foot-note 17.

So we see that the *onus* was on the plaintiff to establish malice in fact, that is, where it was a privileged occasion as this was

there was the requirement to prove express malice upon the part of the defendant and that was not shewn. Here the defendant in all that he said was using the occasion honestly and in making any statement he did make was in no way actuated by any indirect or ulterior motive (*Clark* v. *Molyneux* (1877), 3 Q.B.D. 237). Here the occasion being one of qualified privilege the plaintiff was called upon to prove—which he has not in my opinion—actual malice in order to establish a cause of action (*Jenoure* v. *Delmege*, [1891] A.C. 73, 79) *per curiam* in case just cited.

The privilege would be illusory and worthless if, notwithstanding the proof of the occasion, the defendant was obliged to prove the truth, or his belief of the truth of the communication:

Per Osler, J.A. in *Todd* v. *Dun, Wiman & Co.* (1888), 15 A.R. 85 at p. 99.

Here in my opinion on the evidence as in—there is not even a scintilla of evidence as to malice—this is well shewn in the examination for discovery of the defendant that the plaintiff put in (*per* Lord Finlay, L.C. in *Adam* v. *Ward,* [1917] A.C. 309 at p. 318, also see *Cooke* v. *Wildes* (1855), 5 El. & Bl. 328, 340; *Whiteley* v. *Adams* (1863), 15 C.B. (N.S.) 392 at p. 418; *Stuart* v. *Bell,* [1891] 2 Q.B. 341 at pp. 345, 352; *Turner* v. *Bowley and Son* (1896), 12 T.L.R. 402; *per* Scrutton, L.J., in *J. Lionel Barber* v. *Deutsche Bank, London Agency* (1918), House of Lords' Printed Cases at p. 317).

Upon the whole case I am satisfied that the plaintiff here failed to establish express malice. My opinion is that the plaintiff wholly failed in his action and that the appeal must be allowed.

MACDONALD, J.A.: The occasion being privileged we have to decide if there was enough evidence to satisfy the burden on the respondent to establish express malice on appellant's part. Absence of malice must be presumed until established. The trial judge found malice. We are not confronted, however, with the usual finding of fact where the evidence of one witness or of a group of witnesses is accepted in preference to that of another group. Here, the facts are not in dispute. It is, therefore, a question of drawing proper inferences and while I do not suggest that it is not necessary to give any weight to the finding of malice

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still we are in, at least nearly as favourable a position as the trial judge, to enable us to reach the proper conclusion.

The respondent did not give evidence although his conduct, if not his honesty, was impugned. I would be better satisfied if, under such circumstances, one seeking damages for an injury to his reputation would at least allow the trial judge to see him in the witness box, and also submit to cross-examination. True the defendant (appellant) did not testify either but the same criticism is not applicable. Practically all, if not all, of his examination for discovery, was placed in evidence by the respondent as part of his case, and it covered the whole ground. That evidence, I may add, negatived malice in so far as direct and positive statements by way of denial could do so.

If, as we should assume from the evidence adduced on behalf of the respondent, appellant honestly believed that he incurred losses in his business while respondent was in his employ he was within his rights in warning a new employer of possible danger particularly one with whom he had business relations and in respect to which respondent would at least have some connection. While it would be better to speak openly to Drew thus avoiding the circuitous course of attracting his attention by gradually curtailing purchases it does not follow that singular methods in effecting a legitimate purpose indicate malicious intent or that malice must be inferred.

Had respondent, charged with responsibility for shortages entered the witness box, not only to maintain his case but also, if possible, to testify to other incidents (*e.g.,* a private quarrel) which might account for appellant's action in pursuing him some basis might be laid for a finding of malice. No such incidents are shewn and we cannot in law assume malice where the evidence is consistent with its absence. The furthest respondent can logically go is to suggest that the facts are consistent with the presence of malice but that is not enough. The point is succinctly stated by Maule, J., in *Somerville* v. *Hawkins* (1850), 10 C.B. 583 at p. 590, referred to by my brother MARTIN.

The only incident from which, as intimated, malice could possibly be inferred was the means followed by appellant to

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attract the attention of respondent's new employer but that is merely criticism. It is not shewn that appellant had no honest belief in the truth of his statement or that he was actuated by indirect motives.

I would allow the appeal.

McQUARRIE, J.A.: I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, Stultz & Bull.*
Solicitors for respondent: *Martin & Sullivan.*

JACKSON v. LAVOIE.

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June 6, 10.

Costs—Contributory Negligence Act—Apportionment—B.C. Stats. 1925, Cap. 8.

In an action for damages for negligence the liability of the parties was apportioned at 80 per cent. degree of fault on the part of the defendant and 20 per cent. on the part of the plaintiffs. The order as to costs was "that the costs of both parties be taxed and added together and that the aggregate amount of such taxed costs shall be borne and paid 80 per cent. by the defendant and 20 per cent. thereof by the plaintiffs." In taxing the costs under said order the taxing officer taxed those of the plaintiffs at $332.55 and those of the defendant at $397.27, he adding them together, making a total of $729.82, and allowed 80 per cent. of that total amounting to $583.85 to the plaintiffs, and 20 per cent. of it, amounting to $145.96, to the defendant, and after subtracting the lesser from the greater giving a balance of $437.87 in favour of the plaintiffs, he issued his *allocatur* to them for that sum as payable to them by the defendant. On motion to review, an order was made varying the *allocatur* in a way that made the result more favourable to the defendant.

Held, on appeal, reversing the decision of FISHER, J., that the taxing officer followed and worked out this Court's decision in *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214, and the original *allocatur* should be restored.

APPEAL by plaintiffs from the order of FISHER, J. of the 24th of April, 1935, allowing an appeal by the defendant from the findings of the deputy district registrar at Vancouver on the taxation and *allocatur* of the costs of this action, and referring the matter back to the deputy district registrar to vary his *allocatur* according to certain directions. The facts are set out in the reasons for judgment.

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The appeal was argued at Victoria on the 6th of June, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. A. MacInnes, for appellants: Under the Contributory Negligence Act it was found that the defendant was liable for 80 per cent. of the damages and the plaintiffs 20 per cent. Under the Act the costs are apportioned on the same basis. If the case of *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214 is followed the two sets of costs are added together, the defendant paying 80 per cent. of this amount and the plaintiffs 20 per cent. The lesser sum is then subtracted from the greater and the balance is payable by the defendant to the plaintiffs: see *Wegener* v. *Matoff* (1934), 49 B.C. 125; *Ansel* v. *Buscombe*, [1927] 3 W.W.R. 137.

Nicholson, for respondent: We rely on *Wegener* v. *Matoff* (1934), 49 B.C. 125; also *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214. These cases do not contemplate any such system of division as proposed by the appellants. We submit the proper way to arrive at a correct division of the costs is first to add the two sets of taxed costs together. The defendant then pays 80 per cent. of this amount and the plaintiffs 20 per cent. When this total amount is received the taxed costs of each party should be paid from that sum. Although differently expressed the judgment of FISHER, J. arrives at the same conclusion. The proposal of the appellants imposes a double liability of 80 per cent. on the defendant.

MacInnes, in reply, referred to *London Steamship Owners' Insurance Company* v. *Grampian Steamship Company* (1890), 24 Q.B.D. 663.

Cur. adv. vult.

10th June, 1935.

Per curiam: By the judgment entered herein the liability of the parties concerned "to make good the damage" caused by their joint negligence was apportioned at 80 per cent. degree of fault on the part of the defendant and 20 per cent. on the part of the plaintiffs, and the following order respecting costs was made:

That the costs of both parties be taxed and added together and that the aggregate amount of such taxed costs shall be borne and paid 80 per cent. by the defendant and 20 per cent. thereof by the plaintiffs.

This order was made under section 4 of the Contributory Negligence Act, 1925, Cap. 8, *viz.*:

> Unless the judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage.

In taxing the costs of the respective parties under said order the taxing officer taxed those of the plaintiff at $332.55, and those of the defendant at $397.27, and after adding them together to make a total of $729.82, he allowed 80 per cent. of that total, amounting to $583.85, to the plaintiffs and 20 per cent. of it, amounting to $145.96, to the defendant, and after adjusting and deducting the lesser from the greater (under rule 1002 (23)) and finding the balance of $437.87 in favour of the plaintiffs, issued his *allocatur* to them for that sum as payable to them by the defendant.

In so doing he followed and worked out exactly our decision in *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214 on the effect of said statute; and recently followed and confirmed by us in *Wegener* v. *Matoff* (1934), 49 B.C. 125 and 129.

A motion, however, was made by the defendant-respondent to the learned judge who had pronounced the said judgment (Mr. Justice FISHER) to review and vary said *allocatur* in a way that made the result of the taxation more favourable to the defendant, and the learned judge granted the motion on the ground that our said judgment in *Katz's* case had been departed from by our judgment, unreported, in *Connors* v. *Grohregin* pronounced on the 18th day of March, 1932.

Out of deference to the view expressed by the learned judge we have carefully examined our oral reasons for judgment pronounced in *Connor's* case and our notes of the argument therein with the result that it is clear beyond question, as appears particularly by the judgments of the Chief Justice and Mr. Justice MCPHILLIPS that we not only did not in any respect depart from our decision in *Katz's* case but affirmed it precisely.

It follows, therefore that the original *allocatur* should be restored, the order varying it set aside, and this appeal allowed.

Appeal allowed.

Solicitor for appellants: *G. T. S. Saundby.*

Solicitors for respondent: *Locke, Lane & Nicholson.*

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1935
Mar. 22, 25;
June 4.

COLLINS, CORKINGS AND LEONARD v. THE TORONTO GENERAL TRUSTS CORPORATION.

Administration — Deceased husband — Intestacy — Survived by widow and nephew and nieces—Value of estate—Taken as of time of death—B.C. Stats. 1925, Cap. 2, Secs. 3 and 4.

G. H. Collins died intestate leaving a widow without issue. The chief asset of the estate was 256,017 shares in B.C. Nickel Mines Limited. A nephew and niece 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 recites that "No distribution of the surplusage of the personal estate of an intestate shall be made until one year after the death of such intestate:" They further claim that the market value of the shares on the death of deceased was 29 cents per share. It was held that the net value of the estate should be ascertained as of the date of deceased's death, and 5½ cents per share was the outside price at which the shares could have been realized upon at that time, and the widow was entitled to the whole estate.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting as to the value of the estate), that the value of the estate must be taken as at the time of intestate's death, and that the finding that 5½ cents per share as the outside price that could have been realized upon them at the time, should not be disturbed.

APPEAL by plaintiffs Thomas R. Corkings and Beatrice Corkings Leonard from the order of MURPHY, J. of the 6th of February, 1935 (reported, 49 B.C. 398), on an issue to determine: (1) Who is or are entitled to the estate of George Henry Collins, deceased, pursuant to the provisions of the Administration Act, and as of what date should the net value of the said estate be ascertained? (2) What was the net value of the estate upon such date without making allowance for payment of the charges thereon and the debts, funeral expenses, expense of administration, probate duty and succession duty? (3) Is the defendant Amelia Collins the lawful widow of the above-named George Henry Collins, deceased? George Henry Collins died on the 6th of August, 1933, intestate, survived by his widow Amelia Collins. Thomas R. Corkings is a nephew of deceased and Beatrice Corkings Leonard is a niece. The chief asset of

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the estate was 256,017 shares in B.C. Nickel Mines Limited. The plaintiffs Thomas R. Corkings and Beatrice Corkings Leonard claim that the date of the ascertainment of those entitled to share in the distribution of the estate is the date of decease, but the date of ascertainment of the value of the estate for the purpose of distribution is 6th of August, 1934. They claim the value of the shares on the 6th of August, 1933, was 29 cents per share and the value one year later was 77 cents per share. It was held on the trial of the issue that the net value of the estate should be ascertained as of the 6th of August, 1933, that the value of the shares on that date was 5½ cents each, and the value of the estate $17,317.55.

The appeal was argued at Vancouver on the 22nd and 25th of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bray, for appellants: Under section 91A of the Administration Act no distribution of the surplusage of the personal estate of an intestate shall be made until one year after the death of such intestate. The date of distribution being one year after the death the valuation should be taken as of that date. The widow is entitled to the first $20,000 and the nephew and niece share in any assets over that sum. One year must elapse before valuations. The case of *In re Heath, Heath* v. *Widgeon,* [1907] 2 Ch. 270 was under the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29). As to the valuation at the time of intestate's death, 29 cents per share was the proper value. The valuation of 5½ cents per share was arrived at on succession duty. One year after the market value was 77 cents per share and it is 41 cents per share at the present time. If date of death is the proper time for valuation it was 29 cents on the market. That the market value is the proper valuation see *Untermeyer Estate* v. *Attorney-General for British Columbia,* [1929] S.C.R. 84. It is the value on exchange: see *Lord Advocate* v. *Earl of Home* (1891), 18 R. 397; *Belton* v. *The London County Council* (1893), 68 L.T. 411. The American cases on the subject are *Dean* v. *Hawes* (1916), 157 Pac. 558; *Castner, Curran & Bullitt* v. *Lederer* (1921), 275 Fed. 221; *National Bank of Commerce* v. *City of*

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New Bedford (1900), 56 N.E. 288; *Continental Rubber Works* v. *Bernson* (1928), 267 Pac. 553.

J. W. deB. Farris, K.C. (*Savage,* with him), for respondent Amelia Collins: There are two points: (1) One of law as to the date for valuation; (2) as to the value of the property at the time of intestate's death. On the first point their only argument is based on section 3 of the 1925 amendment to the Administration Act, but that only has reference to distribution and has nothing to do with "valuation." The proper time for "valuation" is the date of intestate's death: see *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53. The executor fixed the value of this stock and his valuation stands: see *Blake* v. *Bayne,* [1908] A.C. 371 at p. 383; Williams on Executors, 12th Ed., 992 and 1020; *Untermeyer Estate* v. *Attorney-General for British Columbia,* [1929] S.C.R. 84 at p. 89; [1929] 1 D.L.R. 315 at pp. 318-20.

Bray, replied.

Cur. adv. vult.

4th June, 1935.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed, the learned judge below having, under the special circumstances, reached the right conclusion.

MCPHILLIPS, J.A.: With great respect to the learned judge in the Court below I cannot agree that the value of the estate—really composed in the main of shares in a mining company—has been correctly arrived at, *viz.*: 5½ cents per share. My conclusion is that taking the value as of the date of the death of the intestate, *viz.*, 6th of August, 1933, that the value of the shares was at the least 29 cents per share at the date of death, and 77 cents per share one year thereafter, *viz.*, the 6th of August, 1934, before which latter date, by statute, no distribution of the estate could be made.

I am of the view following the decision of Kekewich, J., in *In re Heath, Heath* v. *Widgeon* (1907), 76 L.J. Ch. 450, that under the statute governing in the matter the Administration Act (R.S.B.C. 1924, Cap. 5; B.C. Stats. 1924, Cap. 1; as amended 1926-27, Cap. 2; 1934, Cap. 2) which is similar in terms to the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29),

Secs. 1, 5 and 6 (Imperial), where that learned judge used this language (pp. 452-3):

> . . . there seems to me to be no room for doubt that "the real and personal estate" of an intestate must be taken as being what they are at the date of his death; and it is then, and at no other time, that you must ascertain whether the total value amounts to 500*l.* or not. If that is omitted to be done in the course of administration, it can be done afterwards. It is not satisfactory, we know, because there is always a difficulty in valuing property *nunc pro tunc*, but still it can be done. Competent persons can tell you what was the value of property a certain number of years ago; but you must take the value at that time, and having ascertained that the value does not exceed 500*l.*, then the Act seems to me to say in plain terms that all the husband has, whether real or personal, shall belong to the widow. The real and personal estates of a man mean all that he has, whether in possession, reversion, or contingency.

In British Columbia where the net value of the estate exceeds $20,000 the widow has a charge upon the estate for that sum with legal interest from the date of the death of the intestate (section 114 (2)). Now as I scan the evidence before the learned judge below it would seem to me that there is evidence which warrants it being held that the shares had a value at the date of death of at least 29 cents. That is the contention of the others entitled, but combatted by the widow.

Then as I view it the widow is entitled to the $20,000 and a charge on the estate therefor. That is, the administrator would pay the widow the $20,000 if that sum were in hand after discharging all the just debts and claims. The further distribution of the estate would take place when the whole estate is got in—that is, should there be a surplus. It would not appear that any valuation really was made of the shares at the date of death, in the way of the due administration of the estate, and over a year has now elapsed from the date of death, nearing two years from the date of death. The shares being mining shares are of a very fluctuating value. There is evidence given by one who, in my opinion, could best give the evidence which fully warrants the valuation of the shares—much in excess of 5½ cents—in truth to at the very least 29 cents at the date of the death and much greater still after the expiry of the year after death, namely, the 6th of August, 1934. The evidence I rely upon is that given by Albert Ernest Sprange a witness called on behalf of the plaintiffs Corkings and Leonard who was secretary of the

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Vancouver Stock Exchange on the date of the death of the intestate. His evidence extends from pages 31 to 36 and pages 63 to 65 of the appeal book. This witness was best able to give the required evidence of the value of the shares and I cannot give credence to the other evidence adduced to the contrary. It is singular that in one's experience directors and officers of a company have such divergent views of the standing of the company and its properties where there is valuation for succession duty purposes and where statements go to the public for the purpose of influencing the public to invest in the shares of the company. We have it in this present case. The shares to be valued here are shares in the B.C. Nickel Mines Limited, said on the street to be a mine of great potential value and possibly the greatest nickel mine of the continent. Yet at other times and in the case before this Court there is evidence forthcoming of a value not greater than 5½ cents on the 6th of August, 1933. I do not propose to canvass the evidence in detail but only to say that I am by no means impressed by the evidence of the directors and accountant and it would appear that that was the evidence upon which the learned judge below proceeded in arriving at the value of 5½ cents per share. I cannot agree with that valuation and in my opinion it is a very serious undervaluation and the stock quotations during the relevant times are against any such valuation, the quotations in an ascending scale going as high as $1.75 a share and never lower, I think, than 41 cents, which is about the present day quotation. In a matter of this kind there must reasonably be some latitude allowed to the Court as to salient matters of evidence where there is so much publicity and I would refer to what Anglin, J. (afterwards Chief Justice of Canada) said in *In re Price Bros. and Company and the Board of Commerce of Canada* (1920), 60 S.C.R. 265 at p. 279:

> The common knowledge possessed by every man on the street, of which Courts of justice cannot divest themselves, makes it impossible to believe that . . .

and I do not believe that a valuation of 5½ cents at all approximates the true value of the shares on the 6th of August, 1933, and in no way accords with what was understood by every man on the street and certainly was not what was understood to be

the value of the shares on the Stock Exchange. To indicate how the value of shares may reasonably be arrived at I would refer to what Mignault, J., said in *Untermyer Estate* v. *Attorney-General for British Columbia*, [1929] S.C.R. 84, at pp. 91-2:

We were favoured by counsel with several suggested definitions of the words "fair market value." The dominant word here is evidently "value," in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies not the least potent of which is what may be called the investment value created by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

I therefore think that the market price, in a case like that under consideration, where it is shewn to have been consistent, determines the fair market value of the shares. I do not lose sight of the fact that mining operations are often of a speculative character, that there is always a danger of depletion, and that a time will sooner or later arrive when no more minerals will be available, unless other properties are secured to keep up the supply. But all these elements have an effect on the price of the shares on the stock exchange, and no doubt they were fully considered by the purchasers of the stock at the then prevailing prices.

I would not deduct anything from the market value of these shares on the assumption that the whole of them would be placed on the market at one and the same time, for I do not think that any prudent stockholder would pursue a like course. To make such a deduction in a case like the one at Bar, would be to render the "sacrifice value" or "dumping value" of the shares the measure of valuation. It is certainly impossible to say that the price allowed by the learned commissioner and approved in the Court of Appeal exceeded the fair market value of these shares.

The duty upon the administrator of this estate was to realize $20,000 on the shares, which I would consider to have been easily possible, and possible today and pay that sum over to the widow and proceed to wind up the estate and make distribution to those

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entitled to be recognized in law and that still remains the duty of the administrator of the estate.

I would allow the appeal.

MACDONALD, J.A.: On further consideration I adhere to the view formed at the hearing of this appeal that it should be dismissed.

MCQUARRIE, J.A.: According to counsel for the appellants in his argument before us there are only two questions involved in this appeal, *viz.*: (1) The date when the estate should be valued; and (2) what was the value of the estate. As to the first question I agree with the learned trial judge on the authorities stated by him that the value of the estate of the intestate must be taken as at the time of his death. As to the second question the learned trial judge found as a fact that 5½ cents per share was the outside price at which the shares with which we are concerned could have been realized upon at the time of the intestate's death and I can see no good reason why that finding should be disturbed. I would, therefore, dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting as to value of estate.

Solicitor for appellants: *H. R. Bray.*

Solicitor for respondent Amelia Collins: *Wm. Savage.*

Solicitors for respondent The Toronto General Trusts Corporation: *Robertson, Douglas & Symes.*

GROH AND JEFFREY v. RITTER.

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1935
Mar. 21, 22; *June* 4.

Negligence—Automobile—Collision at intersection—Right of way—Care to be taken as to car coming on the left.

The plaintiffs were passengers in the defendant's car, all sitting in the front seat, when he was driving south on Hornby Street in Vancouver at about four o'clock in the morning on June 16th, 1934, and approaching the intersection of Smythe Street. He was going at about fifteen miles an hour, when on nearing the intersection he looked to his left and saw a car from 100 to 125 feet away coming at a speed of from 30 to 35 miles an hour. He proceeded to cross, but when the front of his car was near the centre of the intersection he again looked to his left and saw the car close to the intersection coming at a great speed without any apparent intention of slowing up. He then put on his brakes. The other car then turned slightly to its left with the intention of crossing in front of the defendant's car, but its right wheel struck the left wheel of the defendant's car and overturned it. The plaintiffs were injured. In an action for damages it was held that he "took a chance" that he should not have taken in attempting to cross and was liable.

Held, on appeal, reversing the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that there was no evidence to shew that the defendant failed to keep a proper look-out or that he unwarrantably "took a chance" in continuing to exercise his admitted right of way in crossing the intersection at a speed of fifteen miles an hour, when the car on the left was from 100 to 125 feet away from him and approaching at from 30 to 35 miles an hour, and he had a right to assume that the driver on the left would slacken his pace if necessary so as to concede the defendant's right of way.

Swartz Bros. Ltd. v. *Wills*, [1935] 3 D.L.R. 277 followed.

APPEAL by defendant from the decision of McDONALD, J. of the 17th of December, 1934 (reported 49 B.C. 272), in an action for damages resulting from a collision between two automobiles at an intersection. The plaintiffs were passengers in the defendant's motor-car early in the morning of June 16th, 1934, all three sitting in the front seat. He had been driving the plaintiffs for some time prior to 4 o'clock in the morning, when he was proceeding south on Hornby Street in Vancouver, and nearing the intersection of Smythe Street. He was then going about fifteen miles an hour, and when about fifteen feet from the intersection he looked to his left on Smythe Street and saw a car about 125 feet away coming at a speed of from 30 to 35 miles

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per hour. The defendant proceeded to cross, but when the front of his car was near the centre of the intersection he looked to his left again and saw the car coming at a great speed and near the intersection. He then put on his brakes. The other car turned slightly to the left to try to cross in front of the defendant's car but the right wheel of the approaching car struck the left front wheel of the defendant's car and overturned it. The other car proceeded on about 100 feet, ran into a telegraph post on the south side of Smythe Street, when the driver got out and ran away. It was afterwards found that it was a stolen car. The plaintiff Violet Groh was severely injured and Violet Jeffrey slightly injured. Shortly after the accident the plaintiffs made statements to a witness that the defendant was crossing the intersection at from fifteen to twenty miles per hour, that they did not see the other car until just before the collision, and that the defendant was not to blame. The plaintiff Violet Groh recovered $604.10 special damages and $1,200 general damages, and Violet Jeffrey $30 special damages and $100 general damages.

The appeal was argued at Vancouver on the 21st and 22nd of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Maitland, K.C. (*Yule,* with him), for appellant: It was with hesitation that the learned judge decided in favour of the plaintiffs. He should have held that the defendant had the right of way and that the defendant was entitled to assume the driver of the other car would respect defendant's right of way, would observe the rules of the road and obey the law, and defendant was entitled to assume that the other driver would reduce his speed and allow the defendant to cross the intersection: see *Maloney* v. *Hamilton Street Railway Co.* (1929), 64 O.L.R. 444 at p. 446; *Baldwin* v. *Bell,* [1933] S.C.R. 1 at p. 10; *Lechtzier* v. *Lechtzier. Levy* v. *Lechtzier* (1931), 43 B.C. 423; *Henderson* v. *Dosse* (1932), 46 B.C. 401; *Swartz Bros. Ltd.* v. *Wills,* [[1935] 3 D.L.R. 277].

Bray, for respondent: The finding of the trial judge should not be disturbed. This man was driving the plaintiffs for some hours before the accident, and on two occasions he was warned

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by policemen for fast driving. His action previous to the accident indicated a careless state of mind and he should have been in a position to stop when he saw the speed that the man on Smythe Street was driving. The women in the car warned him of his careless driving.

Maitland, in reply: What happened before defendant was approaching the intersection in question is not relevant.

Cur. adv. vult.

4th June, 1935.

MARTIN, J.A.: This appeal should, in my opinion, be allowed on the principal ground, putting it briefly, taken in support of the appeal, *viz.,* that there is no evidence to shew that the defendant at the time of the collision, however negligent he may have been before it, failed to keep a proper look-out or that he unwarrantably "took a chance" in continuing to exercise his admitted right of way in crossing the intersection at a speed of "only fifteen to twenty miles an hour" (as the learned judge below finds) when the car on his left was about 100 to 125 feet away from him and approaching at a speed of not more, according to the evidence, than 30 to 35 miles per hour, and there were no other circumstances that should have induced him to refrain from acting on the presumption that the driver on his left would slacken his pace if necessary, and very little would have been sufficient, so as to concede the defendant's right of way and thereby avoid the accident—*Cf.* the very recent decision of the Supreme Court in *Swartz Bros. Ltd.* v. *Wills,* [[1935] 3 D.L.R. 277].

The learned judge refers to that other driver at "pursuing his mad career," but, as I understand his reasons [49 B.C. at p. 273] he finds his speed to be not more than 30 to 35 miles per hour, and that is the estimate the defendant made of it and thereupon he says "I figured I had lots of time to get by"; and, "when I first saw it, it didn't appear to be going fast, not more than 30 or 35 when I first saw it. . . . At that speed I had lots of time to get across."

There is no conflict of evidence upon essential facts, and, under the circumstances, I feel less difficulty in reaching this

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conclusion differing, in every respect, from the learned judge below, because he says, p. 273, that he only reached his decision "after a good deal of hesitation."

It follows that the appeal should be allowed.

MCPHILLIPS, J.A.: In my opinion the learned trial judge arrived at a proper conclusion upon the evidence and the application of the law to the facts adduced before him at the trial. I deprecate in the strongest way the practice which has been growing up of accident insurance companies following up accidents in which they are interested by immediate attendance upon parties injured in accidents, by sending adjusters to the hospitals where injured persons have been taken and interviewing them when under the pain and distress of their injuries and getting admissions from them bearing upon the responsibility and liability for the accident. Here we find evidence led at the trial of statements made to one Mulhern and the attempt was made upon alleged admissions made under such circumstances to negative any right in the plaintiffs to recover damages for the injuries suffered by the plaintiffs. I have no hesitation in saying that all such evidence should be given no heed—statements made under such distressing circumstances, the plaintiffs being without legal advice—and this practice should be discontinued, as it will be found to be at all times profitless and I agree with the learned trial judge in disregarding it. The learned trial judge found that the driver of the motor-car—the defendant—upon his own evidence admitted he saw the other car which collided with his car about 125 feet away coming from his left at a high rate of speed (on the trial put at 30 to 35 miles an hour); and that in view of this that the duty of the defendant was to stop as a car coming at that speed into an intersection was a danger to life, and to go on was to imperil the life of his passengers, the plaintiffs. Admittedly he could stop but did not stop and going on that happened which should have been present in his mind and the mind of any reasonable man. There was a terrific collision which providentially fell short of the death of the passengers, but resulted in serious injuries and damages. Travelling at that time at only fifteen or twenty miles an hour to stop was easily possible but no the defendant in face of this palpable

danger goes recklessly on relying upon, as he thought, the right to proceed as he had the right of way entering into the intersection from the right. A characteristic answer under cross-examination at the trial the defendant made the following answer to the question put:

Why didn't you realize. You have been driving a car for eight years and the car you say was going over 50 miles an hour. Why didn't you realize how fast it was going? Well naturally you don't stare at a car a long time and another thing I had the right of way and there was a lot of distance.

Now the distance of the approaching car was only 125 feet, yet in the face of this dire danger the defendant continues to cross and the inevitable collision takes place; the car of the defendant is struck, turns upside down, and the defendant and his passengers are pinned down under the car and the plaintiffs, the passengers, seriously injured. To indicate the absolute recklessness of this driver I would refer to a further question and answer given by the defendant at the trial when under cross-examination:

And you say 30 miles an hour going round a corner is not a high rate of speed and 45 miles an hour is not a high rate of speed in some sections of the city. What would you say a high rate of speed was? In this section of the city I would say 50 miles an hour is a high rate of speed. I think he was going more.

The accident took place in a central part of the City of Vancouver in the near neighbourhood of the Vancouver Hotel and occurred in the small hours of the morning. The defendant in driving his passengers had been driving recklessly and had been told to desist from such reckless driving but he persisted to drive in this reckless fashion. Is it possible to excuse such conduct and absolve the defendant from liability? It would seem to me that there can be but one answer and that is that liability for the injuries sustained by his passengers must be, in the light of the facts brought out at the trial, imposed against the defendant and I unhesitatingly agree with the learned trial judge in imposing that liability upon the defendant. The statute that has to be considered in this case governing rules of the road is the Highway Act, B.C. Stats. 1930, Cap. 24, Sec. 21, which reads as follows:

21. The person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another

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vehicle approaching from the left upon an intercommunicating highway, and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times.

It will be seen at once that the enactment does not give immunity to the driver of a car to crash forward without regard to the imminence of danger, which was the case here. Here the defendant took a desperate chance and imperilled his own life as well as the lives of the two ladies who were his passengers and who are the plaintiffs in this case.

It is profitless to get any support for the defendant's course and excuse him from liability to rely upon the recent decision of the Supreme Court of Canada in *Swartz Bros. Ltd.* v. *Wills*, [[1935] 3 D.L.R. 277]. In that case Mr. Justice Cannon said (Sir Lyman P. Duff, Chief Justice of Canada, said he concurred with Mr. Justice Cannon) in the course of his judgment this:

> The only remaining question is whether the defendant although he had the right of way exercised proper care. Having observed when he was 50 feet away from the intersection that there was no traffic approaching from his left . . .

Here we have the defendant with the knowledge that a car was coming on his left at a high speed yet he goes recklessly on although admittedly he could have easily stopped. What did he do? He did what the learned trial judge properly said he did "took a chance" and he must be held in law to be answerable in damages for the consequences. The statute is clear the right of way has a clog on it as in the words of the statute "the provisions of this section shall not excuse any person from the exercise of proper care at all times." Can it be said that this defendant exercised "proper care" as provided in the statute? There can be but one answer and that is, no.

It is impossible in my view to absolve the defendant of liability upon the facts of this case. In the *Swartz* case Mr. Justice Cannon found it necessary to examine into the facts of that case as to "proper care" and found that there was no absence of proper care as "there was no traffic approaching from his left." In this case there was traffic approaching from the defendant's left—a motor-car being driven at a reckless speed and only 125

feet away—yet he the defendant carries on and drives right into that which might have reasonably been speedy death to all three of them.

Here we have the learned trial judge who saw and heard the witnesses and was able to observe the manner and demeanour of them and especially able to observe the manner and demeanour of the defendant finding in favour of the plaintiffs. The advantage that the trial judge has is set forth in the judgment of Lord Sumner in *S.S. Hontestroom* v. *S.S. Sagaporack,* [1927] A.C. 37 at pp. 47-48.

I would also refer to what the Lord Chancellor said in the very recent case of *Powell* v. *Streatham Manor Nursing Home* (1935), 51 T.L.R. 289 at p. 290, as to disturbing the judgment below:

What, then, should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below in such circumstances as the present? It was perfectly true that an appeal was by way of re-hearing, but it must not be forgotten that the Court of Appeal did not re-hear the witnesses. It only read the evidence and re-heard counsel. Neither was it a re-seeing Court. There were different meanings to be attached to the word "re-hearing." For example, the re-hearing at quarter sessions was a perfect re-hearing because, although it might be the defendant who was appealing, the complainant started again and had to make out his case and call his witnesses. The matter was rather different in the case of an appeal to the Court of Appeal. There the *onus* was on the appellant to satisfy the Court that this appeal should be allowed. There had been a very large number of cases in which the law on this subject had been canvassed and laid down. There was a difference between the manner in which the Court of Appeal dealt with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone the Court of Appeal would not set aside such judgment unless the appellant satisfied them that the judge was wrong, and that his decision ought to have been the other way. Where there had been a conflict of evidence the Court of Appeal would have special regard to the fact that the judge saw the witnesses: see *per* Lord Shaw in *Clarke* v. *Edinburgh and District Tramways Company, Limited* ([1919] S.C. (H.L.) 35), where he said (at page 36):

"When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more

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evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

I certainly am not satisfied that Mr. Justice MCDONALD went wrong and that his decision ought to have been the other way. On the contrary, I am satisfied that the learned judge came to the right decision in imposing upon the defendant liability for his gross negligence in the driving of his car, exposing his passengers to danger, and the defendant is answerable in damages for the injuries sustained.

I would unhesitatingly dismiss the appeal.

MACDONALD, J.A.: The decision turns on the proper deduction to draw from the respective positions of the two cars in relation to the intersection where the collision occurred as found by the trial judge, *viz.*, that defendant's (appellant) car was 15 feet therefrom, approaching it at moderate speed while the car to his left was 125 feet away driving at from 30 to 35 miles an hour. Obviously under such circumstances appellant had the right to cross unless he observed, or should (by taking reasonable care) have observed that the man at the wheel in the other car was driving at a high rate of speed and in a reckless manner indicating to a prudent observer that he was not likely to lower it or to bring his car under control before reaching the intersection. If too erratic conduct, if any, of the on-coming driver suggested irresponsibility on his part appellant should not expose his passengers to injury by asserting his right of way in the face of possible danger, and if the collision occurred because of negligence in this respect the judgment could not be disturbed. That, however, was not the situation. This so-called reckless driver was approaching the intersection from appellant's left as stated

at from 30 to 35 miles an hour in the early morning when I assume—although it is not material—that the streets were comparatively free of traffic. That is not necessarily reckless driving nor does it indicate a "mad" rate of speed. Motor-cars driven at that rate can be readily brought under control well within the 125 feet available. Appellant therefore might reasonably and properly assume that the driver of the other car would respect his right of way and reduce his speed as he might easily do permitting appellant to cross in safety.

As therefore the admitted facts, *viz.*, the speed stated and the distance from the intersection presented no unusual situation giving to appellant notice that in the interests of safety he should forego his rights negligence cannot be imputed to him, and the appeal should be allowed.

MCQUARRIE, J.A.: Although the circumstances in this case are somewhat unusual we are bound by the recent decision of the Supreme Court of Canada in *Swartz Bros. Ltd.* v. *Wills* and I would therefore allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Locke, Lane & Nicholson.*
Solicitor for respondent: *H. W. Colgan.*

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Banks and banking—Bank of Canada—Directors—Election of—Nomination—Qualification—Mandamus—Can. Stats. 1934, Cap. 43, Secs. 9, 10 and 43.

Section 7 of Part II. of the by-laws passed by the Governor in Council pursuant to section 43 of the Bank of Canada Act, provides that "At the first general meeting [of the shareholders of said bank] the following persons shall be declared elected as directors, (*a*) the two persons receiving respectively the greatest and the next greatest number of votes amongst those candidates whose chief occupation is in primary industry; (*b*) the two persons receiving respectively the greatest and next greatest number of votes amongst those candidates whose chief occupation is in commerce or manufacturing; (*c*) the three persons receiving respectively the greatest and the two next greatest numbers of votes amongst those candidates whose chief occupation is other than in primary industry, commerce or manufacturing."

On the list of nominees for directors of said bank appears the name of the defendant Woodward, described as an accountant, whereas in the printed list of shareholders he is described as a merchant.

The plaintiff, a shareholder, claiming that Woodward's chief occupation is that of a merchant, and not that of an accountant, asked for a declaration that he is not eligible to act as a director under said category (*c*) and for a mandatory injunction directing him to withdraw his acceptance of said nomination. He obtained a mandatory injunction commanding Woodward to "forthwith withdraw his acceptance of said nomination as a director of the bank under category (*c*)."

Held, on appeal, reversing the decision of MCDONALD, J., that the finding that Woodward is a merchant is not established in a reasonably conclusive manner on the material filed, the question of fact touching his "chief occupation," which has still to be tried, must be determined by the trial judge and cannot properly be ventilated on this application based on a defective affidavit and doubtful inferences.

Gaskell v. *Somersetshire County Council* (1920), 84 J.P. 93, applied.

APPEAL by defendant Woodward from the order of *mandamus* of MCDONALD, J. of the 12th of January, 1935, whereby the defendant Woodward was ordered to forthwith withdraw his acceptance of nomination as a director of the Bank of Canada. The plaintiff is the holder of fifteen shares of the capital stock of the defendant bank. By the Bank of Canada Act (Can. Stats. 1934, Cap. 43) the Bank of Canada is established. The provisional directors are named in section 9 of the Act, and by

section 10 (2) it is provided that the permanent directors shall be selected from diversified occupations. By section 43 it is provided that the Governor in Council shall make by-laws with respect to "(*d*) . . . the nomination of directors . . . and what constitutes such nomination." The plaintiff, as shareholder of the bank, received through the mail a printed notice addressed to the shareholders, signed by the chairman of the board of provisional directors. In this notice it is stated, *inter alia*, that it is the intention of the provisional board of directors to call the first general meeting of shareholders for the election of directors on January 23rd, 1935; that a list of shareholders is being mailed to each shareholder; and that prior to the first general meeting for the election of directors a notice of such meeting will be mailed to each shareholder, accompanied by a list of those who have been validly nominated. The plaintiff also received through the mail a printed book purporting to contain the names of all the shareholders of the bank and also a printed list containing the names of persons who have been nominated for directors. On this list of nominees appears the name of the defendant Woodward, who is described as an accountant, while in the printed list of shareholders above referred to he is described as a merchant.

Section 4 of Part II. of the by-laws passed pursuant to section 43 of the Act provides that:

> No person shall be deemed to be validly nominated unless the board is satisfied, (*a*) that the nominee is eligible for election, and (*b*) that the nominee accepts the nomination.

Section 7 of said Part II. of the by-laws provides that:

> At the first general meeting [of the shareholders] the following persons shall be declared elected as directors,
>
> (*a*) the two persons receiving respectively the greatest and the next greatest number of votes amongst those candidates whose chief occupation is in primary industry;
>
> (*b*) the two persons receiving respectively the greatest and the next greatest number of votes amongst those candidates whose chief occupation is in commerce or manufacturing;
>
> (*c*) the three persons receiving respectively the greatest and the two next greatest numbers of votes amongst those candidates whose chief occupation is other than in primary industry, commerce or manufacturing.

The plaintiff contends that the defendant Woodward, while nominated as an accountant under category (*c*) is in truth and

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in fact a merchant and could be nominated only under category (*b*), and moved for an interlocutory injunction restraining the defendant bank from acting upon defendant Woodward's nomination, and for a mandatory order that Woodward withdraw his nomination paper.

The appeal was argued at Victoria on the 17th, 18th and 21st of January, 1935, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Locke, for appellant: Qualification for directors is set out in sections 9 and 10 of the Act. Section 37 provides for punishment in case of one holding office, including that of director, when not eligible. Cross-examination of the plaintiff on his affidavit shews he had no personal knowledge of the facts deposed to and false statements were made. There are 33 paragraphs in his affidavit and paragraph 7 to the end should be struck out, except paragraphs 26 and 27. The false statements and statements made on information and belief without the source of information is ground for refusing the order: see *Tate* v. *Hennessey* (1901), 8 B.C. 220 at p. 222; *In re J. L. Young Manufacturing Company, Limited,* [1900] 2 Ch. 753; *The King* v. *Licence Commissioners of Point Grey* (1913), 18 B.C. 648. He must state his grounds of belief: see *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274 at p. 289. There is no proof that Woodward was nominated or that he was nominated in any particular category. The list of names put in is not signed and is not evidence. There is no proof that he accepted the nomination or that he was nominated by shareholders. He deliberately attempted to mislead the Court: see *Sheard* v. *Webb* (1854), 23 L.T. Jo. 48. The plaintiff is disentitled to relief on the ground of delay. From the 5th of December until the 4th of January he did nothing, and then only fourteen days remained before the election: see Kerr on Injunctions, 6th Ed., 43. He must shew irreparable injury: see *Armstrong* v. *Armit* (1886), 2 T.L.R. 887 at p. 890; *Attorney-General* v. *Hallett* (1847), 16 M. & W. 569 at p. 580; Halsbury's Laws of England, Vol. 17, p. 221, sec. 487; *Widnes Alkali Company (Limited)* v. *Sheffield and Midland Railway Company's Committee* (1877), 37 L.T. 131. Before

granting an injunction the Court must be satisfied that a legal right will be established: *Ridings* v. *Board of Trustees of Elmhurst S.D. Mo. 3665* (1926), 21 Sask. L.R. 1; *Toronto Brewing and Malting Co.* v. *Blake* (1882), 2 Ont. 175 at p. 183; *Electric Telegraph Company* v. *Nott* (1847), 47 E.R. 1040. A possible future injury is not sufficient: see *Maxwell* v. *Ditchburn* (1845), 5 L.T. Jo. 405. It is not the practice to grant all relief asked for on an interlocutory motion: see *Dodd* v. *Amalgamated Marine Workers' Union* (1923), 93 L.J. Ch. 65; *Jones* v. *Victoria* (1890), 2 B.C. 8. There is no cause of action and the Court has no jurisdiction to restrain persons acting without authority: see *Calloway* v. *Pearson* (1890), 6 Man. L.R. 364; *The London and Blackwall Rail. Co.* v. *Cross* (1886), 55 L.J. Ch. 313 at 318; *Child* v. *Douglas* (1854), 5 De G. M. & G. 739 at p. 740. This is a matter of internal management and the Court will not interfere: see Mitchell on Canadian Commercial Corporations, 507; *Burland* v. *Earle,* [1902] A.C. 83 at p. 93; *Foss* v. *Harbottle* (1843), 2 Hare 461; *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215 at p. 227. If the by-laws deal with eligibility of a director they go beyond the power of the Governor in Council. The date of the election or the date when the candidate sets, is the time to consider his eligibility. In any case it is a matter that should be decided on the trial and not now.

Hogg, for respondent: The Bank of Canada is a National bank and the Court has jurisdiction to grant an injunction. The whole question is whether it is just and convenient. The right he has is to have an election for directors selected from diversified occupations. Unless we get it now there is no remedy. On an interlocutory application an affidavit on information and belief may be received: *In re Anthony Birrell Pearce & Co.,* [1899] 2 Ch. 50 at p. 52. The affidavit of one Paisley submitted by the defendant should be rejected, as the defendant knowing all the facts should have made the affidavit. The best evidence must be given: see Odgers on Evidence, 1911, pp. 302 and 306. The statute provides for diversified occupations and this must be complied with: see Halsbury's Laws of England, Vol. 27, p. 149, sec. 281. The evidence shews conclusively that Woodward is in commerce. The provisional directors had the authority to

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make these categories. To say that his chief occupation is that of an accountant is not true.

Locke, replied.

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MACDONALD, C.J.B.C. (oral): I think the appeal must be allowed. If I were convinced that the Governor in Council had no right to make those categories and require each candidate to keep within the category in which he ran, then I might come to the conclusion that Mr. Woodward ought to be enjoined, because I think on the evidence that he is in commerce. I think he is in commerce, and he may have been an accountant but his principal business, his chief business, is commerce. And therefore I might have thought that the appeal should be dismissed; but if it is taken, as it seems to be, that the categories are legal, then I do not think that the fact that he is in commerce makes any difference. Mr. *Locke* has admitted that that question of the category should be left to the trial judge, and should not be decided in an interlocutory application of this kind. If that is so, then there can be no doubt that the appeal should be allowed.

MARTIN, J.A.: I am of the opinion that this appeal should be allowed, and, to put it briefly, it is primarily one of fact, *i.e.*, as to whether or no the "chief occupation," not merely the "occupation" of the appellant, brings him within class (b) or (c) of the by-law in question, and so the case comes within the reasoning of the decision of the Court of Appeal in *Gaskell* v. *Somersetshire County Council* (1920), 84 J.P. 93, where Lord Sterndale, M.R., in giving the judgment of the Court, said:

> The plaintiff may or may not have a good case, but we cannot say that it is obviously right or obviously wrong. The question between the parties has still to be tried, therefore there can hardly be said to be a right to the injunction unless the Court can form an opinion that the plaintiff is clearly in the right.

And after considering the facts he concludes (p. 94):

> The balance of convenience is to dissolve the injunction, allowing the action to take its course.

The learned judge below says in his reasons that the plaintiff "has established that the defendant Woodward is a merchant," but with respect I cannot accept that statement of the evidence,

or its implication. The judge's attention was not, adequately at least, directed to the great distinction between "chief occupation" and "occupation" above noted, though it was essential to consider it fully because a man may have many "occupations" (as indeed the by-law expressly contemplates) which he engages in at the same time, *e.g.*, manufacturer, mine owner and operator, motor-garage owner and operator, fish-trap owner and operator, logger, shipbuilder, merchant, restaurant-keeper, shopkeeper, etc., but the question to be decided under this Act is which one of them is his "chief occupation"? and that essential point did not, unfortunately, receive due, if any real, consideration.

My view of the evidence (much of which was inadmissible as contrary to rule 523 and our many decisions thereupon), which was all by affidavit and cross-examination thereupon before the registrar, is that it is of such a loose and unsatisfactory nature that it did not afford a sure foundation for the mandatory order made below, and therefore this appeal should be allowed and said order set aside.

McPHILLIPS, J.A. (oral): I have no hesitation in saying that the appeal should be allowed. One has to look at the fundamental law, that which guides us in a matter of this character; and that is summed up in three very positive words, "just and convenient." This Court should never grant an injunction unless it is just and convenient. Now here we have an election of the directors of the Bank of Canada running throughout this great Dominion 3,000 miles across and some 1,000 and more miles from north to south, and all the people are interested, and many of them are shareholders in this bank. The machinery is all set out by statute in detail as to what shall be done. One of the requirements is that one desirous to be nominated has to swear what his occupation is. It is a fact that Mr. Woodward has sworn that he is an accountant, and that is the classification in which he desires to be placed. The election is to take place I think on Wednesday next, that is of this week. In the first place the motion was very late in its inception. Further, in my opinion, the applicant is without legal right to make it. Let us visualize this: all this machinery, the election, is moving, from

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Halifax to Victoria, the Courts in the various Provinces grant injunctions as against all those nominated as directors, what a spectacle that would be. Would that be just and convenient or in the public interest? Certainly not. The Parliament of Canada was not unmindful of the fact that a man should not enjoy the office without the proper qualification; and therefore in the Act itself is provided the penalty for becoming a director when disqualified. We are here asked to paralyze the operation of the statute and beforehand pass upon the qualification of Mr. Woodward. Can it be said under these circumstances that it is just or convenient that a Court should do this? Why, it is impossible to visualize a case which would entitle the Court at this stage to grant an interlocutory injunction restraining Mr. Woodward standing for election as director. It would be an enormity for a Court to make an order of this character in view of the law and the facts and circumstances. Shortly, in my opinion no legal right has been established in the plaintiff; further, it is not a right or proper case, nor is it just or convenient that an injunction should issue or be continued. The statute in its terms safeguards the rights of the shareholders, and gives the necessary machinery to ensure the election of only qualified directors. The appeal in my opinion should be allowed.

MACDONALD, J.A.: Under section 10 (2) of the Bank of Canada Act, Cap. 43, Can. Stats. 1934, permanent directors of the bank are selected from "diversified occupations." By by-laws passed pursuant to section 43—and in this appeal we assume validly passed—the following persons after the observance of preliminary steps may be declared elected as directors, *viz.*: [already set out in the head-note and statement.]

Mr. Woodward was duly nominated and styled an "accountant," within category (*c*), *i.e.*, not his occupation, but his "chief occupation" is so described. It is not an occupation in the primary industries or in commerce or manufacturing. To carry out the policy of the Act it was intended that diversified industries should be represented on the board of directors and if Mr. Woodward should be elected as an "accountant" when in fact his "chief occupation" is that of a merchant, or of one engaged in commerce or manufacturing this policy will be defeated. To

preserve the alleged right of the plaintiff (a shareholder) to maintain this policy a mandatory injunction, the subject of this appeal, was obtained, from McDONALD, J., commanding Woodward to "forthwith withdraw his acceptance of the nomination of himself as a director of the Bank of Canada under category (*c*) of section 7 of the by-laws of the defendant bank, Part II."

Obviously a question of fact must be conclusively decided to justify this order. Mr. *Hogg* submitted that on the material before the judge that question of fact was finally determined, *viz.*, that the defendant (appellant) could not qualify under category (*c*). If that is not so "there can hardly be said to be a right to the injunction." That right cannot arise "unless the Court can form an opinion that the plaintiff is clearly in the right": *Gaskell* v. *Somersetshire County Council* (1920), 84 J.P. 93, referred to by my brother MARTIN in the course of the hearing. This judgment of the Court of Appeal in England, *viz.*, that a right to an injunction does not lie where the basic facts are not determined is in accordance with principles of logic. There, the injunction was set aside.

We are not called upon to finally determine this question of fact; it is enough to say that it can only be properly tried at the trial of the action. The learned judge below in the necessarily limited time at his disposal assayed this task on the material before him. I think with deference, that his conclusion was not warranted and that further his method of approach was inaccurate. He said "It now becomes necessary to determine whether defendant Woodward is in substance and in fact a merchant or [on the other hand] an accountant." That is not the true inquiry. The point is—what is his "chief occupation" as contemplated by the Act? The by-laws recognize that a candidate may have several occupations. It is true that in another part of his reasons for judgment he states that there is some evidence (it ought to be reasonably conclusive) that his "chief occupation" is in commerce, but his final view based on what I venture to think is a faulty premise, as already indicated, was expressed as follows: "I have reached the conclusion that so far as the facts are concerned, the plaintiff has made out his case and has established that defendant Woodward is a mer-

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chant," although the real inquiry is in respect to his "chief occupation." One might be interested in, and part owner of (as a shareholder) a mercantile business and yet be "chiefly" occupied as a financial agent or an accountant, or, indeed, in any number of occupations.

The foregoing conclusion, too, *viz.*, that Mr. Woodward is a merchant, is not established in a reasonably conclusive manner by the material filed on the application. I refer to the reasons under review outlining the material used on the motion. The affidavit of the plaintiff Bain is nearly worthless. His affidavit offends against principles referred to in *Tate* v. *Hennessey* (1901), 8 B.C. 220; *In re J. L. Young Manufacturing Company, Limited,* [1900] 2 Ch. 753, inasmuch as although his alleged facts are obviously based on information and belief the grounds thereof are not stated. He also makes definite statements of fact, as within his own knowledge when obviously such is not the case. That is a serious matter and the Court would be justified in disregarding the whole affidavit. Mr. *Hogg,* realizing that he could not base his right to an order on Bain's affidavit relies on part only of an affidavit made by one Paisley, a chartered accountant and the auditor of Woodward Stores Ltd., filed on behalf of the defendant, and on his cross-examination thereunder. To prove Woodward's "chief occupation" he selects part of this affidavit (and cross-examination) which appears to support his submission and rejects part of it that points the other way on the ground (and the judge below agreed) that as Woodward, who could give the best evidence, refrained from making an affidavit on which he could be cross-examined, Paisley's evidence "ought not to be looked at." It is true that on this ground all his evidence in a proper case might be rejected. Instead of doing so, however, the trial judge after stating that "such evidence ought not to be looked at" further stated that "inasmuch as defendant Woodward has put forward Paisley in a sense as his agent or representative for the purpose of making the affidavit he must be held bound by any admissions which Paisley in his affidavit has made." No authority was cited for this submission. A fair inference from Paisley's evidence could not be obtained by accepting part of it and rejecting other parts that

nullify alleged admissions. In part of the evidence rejected he stated that since the 1st of December, 1934, the defendant is not a director of Woodward Stores Ltd., but instead is now acting as financial comptroller. As he refers to the records as a basis for this assertion it is doubtless true. Its significance is that if, at the material time, Woodward is not a director he is not charged with general supervision of the business and instead may be engaged in work of a specialized character.

I pass no final opinion but merely say that the question of fact touching his "chief occupation" must be determined by the trial judge and cannot properly be ventilated on this hurried application, based upon a defective affidavit and doubtful inferences. Many questions arise in deciding the point. May one (even though a shareholder, in a joint-stock company engaged in merchandising) who within that organization performs special work, disassociated from the sale of merchandise be properly designated as a merchant only? Is that his "chief occupation"? Is it because of Mr. Woodward's special qualifications gained by mastering accountancy and by becoming a qualified accountant that he was selected to act in a special capacity in a mercantile establishment and if so how should he be designated when defining his chief occupation? Many other tests may be applied. A trial judge would likely weigh the suggestion that the real "merchant" may be the entity (the company) while in its organization many specialists may be employed who may not be properly described as merchants when defining their "chief occupation," but rather as accountants, advisers, book-keepers or financial agents. I mention these aspects (without deciding it) to shew that a question remains to be tried and while "the plaintiff may or may not have a good case, we cannot say [at this stage] that it is obviously right or obviously wrong": *Gaskell* case, *supra*.

For the foregoing reasons an irrevocable decision should not be made at this stage, subjecting the defendant to the irreparable injury of disqualification—an injury that cannot be remedied until several years elapse when he might again qualify for nomination as a director. All that the plaintiff can suggest is that if the defendant is not restrained the policy of the Act in enacting that diversified industries should be represented will be

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destroyed but that wholly depends upon the proper determination of the question of fact referred to.

There are other reasons why the point should not be finally determined at this stage. There was no consent to change the application into a final motion for judgment. Further the plaintiff's right of action as a single shareholder—it is not a class action—is at least doubtful. Is the legal right so clear that the contrary is not arguable? Are the by-laws referred to *intra vires?* Is a possible future alleged injury, which may or may not materialize, a proper subject for an order of this sort? Has the plaintiff discharged the *onus* upon him to shew that the balance of convenience justifies the order? These questions may be decided at the trial and the Court ought not to give its aid to establishing a legal right by injunction unless satisfied—the legal right, as here, being disputed—that it would in any event be established at the trial (*Electric Telegraph Company* v. *Nott* (1847), 47 E.R. 1040).

I would allow the appeal.

MCQUARRIE, J.A. (oral): I agree that the appeal should be allowed on the balance of convenience. The injunction should be dissolved and the election allowed to proceed, under the decision cited by my learned brother MARTIN, *Gaskell* v. *Somersetshire County Council* (1920), 84 J.P. 93. I do not feel that the proceedings should ever have been taken; but of course that is a matter that counsel for the plaintiff has to take the responsibility for. But I am firmly convinced that the injunction should not have been granted.

Locke: My Lord, it will be that part of the order, that is the *mandamus,* that will be set aside. It is against that part of the order that I appealed. That is all that affects Mr. Woodward.

MACDONALD, C.J.B.C.: I understood the other was abandoned.

Locke: Well, the rest of the order, my Lord, dissolves the injunction against the Bank of Canada; I am not interested in that.

MACDONALD, C.J.B.C.: And they have not appealed.

Locke: No.

MARTIN, J.A.: You see the directions as to what ought to be done in that case that I cited, the *Gaskill* case.

Locke: Yes, my Lord.

Appeal allowed.

Solicitor for appellant: *F. Kay Collins.*
Solicitor for respondent: *J. P. Hogg.*

NORWICH UNION FIRE INSURANCE SOCIETY LIMITED v. LEONG.

Principal and agent—Sub-agent—Issue of insurance policies—Collection of premiums—Privity of contract—B.C. Stats. 1933, Cap. 28, Sec. 20.

B., B. & B. Ltd., general agents of the plaintiff company, employed the defendant as a sub-agent to solicit insurance. The plaintiff, as required by the Insurance Act, gave its consent to the superintendent of insurance that the defendant should act as an insurance agent representing it, and a number of insurance policies were issued by the plaintiff through the defendant's agency. The business relations between B., B. & B. Ltd. and the defendant included other business than that done for the plaintiff company, and all premiums collected by the defendant including those collected on the plaintiff's policies were paid direct to B., B. & B. Ltd. The plaintiff gave the defendant notice that the general agency of B., B. & B. Ltd. was cancelled, and at the same time made a demand on the defendant for payment of the premiums that the defendant had collected, but the plaintiff had not as yet received. In an action for the premiums not received by the plaintiff, it was held that the facts constituted a direct relationship of contract between the plaintiff and the defendant, and the plaintiff was entitled to succeed.

Held, on appeal, affirming the decision of HARPER, Co. J., that the learned judge below reached the right conclusion respecting the true relationship of the parties upon the facts before him.

APPEAL by defendant from the decision of HARPER, Co. J. in an action tried by him at Vancouver on the 14th and 15th of January, 1935, to recover the amount of premiums collected by the defendant on certain insurance policies issued by the plaintiff company. Banfield, Black & Banfield Limited were

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general agents for the plaintiff company for the mainland of British Columbia. The defendant Leong was a sub-agent of Banfield, Black & Banfield Limited, and carried on an insurance business as such. The plaintiff, as required by the Insurance Act, gave its consent to the superintendent of insurance that the defendant should act as an insurance agent representing it, and many insurance policies were issued by the plaintiff through the defendant's agency. All premiums of insurance policies collected by the defendant were paid direct to Banfield, Black & Banfield Limited, and the defendant and Banfield, Black & Banfield Limited had other business relations outside of the business they did for the plaintiff company. On August 6th, 1934, the plaintiff company gave the defendant notice that the general agency of Banfield, Black & Banfield Limited had been cancelled, and Norwich Agencies Limited were substituted as general agents on the mainland. At the same time the plaintiff made a demand on the defendant for payment of the premiums that the defendant had collected but had not paid over. The defendant had been making remittances from time to time to Banfield, Black & Banfield Limited, but the accounts included their other business dealings and the defendant claimed there was an indebtedness from Banfield, Black & Banfield Limited to himself on their various transactions.

Campney, for plaintiff.
Bray, for defendant.

Cur. adv. vult.

30th January, 1935.

HARPER, Co. J.: The material facts herein not being in dispute, the main question is, does the evidence entitle me to find privity of contract between the plaintiff and the defendant?

The action is brought to recover the amount of certain premiums on insurance policies collected by the defendant as sub-agent of Banfield, Black & Banfield Limited.

Banfield, Black & Banfield Limited acted as general agents of the plaintiff. As a sub-agent of the general agent, the defendant carried on an insurance business. The plaintiff, as required by the Insurance Act, gave its consent to the superintendent of

insurance that the defendant should act as an insurance agent representing it and many insurance policies were issued by the plaintiff through the defendant's agency.

On the 6th of August, 1934, the plaintiff gave notice to the defendant that the general agency of Banfield, Black & Banfield Limited had been cancelled and the Norwich Agencies Limited substituted as general agents. A demand was at the same time made upon the defendant for payment of unpaid premiums on policies issued through the agency of the defendant.

The evidence discloses that the defendant had been making his remittances of premiums from time to time to Banfield, Black & Banfield Limited. They had also other business relations which are not relevant to this action. The state of accounts between the defendant and Banfield, Black & Banfield Limited, it was suggested, would shew an indebtedness to the defendant on their various dealings but as Banfield, Black & Banfield Limited are not parties to this action it is unnecessary to refer further to their mutual transactions except so far as they may have some evidentiary value in the attempt made to prove that the defendant's business connections were solely with them.

It is clear from a perusal of the Insurance Act that the Legislature has recognized the responsibility which attaches to the position of an insurance agent. The statutory guarantee and recommendation of the agent by the insurer is an evidence of this. The agent also countersigns the policy giving his approval to the desirableness of the insurer undertaking the risk.

The defendant here is directly associated with the plaintiff in the various contracts of insurance and there is nothing in the facts of this case which does violence to the well-established principle that everyone has a right to determine with whom he will contract. This maxim *delegatus non potest delegare* has been so often discussed that it is unnecessary to do more than refer briefly to the judgment of Thesiger, L.J. in *De Bussche* v. *Alt* (1878), 8 Ch. D. 286 at p. 310:

> As a general rule, no doubt, the maxim "*delegatus non potest delegare*" applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot without authority from his principal, devolve upon another obligations to the prin-

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cipal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed "a sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself.

Though a sub-agent of Banfield, Black & Banfield Limited I think this is a case where the principle of *De Bussche* v. *Alt* applies. The nature of the business and the conduct of the defendant in issuing contracts by insurance of the plaintiff through his own agency placed upon him a responsibility to the plaintiff. The circumstances here, in my opinion, disclose sufficient to establish that Banfield, Black & Banfield Limited by an agreement with the plaintiff could appoint the defendant to carry on certain insurance business on behalf of the plaintiff. The recognition of the defendant as one discharging certain duties on its behalf is demonstrated by the plaintiff's recommendation to the superintendent of insurance and a privity of contract was established.

The contracts of insurance issued from time to time by the defendant imposed liabilities upon the plaintiff which were accepted by it. In the exercise of its authority as a general agent of the plaintiff Banfield, Black & Banfield Limited appointed the defendant as a special agent to solicit insurance. There was thus constituted a direct relationship of contract between the

plaintiff and the defendant. The defendant accepted this relationship and acted upon it.

As to the appropriation of payments, I accept the evidence of W. O. Banfield that payments made by the defendant were specifically applicable to the accounts set forth in Exhibit 6 and that other payments were applied on the defendant's account in order of date on items prior to April 17th, 1932.

The "exigencies of business" here require that it should be entitled to recover premiums now in the hands of the defendant on its contracts of insurance.

There will be judgment for the plaintiff. If the parties cannot agree on the amount it may be spoken to at any time counsel desire.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 18th of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Bray, for appellant: The defendant was under contract with Banfield & Co. and all premiums collected by the defendant were paid to Banfield & Co. There was no privity between the plaintiff and the defendant. There are two branches to the case: (1) No privity; (2) the company cannot collect premiums we owe to other companies. As to our legal position under the statute see section 20, Cap. 28, B.C. Stats. 1933. As a general rule there is no privity between a sub-agent and a principal: see Halsbury's Laws of England, 2nd Ed., Vol. 1, pp. 227-8, secs. 392-3; Bowstead on Agency, 8th Ed., 113; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q.B.D. 374; *Hoole* v. *Royal Trust Co.,* [1930] 3 W.W.R. 426; *Calico Printers Association* v. *Barclays Bank Limited, and the Anglo-Palestine Company, Limited* (1930), 36 Com. Cas. 71.

Griffin, K.C., for respondent: The learned trial judge has found on the facts that there was privity of contract between the plaintiff company and the defendant. The 1933 amendments to the Insurance Act came into force in December, 1933, and do not apply to this case as they came in later than the facts in this case. The last premium was paid in July, 1933. That there was privity of contract see *De Bussche* v. *Alt* (1878), 8 Ch. D.

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286; *Tarn* v. *Scanlan,* [1928] A.C. 34 at p. 47; *Blackburn* v. *Mason* (1893), 68 L.T. 510 at p. 511; *Powell & Thomas* v. *Evan Jones & Co.,* [1905] 1 K.B. 11. In the United States the law is the same: see *Wilson & Co.* v. *Smith* (1845), 44 U.S. 762; *Penn Mut. Life Ins. Co.* v. *Ornauer* (1907), 90 Pac. 846; 2 C.J. 691, sec. 352; 32 C.J. 1068, sec. 146. On the appropriation of payments see *Scott & Peden* v. *Elliott* (1926), 37 B.C. 143.

Bray, in reply, on privity of contract, referred to *Hoole* v. *Royal Trust Co.,* [1930] 3 W.W.R. 426; *Calico Printers Association* v. *Barclays Bank* (1931), 145 L.T. 51. On the question of appropriation of payments see *In re Hallett's Estate* (1880), 49 L.J. Ch. 415.

Cur. adv. vult.

4th June, 1935.

MARTIN, J.A.: This appeal should be dismissed, because, in my opinion, but without wholly adopting the reasoning therefor, the learned judge below has reached the right conclusion respecting the true relationship of the parties upon the facts before him (which are unusual and complicated and somewhat obscure in essentials) when considered in the light of the relevant sections of the Insurance Act, Cap. 120 of 1925, and amending Acts, that were cited by counsel.

MCPHILLIPS, J.A.: I would dismiss the appeal being of the opinion that the learned trial judge arrived at a proper conclusion and that the appellant was required to answer to the respondent for all premiums received. It is true that in the course of business the dealings were in the main had with the general agents—Banfield, Black & Banfield Limited—for the Norwich Union Fire Insurance Society Limited, but it is to be observed that to comply with the Insurance Act (section 185) the appellant had to be authorized by the Norwich Union Fire Insurance Society Limited and in the office of the superintendent of insurance the following document is filed: [After setting out the authorization his Lordship continued].

There it will be seen that the appellant was expressly appointed "to act as insurance agents representing us" that is the Norwich

Union First Insurance Society Limited, and by reason of that authority only—approved by the superintendent of insurance—could the appellant act. In view of this it is impossible to contend that there is no privity existent here as between the insurance society and the appellant. If the appellant had been able to shew that all insurance premiums on insurance effected by the appellant for the insurance society had been paid to the general agents it might have been necessary that some consideration should be given to that and as to whether or not that would constitute sufficient payment in law to the insurance society. However, no evidence of that character was adduced; further if that were a fact I would not for a moment doubt that a company of the standing of the Norwich Union Fire Insurance Society Limited in the insurance world would not be taking proceedings as here for the insurance premiums if payments had been made to the general agents. This is clear to demontration that the appellant, to carry on the business of an insurance agent, had to have the direct authority of the insurance society and needed that authority under the Insurance Act to act as such, so that the privity is complete and the making of payments to the insurance society of insurance premiums would be in compliance with that obligation and the privity existing.

Upon the facts of this case, I have no doubt that the necessary privity in law is present and I see no necessity to canvass the large number of cases referred to in the argument, all interesting in their nature. Therefore as already stated I would dismiss the appeal.

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

MCQUARRIE, J.A.: Under the heading of "Insurance," 32 C.J. p. 1068, sec. 146, appears the following reference to "Subagents and Clerks":

> In accordance with the general law of agency relating to the delegation of authority, an insurance agent whose powers involve trust and confidence, and the exercise of discretion as a general rule, cannot delegate his authority or bind the company through a subagent, unless he is either expressly or impliedly authorized by the company to do so. But it is generally held that by reason of the nature of his business, a general insurance agent may, in the due prosecution of the business of his principal, delegate to another authority to do any act within the scope of his authority, such subagent

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becoming the agent of the company, and his acts within the scope of the delegated authority being binding on the company. Such authority may arise by a general custom known to and approved by the company.

This is not in conflict with the authorities binding on us cited by counsel on the hearing of this appeal and I think is good law in this country. In this connection we were referred to Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 227, sec. 392, reading in part as follows:

> There is as a general rule no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. The exception is where the principal was a party to the appointment of the sub-agent, or has subsequently adopted his acts, and it was the intention of the parties that privity of contract should be established between them.

And Bowstead on Agency, 8th Ed., p. 113, art. 41, reading in part as follows:

> There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto. Provided, that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent is expressly or impliedly authorized to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted.

In the case under consideration the evidence shews that the defendant, a sub-agent, issued policies of insurance countersigned by himself, without the intervention of the agent, Banfield, Black & Banfield Limited, and collected the premiums which undoubtedly belonged to the plaintiff company. It also appears by the evidence that in order to carry on business it was incumbent on the defendant to obtain a licence under the Insurance Act and that the defendant duly received such a licence with the approval of the plaintiff. It is true that the accounting was between the defendant and Banfield, Black & Banfield Limited, and the defendant made payments to Banfield, Black & Banfield Limited. If he had paid over to Banfield, Black & Banfield Limited all premiums collected by him, less his commission, he would have been absolved from any responsibility to account to the plaintiff but as he did not do so he is under obligation to pay to the plaintiff the amount due by him in respect to the said premiums, subject to the plaintiff shewing that Banfield, Black & Banfield Limited is indebted to it in at least that amount,

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which I think has been clearly established. This disposes of the principal ground of appeal. There was also the question of appropriation of payments and the contention on the part of the appellant that a small part of the plaintiff's claim consisted of premiums collected for another insurance company. As to this ground of appeal I agree with the judgment of the learned trial judge.

I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *R. O. Campney.*

TAYLOR v. HUDSON'S BAY COMPANY.

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June 20, 27.

Negligence—Damages—Master and servant—Waitress at lunch-counter—Fall on slippery floor—Workmen's Compensation Act, Part II.—Whether a domestic servant—Volens—R.S.B.C. 1924, Cap. 278, Secs. 2 (2) and 80 (2).

The plaintiff, who was employed as a waitress inside of a four-sided lunch-counter in the basement of the defendant company's store in Vancouver, fell when turning one of the corners while carrying a tray of dishes and seriously injured herself. The basement floor was of marble chips worked into cement with a hone finish known as terazzo. Rubber mats were supplied inside the counter, but owing to their becoming worn they were removed on two sides several days before the accident, and particles of food and liquid would from time to time fall on the floor, making it slippery. In an action for damages for negligence:—

Held, that the plaintiff is not a domestic servant within the meaning of the Workmen's Compensation Act and that this part of the defendant company's business is not one in which Part I. of said Act applies; but is one in which Part II. of said Act applies. The floor was defective to the knowledge of the defendant, owing to its slippery condition which caused the plaintiff's injuries, and as there was no voluntary assumption of risk on her part, the defendant company is therefore liable to the plaintiff for damages.

ACTION for damages for injuries sustained by the plaintiff when she slipped and fell on the floor of the defendant company

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while in its employ as a waitress inside the lunch-counter in the basement of the company's store in Vancouver. The facts are set out in the reasons for judgment. Tried by LUCAS, J. at Vancouver on the 20th of June, 1935.

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

Cur. adv. vult.

27th June, 1935.

LUCAS, J.: The defendant company owns and operates a very large department store in the City of Vancouver. As part of the business of the store it operates a restaurant or lunch-counter in its basement. This counter is in the form of a rectangle with seats for customers on all four sides and with the kitchen in a smaller rectangle in the enclosure created by the lunch-counter.

In the comparatively narrow space or passageway between the rectangular counter on the outside and the rectangular kitchen on the inside the waitresses and employees pass to and fro giving service to the customers seated on the outside of lunch-counter.

The plaintiff is a girl, age 24, then employed by the defendant company as a kind of waitress whose duties it was to pass around clean dishes from the kitchen enclosure to various places in the prescribed area of the passageway above described and to collect up dirty dishes and pass them into the kitchen.

The defendant contends that this employment constituted the plaintiff a domestic servant. It appears to me difficult to imagine an occupation from which every element associated with the idea of domesticity had been more completely removed. The case of *Duncan* v. *Norton-Palmer Hotel Co. Ltd.,* [1933] O.R. 86, was cited as an authority in the defendant's favour. That was the case of a housemaid in an hotel, and is clearly distinguishable. I hold that the plaintiff was not employed as a domestic servant.

I hold further that this operation of the defendant company is not one to which Part I. of the Workmen's Compensation Act, R.S.B.C. 1924, Cap. 278, applies; but that it is one to which Part II. of the said Act applies.

I hold also that the place of employment and its equipment was part of the ways, buildings and premises connected with and used by the company in its business.

The floor of the basement was laid with a finish described as terazzo which consisted of marble chips worked into cement with a hone finish. The restaurant in which the plaintiff was employed was erected on top of this floor so that the narrow passageway, which can be described as the place of employment of the plaintiff, had this said terazzo as a floor. It was admittedly incidental to the course of the work of carrying on the restaurant that bits of liquids, particles of food stuffs and the like would from time to time fall on the floor making it slippery. Rubber mats were supplied, however, on the floor and the expert witness called on behalf of the defendant said that these mats were for the purpose of making it an easier and softer place for the waitresses to walk. Several days before the accident, however, the mats on two sides of this passageway, having become worn and frayed, were removed. Some delay occurred in their replacement. I find as a fact from the evidence that the bare floor was more slippery, and very much more slippery, than the floor with the mats laid upon it. It was on the bare portion of this floor, near one corner of the passageway, where the plaintiff, in carrying a tray of dishes and turning the corner, stepped off the mat on one side of the corner to the slippery bare floor on the other side, that the accident took place. She slipped and fell on the slippery floor and seriously injured herself. The plaintiff herself says that when the floor was left without matting the surface was very smooth and "we had no grip on it whatever." Miss Fordyce, a fellow employee, said that when anything got spilled on the floor it gets very slippery so the rubber mats were put down for that purpose. It appears that there is a slight slope on the floor with a drain in the centre.

I find, therefore, upon the evidence that this place and equipment provided for the plaintiff in her employment was defective at the time of the accident in that the said floor was in an excessively slippery condition and that it was this defect which caused the injuries to the plaintiff which is the subject-matter of this action.

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Lucas, J.

I find further upon the evidence that complaints had been made by the waitresses working in this place of the absence of the mats, and that notice of the defective condition was brought to the knowledge of the defendant and that there was no voluntary assumption of this risk. I find that there was no contributory negligence on the part of the plaintiff and that the plaintiff was injured in the course of her employment by reason of the defective condition as above described.

I have observed carefully the demeanour of the plaintiff in the witness box and have given consideration to all the circumstances and I am satisfied that there was no malingering on her part and I find accordingly. Her story is truthful. There was no negligence on the plaintiff's part in acting as she did at the time of the accident, namely, in accepting the services of the medical practitioner retained by the defendant company to attend on employees injured in the store.

I find, therefore, the defendant company liable to the plaintiff for damages which I assess as follows: General damages, $2,000, special damages, $200, and I give judgment accordingly.

Judgment for plaintiff.

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Oct. 31;
Nov. 1.
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Jan. 8.

Landlord and tenant—Lease—Provision for termination on notice—Notice to sell and terminate lease—Sufficiency—Interpretation.

A lease provided that in the event of sale of the premises 45 days' notice to terminate the lease should be given and there was the further provision that in the event of a proposed sale the owner should offer to sell to the lessee at the same price and on the same terms as to any other purchaser. The lessor secured a purchaser and gave the lessee a 45-days' notice of termination of the lease, and by the same notice offered to sell the premises to the lessee at the same price and on the same terms "as he is willing to sell to another to whom he will sell in the event of you failing to, within fifteen days from this date, inform him by writing of your being then ready and willing to purchase at the price and on the terms hereinafter contained." This was followed by the terms on which he proposed to sell to the tentative purchaser. On the refusal of the lessee to quit, the lessor took possession after the lapse of 45 days. The plaintiff recovered judgment in an action for damages for breach of covenants of the lease.

Held, on appeal, reversing the decision of McDONALD, J., that notice was in substantial compliance with the terms of the lease and the lessee's claim for damages fails.

APPEAL by defendant from the decision of McDONALD, J. of the 20th of June, 1934, assessing the plaintiff's damages at $1,000 in an action for breach of the covenants contained in a lease of the 11th of December, 1933, whereby the defendant leased the premises and equipment of the Valley Publishing Company at Port Haney, B.C., to the plaintiff for one year. Under the lease the rent was $45 per month, payable in advance on the 11th of each month. The lease further provided that should the lessee fail to pay the rent within ten days after the due date, the lessor might re-enter and take possession of the premises, plant and equipment, also that in the event of the lessor effecting a sale of the premises, plant and equipment he would give the lessee 45 days' notice in writing to terminate the lease but that he should first offer to sell at the same price to the lessee on the same terms. On the 2nd of March, 1934, the lessor gave the lessee a 45-days' notice to terminate the lease and at the same time offered to sell the premises and equipment to the

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lessee on the same terms as he was to sell to the proposed purchaser, giving him 15 days within which to accept the offer. On the 24th of March following, the lessee not having paid his rent for that month, the lessor re-entered and took possession of the premises under the terms of the lease, but on the 28th of March he delivered possession thereof to the lessee upon the lessee verbally promising to deliver up possession thereof again to the lessor on the 14th of April, 1934, and terminate the lease. The lease further provided that the lessor should have exclusive right to use and occupy the rear room of the premises as living quarters with heat and light free of charge during the term of the lease, and on the 24th of March the lessee put new locks on the entrance to the building and deprived the lessor of the right to use and occupy his room. On the 16th of April, 1934, the lessor applied to the lessee for possession of the premises in accordance with the verbal agreement made on the 28th of March, but the lessee declined to give up possession. On the 19th of April following the lessor re-entered and took possession of the premises.

The appeal was argued at Vancouver on the 31st of October and the 1st of November, 1934, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Oliver, for appellant: On March 2nd, 1934, notice terminating the lease was sent to Heide at his city address and to Port Haney. The landlord entered into possession on the 24th of March because the tenant had not paid his rent for that month and was in default. The tenant was let into possession again on agreeing to terminate the lease on the 16th of April, but he did not keep his word and the landlord took possession on the 19th of April, the 45 days after the notice was given having expired. It was wrongly decided by the trial judge that notice was ineffective. On the interpretation of this notice see *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61 at p. 104.

Ian A. Shaw, for respondent: Appellant rests his case on the notice of the 2nd of March, authorized by clauses 16 and 17 of the lease. When there is a provision for forfeiture it is strictly construed against the lessor: see Woodfall on Landlord and Tenant, 23rd Ed., 467. Under clause 17 of the agreement he must first offer the property to us. Compliance with clause 17

is a condition precedent to his acting under clause 16. He had not effected a sale when he gave us the notice of March 2nd. We did not receive the notice until March 5th so that upon his entering into possession on April 19th he improperly entered into possession one day before the 45 days had expired. There was no effective sale when the notice was given.

Oliver, replied.

Cur. adv. vult.

8th January, 1935.

MACDONALD, C.J.B.C.: By the terms of the lease it was agreed (paragraph 17)

that in the event of the party of the second part during the term hereby granted proposing to effect a sale of the premises and plant and equipment, he shall first offer to sell the same to the party of the first part at the same price and on the same terms as he is willing to sell to any other purchaser.

Paragraph 16 of the said lease provides for a 45-days' notice in case of an actual sale. Paragraph 17 deals with a proposal to sell. No notice of sale was given nor perhaps required under paragraph 17, but a notice of intention to sell was given nevertheless. The notice was dated the 2nd of March and was received on the 18th of April, so that if the 45-days' notice was necessary as allegedly implied from paragraph 16 that notice was given.

The plaintiff refused to quit and the defendant took possession on the 18th of April. I think he was entitled to do so and that the plaintiff's claim for damages must fail.

The appeal should be allowed.

MARTIN, J.A. agreed in allowing the appeal.

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

MACDONALD, J.A.: The decision in this appeal turns upon the proper interpretation of two clauses in a lease and upon whether or not in giving a certain notice there was compliance with the terms therein contained. They read as follows:

16. It is understood and agreed by and between the parties hereto that in the event of the party of the second part effecting a sale of the premises and plant and equipment, the said party of the second part [the appellant] may give to the party of the first part [the respondent] forty-five (45) days' notice in writing thereby to terminate the lease hereby granted and at the expiration of the said period the said lease shall be terminated and the

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party of the second part shall thereupon be at liberty to re-enter and retake possession of his property peaceably for the purpose of delivering same to the purchaser.

17. It is further understood by and between the parties hereto that in the event of the party of the second part [appellant] during the term hereby granted proposing to effect a sale of the premises and plant and equipment, he shall first offer to sell the same to the party of the first part at the same price and on the same terms as he is willing to sell to any other purchaser.

The appellant secured a purchaser and tentatively arranged for a sale. He could not conclude it until respondent had been given an opportunity to purchase upon the same terms. Appellant therefore, through his solicitor, served a notice dated March 2nd, 1934, upon respondent saying in part:

In accordance with the said provisions of the said agreement, Mr. Brisco, through me, hereby gives you forty-five (45) days' notice in writing to terminate the lease and hereby first offers to sell the premises and plant and equipment to you at the same price and on the same terms as he is willing to sell to another to whom he will sell in the event of you failing to, within fifteen (15) days from this date, inform him by writing of your being then ready and willing to purchase at the price and on the terms hereinafter contained:

(Then follows the complete terms upon which he proposed to sell to another.)

It will be observed that appellant gave the lessee 15 days (part of the 45) to decide if he wished to purchase. Having received no response he on April 17th, 1934, resumed possession of the premises.

It was urged that the landlord re-entered before the termination of the 45-day period. It is true that the evidence on this point is very unsatisfactory but as the question was not specifically dealt with by the trial judge I would, as stated during argument, find from the lessee's (respondent) evidence that he received the notice on March the 3rd and therefore 45 days elapsed before re-entry. There are several factors in the case, not to mention the interests of justice which enable me to take that view.

The remaining submission was that—as the trial judge found—the notice itself was defective. It was submitted that pursuant to clause 17 the appellant, upon arranging tentatively for the sale to another, should "first offer to sell the same to the party of the first part [*i.e.*, the respondent] at the same price," etc., and that after the end of a reasonable period (and 15 days is

admitted to be a reasonable time) he should then perfect his sale and pursuant to clause 16 give to respondent a 45-day notice of intention to terminate the lease.

While there is much to be said for this view I do not think it is the best or, at all events, the only construction open to both clauses read together. Clause 17 follows 16 and as it deals in part at least with the same subject-matter it may be read as associated with the preceding clause, both clauses forming part of the one scheme. The two clauses must be read also, if it is possible to do so, to produce a workable result. It was impossible to effect a sale in the sense of concluding it before the option to purchase was given to the respondent. It was when appellant agreed upon terms and reached the point where he was "willing to sell" to some other purchaser that he was obliged to first offer it to the respondent. Nor does it follow, viewing the two clauses together, that the words "effecting a sale" in clause 16 must be read as meaning to actually conclude a sale.

When appellant was engaged in finding a purchaser, agreeing with him upon terms and conditions, doing everything but actually concluding it he was "effecting a sale" of the premises, plant and equipment, etc., in the sense in which the phrase is used in clause 16. As he had in this sense "effected a sale" he was entitled to give the 45 days' notice and to carry out the provisions of clause 17 might in the same notice offer to sell to the respondent within a reasonable time to enable him to buy before closing the sale with the contemplated purchaser. I do not think this view is affected by the words "proposing to effect a sale" in clause 17. That is what was contemplated by the words "effecting a sale" in clause 16.

As stated there is much to be said for the interpretation submitted by respondent's counsel. There is, however, no merit in his case. He is relying entirely upon a technical construction to secure damages to which equitably he is not entitled. There was substantial compliance with the terms of the agreement and now respondent seeks to avoid the result of his bargain by saying the same result should have been brought about in a slightly different way. The same is true of his contention that the 45 days' period did not expire before re-entry. It is a canon of

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interpretation that where two different constructions are possible one advancing the interest of justice while the other does not, the former construction should prevail.

I would allow the appeal.

MCQUARRIE, J.A.: I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Joseph Oliver.*
Solicitor for respondent: *F. R. Anderson.*

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STEVENSON v. B.C. LEATHER COMPANY LIMITED.

Male Minimum Wage Act—Wholesale and retail leather-goods business—Manufacture and repairing golf clubs as subsidiary thereto—"Mercantile industry"—Employee assembling and repairing golf clubs—Application of Act—B.C. Stats. 1934, Cap. 47.

Under section 1 of order 10 of the Board of Industrial Relations under the Male Minimum Wage Act the expression " 'mercantile industry' includes all establishments operated for the purpose of wholesale and (or) retail trade."

Section 4 of said order 10 provides that the minimum wage for every male person over the age of 18 and under the age of 21 years in the mercantile industry, whose week consists of 40 hours or more, shall be after one year's employment $12.75 per week.

The defendant company carried on a wholesale and retail leather-goods business in Vancouver, and as subsidiary thereto carried on the business of manufacturing and repairing golf clubs. The plaintiff (between 18 and 21 years of age) was employed by the defendant company in assembling and repairing golf clubs from January, 1933, until April 5th, 1935. The plaintiff claims that from October 5th, 1934, until April 5th, 1935, he received as wages $6 per week, whereas under said order he was entitled to $12.75 per week. He recovered judgment in an action for the balance.

Held, on appeal, affirming the decision of ELLIS, Co. J., that where an employee is in an establishment which is conducting a mercantile industry he is within the scope of the Act. The fact that he is assisting partially or entirely in the manufacture of the products which the establismment sells to the public does not deprive him of the benefit of the Act.

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APPEAL by defendant from the decision of ELLIS, Co. J. of the 10th of May, 1935. The defendant carries on a wholesale and retail leather-goods business on Pender Street in Vancouver, and as subsidiary thereto carries on the business of manufacturing and repairing golf clubs. The plaintiff was employed by the defendant in the golf club department of the store and was engaged in assembling golf clubs and doing repairing work. He was employed from the 9th of January, 1933, until the 5th of April, 1935. Pursuant to the provisions of the Male Minimum Wage Act, the Board of Industrial Relations made an order which came into force on August 10th, 1934, providing a minimum wage for every employee in the mercantile industry of $12.75 per week. The plaintiff claims that the defendant company was engaged in a mercantile industry, and between the 5th of October, 1934, and the 5th of April, 1935, the defendant company only paid him $6 per week, when under the said order of the Board of Industrial Relations he was entitled to $12.75 per week. The plaintiff claims the balance, namely, $174.37.

The appeal was argued at Victoria on the 7th of June, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. A. MacInnes, for appellant: The plaintiff was solely engaged in the factory fixing clubs. There was an error in holding that the plaintiff was an employee in the mercantile industry as defined by the Male Minimum Wage Act. He merely repaired clubs and was not engaged in the mercantile industry. He was engaged in the manufacturing industry and should not be classified as of the mercantile industry.

Adam Smith Johnston, for respondent: The plaintiff was engaged in the manufacturing and repairing of golf clubs and comes within the provisions of order 10 of the Board of Industrial Relations, establishing a minimum wage in the mercantile industry.

MacInnes, replied.

MARTIN, J.A.: This appeal raises the question as to whether or no the plaintiff is an "employee in a mercantile industry"

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Martin, J.A.

within the meaning of section 2 of order 10, made by the Board of Industrial Relations under the Male Minimum Wage Act, Cap. 47, R.S.B.C. 1924.

By section 1 of that order the expression "mercantile industry" includes all establishments operated for the purpose of wholesale and (or) retail trade." It is conceded that upon the evidence herein the employers of this plaintiff (respondent) are "a mercantile industry" within the meaning of that definition so far as regards the general public, but it is said that because in the course of their own indoor operations they manufacture in one part of their establishment certain goods that they sell over the counter therefore they are not *qua* their own employees a mercantile industry. With all respect I am unable to accept that submission, which carries consequences that on the face of it are absolutely opposed to the spirit and intention of the Act. It is sufficient, as sections 2 and 3 read together indicate, that the establishment is a mercantile one, and once you get a person who is an employee in a mercantile industry or establishment—that word "establishment" is significant as embracing the business as a whole—once, I say, you get the employee in an establishment which is conducting a mercantile industry then he is within the scope of the Act, and the fact that behind or in front of the scene he is assisting in the "operation" of the "establishment" by partially or entirely participating in the manufacture of products which the establishment sells to the public, cannot deprive him of its benefits.

We are all of opinion that the appeal should be dismissed.

MCPHILLIPS, J.A.: I may say I am of a like opinion to that expressed by my learned brother MARTIN. I would only say this in further elucidation of the matter, if such is necessary, that in this particular case upon the admitted facts the employees do certain work, or put certain finishing touches upon golf clubs, and other sport goods, sold in the establishment. Now in this particular case it is stronger than perhaps another might be, as I would indicate, if the mercantile industry, which we certainly have before us, purchased out and out certain articles which they put upon sale, irrespective of having done any work upon the

articles of sale. But here it would appear that the mercantile industry in placing its products upon the market does have in its employ certain people who do certain things to the product which is placed on sale; and it would seem to me that in this case at any rate it is a complete case coming within the purview of the statute.

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MACDONALD, J.A.: I have nothing to add to what has been said by the acting Chief Justice dismissing the appeal.

MCQUARRIE, J.A.: I agree.

Appeal dismissed.

Solicitor for appellant: *Elmore Meredith.*
Solicitor for respondent: *Adam Smith Johnston.*

CREIGHTON v. CLARK.

C. C.
In Chambers
1935
April 19, 26.

Practice—Costs—County Court—Taxation—Review—Evidence at coroner's inquest—Plan of scene of accident—Stenographer.

On review of the taxation of the defendant's bill of costs in an action for damages caused by an automobile accident, objection was taken to three items: (1) "Paid for transcript of evidence at inquest $19.40"; (2) "Paid T. M. for surveying and preparing of plan of scene of accident and copies, $12.90"; (3) "Paid for attendance of stenographer at trial, $15."

Held, as to (1) that the transcript was in the nature of a luxury used by both parties to assist in the conduct of their case and the cost thereof ought to be borne equally; (2) that the taxing officer should not allow the costs of surveying and preparing plans of the scene of the accident without an order therefor, but there being jurisdiction under Order XXII., r. 35 of the County Court Rules to make the order now, it should be made, and although the plan was prepared for the defendants it was primarily used by the plaintiff as part of her case and it would be inequitable for her to now object to paying for it; (3) that there being no express agreement that the costs of attendance of a stenographer be costs in the cause, but there being an implied agreement that they would be borne equally, the item should be reduced by one-half.

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APPLICATION to review a taxation by the deputy registrar at Vancouver. Heard by LENNOX, Co. J. in Chambers at Vancouver on the 19th of April, 1935.

Ian Shaw, for plaintiff.
Tysoe, for defendant Jessie Clark.
J. A. MacInnes, for defendant A. F. B. Clark.

Cur. adv. vult.

26th April, 1935.

LENNOX, Co. J.: This is an application in Chambers by the plaintiff to review a taxation by Harold Brown, Esquire, deputy registrar of this Court, to the extent of three items of a bill of costs of the defendants.

The action, which was tried before His Honour Judge MCINTOSH, was for damages incurred through an automobile collision. Prior to the action an inquest had been held into the death of Mrs. Tracey as the result of the collision, at which inquest shorthand notes were taken of the evidence. The three items objected to and the reasons for the objections are set out as follows in the notice of application:

No. of Item	Page	Item to which objection is made	Reason for objection
39	3	Paid for transcript of evidence at inquest, $19.40.	No provision for the allowance of same either by order of the judge or by Rules of Court.
40	3	Paid T. Morcom for surveying and preparing of plan of scene of accident, and copies, $12.90.	No order of the judge allowing same.
46	3	Paid for attendance of stenographer at trial, $15.00.	This item is unnecessary and no provision therefor in the Rules of Court.

As to the first item: Order XXII., r. 7, of our Rules of Court is as follows:

> No costs which are to be paid or borne by another party shall be allowed which do not appear to the registrar on taxation to have been necessary or proper for the attainment of justice or for defending the rights of the party incurring the same, or which appear to such registrar to have been incurred through overcaution, negligence, or mistake, or merely at the desire of such party.

In *Oliver* v. *Robins* (1894), 43 W.R. 137 (64 L.J. Ch. 203),

the question was whether the losing party should have to pay an allowance to a witness who it was alleged had been called "through over-caution and mistake" under a similar rule to our Order XXII., r. 7. The learned judge (Mr. Justice Kekewich) said:

> I do not think I have any jurisdiction in the matter, for by the rule it is left to the discretion of the taxing master. I think the rule means that the taxing master is to do his best, and in that case his discretion is conclusive . . . The Court can of course go into the question of whether or not the taxing master has properly considered the matter, . . .

Order XXII., r. 35, gives the judge on review power to make such order as he may think just.

The deputy registrar informs me that he went into the details of the use of this transcript and found that it had been used by both counsel in the conduct of their case; that they and the Court had the benefit of it and that therefore it was necessary or proper for the attainment of justice. I am of opinion that in arriving at this conclusion he did not "properly consider the matter."

In *Bright's Trustee* v. *Sellar,* [1904] 1 Ch. 369; 73 L.J. Ch. 245, which was an action for being party or privy to a fraud disclosed in a previous action, objection was taken (on review of a taxation) to an allowance of a transcript of the proceedings in the previous action. So much of the transcript "of the evidence and judgment as relates to the question whether the defendant was or was not party or privy to the fraud," was allowed. In the present case, however, there were no such grounds for use of the transcript and I find that this transcript was in the nature of a luxury used by both parties to assist in the conduct of their case and therefore that the cost thereof ought to be borne equally.

As to item No. 1: The deputy registrar's finding is varied to the extent of $9.70. As to item No. 2: No order so far has been made allowing costs in the cause for the expenditure by the defendants of surveying and preparing the plan of the scene of the accident nor, as I understand it, was any application made (up till now) for such an order. In the ordinary case without such an order the taxing master could not allow the charge—he has no discretion under the Rules. But an order is now asked

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for and after hearing both counsel and what was admitted I would, without hesitation, make such an order if I have jurisdiction to do so.

It is submitted by Mr. *Shaw* for the plaintiff that it is now too late to make such an order as the taxation is completed; and Mr. *Tysoe* for the defendants that under Order XXII., r. 35, such an order can be made on review. Rule 35 is as follows:

> Any party who may be dissatisfied with the taxation by the registrar, or as to any item or part of an item in any bill of costs taxed by him, may within three days from the date of the taxation, or such other time as the judge or taxing officer may allow, apply to the judge for an order to review the taxation as to the same or any item or part of an item, and the judge may thereupon make such order as he may think just.

This rule is very broad and taken in conjunction with the fact that the County Court Rules differ from the Supreme Court Rules in that the latter restricts the time in which such an order can be made and there is no such restriction in the County Court Rules, it would seem that I have jurisdiction on review to order that this item be taxed "in the cause," and I so order. However, if I am wrong in that, I find that it is admitted by both counsel that while the drawings were prepared by or for the defendants, in fact they were not used primarily by the defendants but by the plaintiff as part of her case and put in as exhibits by her. Such being the case it is inequitable that she should now object to paying for same.

As to item No. 2 the deputy registrar's decision is sustained. As to item No. 3: On consultation with the registrar of this Court I am advised that it has been the practice in the County Court for a considerable length of time to allow as costs in the cause the cost of the attendance of a stenographer when one is present and takes notes at the request of one party's counsel and not objected to by the other party's counsel, on the ground that there is an implied agreement. I do not agree with this practice. Any such implication would only amount to an agreement to share the costs equally. In support of this practice I was referred to the decisions (or what might be taken as a corollary to the decisions) in *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, and *Welch* v. *Grant*, [1920] 3 W.W.R. 388; 28 B.C. 367. Neither of these decisions deals with this subject-matter in any way.

On the other hand, it has been decided that the costs of stenographers are not costs in the cause unless there is a distinct agreement to that effect: *Seal* v. *Turner,* [1915] 3 K.B. 194; 84 L.J.B.K. 1658. At pp. 196-7 Lord Cozens-Hardy, M.R. says:

> There is only one point upon which judgment was reserved, and it raises an important question as to the circumstances in which costs of shorthand writers' notes of evidence ought to be allowed on party and party taxation.
>
> I think it is settled that the costs of shorthand notes of the evidence ought not to be allowed unless there is some agreement by the parties or some direction by the judge to the contrary. If there is nothing more than an agreement between the solicitors that there should be one shorthand writer's notes, the only implied agreement is that the costs of the shorthand writer should be borne equally between the parties. . . . If nothing more is expressly agreed, it is rash to imply any further agreement making the costs costs in the action. Nothing is more easy to express than such an agreement.

I adopt his following words:

> In the present case I think it is clear that there was no express agreement that the costs should be costs in the action.

I quote further:

> There is no authority that such costs can be allowed as being within the discretion of the taxing master.

In the same case Warrington, L.J., at p. 202, says:

> It seems to me eminently desirable that on a subject which in many cases involves an enormous addition to the expense the parties ought not to be held bound to any larger extent than is covered by their express agreement.

In *In re Hilleary and Taylor* (1887), 36 Ch. D. 262; 56 L.J. Ch. 758, the successful party was allowed half the expense of the shorthand notes which were taken for him.

The Yearly Practice, 1935, at pp. 1482 and 1483, deals very fully with these questions under the headings: "Shorthand writer's notes" and "Agreements between counsel or solicitors." Though loath to disturb an existing practice, it seems to me that I have no alternative, when exception is taken, but to do so if in my opinion the practice is unjust or not proper.

In my opinion an agreement was arrived at in the present case that the stenographer's costs should be borne equally. The defendants therefore would be entitled to one-half the amount in item No. 3, namely, $7.50.

Looking to the result there should be no costs of this application.

Order accordingly.

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July 10, 17.
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1930
Jan. 23, 24;
March 4.

SCHONEMEIER v. KING AND JARDINE.

Bill of sale—Chattel mortgage—Promissory notes—Sale of cattle covered by mortgage — Default in payment — Seizure — Non-presentation of promissory notes—R.S.C. 1927, Cap. 16, Sec. 183 (2).

The plaintiff and one Baker as partners, operated a farm leased from the defendants. During the currency of the lease the partners fell in arrear in payments on the farm machinery, etc., bought from the defendants under a conditional bill of sale. To prevent proceedings being taken by the defendants, an arrangement was entered into between the partners and the defendants whereby in consideration of an extension of time being given to the partners to pay the arrears of purchase price due under the conditional bill of sale until after harvest, the defendants were given two promissory notes for the amount owing to them secured by a chattel mortgage on 30 head of cattle on the farm owned by the partners. A term of the chattel mortgage was that the cattle could not be sold without the permission of the mortgagees but in violation of this term the partners subsequently sold nineteen of the 30 head of cattle. In consequence, the defendants caused a seizure to be made under the chattel mortgage. The promissory notes were demand notes payable on The Royal Bank of Canada, East End Branch, Vancouver. They were never formally presented for payment.

Action was brought by the plaintiff for damages for wrongful seizure, the ground being that the chattel mortgage having been given as collateral security for the promissory notes did not become enforceable until the promissory notes became due and payable and as it was necessary to present the promissory notes at the place of payment before the makers became liable thereon (*Croft* v. *Hamlin* (1893), 2 B.C. 333) the notes were not overdue at the date of the seizure which was, therefore, wrongful.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the plaintiff committed a breach of the covenant in the chattel mortgage by selling the cattle without consent and that presentation of the promissory notes at the place of payment was not necessary to make the plaintiff liable thereon.

Canadian Bank of Commerce v. *Bellamy* (1915), 9 W.W.R. 587, followed. *Croft* v. *Hamlin* (1893), 2 B.C. 333, not followed.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. in an action tried by him at Vancouver on the 10th of July, 1929, for the cancellation and rescission of a chattel mortgage of the 20th of December, 1928, made between the plaintiff and one Baker as mortgagors in favour of the defendants, for an order setting aside the seizure of the goods and chattels in the

said chattel mortgage mentioned on the 6th of June, 1929, for damages, and an injunction restraining the defendants from disposing of the goods and chattels seized. On the 24th of February, 1927, one Schallhorn leased a farm of 240 acres in the Sumas District from the defendants and purchased goods and chattels from the defendants for $5,000 under a conditional bill of sale. On the 15th of February, 1928, the plaintiff joined Schallhorn as a partner in farming operations, and to share profits and liabilities on an equal basis. At the time the partnership was entered into the only goods and chattels on the premises not covered by the aforesaid conditional bill of sale was 30 head of Jersey cows, the property of Schallhorn subject to a chattel mortgage held by the First National Bank at Linden in the State of Washington. The partnership between the plaintiff and Schallhorn continued until the 1st of January, 1929, when Schallhorn sold his interest in the partnership to one Karl Baker. The defendants, then wanting further security from the plaintiff and Baker, for the balance due under said conditional bill of sale, signed two promissory notes on the 18th of January, 1929, for $2,000 and $1,830.70 respectively, payable on demand at The Royal Bank of Canada, East End Branch, Vancouver, and on the same day they executed a chattel mortgage to secure payment of the notes, on all the goods and chattels on the farm. The plaintiff claimed this was done on the express condition that the defendants would forbear from taking any action by way of foreclosure or otherwise against the plaintiff, either under the conditional bill of sale or the promissory notes and chattel mortgage until the conclusion of all harvesting operations on the premises in 1929, provided the plaintiff and Baker pay the defendants $50 per month (first payment to be made on the 25th of January, 1929) and monthly thereafter, and the plaintiff should endeavour to sell a Chevrolet truck he owned and pay the proceeds to the defendants. The plaintiff made the monthly payments in January, February, March and April, but were unable to make a satisfactory sale of the Chevrolet truck, and owing to disputes arising between the parties the monthly payment for May was not made. On the 6th of June, 1929, the defendants through their bailiffs and without notice, seized all

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the goods and chattels on the farm, preventing further farming operations by the plaintiff and his partner. The promissory notes were not presented for payment prior to the seizure. The defendants claimed that on the 16th of March, 1929, the plaintiff without the consent of the defendants and in violation of the terms of the chattel mortgage, sold 19 head of cattle and retained the proceeds thereof, and by reason of said wrongful sale are not entitled to the relief claimed.

Griffin, K.C., and *Fleishman,* for plaintiff.
Cassady, for defendants.

Cur. adv. vult.

17th July, 1929.

MORRISON, C.J.S.C.: The plaintiff displayed commendable courage and stamina in taking upon himself the onerous task of carrying the proper tilling of the lands in question and winning therefrom that which would enable him to discharge his contractual obligations and at the same time succeed in retaining anything for himself by way even of a living wage. Undertake it he did. He is now quite under a load of debt. It would be folly for him to spend any more time or energy upon the place. He came into the matter without any money and he leaves it in very much the same condition. The sale of the stock by the plaintiff was a breach of his contract with the defendants. There was as well an incompatibility existing between all the parties which jeopardized the proper carrying on of the work necessary to be performed. The somewhat heroic measures adopted by the defendants and of which the plaintiff now complains were amply justified under all the circumstances. The plaintiff voluntarily left the premises. The defendants were released from the obligation to present the note for payment with the knowledge they possessed of his inability to meet it if presented. I do not say it by way of paradox, but I think that in dismissing his action, he is being saved from the consequences of his further valiant efforts to regain possession. The action is dismissed.

From this decision the plaintiff appealed. The appeal was

argued at Victoria on the 23rd and 24th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Fleishman, for appellant: The plaintiff made his payments under the terms of the agreement until May, 1929, when, owing to disputes arising between the parties and threats by the defendants, the May payment was not made. The notes were never presented for payment and the seizure was illegal: see *Croft* v. *Hamlin* (1893), 2 B.C. 333; *Westaway* v. *Stewart* (1909), 10 W.L.R. 623; *Warner* v. *Symon-Kaye Syndicate* (1894), 27 N.S.R. 340; *Robertson* v. *Northwestern Register Co.* (1910), 19 Man. L.R. 402; *Jones* v. *England* (1906), 5 W.L.R. 83; *Albert* v. *Marshall* (1913), 48 N.S.R. 34; *Morgan* v. *Shaw* (1926), 36 B.C. 454; Falconbridge on Banking and Bills of Exchange, 4th Ed., 896; *Pritchard* v. *Couch* (1913), 57 Sol. Jo. 342. It is his duty to prove presentment. The chattel mortgage was collateral to the promissory notes. They knew of the sale of the cattle on April 1st, 1929, and accepted a payment of $50 on the 20th of April following. He waives his right to seize under the breach: see *Rex* v. *Paulson* (1920), 90 L.J.P.C. 1; *Graveley* v. *Springer* (1898), 3 Terr. L.R. 120. There must be reasonable notice of taking security if a breach takes place: see *Brighty* v. *Norton* (1862), 32 L.J.Q.B. 38; *Toms* v. *Wilson* (1863), *ib.* 382.

A. Alexander, for respondents: Under the chattel mortgage we had the right to go into possession irrespective of any default: see Barron & O'Brien on Chattel Mortgages, 3rd Ed., 82. There was no distress and no sale: see *Smith* v. *Fair* (1885), 11 A.R. 755 at p. 763; *Paterson* v. *Maughan* (1876), 39 U.C.Q.B. 371 at p. 381; *Merchants Bank of Canada* v. *The Queen* (1881), 1 Ex. C.R. 1 at p. 31; *Doe d. Roylance* v. *Lightfoot* (1841), 8 M. & W. 553 at pp. 563-4. As to presentment of the notes, the cases on this question are fully reviewed in the report of *Canadian Bank of Commerce* v. *Bellamy* (1915), 9 W.W.R. 587 at pp. 589 and 590, and later cases hold that presentment is not necessary: see *The Hayden, Clinton National Bank* v. *Dixon* (1916), 9 W.W.R. 1269 at p. 1274; *Albert* v. *Marshall* (1913),

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48 N.S.R. 34 at p. 37. All the later authorities dealing with section 183 (2) of the Bills of Exchange Act hold that presentation at the place of payment is not necessary, the most that can happen is that costs may be given against the holder. The plaintiff moved some of the goods covered by the chattel mortgage, and sold some of the cattle: see *Dedrick* v. *Ashdown* (1888), 15 S.C.R. 227 at p. 243; *Payne* v. *Fern* (1881), 6 Q.B.D. 620. The English cases do not apply owing to statutes there. The plaintiff has no *status* to sue as he only has a half interest in the right to purchase the chattels. The promissory notes are collateral to the notes given at the time of the original bill of sale in 1927. The maker of a promissory note payable on demand can be sued on it without demand: see *In re George* (1890), 44 Ch. D. 627.

Fleishman, replied.

Cur. adv. vult.

4th March, 1930.

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

MARTIN, J.A.: I agree in dismissing the appeal.

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

In the first place, there was a breach of the covenant in the bill of sale by selling the cattle without consent. And in the second place, presentment of the note, I would hold, is not necessary. I am aware there is a conflict of authority on this point, but the trend of all the later cases is to that effect. I am in accord with the views of the Court *en banc* in Saskatchewan, in *Canadian Bank of Commerce* v. *Bellamy* (1915), 9 W.W.R. 587, which was also the view of the Court of Appeal in Alberta in *The Hayden, Clinton National Bank* v. *Dixon* (1916), 9 W.W.R. 1269.

MCPHILLIPS, J.A.: In my opinion the learned Chief Justice of the Court below arrived at the right conclusion. Further, upon principle, the case was one that should be finally determined by the trial judge involving so many matters of disputed fact where the demeanour of the witnesses necessarily was most

important and that advantage the learned trial judge had. It could only be when the learned judge could be said to be wholly wrong that this Court would be entitled to interfere. It is instructive upon this latter point to note what Lord Sumner said in his speech in the House of Lords in *"Hontestroom" (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J. P. 153, at pp. 154-5: [The learned judge quoted from "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses?" down to the end of the paragraph at the top of p. 155, and continued].

I am clearly of the opinion that the case is not one for the disturbance of the judgment of the learned Chief Justice. I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondents: *George L. Cassady.*

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June 24, 25, 26, 27, 28; *July* 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18.

Criminal law—Conspiracy—Crime at common law—In force in Canada—Development—Unlawful purpose—Public mischief—Perverting justice by non-enforcement of criminal law — Police corruption—Wrongful agreement—Evidence of—Lack of proof.

A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act or to do a lawful act by an unlawful means.

The accused were indicted with conspiring to effect a public mischief by perverting the course of justice between March 1st, 1933, and December 30th, 1934.

The evidence disclosed that certain prostitutes carried on their activities for gain in certain indicated places during the period mentioned, and the accused Celona and Barrack participated directly or indirectly in the proceeds through their control or interest in the indicated places of prostitution. The accused Cameron, while chief of police, met Celona in his office at police headquarters on two occasions. In March, 1934, a cruise was made by the police boat, ostensibly in search of bandits in

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Howe Sound, having on board in addition to the crew, Cameron, Murdoch (deputy chief of police), two detectives, Celona and one Turone (of the underworld) and on the 2nd of April Cameron took another cruise from 7 in the evening until midnight with Celona and Turone and a Vancouver barrister and his wife, when liquor and food were served on board to the party. In November, 1934, two officers called at Cameron's house and found Celona there. In the summer of 1934 Cameron had a party at his ranch near Vancouver attended by Celona, Turone and three others of the underworld, and four women who came at the invitation of Celona, also McNeill, chief detective and deputy chief Murdoch. McNeill stated in his evidence that it was the practice in police circles to look to the underworld and its satellites for information as to major crimes.

Held, that there are no special rules of evidence applicable to this crime and it is wholly a question of evidence of participation in a design and not an act as in most crimes, which is sought to be proved, and the evidence in each case must be considered on its own merits, as there has been laid down no rule as to what constitutes an agreement.

Held, further, that it is the purpose of agreement which determines whether it is a criminal conspiracy or not and evidence must point to obvious agreement for unlawful purpose, and where capable of another and innocent construction effect must be given to the latter.

Held, further, that non-enforcement of criminal law by a chief of police is a public mischief, but actual and repeated meetings of accused as chief of police and underworld characters is not *per se* evidence of agreement for unlawful purpose.

Held, further, that as the finding to be made by the Court is one of fact as to the existence or non-existence of the alleged agreement, the whole evidence adduced does not disclose that such agreement or combination of conspiracy, alleged by the Crown, exists, and the *onus* to establish such an agreement of criminal combination is upon the Crown. In the final analysis the Crown must establish the guilt of the accused beyond a reasonable doubt, and has obviously failed to do so.

References to the crime of conspiracy to effect a public mischief, under the common law.

TRIAL of the accused who stand indicted that they, the said John Cameron, Joe Celona, Lou Barrack, and Joe Alvaro and Joe Schwartz of the city of Vancouver, on divers days between the 1st of March, 1933, and the 30th of December, 1934, did unlawfully conspire together and with each other and with Josie Celona and with divers other persons unknown, to effect a public mischief by obstructing the police force of the City of Vancouver in the execution of their public duty, and by contriving to secure that the said police force should not perform their public duty and thereby prevent the due administration of the law to defeat and pervert the course of public justice, whereby the commission within the said City of Vancouver of crimes under sections 225, 226, 227, 228, 229, 235 and 236 of the Criminal Code and of offences against the Government Liquor Act, were unlawfully connived at by members of the

said police force and whereby members of the said police force failed to perform their public duty of endeavouring to prevent the commission of the said crimes and offences, and of bringing the offenders to public justice, to the disturbance of the public peace of His Majesty the King, His Crown and Dignity.

Tried by McINTOSH, Co. J. at Vancouver on the 24th of June to the 18th of July, 1935.

Donaghy, K.C., and *Owen*, for the Crown.
Wismer, and *Hurley*, for accused Cameron.
Stuart Henderson, for accused Celona.
C. L. McAlpine, for accused Barrack.

McINTOSH, Co. J. [after quoting the indictment as set out in the statement continued]: The salient features of the evidence submitted by the Crown are readily determined. Four self-confessed prostitutes, with several others, carried on their activities for gain at certain indicated places in the City of Vancouver during the period mentioned in the indictment, and the accused Celona and Barrack participated either directly or indirectly in the proceeds of their operations through the control or interest which they had or exercised in such indicated places of prostitution. There were laid by the police during this period one information against the accused Celona and two against the accused Barrack, while 60 charges were laid against others in the Windsor Hotel, of which Barrack was lessee, nine as keepers of bawdy-houses, and 51 as being inmates, and none against other indicated places. The accused Cameron while chief of police of the said city met the accused Celona in his office at police headquarters in December, 1933, and again in the beginning of 1934. In March, 1934, a cruise was made by the police boat, having on board, in addition to the regular police crew, the accused Cameron, deputy chief Murdoch, detectives Hann and Pettit, the accused Celona and one Turone, known as Lombardo. The police were armed with service revolvers, and were ostensibly searching Howe Sound, within their jurisdiction, for men at Hood Point rumoured to be bandits. The accused Cameron went ashore at Bowen Island to see his daughter.

On the 2nd of April, 1934, the accused Cameron, with the accused Celona, Turone and a Vancouver barrister and his wife,

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and an unnamed middle-aged woman, embarked at 7 in the evening upon the police boat at its regular landing stage at the immigration dock, Vancouver Harbour, and with the usual police crew, cruised about Howe Sound, returning to the starting point at 1 in the morning. Refreshments in the form of whisky, champagne and beer, with food, were in evidence during the trip. In November, 1934, officers Tisdale and Dunlop were called to accused Cameron's house and found Celona there. One summer evening in 1934, there were assembled at the ranch house of the accused Cameron, near Vancouver, the accused Cameron, the accused Celona, certain others known as Radinsky, Shu Moy, Turone and Bancroft, some having criminal records, and four women, there at the invitation of the accused Celona, who had arranged the refreshments for the occasion.

Chief of detectives McNeill, deputy chief Murdoch and an unknown lady were invited by the accused Cameron and arrived about 6 in the evening. McNeill and this lady stayed outside on the verandah, and were later joined by Major Mercer, a neighbour. McNeill saw and heard nothing extraordinary before he left about midnight, after the four women and others had departed. Drinking was indulged in by some of the guests. McNeill states it is the practice in police circles to look to the underworld and its satellites for information as to major crime and its perpetrators. This officer and other superior officers who were called as witnesses all state that this is an accepted practice, and that the accused Cameron never interfered with them, or prevented them from performing their duty.

Police officer McGregor drove accused Cameron to one Radinsky's flat, and says the accused Celona and Barrack were there.

Mr. Crompton, the police court clerk, supplied figures shewing 983 arrests in 1931, 959 in 1932, 1014 in 1933, and 1181 in 1934, for major crimes.

Constables Butcher and Hudson were transferred during the period mentioned, from the vicinity of the indicated places, to the residential areas by authority of accused Cameron.

During January, 1935, the telephone line of accused Celona was tapped and certain unrelated conversations reported.

There was much other evidence of a less material character.

The accused Cameron denies specifically the allegations of the Crown and accused Celona and Barrack offered no evidence in defence.

Having regard to the peculiar nature of this offence, unusual, fortunately, in Canada, it is advisable to examine the law upon the subject.

The crime of conspiracy to effect a public mischief in the manner set out in this indictment is one made so by the common law of England, there being no adequate provision in the Criminal Code of Canada to warrant proceedings of this nature; the common law of England being still in force in Canada, except where repealed expressly or by implication. *Brousseau* v. *Regem* (1917), 56 S.C.R. 22; 39 D.L.R. 114.

To exemplify the difficulties with which the Court is confronted, although the broad principles are fairly well settled, the *dicta* of three famous judges, widely separated by the years, and one the present Lord Chief Justice of England, are quoted. The *dictum* of Chief Justice Parker, in the reign of Queen Anne, in *Jones* v. *Gwynn* (1714), 10 Mod. 214 at p. 219; 88 E.R. 699 at p. 701:

> Actions of conspiracy are the worst sort of actions in the world to be argued from; for there is more contrariety and repugnancy of opinions in them than in any other species of actions whatever,

and the theoretical *dictum* of Lord Campbell, House of Lords, 1st March, 1859 (Hansard):

> If two men agree to blow their noses together during divine service so as to disturb the congregation, they may be indicted for conspiracy.

This, of course, because the disturbance of divine service is an offence by statute; and the *dictum* of Lord Chief Justice Hewart in *Rex* v. *Meyrick* (1929), 45 T.L.R. 421 at p. 423:

> There was no doubt that conspiracy was a difficult branch of the law—difficult in itself, and still more difficult when the question of its application to particular facts arose.

This being so, it would seem interesting, as well as necessary and in the public interest (as the matter is one of considerable public concern), to trace the history of this offence and outline its development to the present day.

The offence is one of considerable antiquity, having its origin in England in the Middle Ages. As an important wrong, it is

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unique, in that it is a wrong which is very difficult to define, with an involved history, and is important as supplying the means of punishing offences which would otherwise be outside the reach of the law. Curiously enough, it was at first a carefully defined offence created by statute in Plantagenet times (Statutum de Conspiratoribus, 20 Edw. I. (1292); 21 Edw. I. (1293); De Conspiratoribus Ordinatio, 21 Edw. I., 1 Rot. Parl. 96A. (1293); Articuli super Chartas, 28 Edw. I., Stat. 3 (1300); Ordinatio de Conspiratoribus, 33 Edw. I., Stat. 2 (1305)), to secure the smoother working of the mediæval criminal procedure, in cases somewhat akin to the one at Bar, as to the perversion of justice, and are still in force. Conspiracy was at first a civil rather than a criminal law, and it was left to the party aggrieved to apply for redress, although the culprit could be punished by imprisonment. As there was then no marked difference between crime and tort, it was not until the reign of Edward III. that conspiracy was given a definite criminal character and could be then punished on indictment (4 Edw. III., Stat. 2 (1330)). It consisted in a combination of two or more persons for the false and malicious promotion of indictments or suits for embracery and for maintenance, the former offence consisting in the abuse or the perversion of justice by the wrongful influencing of jurors. It was later defined by Lord Chief Justice Coke (3 Co. Inst. 143) as "consultation and agreement between two or more, to appeal, or indict an innocent falsely, and maliciously of felony, . . . and afterward the party is lawfully acquitted, . . ." which he called a "doctrine of mercy" to the intending offender and which ancient judgment for this crime was the "villainous judgment" (*i.e.* one by common law as distinguished from statute law) usual in attaints for crimes of falsity in relation to justice. Therefore, conspiracy was incomplete until the party falsely accused had been actually indicted and acquitted.

The combination was then a mere matter of aggravation, and until some public or private wrong had been caused by some act there was no punishment.

The modern law of criminal conspiracy was formulated in the 17th century as a result of the decision in *The Poulterers'*

Case (1610), 5 Co. Rep. 99; Moore, 813, where it was held that the mere act of combination to commit the crime of conspiracy was punishable, and is familiarly known as the 17th Century Rule. This was deduced from the general rule of criminal law that the gist of the crime was in the criminal intent, although it could not be punished until the intent was manifested by some act done in furtherance of it, and that in conspiracy the criminal intent was the intent to combine to indict falsely, and that this intent was sufficiently manifested by the act of combination, that by the agreement itself, without any carrying out of the objects of the agreement. Thus originated the common law offence of criminal conspiracy, for once it was established that a conspiracy to indict falsely had been committed by the mere act of combination for that purpose, without any act of furtherance of the object of the combination, it followed that nothing had been done which amounted to a complete crime under the statute, as had formerly been the case, therefore the agreement or act of combination must be in some sense criminal at common law. If such combination to indict falsely was criminal at common law, it followed that other combinations, containing some wrongful element, were also criminal, and became the accepted proposition that a combination to commit any crime was a criminal conspiracy, although such crime may not have been executed. *Vide* Harrison's Law of Conspiracy.

The earliest decided case that a combination to do that which is not an indictable offence, may yet be criminal, and upon which the very wide definitions of conspiracy subsequently propounded are built, is the classic *Rex* v. *Starling* (1664), 1 Sid. 174; 1 Keb. 650; 1 Lev. 125; 82 E.R. 1039.

This is the foundation of all modern law on the subject, and that the conspiracy, as opposed to the criminal objective, has always been a common law crime, since, as between the combination to commit a crime and the crime itself, the gist of the offence is the combination.

In 1762 the Courts went further still, Lord Mansfield, in *Rex* v. *Rispal* (1762), 3 Burr. 1320; 97 E.R. 852, holding that it was sufficient to establish a criminal conspiracy to prove a combination to extort by accusing of "a false act," defined as

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"whether it be to charge a man with criminal acts, or such only as affect his reputation."

It was at this time that there is a suggestion that a combination to design or pervert justice might be a criminal conspiracy. This extension is intelligible, as the real purpose of the ancient law was to prevent justice being defeated. (Harrison, *supra.*)

Sir R. S. Wright states, "It was anciently always held essential that the accusation should be to be made *falso* as well as *malitiose.*" But in 1825 a further extension was made in *Rex* v. *Hollingberry,* 4 B. & C. 329; 107 E.R. 1081, where it was held that it was immaterial whether the charge was true or false, so long as the purpose was to extort money.

A still wider extension was made by Lord Denman, C.J. in *Rex* v. *Jones* (1832), 4 B. & Ad. 345, when he decided that a criminal conspiracy consists in a combination to accomplish an unlawful end or a lawful end by unlawful means, leaving open the meaning of "unlawful," and was adopted by Lord Brampton in 1901 in *Quinn* v. *Leathem,* [1901] A.C. 495, and, as has been said by a learned writer (Harrison), "no doubt contributed greatly to the vague notions which have been prevalent in modern times as to the exact limit of criminal conspiracy." Sir R. S. Wright says in his treatise on Criminal Conspiracies at pp. 48-9:

> The modern law of conspiracy is in truth merely an extension of the law of attempts, the act of agreement for the criminal purpose being substituted for an actual attempt as the overt act . . . . and perhaps in the case of agreements to pervert or defeat justice, the law of criminal combination has gone somewhat beyond the bounds of the ordinary criminal law.

Up to the present time there exists no definite and all-embracing definition which is universally accepted and recognized as such. The one most frequently quoted is that given by Willes, J., on behalf of the judges to whom the question was referred by the House of Lords in *Mulcahy* v. *Reginam* (1868), L.R. 3 H.L. 306 at p. 317:

> A conspiracy consists not merely in the intention of the two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by an unlawful means.

Considerable time has been taken up in dealing with the history of this offence, but the obvious difficulties confronting the Court make it necessary, as the authorities shew how wide

and varied is the scope of the offence of conspiracy and how difficult it is to arrive at an adequate definition embracing the particular offence of conspiracy to effect a public mischief by perverting the course of justice, for which the accused stand indicted.

Criminal conspiracy, as has been defined, is made up of three ingredients, the persons, the agreement and the unlawful purpose. There can obviously be no agreement without two or more persons, and which is completed in that respect in the present instance. As to agreement, one element stands out clear and undisputed throughout, and that is that so long as such a design rests on intention only it is not indictable, and was so definitely decided in *Mulcahy* v. *Reginam, supra.* Once, however, the agreement has been proved, it is not necessary to go on to prove any overt acts in furtherance of its objects, the criminal intent being sufficiently shewn by the agreement itself.

As stated, however, by Brett, J.A., in *Reg.* v. *Aspinall* (1876), 2 Q.B.D. 48 at p. 59, "It is not, of course, every agreement which is a criminal conspiracy."

In *Rex* v. *Brailsford,* [1905] 2 K.B. 730, it was held that a combination to obtain a passport by false representations was a criminal conspiracy as being a fraud which was "not merely improper or immoral" but tending "to produce a public mischief." Yet we have in our own Courts the case of *Rex* v. *Sinclair* (1906), 12 Can. C.C. 20, in which it was held not indictable to conspire "to defraud a candidate at an election, the electors of the division, and the public" by illegally obtaining the return of the opposing candidate. Regard, therefore, must be had to the ultimate object of the agreement to determine whether the agreement comes within the definition of criminal conspiracy.

This is the third ingredient, that of the unlawful purpose, and this element is of importance in that it is the purpose of the agreement which determines whether it is a criminal conspiracy or not.

The first suggestion that a combination to defeat the course of public justice is criminal was developed by Lord Hardwicke in *Chetwynd* v. *Lindon* (1752), 2 Ves. Sen. 450; 28 E.R. 288.

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In this and subsequent cases great difficulty was had by the Courts in applying the rule of criminal conspiracy to combinations to defeat or pervert public justice, where the act of the individual was not criminal in itself, or doubtful, and it was not until 1910 that Lord Alverstone finally decided the question by declaring such acts to be a public mischief, in the case of *Rex* v. *Porter,* [1910] 1 K.B. 369, when he upheld the argument of the Crown that "an agreement to do an act which tends to produce a public mischief is an illegal agreement, the parties to which are guilty of a criminal conspiracy, even though they may in fact have had no wrongful intent," by declaring (p. 373) "It is, in our opinion, difficult to conceive any act more likely to produce a public mischief than that which was done in this case" (which was a case of indemnification against the liability for bail) and (p. 374) "without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice." See also *Rex* v. *De Berenger* (1814), 3 M. & S. 67.

Though it is difficult to say what constitutes a conspiracy to effect a public mischief, as is charged in this indictment, there can be no doubt that those cases establish that such a combination is indictable, whether the act complained of constitutes a crime in the individual or not.

In a late case on the subject Lord Chief Justice Hewart, in *Rex* v. *Meyrick, supra,* said (p. 424):

> . . . the matter to be ascertained was whether the acts of the accused persons were done in pursuance of a criminal purpose common to all of them.

There are no special rules of evidence applicable to this crime, and it is wholly a question of evidence of participation in a design, and not an act as in most crimes, which is sought to be proved.

This case like all criminal cases must be considered and judged calmly and dispassionately, according to the evidence, and everything redundant and irrelevant must be disregarded.

Much evidence of moral delinquency has been heard and the sordid recitals of the experiences of those unfortunate women thrust into the underworld has outraged decency, but "Justice," said Lord Chief Justice Reading, "is ever in jeopardy when passion is aroused." These conditions, bad as they may be, are,

however, beside the question to be decided by the Court, except in so far as they relate to the conduct of the accused and inferences to be drawn therefrom in connection with the offence with which they stand indicted.

No one of the accused is here charged with the commission of any offence under those sections of the Criminal Code set out in the indictment pertaining to criminal immorality or gaming, or indeed with any offence set out in the Criminal Code of Canada, as the Crown in that regard has already exacted the penalty from the accused Celona and Barrack.

The accused now stand before the Court indicted with conspiring to effect a public mischief by perverting the course of justice, and for no other offence.

The unlawful purpose alleged by the Crown is the want of enforcement of the sections of the Criminal Code as to immorality and gaming, and not as against the accused Celona and Barrack in particular, but the want of enforcement of these sections generally against all offenders during the period mentioned in the indictment, and that the accused entered into a combination and agreement for such unlawful purpose.

The gist of this offence is in the combination and agreement between the parties, which must be common to all of them. This, then, is wholly a question of evidence of participation of the accused in such design and which must be proved by the Crown with reasonable certainty.

The majority of the cases shew that the evidence in each case must be considered on its own merits, as there has been laid down no rule as to what constitutes an act of agreement. The merits of the evidence before the Court must be examined for the purpose of finding if such agreement exists between the accused, and it matters not whether the unlawful purpose suggested was, or was not brought into effect, as long as it has been definitely proved that such agreement exists to effect such unlawful purpose. The foundation of the Crown's case is the agreement for the unlawful purpose, being the alleged existence of a continued condition of criminal immorality without the active and continued enforcement of the law in that regard by the police force under the accused Cameron

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by virtue of his office as chief of police, because of the alleged agreement for that purpose between the accused.

It is the purpose of the agreement which determines whether it is a criminal conspiracy or not, and if the purpose of this conspiracy is that alleged by the Crown, it would undoubtedly be unlawful and a public mischief.

During the period in question the records of the city police force shew 60 prosecutions for such offences, one against the accused Celona and two against the accused Barrack, and none against other indicated places. This is inconclusive as shewing lack of law enforcement in this regard, as the number of offences actually committed is unknown. It is notorious, and the evidence shews, that the city police in their undermanned condition during the indicated period were faced with a tremendous problem in the suppression of crime, particularly that known as major crime, and the city was overrun with evil-doers of all descriptions and serious offences were much greater then in number than in normal times. In other words, the activities of the police were necessarily concentrated in the suppression of major crimes rather than those of the nature indicated, as being in that regard the result of a condition incident to all seaports of consequence, even in normal times. Major crime was rampant, there being 1014 arrests alone in the City of Vancouver in 1933, and 1181 in 1934. This is the evidence produced by the Crown as evidence of unlawful purpose as forming part of the allegation of the existence of the agreement between the accused to carry into effect the non-enforcement of the sections of the Criminal Code as to sexual immorality.

In addition to the evidence of existing conditions of criminal immorality, there are the episodes of association of the accused Cameron and Celona. The two police boat cruises, the assemblage at Cameron's ranch, the two meetings at police headquarters, and the meeting at his home. From these in particular, and the evidence in general, the Court is asked from the conduct of the parties, and inferences deducted therefrom, and collateral circumstances, to construe an agreement between the accused to carry into effect the alleged unlawful purpose. These occurrences are subject to survey. If they constitute the

basis of the agreement between the accused, it is peculiar that at none of these meetings was the accused Barrack present. To succeed, the Crown must shew that the design was common to all of the accused, and although actual communication or physical contact is unnecessary, still each of the accused must be shewn to have his part in the design, and that they acted in concert. The official police atmosphere is common to all these incidents. The first police boat cruise was in search of bandits rumoured to be in Howe Sound, and for the purpose had, in addition to the regular police crew, the accused Cameron as chief of police, deputy chief Murdoch, and detectives Hann and Pettit, as well as accused Celona and one Turone. The police were fully armed. On the second cruise the regular police crew, the accused Cameron as chief of police, a well-known barrister and his wife, and another woman and the accused Celona, and Turone, were on board. At the two meetings of accused Cameron and Celona at police headquarters a police constable was in attendance on call, and they were surrounded by all the activities of the city's central police organization, and at the November meeting at his home police officers Tisdale and Dunlop, and detectives Pettit and Hann were present. The accused Cameron denies that the accused Celona and Barrack were present when he visited Radinsky with police officer McGregor. Even at the much-accentuated meeting at the ranch there were present the deputy chief of police and chief inspector of detectives McNeill, head of the criminal investigation department, in addition to accused Cameron and Celona and certain underworld characters. At all those meetings no secrecy is observed. The police boat leaves from and returns to its regular landing stage, the ranch meeting is open to many, with superior police officers in attendance, and the two meetings at police headquarters were in the official room of the chief of police.

It is significant that nothing was said and nothing occurred outside of the actual meeting of the accused and the manner in which they conducted themselves to indicate the existence of the suggested agreement. The element usual in such cases is also absent. Money, or money's worth, is the cement which commonly binds conspirators together, and here it is non-existent.

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In a recent case of police corruption, that of *Rex* v. *Meyrick, supra,* the prime factor shewing the existence of an agreement to pervert justice was the evidence of the receipt by the police officer Goddard of bank notes and cheques. It is true that evidence of conversations between the accused, or the passing of money is unnecessary, if their conduct and collateral circumstances give rise to reasonable certainty of the existence of the agreement, but such valuable consideration being present would obviously point to its existence and the existence of such agreement must be obvious. There is left the conduct of the accused Cameron in association with the accused Celona and Barrack, and other underworld persons, and the collateral circumstances surrounding their association from which to construe the alleged agreement. The explanation of this phase of the problem is offered by a witness for the Crown. The present chief inspector of detectives, McNeill, who has been with the Vancouver police force since 1912, and whose enviable record is above reproach, explains the methods employed by the criminal investigation department of which he is the head, in search of criminals and the discovery of their criminal activities. In criminal investigation work he states that the police depend, as far as major crime is concerned, to a large extent upon information derived from the underworld sources and is bound to, in order to keep down major crime and says, "We could not go very far if we went by our own ocular observation" and efforts made in keeping down crime is based on this information. This is confirmed by other superior officers. Dangerous criminals being of the underworld and places of ill repute, knowledge of them and their activities would be discoverable by the police from those living in such an invironment and accessible by the police, as seemingly were the accused Celona and Barrack. It is not for the Court to decide whether this practice is a right and proper one but rather and only to find that such practice exists in police circles of authority. The general instructions seem to have been to get the major criminals as the prostitutes were always accessible. The accused Celona and Barrack being persons of the underworld were evidently used for this purpose by the accused

Cameron as chief of police. Erle, J., in *Reg.* v. *Duffield* (1851), 5 Cox, C.C. 404, says, p. 434:

> The unlawful . . . conspiracy [may] be inferred from the conduct of the parties . . . , all tending towards one obvious purpose."

There must therefore be one obvious purpose only, and that, the unlawful one as shewn by the evidence, and the evidence here does not tend only to the wrongful purpose alleged by the Crown, but is capable of another and innocent construction.

Bayley, J., in *Reg.* v. *Hunt* (1820), 1 St. Tri. (N.S.) 171 at p. 437 says:

> The circumstances [must be] such as imperiously call upon you to say that they could not have occurred but in pursuance of a previous conspiracy and plan between the parties, . . . , and therefore, will entirely warrant the conclusion of conspiracy.

As the finding to be made by the Court is one of fact as to the existence or non-existence of the alleged agreement, the whole evidence adduced does not disclose that such agreement or combination of conspiracy, as alleged by the Crown, exists, and the *onus* to establish such an agreement of criminal combination is upon the Crown. In the final analysis the Crown must establish the guilt of the accused beyond a reasonable doubt and has obviously failed to do so.

The accused are not guilty of the offence for which they stand indicted.

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June 5, 28.

THE CANADA LIFE ASSURANCE COMPANY v. COUGHLAN *ET AL.*

Mortgage—Non-payment of taxes—Foreclosure—Right of—Taxes paid by mortgagee — Order for foreclosure granted — Period for redemption twelve months.

The plaintiff holding a mortgage on the defendant's premises for $100,000, paid the taxes for the years 1932, 1933 and 1934, amounting to $25,934.88. In an action for foreclosure on the ground that the defendants were in default in payment of taxes under said mortgage which the plaintiff paid:—

Held, that in the particular circumstances of this case a foreclosure order should be granted, but the period for redemption should be twelve months.

ACTION for foreclosure. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 5th of June, 1935.

A. Alexander, for plaintiff.
Bourne, for defendant.

Cur. adv. vult.

28th June, 1935.

FISHER, J.: If I understand aright the judgment of the Court of Appeal (unreported) on appeal from my judgment in *Tatroff* v. *Ray* (1934), 49 B.C. 24 the Court of Appeal decided in such case that foreclosure proceedings could be taken for default in taxes, even where the mortgagee had not paid such taxes before action brought, but refused upon the particular facts of the case to grant an order for foreclosure though appointing a receiver or agent to receive the rents and profits and reserving liberty to apply.

In the present case the plaintiff alleges in paragraph 5 of the statement of claim that default has been made in payment of taxes under said mortgage which the plaintiff has paid. In its defence the defendant John Joseph Coughlan denies the allegations contained in said paragraph 5 but I find that such allegations have been proved. I also hold that the plaintiff is in no worse position by reason of the clause in the mortgage referred to on the argument herein as the sixth paragraph on page 3 thereof or by reason of having made and pleaded payment of

the taxes and that the action has not been brought prematurely. Having reached the conclusion therefore that it cannot be successfully contended that foreclosure proceedings do not lie in the present action, I still have to consider whether or not the judgment for foreclosure that the plaintiff is contending for should be granted or if the plaintiff should only have the appointment of a receiver with liberty to apply. As has been already intimated the Court of Appeal in the *Tatroff* v. *Ray* case, *supra,* refused to grant the judgment for foreclosure but did appoint a receiver or agent with liberty to the plaintiff to apply. I think it is a fair inference from the judgment delivered by the Court of Appeal in the *Tatroff* v. *Ray* case that it was owing to the particular circumstances of that case that the Court felt it was unable to grant the judgment for foreclosure. As I recall the particular circumstances of that case I also think that upon the hearing of the appeal it would be apparent that a comparatively small amount remained unpaid on account of the taxes and that the receiver or agent, if appointed, would be able to pay out of the incoming rents and profits, as matters then stood, something on account of such taxes and thus pay off the arrears within a reasonably short time.

It seems to me that the particular circumstances of the present case must be seriously considered to see if the case must be distinguished from the *Tatroff* case and a foreclosure order granted. When I come to such consideration I think it must first be noted that taxes paid by the plaintiff amount to the very substantial sum of $25,934.88 being taxes for the years 1932, 1933 and 1934 with interest and that upon the figures before me the receiver would not be able to pay out of the rents and profits received anything on account of the said taxes sued for unless and until there is some substantial increase in the net receipts from the premises. I think in this respect the case is distinguishable from the *Tatroff* v. *Ray* case and that a foreclosure order should be granted.

I still have to consider, however, the argument by counsel on behalf of the said defendant that in any event the redemption period should be longer than the usual period of six months. On this phase of the matter I may say at the outset that I do not

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Fisher, J.

agree with the suggestion of counsel on behalf of the plaintiff that the time should be shorter than six months. With respect to making the time longer than six months counsel for the plaintiff relies on *Western Imperial Co.* v. *Nicola Land Co.* (1921), 29 B.C. 390 where MARTIN, J.A. at p. 393 refers to the six months' period being appointed "in accordance with the long-established and invariable practice of the Court" but it may be noted that in the same case MARTIN, J.A. says, at p. 393:

> I am unable to take the view that the Court is powerless and must close its eyes to new conditions created by extraordinary times and circumstances.

It is or must be admitted that though the usual redemption period in foreclosure actions has been six months such actions with respect to taxes merely have not been common until recently. It must also be noted that by virtue of the Vancouver Enabling Act, 1935, an attempt is being made to make it possible for an owner of Vancouver property to pay his arrears of taxes by instalments under what might be called a consolidation of taxes plan and therefore it seems to me that under certain circumstances a mortgagor might fairly be allowed some further time within which to endeavour to pay the taxes. In the present case these taxes were paid by the plaintiff mortgagee at a time when, according to the evidence before me, it must have been apparent that some such consolidation plan was likely to be available for the mortgagor. It is also apparent that the value of the mortgaged premises at the time the mortgage was taken in 1927 was at least double the sum of $100,000 advanced and that the premises are situate in what might be called the heart of the business district in the City of Vancouver. The premises are by no means vacant property and I would say there is at least some justification for a little optimism on the part of the mortgagor with respect to an improvement in the future net receipts and in the value of the premises.

Dealing with this case then upon its own particular circumstances I have to say that my conclusion on the whole matter is that a foreclosure order should be granted but that the period for redemption should be twelve months. Judgment accordingly in favour of the plaintiff as claimed with costs.

Judgment for plaintiff.

REX v. KIRKHAM.

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1935
June 4, 25;
July 6.

Criminal law—Conviction—Sentence—Application for leave to appeal from —Criminal Code—Secs. 773 (d), 777, 779, 1013 (2) and 1079.

The accused was convicted for indecent assault on a girl nine years of age and sentenced to two months' imprisonment by the police magistrate of Victoria on the 2nd of April, 1935. Notice of motion by the Crown for leave to appeal from sentence under section 1013 (2) of the Criminal Code was served on the accused when serving his sentence in the Provincial prison. He was discharged from prison on the 23rd of May and the motion first came on for hearing on the 4th of June following.

Held, that section 1079 of the Criminal Code does not come into operation until the question of what is the proper term of imprisonment to be "suffered" has been finally decided by the proper tribunal for that purpose and therefore the jurisdiction conferred by said section 1013 (2) should be exercised by granting the motion.

The jurisdiction under said section 1013 (2) is not conferred upon the "Court of Criminal Appeal" as it is in England by section 3 (*c*) of the Criminal Appeal Act of 1907, but upon "a judge of the Court of Appeal," a jurisdictional distinction which was overlooked by the Court of Appeal in Nova Scotia in *Rex* v. *Musgrave and Reid* (1926), 58 N.S.R. 536 and again in *Rex* v. *MacKay* (1934), 62 Can. C.C. 188, wherein the Court exercised jurisdiction *propriu motu*, based upon an English decision under the said different statute.

MOTION by the Attorney-General under section 1013 (2) of the Criminal Code for leave to appeal against the sentence passed by the police magistrate of Victoria on the 2nd of April, 1935, of two months for indecent assault on a girl of nine years of age. Heard by MARTIN, J.A. at Victoria on the 4th and 25th of June, 1935.

Pepler, D. A.-G., for the Crown.
Stuart Henderson, for accused.

Cur. adv. vult.

6th July, 1935.

MARTIN, J.A.: This is a motion by the Attorney-General of this Province made, under section 1013 (2) of the Criminal Code, to me, as one of the justices of the Court of Appeal, for leave to appeal to that Court from the sentence imposed upon

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the convict under sections 773 (*d*), 777, and 779, by the police magistrate of Victoria on the 2nd of April last, of two months' imprisonment for indecent assault on a young girl nine years of age.

Upon this motion being brought on for hearing on the 4th of June last, pursuant to notice thereof duly given while the convict was still in the Provincial prison at Oakalla serving said sentence, objection was taken on behalf of the convict that as he had served his said sentence (less the deduction for good conduct) and been discharged from prison on the 23rd of May, he had "suffered the imprisonment awarded in the first instance," and therefore "shall be released from all further or other criminal proceedings for the same cause," as declared by section 1079 of the Code, which language, it was submitted, included this motion leading to a review of his original sentence, and *Leyman* v. *Latimer* (1878), 3 Ex. D. 352, and *Hay* v. *Justices of Tower Division of London* (1890), 24 Q.B.D. 561, were cited.

In answer to this argument it was submitted by Crown counsel that said section has no application to this motion because it is not, in the true sense, "a further or other criminal proceeding for the same cause," but only one to have it declared what was the proper sentence that should have been imposed upon the convict in that "cause"—in other words to rectify a judicial error therein. In support of this submission it is pointed out that the said section is an old one in our criminal jurisprudence (*vide* section 120 of the Larceny and other similar Offences Act, Cap. 21, Can. Stats. 1869, and the Malicious Injuries to Property Act of the same year, Cap. 22, Sec. 73) and appears as section 42 of Cap. 181, R.S.C. 1886—the Punishments and Pardons Act—and as section 971 of the Criminal Code of 1892, long before any jurisdiction to review improper sentences and declare and impose those which should have been originally passed was conferred upon our Courts of Criminal Appeal.

Such being the progressive history of the legislation, there is, to my mind, no doubt that the present power of review and rectification (limited, be it noted, to sentences not "fixed by law") under sections 1013 (2), 1015, and 1012 (*e*) is an additional and supplemental power exercised not "in further or other

criminal proceedings in the same cause" but in the original cause itself just as though the Appeal Court was at the end of the trial passing the original sentence which should properly have been imposed.

That this is clear appears from said section 1015 which declares the new, wide, and various duties and powers imposed on said Court in passing the "fit," *i.e.*, proper sentence when the appeal comes before it, *viz.*:

1015. On an appeal against sentence, unless the sentence is one fixed by law, the Court of Appeal shall consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

(*a*) refuse to alter that sentence; or

(*b*) diminish or increase the punishment imposed by that sentence, but always so that the diminution or increase be within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; or

(*c*) otherwise, but within such limits, modify the punishment imposed by that sentence; and

(*d*) in any other case shall dismiss the appeal.

And by subsection 2 the intention of Parliament is put beyond a doubt, *viz.*:

2. A judgment whereby the Court of Appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial Court.

There is nothing in the exercise of this power that is inconsistent with the fact that the term of imprisonment has been "suffered" before the motion for leave to appeal has been duly made, or, if granted, before the appeal comes on for hearing, otherwise the object of the statute to secure the imposition of the fit and proper sentence could be frustrated by, *e.g.*, a magistrate "awarding" (section 1079) so short and trivial a sentence of imprisonment that it could be "suffered" before it was possible to move in due course to rectify it.

Counsel for the Crown cited *Re Royal Prerogative of Mercy*, [1933] S.C.R. 269, upon the effect of section 1078; and also *Rex* v. *Williams* (1912), 8 Cr. App. R. 71, 84; and *Rex* v. *Denyer* (1926), 19 Cr. App. R. 93, to shew that the Court of Criminal Appeal in England had, in the former case, granted leave to appeal from conviction after a sentence of six months had been served, and in the latter, one of six days, and while they are not precisely in point, as this is an appeal from sentence, yet it is

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difficult to understand why the same principle should not apply.

Upon a careful consideration of the question, which is one of importance, no other conclusion is, to my mind, open than that section 1079 does not come into operation until the question of what is the proper term of imprisonment to be "suffered" has been finally decided by the proper tribunal for that purpose, and therefore I should exercise the jurisdiction conferred upon me by said section 1013 (2) by granting the motion.

In so doing I think it desirable to draw attention to the fact that by our Code this jurisdiction is not conferred upon the "Court of Criminal Appeal" as it is in England by section 3 (*c*) of the Criminal Appeal Act of 1907, but upon "a judge of the Court of Appeal" by said section 1013 (2), a jurisdictional distinction which, with respect, was overlooked by the Court of Appeal in Nova Scotia in *Rex* v. *Musgrave and Reid* (1926), 58 N.S.R. 536; 46 Can. C.C. 45; and again in *Rex* v. *MacKay* (1934), 62 Can. C.C. 188, wherein the Court exercised jurisdiction, *propriu motu,* based upon an English decision under the said different statute, *Rex* v. *Moscovitch* (1924), 18 Cr. App. R. 37, wherein "the Court [had] invited appellant's counsel to ask leave to appeal against sentence."

Motion granted.

NOTE. On the 12th and 15th of July, 1935, the Court of Appeal, *coram* MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A., heard the appeal and gave judgment increasing the sentence to six months' imprisonment with hard labour.

RE P. v. P.; Y. INTERVENER.

S. C.
In Chambers
1935
Aug. 6, 9.

Practice — Divorce petition — Intervener — Particulars of allegations— Affidavit verifying—Order for—Divorce Rule 27.

The petitioner in divorce (the wife) named a woman Y. and Y. was given leave to intervene. The intervener demanded particulars of the allegations set out in the petition against her. Particulars were filed but were not verified by affidavit as required by r. 27 of the Divorce Rules, 1925. On an application to strike out the particulars because of the absence of the affidavit an order was made by MURPHY, J. on the 17th of June, 1935, that the petitioner file an affidavit verifying the particulars and that the petitioner be given leave to amend the petition. The petitioner drew an amended petition setting out the same and further allegations but did not file an affidavit in compliance with the order. On an application by the intervener for an order that the cause be stayed until the order of the 17th of June be complied with in regard to the filing of an affidavit:—

Held, that the order of the 17th of June must be strictly complied with and that the cause be stayed until the petitioner do verify the particulars filed in the original petition as required by said order.

APPLICATION by the intervener in divorce proceedings that the cause be stayed until an order of the 17th of June, 1935, be complied with in regard to the petitioner being required to file an affidavit verifying the particulars filed in the original petition. Heard by MCDONALD, J. in Chambers at Victoria on the 6th of August, 1935.

C. L. Harrison, for the application.
F. C. Elliott, contra.

Cur. adv. vult.

9th August, 1935.

MCDONALD, J.: The order of my brother MURPHY, of the 17th of June, 1935, must be strictly complied with: the cause will be stayed until the petitioner do verify the particulars of the 9th of May, 1935, as required by the said order. The petitioner was given liberty to amend her original petition as she might be advised, and to re-serve the same as amended. In my opinion that is what she has done. I can find no direct authority on this,

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but the fact is that what she has issued and served is called by her an amended petition—that is what it purports to be, and was intended to be, and in my opinion that is what it is. Nevertheless she does not escape the necessity of complying *in toto* with the order of the 17th of June.

As success has been divided there will be no costs of this application to either party.

Application granted.

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1935

March 6, 7; June 4.

TURNER v. VIDETTE GOLD MINES LIMITED (N.P.L.).

Mining law—Conflict of location—Assessment work and certificate of work—Free miner's certificate—Lapse of—Loss of claims—R.S.B.C. 1924, Cap. 167, Secs. 4, 8, 12, 13 and 80.

The plaintiff located and recorded two mineral claims in 1931 that were kept in good standing, the last certificate of work having been recorded in August, 1934. The defendant company acquired a group of four claims that were located and recorded in 1932 and 1933, said group including within its boundaries the ground covered by the plaintiff's claims. The defendant recorded the necessary certificates of work for five years' assessment work, and in July, 1934, gave notice of intention to apply for certificates of improvements. In the plaintiff's adverse action it appeared that the plaintiff's free miner's certificate expired on the 31st of May, 1932, and he did not obtain another certificate until the 14th of June following, nor did he obtain a special certificate under section 8 of the Mineral Act to cover the lapsed period. It was held on the trial that the lapse of the licence was a mere irregularity that was cured by section 80 of said Act, and the plaintiff was entitled to judgment.

Held, on appeal, reversing the decision of MCDONALD, J., that as the plaintiff allowed his free miner's certificate to lapse without renewal thereof and without availing himself of the curative provisions of section 8 of said Act, he forfeited all his rights and interests in any mining property under section 13 of said Act, and section 80 thereof does not apply.

APPEAL by defendant from the decision of MCDONALD, J. of the 19th of November, 1934, in an action involving the title to

the Revenue mineral claim, located by the plaintiff on the 20th of July, 1931, and the Portland mineral claim, located on the 27th of the same month. The necessary assessment work was done on both claims and certificates of work duly recorded, the last certificate of work for both claims having been recorded on the 2nd of August, 1934. The predecessors in title of the T.F. Fraction mineral claim, the Amy mineral claim, the Myrta mineral claim and the Percy mineral claim, now owned by the defendant, staked said claims respectively on the 15th of September, 1933, the 16th of September, 1933, the 24th of June, 1932 and the 24th of June, 1934. The necessary certificates of work for five years' work were recorded on May 11th, 1934, and the requirements for certificate of improvements have been complied with. The latter four claims cover the same ground as the Revenue and Portland mineral claims. The plaintiff allowed his free miner's certificate to lapse on the 31st of May, 1932, and did not obtain another certificate until the 14th of June following. It was held on the trial that the lapse of the certificate for two weeks was a mere irregularity which was cured by section 80 of the Mineral Act, and the plaintiff recovered judgment.

The appeal was argued at Vancouver on the 6th and 7th of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

G. F. H. Long, for appellant: The plaintiff allowed his free miner's certificate to expire for two weeks and did not obtain a special certificate under the provisions of section 8 of the Act. Under section 13 he lost all rights to the two prior claims: see *Engineer Mining Co.* v. *Fraser* (1922), 92 L.J.P.C. 65; 128 L.T. 554; [1923] A.C. 228; [1923] 1 W.W.R. 449. Once they become forfeited there is no revival: see Crowe's Mines and Mining Laws of B.C. 43. The meaning of irregularity is considered in *Peters* v. *Sampson* (1898), 6 B.C. 405; 1 M.M.C. 247; *Callahan* v. *Coplen* (1899), 7 B.C. 422 at p. 425; 1 M.M.C. 348 at p. 353; 30 S.C.R. 555; *Gelinas* v. *Clark* (1901), 8 B.C. 42; 1 M.M.C. 428; *Collom* v. *Manley* (1902), 32 S.C.R. 371; 1 M.M.C. 487 at p. 500; *Cleary* v. *Boscowitz* (1901), 8

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B.C. 225; 1 M.M.C. 506; (1902), 32 S.C.R. 417; *Payne Consolidated Mining Co.* v. *Wilson* (1902), 1 M.M.C. 485.

Archibald, for respondent: The plaintiff allowed his free miner's certificate to expire for fourteen days in 1932. This is an irregularity that we submit is cured by section 80 of the Act. The certificates of work were taken out regularly from location in 1931. The last certificate was issued in August, 1934, and the claims are in good standing. In the cases referred to they never had a valid location which distinguishes them. Once we have our certificate of work the lapse does not deprive us of our title. It comes down to whether this is an irregularity: see *Cleary* v. *Boscowitz* (1901), 8 B.C. 225; 1 M.M.C. 506; (1902) 32 S.C.R. 417; *Peters* v. *Sampson* (1898), 6 B.C. 405; 1 M.M.C. 247 at p. 254. We cured our title on getting our certificate of work.

Long, in reply: Section 80 does not come into play unless there is a dispute: see *Gelinas* v. *Clark* (1901), 8 B.C. 42 at p. 49; 1 M.M.C. 428 at p. 434.

Cur. adv. vult.

On the 4th of June, 1935, the judgment of the Court was delivered by

MARTIN, J.A.: This appeal raises a new and important question respecting the consequences of the expiration of a free miner's certificate under the Mineral Act, Cap. 167, R.S.B.C. 1924.

The relevant and undisputed facts are that the plaintiff while he was a "free miner" within the definition of section 2 of that Act, in that he was "lawfully possessed of a valid existing free miner's certificate," under section 7 of "Part I. Free Miners and their Privileges" of said Act, duly located, in July, 1931, two mineral claims, the Revenue and the Portland, but when his certificate expired, pursuant to section 5, on the 31st of May, 1932, he did not take out a new one, as authorized by section 6, and continued to be without one for two weeks thereafter when, on the 14th of June, he took out a new certificate, and since that time he has continued to "possess" the required certificates.

He neglected, unfortunately, to avail himself of the special

remedy for his default in allowing his certificate to expire and did not "obtain" a "special certificate" (at the increased fee of $15) under section 8 (as it then stood before its further amendment, by the addition of two more heads of relief on 7th April, 1933, by the Mineral Act Amendment Act, 1933, Cap. 39, Secs. 3 and 4) "within six months from the date of [the] expiration" of his said ordinary certificate, and therefore he cannot now claim the limited curative "effect of reviving the title" under that section (subject to intervening rights of property therein acquired by "other persons") to the claims that he had lost, as alleged, by "the lapse of his former certificate," and so it is submitted that he has irrevocably lost, since that lapse and the lack or revivor under section 8, all title thereto because it is declared by section 12:

Subject to section 13, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it has a free miner's certificate unexpired.

The corresponding old section 9 of the Mineral Act of 1891, Cap. 25, had no exceptions.

By section 13 subsection (2) as it then stood before amendment it was further declared that:

On the expiration of a free miner's certificate, the owner thereof shall, subject to the right conferred by section 8, absolutely forfeit all of his rights and interests in or to any mining property which may be held or claimed by the owner of such expired free miner's certificate, unless the owner, on or before the day following the expiration of the certificate, obtains a new free miner's certificate: Provided that if any co-owner fails to keep up his free miner's certificate, such failure shall not cause a forfeiture or act as an abandonment of the said property, but the interest of the co-owner who fails to keep up his free miner's certificate shall, *ipso facto*, be and become vested in his co-owners, *pro rata*, according to their interests; etc.

And this complete deprivation, by the expiration of the certificate, of "all rights and interests in and to any mining property which may be held or claimed by the owner of such expired free miner's certificate" extends also to his free miner's rights at large as conferred by the next section, 14, which at once declares and limits them, as follows:

(1.) Every free miner shall, during the continuance of his certificate, but not longer, have the right to enter, locate, prospect, and mine:—

(*a.*) Upon any waste lands of the Crown for all minerals other than coal; and, etc.

This express limitation "during the continuance of his certifi-

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cate, but not longer," is significant and of much consequence in determining the present question: it occurs so far back as in section 37 of the Mineral Act of 1884, Cap. 10.

Apart from said remedial provisions in sections 8 and 13, there is nothing in this "Part I." of the Act, dealing with "Free Miners and their Privileges," that enables a free miner to recover a lost qualification or *status* that he had acquired under said section 4. The "Qualifications of free miners" are thus set out in section 4:

> (1.) Every person over, but not under, eighteen years of age and every joint-stock company shall be entitled to all the rights and privileges of a free miner, and shall be considered a free miner, upon taking out a free miner's certificate. A minor who becomes a free miner shall, as regards his mining property and liabilities contracted in connection therewith, be treated as of full age.

These qualifications are few but large, and the Legislature, if it felt so disposed, could have added to them by, *e.g.*, requiring "every person" to be a resident of this Province, or a Canadian citizen, or British subject, or otherwise.

The form of the certificate, which is declared by subsection (3) not to be transferable, embodied in section 7, merits consideration, *viz.*:

> Free Miner's Certificate.
> (*Not transferable.*)
>
> No.
>
> This is to certify that , of , has paid me the sum of dollars, and is entitled to all the rights and privileges of a free miner from midnight on the day of , 19 , until midnight on the thirty-first day of May, 19 .
>
> (*Signature of officer issuing same.*)

The "rights and privileges," as distinguished from "qualifications," that a person who has become entitled to "be considered a free miner" under said section 4 may enjoy are primarily set out in said section 14 of the same Part I., but limited as aforesaid to "the continuance of his certificate but not longer."

Then, by section 15 he is given the further right to "prospect for minerals over all lands in the Province whether owned by railway companies or otherwise," as distinguished from the right to enter, locate, prospect and mine on Crown lands under said section 14.

And under the sub-title "General Rights," sections 17-28, his rights are further defined; by sections 17 and 23 he is declared

"entitled to all the minerals . . . within his claim," and to its surface and "all the timber thereon"; by section 18 his interest is defined as "equivalent to a lease for one year"; by section 22 his right is conferred to certain machinery, property and ore after abandonment; by section 24 to "kill game for his own use" at any period of the year while actually prospecting or mining; by section 27 to general relief from all faults of government officials; by section 25, he acquires "rights and privileges granted to free miners by the Placer-mining Act"; by section 28 he may become entitled to the forfeited interests of his delinquent co-owners; and, finally, by section 126, his claim is protected from adverse location "during [his] last illness" and for a year after his death.

In *Engineer Mining Co.* v. *Fraser,* [1923] A.C. 228 the Privy Council adopted (pp. 231-2) the view of this Court, as expressed by the Chief Justice (31 B.C. 229), that as the result of allowing its free miner's certificate to lapse the plaintiff "lost its legal *status* as a company entitled to hold mineral claims in this Province." To save himself from the consequences of this decision the present respondent (plaintiff) invokes section 80 which, though then in force as section 28 of the Mineral Act, Cap. 135, R.S.B.C. 1897, was significantly not invoked in the *Engineer* case (doubtless because of the limitation placed upon it by *Manley* v. *Collom, post*) though the appellant claimed to be in the very strong position of having acquired a "fundamental equitable title" based not merely upon certificates of work, but the right to one of improvements (p. 231) under sections 36-7 of 1897: it will be considered presently.

It is worthy of note that the right to a free miner's certificate is a personal one and not transferable (section 4 (3), *supra*) and so even a sheriff with writs of *fieri facias* in his hands has no power to take out a certificate, ordinary or special, for a free miner to prevent his claim from lapsing "unless specially authorized to do so," as was held by the old Full Court in *McNaught* v. *Van Norman* (1902), 9 B.C. 131; 1 M.M.C. 516, 518 and affirmed by the Supreme Court of Canada in 32 S.C.R. 690; 2 M.M.C. 7.

It was not till the passing of the Mineral Act of 1891, Cap. 25, Sec. 9, that any provision was made to relieve a free miner

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from the consequences of "absolute forfeiture" of his claim if he allowed his certificate to expire and even then he was only given one day to "obtain a new free miner's certificate" to save it, and only in 1899, by section 4 of the Mineral Act Amendment Act, Cap. 45 was provision made for special certificates to revive titles as in present section 8; and, continuing the progressive remedial policy of the Legislature, the two additional remedies already noted and now contained in present amended section 13 (relating to validation after five years despite lapse of certificate, and to the claim not being open for location for six months after said lapse) were bestowed in 1933 by the said amending Act, Cap. 39, Sec. 4, of 1933.

After thus dealing with the "qualifications" and "rights and privileges" of a free miner, the Legislature passes on, in "Part II. Locating Mineral Claims," to make provision for his due exercise of the latter by prescribing in detail the steps necessary to be taken to make a valid location after the "right to enter and locate" one has been duly acquired under section 14, and acted on under sections 34-5.

It is unnecessary for present purposes to consider these requirements for such a location, but it should be borne in mind that from the beginning of our mining legislation they were held by numerous and repeated judgments of the Courts of this Province and of the Supreme Court of Canada to be imperative (*e.g., Williams Creek Bed Rock Flume & Ditch Co.* v. *Synon* (1867), 1 M.M.C. 1; *Wilson* v. *Whitten* (1889), *ib.* 38, 49; *Bleekir* v. *Chisholm* (1896), 8 B.C. 148; 1 M.M.C. 112, 114; *Clark* v. *Haney* (1899), 8 B.C. 130; 1 M.M.C. 281; and *Manley* v. *Collom* (1902), 8 B.C. 153; 1 M.M.C. 487, 504 notes) and so in order to alleviate the hardships that were often occasioned by the strict construction that the Courts were compelled to place upon the Act, even when tempering it in actual practice as far as permissible by regarding "essential" or "substantial" compliance with the terms of the statute as sufficient (examples of which are to be found in *Rutherford* v. *Morgan* (1904), 2 M.M.C. 214, in my charge to the jury at p. 222, and in the judgment of Mr. Justice DUFF, now Chief Justice of Canada, in *Windsor* v. *Copp* (1906), 12 B.C. 212; 2 M.M.C. 318, 325-6), curative sections of different kinds were passed from time to

time, the first, relevant to the present case, being section 25 of the Mineral Act of 1891, Cap. 25, corresponding to present said section 80, and the next, subsections (*d*) of section 16 of the Mineral Act, 1896, Cap. 34, corresponding to present section 36, and it is to be borne in mind that this last section applies to, and cures only, and subject to three specified conditions, the non-compliance with four specified "location" sections (29-32) and that there is no other curative section in that Part II. Upon this very important section 36, there have been numerous decisions, most of them noted in *Manley* v. *Collom, supra,* and it is only necessary to add the decisions of the Supreme Court of Canada in *Cleary* v. *Boscowitz* (1902), 1 M.M.C. 506; 32 S.C.R. 417; and *Docksteader* v. *Clark* (1904-5), 2 M.M.C. 192, 302; and our recent decision in *Berg* v. *Bosence* (1931), 44 B.C. 71.

Then, after thus dealing with the location of claims the Act proceeds in "Part III. Recording Mineral Claims" to provide for their due recording by sections 39-44, and by section 44 emphatically declares:

> A claim which is not recorded within the prescribed period shall be deemed to have been abandoned,

and section 54 prohibits relocation after failure to record unless by permission and upon penalty. The only relief with respect to recording that is granted by this Part III. is in section 46 which, upon one condition, relieves the free miner from the consequence of recording "through ignorance" his claim in a wrong mining division: *Cf. Francoeur* v. *English* (1897), 6 B.C. 63; 1 M.M.C. 203.

By the remaining sections of Part III. the Act sets out the two duties (of doing annual work and recording the certificate therefor) that are to be performed by a free miner after he has "duly located and recorded a mineral claim" (section 48) in order that he "shall be entitled to hold the same," and section 49 declares:

> Subject to section 50, if such work is not done, or if such certificate is not so obtained and recorded in each year, the claim shall be deemed vacant and abandoned, any rule of law or equity to the contrary notwithstanding.

Section 50 (1) is an important curative one giving him the right, upon conditions, to record his certificate within 30 days

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after the time for so doing has elapsed; subsection (2) simply entitles him to record a certificate of excess work for the following year or years, over the annual work done for the current year.

Said section 54 is at once prohibitive and curative and must be read with sections 50 (1) and 44, because it declares that:

> No free miner shall be entitled to relocate any mineral claim or any portion thereof which he has failed to record within the prescribed period, or which he has abandoned or forfeited, unless he has obtained the written permission of the Gold Commissioner to make such relocation; and he shall hold no interest in any portion of such mineral claim, by location, without such permission, for which permission he shall pay a fee of ten dollars.

This is important because it affords the only, and conditional, way in which the consequences of abandonment, imperatively imposed by said sections 44 and 49, can be avoided or ameliorated.

It appears, clearly, from this necessary review of these three Parts of the Act dealing with three distinct subject-matters of (1) personal qualification or *status* of the free miner and rights flowing therefrom; (2) location of claims; and (3) recording and "holding the same" (section 48), that each Part imposes certain distinct duties and obligations upon the free miner in relation to that Part alone, and also provides, within itself, for certain distinct measures of conditional relief which are appropriate only to those specially designated failures to comply with the otherwise intractable requirements of each separate Part that the Legislature has thought fit to, more or less, relieve against; but for many failures no measure of relief whatever is given.

Such is the limited "curative" situation up to the end of Part III., and in continuing this review of the Act, it is not necessary to discuss at any length Part IV., relating to "Crown Grants of Mineral Claims" etc., but it should not be overlooked that it also contains in sections 59 and 61 two special declarations that two classes of Mining Recorder and Gold Commissioner's certificates "shall lapse and be absolutely void" for certain specified defaults, and also that these special forfeitures may be specially cured by the Lieutenant-Governor in Council under the provisions of section 158; thus preserving in a marked way the scheme of the Act that each Part shall carry its own remedy, if any, for defaults thereunder.

Part V. "Conveyances and Transfers" may be passed over because it contains nothing material to the present question, so we proceed direct to "Part VI. Disputes and Adverse Claims," which brings up said section 80 for consideration, *viz.*:

> Upon any dispute as to the title to a mineral claim, no irregularity happening previous to the date of the record of the last certificate of work shall affect the title thereto, and it shall be assumed that up to that date the title to the claim was perfect, except upon suit by the Attorney-General based upon fraud: . . .

It was submitted for the defendant-appellant that the word "irregularity" is wide enough to include the lack of a free-miner's certificate, despite the said requirements of sections 4 and 14 and the express declarations of sections 12 and 13 (2) that upon the expiration of the certificate the "owner" of the claim "shall absolutely forfeit all of his rights and interests in or to it," and "shall [not] be recognized as having any right or interest" therein.

In the admitted absence of any direct authority, several indirect decisions were cited in support of the submission and of the judgment pronounced below, which invokes them, and so we have given them that very careful attention which a question of this importance deserves, but, with every respect, when the scope and structure of the Mineral Act are considered, as they must be, in the light of its said component, yet distinct, Parts, said decisions afford no real foundation for the judgment under review, which, if it be sound, involves the very grave, not to say startling consequence, which must not be overlooked, that if section 80 cures the present default of being two weeks without a certificate, then it also cures every similar default for any and every indefinite period, *e.g.*, of two years or more without limitation.

Much reliance by respondent was placed on certain language of my late brother IRVING in *Peters* v. *Sampson* (1898), 6 B.C. 405; 1 M.M.C. 247, a decision of the old Full Court in which I sat with my late brothers WALKEM and IRVING, and we decided only that the expression "irregularity" in section 28 of the Mineral Act, Cap. 135, R.S.B.C. 1897 (now said section 80) applied to defects in a certificate of work itself and included delay in recording it. My brother WALKEM, after considering the section on pp. 254-5, thus concluded his view thereof:

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> The section is not as clear as it might be, but the meaning of it, as expressed in the last two lines, is that when a certificate of work is recorded the title shall be deemed to be perfect up to the date of record and not open to question except for fraud. . . . In my opinion, it was intended that the word "irregularities" should apply to certificates irregularly issued as fully as it does, in practice, to locations or records irregularly made. It would be mischievous were it otherwise, for a certificate, when endorsed by the recorder as having been recorded, is, in practice, accepted by a purchaser of a mineral claim as official evidence of a good title up to the date of the record. Now this attack upon the certificate is, in effect, an attack upon the title, for the title depends upon the certificate, and an attack upon the title, except for fraud, is absolutely prohibited by the section. . . . The requirement in section 24 as to annual work is evidently a matter of public policy and an essential feature of the Act; but the provision that the certificate of work shall be recorded is a minor matter which only concerns the holder of that document; hence the delay in recording it, which in this case was at most seventy-two hours, may be regarded as an irregularity, and one that is within the scope of section 28.

This view I concurred in, as stated in *Gelinas* v. *Clark* (1901), 8 B.C. 42; 1 M.M.C. 428, 434-7 (note) (wherein I considered the effect of the decision of the Supreme Court of Canada in *Callahan* v. *Coplen* (1899), 1 M.M.C. 348; 30 S.C.R. 555 on said section 28), and our brother IRVING went on (p. 255) to enumerate six "requirements of title" and properly placed the existence of a free miner's licence as the first of them, but there is nothing at all in his language to warrant the assumption that he held the view that because a title was "irregular" without such a licence, therefore, the non-existence of that licence was a mere irregularity, instead of being the foundation of a *status* to acquire any rights at all under the Mineral Act. I never heard him make such a suggestion, and it was obviously foreign to the case that it should have been made, because we were not in any way considering the question of the absence of a licence (since all parties concerned admittedly held one) but only the delay in recording a certificate of work, an entirely distinct question. But furthermore, that my brother IRVING had no intention of making the, to me at least, surprising holding that the lack of a licence was an "irregularity" within the meaning of that term as used in section 28, appears clearly from the continuation of his judgment (p. 256) wherein he points out that the primary "omission" (*i.e.*, "requirement" of title No. 1) to secure a licence was curable under the special provisions of

section 143 of the Mineral Act (R.S.B.C. 1897, Cap. 135; 1 M.M.C. 786) empowering the Lieutenant-Governor in Council to "make regulations for relieving against forfeitures arising under section 9 of this Act, *i.e.*, for lack of a licence, and therefore in view of that special remedy section 28 was not applicable; and he goes on to say that the third "requirement," the failure to do the work, "in my opinion, is not an irregularity," though the due recording of it is. The final reason he gives for these conclusions is that

> As all the other irregularities of title have been specifically provided for, I see no reason why the section [28] should have been passed, unless it was to include the case of non-recording [the certificate].

It is further to be noted that in his said list of "requirements" he overlooked the necessity of duly recording the claim, after specifying as No. "(2) a proper location," and proceeded direct to consider No. "(3) doing of work—the failure to do this could not be called an irregularity," as he correctly says, but the failure to record the claim was still less one (having been an imperative requirement ever since 1884 at least by the Mineral Act of that year, Cap. 10, Secs. 27 and 31), and above all non-irregularities would be the absence of any licence conferring the necessary *status* to acquire and hold any title at all. It will be seen, therefore, that when his judgment is closely considered and understood in the light of the statutory provisions then in force, it not only does not support the submission made here and below but refutes it.

It is to be remembered that in adverse actions of any kind the first "requirement" of proof of "affirmative evidence of title to the ground in controversy" under section 11 of the Mineral Act Amendment Act, 1898, Cap. 33, was the free miner's certificate (as it is under sections 58, 12-14) as I decided in *Schomberg* v. *Holden* (1899), 6 B.C. 419; 1 M.M.C. 290 which as the note on p. 291 says "has been repeatedly followed at *nisi prius*": that note was written in 1903 and since that time neither it nor the decision has ever been questioned.

In the leading case of *Manley* v. *Collom* (1901), 8 B.C. 153; 1 M.M.C. 487; (1902) 32 S.C.R. 371; the Supreme Court of Canada explained its decision in *Callahan* v. *Coplen*, followed the dissenting views of my late brother DRAKE, and of myself

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in *Gelinas* v. *Clark, supra,* and unanimously defined and restricted the operation of section 28 (now 80) saying, p. 501:

> In the case of *Coplen* v. *Callahan, supra,* in considering the effect that should be given to the following sections of the British Columbia Mineral Act, *viz.*, secs. 16 (*g*), 27, and 28, we held that every direction of sec. 16 was imperative, that any deviations from or irregularity in respect to such directions were fatal to the location unless they came within the curative provisions of sub-sec. (*g*); that these were the only statutory provisions that could be evoked in favour of an otherwise invalid location; that sec. 28 did not include within its purview any area that had not been duly located, but only those that had, and in consequence had become "mineral claims"; that the "irregularities" referred to must be such as occurred in the interval between the final location and registration of the mineral claim and the date of the record of the last certificate of work; and that, notwithstanding the certificate of work produced in that case, an inquiry might be had as to whether the provisions of sec. 16 had been so disregarded by the locator as to make his location invalid.

The judgment proceeded to show that section 28 had not displaced section 27, and went on to say:

> We thought that sec. 28, notwithstanding these limitations upon its alleged universality and to the efficiency of its certificate as well, did fulfil a useful purpose, and particularly in the following way.
>
> Assume a valid mineral claim. Its owner before a Crown grant issues is a tenant of the Crown. He must pay rent to the Crown. The Legislature has permitted him to pay his rent either in money or work and to receive from a duly appointed agent of the Crown a certificate of work or payment. This really amounts to a receipt from the Crown of the tenant's annual rental. Whether the work was done or not, the money paid or not, was the business of no one except the Crown. And so it was, I think, reasonably enacted that whenever a dispute arose in which the payment of rent was concerned, the certificate of the Crown's officer as to the payment of the rent was to be conclusive against the world (the Crown included) unless the Crown, upon suit by the Attorney-General upon ground of fraud, had taken proceedings and succeeded in setting it aside.

This decision was immediately followed and affirmed by the same Court in *Cleary* v. *Boscowitz* (1902), 1 M.M.C. 506; 32 S.C.R. 417, and has not been departed from.

Not only, in my opinion, is there nothing in their Lordship's said remarks upon section 28 to give any support to the view that it can be expanded indefinitely in scope and time to cure the consequences and forfeitures imposed by sections 12, 13 and 14, but, on the contrary, their whole tenor is strongly against such a view.

Our duty in construing this section 80 was very aptly pointed out by my brother WALKEM in *Peters* v. *Sampson, supra,* p. 252,

when he cited the well-known language of Lord Herschell (with which Lord Chancellor Halsbury and Lord FitzGerald agreed, pp. 500-502) in the House of Lords in *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493 wherein it was said, p. 506:

> It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the Legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.

That language is most applicable to the various provisions of the statute before us (complicated as it is by a continuous stream of amendments for over half a century) as it has been the endeavour to show, and after having given most careful consideration to all its relevant provisions no other conclusion can, to my mind, with all due respect to other views, be reached than that said section 80 has no application to the sole question involved in this appeal and cannot be resorted to by the free miner to "revive the title" to his claim after he has first allowed his certificate to lapse, and then neglected to take advantage of the special remedy provided by the Act for his relief from his failure to comply with its imperative requirements.

That the Legislature could have had the intention of giving a wide and uncontrolled effect to section 80 is incredible when it is borne in mind that it has been in force in essentials since 1891 (section 25) and therefore if it had the scope now contended for there has been no necessity for the passing of the numerous progressive provisions, beginning with the year 1899, as already noted, that have been enacted to give relief from the forfeitures (that formerly was absolute—*Cf.* section 46 of 1884 and is still so preserved in present 13 unless redeemed as therein provided) consequent upon the failure of a free miner to keep his certificate alive.

This conclusion is in general fortified by the unusual provisions of section 171 of the Act, *viz.*, as it stood at the time the certificate herein expired, and before its amendment in 1933, by Cap. 39, Sec. 25, *viz.*:

> 171. Every person who mines for any mineral for his own sole use and benefit in any waste land of the Crown in the Province, without having obtained and being the holder of an unexpired free miner's certificate, shall, on summary conviction, be liable to a fine not exceeding twenty-five dollars.

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This penal provision evidences the intention of the Legislature in a striking way that the property of the Crown shall not be wrongfully appropriated to "his own sole use and benefit" by one who, as the *Engineer Mining Co.* case, *supra*, p. 231, decides, has "lost [his] legal *status* . . . to hold mineral claims" and can therefore no longer "be considered a free miner" as the said 4th section of the Act declares.

It follows that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *G. F. H. Long.*
Solicitor for respondent: *F. Temple Cornwall.*

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WOODWORTH v. GAGNE AND GAGNE.

Trial—Close of case—Further evidence—Application to reopen and allow in—Refused.

Judgment was reserved at the close of the trial and before judgment was given the defendant applied to reopen the case and adduce further evidence to contradict the evidence of a witness called by the plaintiff to show that a witness T., called by the defendant, could not have been present in the office of the plaintiff at the time defendant signed a certain document which was put in evidence.

Held, that if in such a case the rule in *Hosking* v. *Terry* (1862), 15 Moore, P.C. 495 at pp. 503-4 should be applied, and the trial judge has not absolute and unfettered discretion to resume the hearing of an action apart from the rules until entry of judgment, the application should be dismissed: if on the other hand the judge had an untrammelled discretion, the fundamental consideration being that a miscarriage of justice does not occur, then it is not in the interests of justice that the case should be reopened for further evidence, as the taking of the proposed further evidence along the lines indicated would result merely in placing oath against oath and is not of such a character that if it had been brought forward in the suit it might probably have altered the judgment.

APPLICATION by the defendant to reopen the trial and adduce further evidence before judgment was delivered. The

facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 25th of June, 1935.

Reid, K.C., for plaintiff.
McPhee, for defendant.

Cur. adv. vult.

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FISHER, J.: In this matter, having completed the taking of evidence and the hearing of argument in May last, I reserved judgment but before any reasons for judgment were delivered I heard, on June 28th, an application by counsel on behalf of the defendant to reopen the trial and adduce further evidence to contradict the evidence of the witness Miss Rose Josephine McGrade, called on behalf of the plaintiff, and to show that the witness Mr. Teeporten, called on behalf of the defendant, was elsewhere and could not have been present in the office of the plaintiff at the time the defendant signed there the document (Exhibit 16). Counsel on behalf of the plaintiff opposed the application and referred to *Larsen* v. *Hassard,* [1934] 3 W.W.R. 224, and *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28, especially at p. 66. It must be noted that in the cases referred to the application was made after the delivery of written reasons but before entry of the formal judgment. In the present case, as intimated, the application was made before the pronouncement of any judgment. I still think, however, that what was said by Boyle, J. in a passage in his judgment in *Sales* v. *Calgary Stock Exchange,* [1931] 3 W.W.R. 392 at 394, applies. In *Larsen* v. *Hassard, supra,* I referred to the passage reading as follows:

> It is in my view a serious matter to open up a trial after all the evidence has been taken, and it should never be done unless it seems imperative in the interests of justice that the case should be reopened for further evidence.

Reference might also be made here to what was said by MARTIN, J.A. in the *Clayton* case, *supra,* at pp. 44-5;

> 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.

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"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."

In the present case it must be noted that during the cross-examination of the defendant at the trial she was specifically asked if Mr. Teeporten was with her in the plaintiff's office when she signed said Exhibit 16 and she denied that he was. During the cross-examination of Mr. Teeporten he was also asked if he was present at the time and place aforesaid and he denied that he was. I am satisfied that it was made quite apparent by counsel on behalf of the plaintiff during his cross-examination that the suggestion was seriously being made that Mr. Teeporten was with the defendant at the time she signed the said Exhibit 16, and ample notice given of the necessity of the defendant preparing to meet fully this suggestion. Later on the witness, Miss McGrade, was called and I think her evidence undoubtedly meant that Mr. Teeporten was present when she says the said Exhibit 16 was read over and then signed by the defendant.

No application for an adjournment was made after Miss McGrade gave her evidence but as already indicated the taking of evidence was completed and the argument heard. The general nature of the further evidence now proposed has already been indicated. As I understand the matter it is not suggested that there is any documentary evidence available that would conclusively contradict the evidence of Miss McGrade, but it is sought to introduce the oral evidence of other witnesses, not already called, to support the evidence of the defendant and Mr. Teeporten in contradiction of the evidence of Miss McGrade with respect to the presence of Mr. Teeporten at the time Exhibit 16 was signed by the defendant. On this phase of the matter I have to say in the first place that I look upon Miss McGrade as an independent and credible witness and accept her evidence in preference to that of the defendant and Mr. Teeporten. I have also to say that in my view the taking of the proposed further evidence along the lines indicated would result merely in placing

oath against oath, and I have come to the conclusion that it cannot be said that the evidence now brought forward is "of such a character that if it had been brought forward in the suit it might probably have altered the judgment" as hereinafter pronounced or the reasons therefor. See *Hosking* case, *supra*. The real issue, of course, is not whether Mr. Teeporten was present when the defendant signed Exhibit 16, but whether the defendant, as Miss McGrade says, read over said Exhibit 16 before she signed it.

I pause here to note that if I understand aright the reasons for judgment given in the *Clayton* case, *supra,* the Court was not unanimous as to the guiding principles to be applied to the facts of that particular case. In the present case, as already pointed out, no judgment had been pronounced when the application to reopen was made, and, if in such case the rule, as stated in the *Hosking* case, *supra,* should be applied and I have not an absolute and unfettered discretion as trial judge to resume the hearing of an action apart from rules until entry of judgment, then applying such rule here, I would say that the application should be dismissed. If, on the other hand, I have an untrammelled discretion in the matter, "the fundamental consideration being that a miscarriage of justice does not occur," as MACDONALD, J.A. says in the *Clayton* case at p. 67, then having carefully considered the whole matter as it now stands I have to say in this case, as I said in the *Larsen* case, *supra,* that I am not convinced that it is in the interests of justice that the case should be reopened for further evidence.

The application to reopen the trial and adduce further evidence is therefore dismissed and I have to add that, having heard counsel on the application before delivery of any reasons for judgment, I do not consider it necessary that any order should be taken out. See the *Clayton* case, *supra,* at p. 62. I, therefore, proceed now to give my reasons for judgment on the case upon the evidence now before me.

On the main issues in this matter the oral evidence is very contradictory but it is quite apparent that there are two written documents, *viz.,* Exhibit 4, dated April 3rd, 1934, and Exhibit 16, dated October 31st, 1934, which were signed by the defend-

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ant on or about their respective dates and which the defendant now seeks to repudiate. With respect to the document (Exhibit 4) which may shortly be described as a written retainer or authorization to the plaintiff to act as defendant's solicitor to enforce payment of the Barger (Carlson) mortgage and incur all necessary charges, the defendant alleges that she signed the document under threat, duress and undue influence on the part of the plaintiff. With respect to the document (Exhibit 16) which may be described shortly as a notice from the defendant herein to Mr. Barger that the judgment against him in favour of Mr. Carlson had been duly assigned to her as executrix and should be paid to her accordingly, the defendant alleges that shortly before she signed such document the plaintiff misrepresented to her the nature and effect of the document and that thereupon she went to his office and signed same without reading it at all. Undoubtedly these are serious allegations for the defendant to make and it is or must be admitted that in view of the written documents bearing her signature the burden of proof is on the defendant who seeks to establish such a defence.

I have therefore now to consider the evidence offered by the defendant in support of her allegations as aforesaid and I have to say first that, if I had not the evidence of the witness Miss McGrade with respect to the signing of the said Exhibit 16, and had to reach a conclusion on the whole matter without or apart from her evidence, I would find that the defendant had not satisfied the *onus* of proving either that she signed Exhibit 4 under threat, duress or undue influence or that she signed Exhibit 16 without reading it, under the circumstances as stated by her. Having, however, before me for consideration the evidence of the witness Miss McGrade with respect to the signing of the later document (Exhibit 16) I have to say that I accept her evidence as I have already indicated, and her evidence satisfies me that the defendant is not a credible witness and I find that the evidence of the plaintiff should be accepted with respect to said Exhibit 4 and the instructions he says he received from the defendant and the advice he gave her from time to time during the period referred to in the evidence and covered by the bill of costs referred to. I think it is a fair inference from the

whole evidence, and I find that the defendant freely and voluntarily retained the plaintiff and that though she may have been otherwise advised by the witness Mr. Teeporten, the defendant was satisfied to follow the advice of the plaintiff, and knowing what was being done from time to time continued to instruct the plaintiff as her solicitor, until on or about November 19th, 1934, when she in effect notified or had him notified by letter (Exhibit 17) that she had employed another solicitor and wished the plaintiff to deliver up all papers and documents in connection with the action against Carlson and Barger. I also find that the plaintiff never agreed to accept the sum of $200 as payment in full for his services and am satisfied that any conversation with respect to the approximate costs of the litigation to the defendant was on the assumption that the plaintiff would recover certain costs against the said Barger. Undoubtedly by the services rendered by the plaintiff and the solicitors, whose charges the plaintiff agreed to pay, the defendant obtained judgment in a mortgage foreclosure action with respect to the lands referred to in the statement of claim herein and an assignment in her favour of the judgment in favour of the said Carlson against the said Barger. Since the assignment the defendant made such arrangements with Mr. Barger as prevented the plaintiff from recovering any of his costs against him.

I do not find it necessary to make a finding on the question raised at the trial, as to whether or not a bill of costs duly subscribed with the hand of the plaintiff, was sent to the defendant by letter, as I think the two authorities referred to by both counsel, *viz.*, *In re Bush* (1844), 8 Beav. 66; 14 L.J. Ch. 6; 50 E.R. 26; and *Blake* v. *Hummel* (1884), 1 Cab. & E. 345; 51 L.T. 430, 1 T.L.R. 22, conclusively shew that in any event an unsigned bill of costs enclosed in or accompanied by a letter subscribed by the plaintiff solicitor referring to such bill is sufficient to satisfy the statute. See also *Penley* v. *Anstruther* (1883), 52 L.J. Ch. 367; 48 L.T. 664, referred to by counsel for the plaintiff.

With regard to the cheques received by the plaintiff, I have to say that I accept the evidence of the plaintiff in preference to that of the defendant with respect to the circumstances under

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which the cheque for $50 dated February 12th, 1934 (Exhibit 20) was given. As to the cheque for $10 (Exhibit 21), the plaintiff seems to admit that the defendant may have expected the sum of $10 to be "readvanced" to her though it might well have been applied on account of the plaintiff's costs. As matters now stand this small sum may be off-set against the amount found due the plaintiff.

If the defendant so desires she may have the bill of costs referred to the taxation officer for taxation by indicating such desire within a time to be agreed upon by counsel or to be spoken to if counsel cannot agree.

Subject to such right with respect to taxation of the bill of costs there will be judgment in favour of the plaintiff against the defendant as claimed and the counterclaim of the defendant will be dismissed.

Judgment for plaintiff.

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Sept. 2, 9.

IN RE BLOWEY ESTATE.

Will—Direction as to payment of probate, legacy and succession duties—Interpretation—B.C. Stats. 1934, Cap. 56, Sec. 6; Cap. 61, Sec. 27.

A will directs the trustee to sell and convert into money all property, and "with and out of the moneys produced by such sale, calling in and conversion and with and out of my ready money, pay my debts, funeral and testamentary expenses and all probate, legacy and succession duties and the following legacies." Then follow legacies to a niece, a nurse and two sons, James and Harry, and then the will provides "All above legacies to be free of probate, legacy and succession duties." Then the will gave a quarter of the residue absolutely to James and one-third of the income from the investment of the remaining three-quarters of the residue for his life and upon his death to his wife for life and thereafter to their children. The remaining two-thirds of said income was given to Harry for his life and then to his wife and then to their children. On originating summons to determine the question "Did the testator according to the expressions in that behalf in the said will, intend that all probate, legacy and succession duties should be payable out of the *corpus* of the estate?"

Held, that the probate, legacy and succession duties are payable out of the respective shares (other than the three legacies) given by the will.

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IN RE BLOWEY ESTATE

ORIGINATING SUMMONS to determine a question arising out of the will of the late J. T. Blowey, who died on January 30th, 1934. Heard by ROBERTSON, J. at Vancouver on the 2nd of September, 1935.

Dickie, for applicants.
Bull, K.C., for trustee.

Cur. adv. vult.

9th September, 1935.

ROBERTSON, J.: This is an originating summons to determine a question arising under the last will, dated October 26th, 1933, of the late James Thomas Blowey, who died on January 30th, 1934, *viz.*:

Did the testator, according to the expressions in that behalf in the said will, intend that all probate, legacy and succession duties should be payable out of the *corpus* of his estate?

The will directs the trustee, The Canada Permanent Trust Company, to sell and convert into money all property (not consisting of money) and

with and out of the moneys produced by such sale, calling in and conversion and with and out of my ready money pay my debts, funeral and testamentary expenses and all probate, legacy and succession duties, and the following legacies.

Then follow legacies to a niece, a nurse and his sons, James and Harry, and then the will proceeds:

All above legacies to be free of probate, legacy and succession duties.

Then the will gave to James a quarter of the residue of the estate absolutely and one-third of the income from the investment of the remaining three-quarters of the residue for his life and upon his death to his wife for life and thereafter to their children. The remaining two-thirds of the said income was given to Harry for his life and then to his wife and then to their children.

It is submitted that if the testator had intended that only the three legacies mentioned should be free of duties, he would have inserted the word "only" after the word "legacies." Section 6 of the Probate Duty Act, B.C. Stats. 1934, Cap. 56, and section

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27 of the Succession Duty Act, B.C. Stats. 1934, Cap. 61, impose upon the executor the duty of paying, respectively, the probate and succession duty, so that, when the testator provided that the probate and succession duties should be paid by his executor, he was only directing what it would be its duty to do. In *In re Kennedy* (1916), 86 L.J. Ch. 40; [1917] 1 Ch. 9, the Court construed a will, by paragraph 7 of which the testator devised all his property to his trustees upon trust to sell, and then directed that out of the sale moneys, and his ready money, they should pay, *inter alia,* his death duties. With reference to this Warrington, L.J. said at p. 15:

> As to clause 7, I think the provisions of this clause as to payment of debts, legacies and death duties do not affect the question one way or the other. They are merely administrative provisions telling the trustees to do what it would be their duty to do without such a provision. Moreover, such provisions as these cannot be complied with literally. There are many payments which in the nature of things cannot be made until after the investment of the proceeds of conversion has been carried out. It would, in my opinion, be wrong to give to the details of such provisions a determining effect on the beneficial interests conferred by the will.

The result is that the direction to the trustee to pay the probate and succession duties does not assist the applicants. The last paragraph quoted from the will "that all above legacies are to be free of probate, legacy and succession duties" applies only to the three legacies mentioned.

The answer to the question is as follows: The probate, legacy and succession duties are payable out of the respective shares (other than the three legacies) given by the will.

Order accordingly.

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June 10, 11; July 16.

Criminal law—Procuring miscarriage by instruments—Evidence of similar acts by accused on other occasions—Admissibility—Criminal Code, Sec. 303.

On the trial of accused on a charge of unlawfully using an instrument on a woman with intent to procure a miscarriage, evidence tendered by the Crown of similar acts showing that on previous occasions instruments were used by her on other women with like intent, was rejected by the trial judge and the accused was acquitted.

Held, on appeal, *per* MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A., reversing the decision of LAMPMAN, Co. J., that the uncontradicted evidence of the woman upon whom the alleged operation was performed was if credible (and there is no suggestion by the judge that it was for any reason untrustworthy) established the Crown's case and under the circumstances the Crown counsel was justified in tendering in chief the evidence of three or more witnesses to prove that the accused unlawfully used instruments of the same kind upon them for the same purpose, and the judge could and should, in the proper exercise of his discretion, in the absence of any admissions by the accused and without a clear and unequivocal statement of her defence, have admitted said evidence when so offered, or at least reserved the question of its admission for later consideration when the defence had been clearly defined: the proper course under said circumstances was to allow the appeal and direct a new trial.

Per MACDONALD, J.A.: That it is part of the Crown's case to show "intent" and "unlawful" use of instruments. Any evidence bearing on intent, design or unlawfulness is part of the *res gestæ*. "Intent" or "design" being a necessary element in establishing guilt, any evidence disclosing it is admissible. Repeated use tends to make it more probable that the "intent" or "design" was of a criminal nature. It follows that it is evidence relevant to the issue and there should be a new trial.

APPEAL by the Crown from the decision of LAMPMAN, Co. J. of the 25th of February, 1935, acquitting the accused on a charge

for that she, the said Nellie Anderson, on or about the 5th day of October, 1934, in the City of Victoria, . . . , did with intent to procure the miscarriage of a woman, to wit, Margaret Irene Sinclair, unlawfully use on her, . . . , an instrument contrary to the Criminal Code.

The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 10th and 11th of June, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Jackson, K.C., for appellant: The operation on the woman

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took place on Friday, the 8th of October, 1934, and on the following Monday at the hospital Dr. McNiven found a rubber catheter in the woman's vagina. Evidence of other abortions being brought about by the accused was not allowed in. There was a mistrial: see *Rex* v. *Bond* (1906), 75 L.J.K.B. 693; Kenny's Outlines of Criminal Law, 14th Ed., 374 and 405; *Reg.* v. *Cooper* (1849), 3 Cox, C.C. 547; *Director of Public Prosecutions* v. *Ball (No. 2)* (1910), 80 L.J.K.B. 691; *Rex* v. *Shellaker,* [1914] 1 K.B. 414; *Makin* v. *Attorney-General for New South Wales* (1893), 63 L.J.P.C. 41 at p. 43; *Brunet* v. *Regem* (1918), 57 S.C.R. 83; *Rex* v. *Hamilton,* [1931] 3 D.L.R. 121; *Rex* v. *Pinsk,* [1935] 1 D.L.R. 307. There was error in not admitting the evidence other than that of the woman upon whom the operation was performed: see *Rex* v. *Ah Jim* (1905), 10 Can. C.C. 126; *Rex* v. *Sadick Bey* (1914), 25 Can. C.C. 259; *Rex* v. *Kellen* (1927), 33 O.W.N. 153; 10 C.B. Rev. 271. There was ample corroboration: see *Rex* v. *Steele* (1923), 33 B.C. 197, and on appeal [1924] S.C.R. 1; Roscoe's Criminal Evidence, 15th Ed., 1001; *Rex* v. *McGivney* (1914), 19 B.C. 22; *Rex* v. *Iman Din* (1910), 15 B.C. 476; *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Bristol,* [1926] 4 D.L.R. 753; *Rex* v. *Brindley* (1903), 6 Can. C.C. 196.

Maclean, K.C., for respondent: This was a married woman upon whom the operation was alleged to be performed. If it is a mixed question of law and fact there is no jurisdiction to hear the appeal: see *Rex* v. *McClain* (1915), 23 Can. C.C. 488. The question of corroboration is a mixed question of law and fact. It is unsafe to convict on the uncorroborated evidence of an accomplice: see *Brunet* v. *Regem* (1918), 57 S.C.R. 83; *Rex* v. *Jones* (1935), 49 B.C. 537; *Brunet* v. *Regem,* [1928] S.C.R. 375; *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1. As to what amounts to corroboration see *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Bond* (1906), 75 L.J.K.B. 693; *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57 at p. 62; *Rex* v. *Shellaker,* [1914] 1 K.B. 414. In the case of *Brunet* v. *Regem* (1918), 57 S.C.R. 83, it was to meet the defence set up that the evidence was allowed in of previous cases of performing abortion. See also *Rex* v. *Christie,* [1914] A.C. 545; *Perkins* v. *Jeffrey,*

[1915] 2 K.B. 702 at p. 708. Appellant does not suggest that he wants to put in the evidence to establish a system: see *Brunet* v. *Regem* (1918), 30 Can. C.C. 16 at p. 51.

Jackson, in reply: The admissibility of evidence of previous abortions is not limited to rebuttal of a defence set up but is proper evidence as part of the Crown's case: see Lord Herschell in *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65; "or to rebut a defence which would otherwise be open to the accused." See Jelf, J. in *Rex* v. *Bond* (1906), 75 L.J.K.B. 693 at p. 709 discussing the same principle in *Rex* v. *Wyatt* (1903), 73 L.J.K.B. 15; [1904] 1 K.B. 188 and adopting this expression of Lord Herschell, and see also Darling, J. in the *Bond* case at p. 707, "to negative some possible defences." That evidence of this kind is not restricted to rebuttal of defence but is open to the Crown and admissible in the Crown's case proper is expressly held in *Rex* v. *Hamilton,* [1931] 3 D.L.R. 121.

Cur. adv. vult.

16th July, 1935.

MARTIN, J.A.: This is an appeal by the Crown from the acquittal of the respondent by LAMPMAN, Co. J., in the County Court Judges' Criminal Court at Victoria on the charge that the respondent

> on or about the 5th day of October, 1934, at the City of Victoria, in the County of Victoria, in the Province of British Columbia, did with intent to procure the miscarriage of a woman, to wit, Margaret Irene Sinclair, unlawfully use on her, the said Margaret Irene Sinclair, an instrument contrary to the Criminal Code.

The relevant section of the Code is 303, *viz.*:

> Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent.

The gist of the present charge is the "intent to procure the miscarriage . . . [by] unlawful use [of] an instrument," and to prove it the Crown called as a witness the said Margaret Sinclair who swore a rubber tube was used on her person by the accused with intent to procure her miscarriage, she being two and one-half months pregnant at the time, and that she paid the

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accused money for doing so, and the miscarriage took place three days thereafter, on the 8th of October, in the hospital to which she had been taken the preceding evening.

In further support of the *onus* to establish intent the Crown counsel tendered the evidence of three or more witnesses to prove that the accused had unlawfully used instruments of the same kind upon them for the same purpose as upon Margaret Sinclair, but upon objection it was excluded, the learned judge relying upon his interpretation of the leading case of *Brunet* v. *Regem* (1918), 57 S.C.R. 83, and on a citation he gives from Kenny's Outlines of Criminal Law, 14th Ed., 374, and makes the deduction from the latter that such evidence is "only admissible if the act is admitted," but it is to be observed, with respect, first, that the passage is misapprehended and misapplied; second, that it is obviously not exhaustive; third, that if it is it does not apply to this case because the act is not admitted but denied, of which more later; and, fourth, if correct as to the English practice it is contrary to our practice in Canada, as shall appear.

In the recent valuable treatise by the late lamented Mr. Justice Avory, and associates, on "Criminal Law and Procedure" in Halsbury's Laws of England, 2nd Ed., Vol. 9, pp. ix., 186-8, sec. 270, it is well said, by that high authority, based upon many decisions noted:

> But where a guilty knowledge or intention or design is of the essence of the offence, proof may be given that the defendant did other acts similar to those which form the basis of the charge. Such acts may be proved, whether they were done before or after the acts which form the basis of the charge, and even if they form or have formed the basis of other charges. The evidence, which must be of transactions having such a *nexus* with the offence charged that it forms part of the evidence on which that offence is proved, is admissible to show not that the defendant did the acts which form the basis of the charge, but that, if he did such acts, he did them intentionally or with the knowledge of some fact, and not accidentally, or inadvertently, or innocently, or that they formed a part of a system.
>
> Similarly evidence of articles found in the possession of the accused person is generally admissible to prove identity and the practice of the accused, but there must be a *nexus* between the article found and the offence charged.

Brunet's case, *supra*, the learned judge treated below as being an authority for holding no more than that such evidence may be given only in rebuttal, and the expressions therein to the effect that it may be also given in chief he disregards as *obiter dicta*,

but, with every respect, that is a misconception of the scope and extent of the decision and also an omission to note that it involves much more, as was necessary, because the two relevant questions submitted in the case reserved (p. 84) were:

(2) That the trial judge erred in admitting evidence of other criminal acts of the appellant.

(3) That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

These two questions necessitated a general consideration of the subject-matter under the circumstances of the case (which like the present was tried by a judge without a jury) and all the five judges were of opinion that "upon the particular circumstances," it had been properly given in rebuttal and not in chief since the accused had "gone into the witness box to prove his innocence" of the charge of abortion by testifying that while he admitted the use of the instruments yet miscarriage had begun before his intervention and that his purpose was merely to prevent septic poisoning.

As Idington, J. said (p. 85) after adopting *Rex* v. *Bond*, [1906] 2 K.B. 389 and holding the evidence of two similar prior acts several years before was admissible:

Whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal must depend upon the particular circumstances of each case.

And after giving some illustrations, he concluded:

Often they [defending counsel] have to take chances and do the best they can; but all that furnishes no reason for rejecting evidence when clearly admissible either in opening or in rebuttal according to the circumstances of each case.

And one guiding rule in regard thereto should ever be section 1019 of the Criminal Code which reads as follows:

"1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial;" . . .

I think this curative section applicable here.

Mr. Justice Davies (presiding) and Mr. Justice Brodeur concurred in the reasons of Mr. Justice Anglin, supporting the admission, which contain a valuable and lengthy review of all the relevant leading cases up to that date, which renders it very largely unnecessary to reconsider them herein, but I feel it should be noted that in his review of *Rex* v. *Bond*, [1906] 2

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K.B. 389, the approval by Kennedy, J., at p. 406, of the decision of that learned judge, Charles, J., in *Reg.* v. *Dale* (1889), 16 Cox, C.C. 703, was overlooked in the note thereon at p. 102, though the view of Lawrence, J., is there given.

Lemieux, C.J. (*ad hoc*), aptly pointed out, p. 112, that the "theory of the disinfection"

> amounted to a special plea based on a special fact which the Crown, in the examination in chief, could not anticipate.

Another important conclusion, however, arrived at by Anglin, J., embodying that of the majority of the Court at least, was the practical and essentially fair one (having regard to the former section 1019 of the Code—and our powers have been increased by present section 1014, subsection 2) that the unanimous decision of the five justices of the Ontario Court of Criminal Appeal in *Rex* v. *Pollard* (1909), 19 O.L.R. 96 should be followed in so far as it decided that the question as to whether the evidence should have formed part of the Crown's case in chief or in rebuttal was not of importance, and the Supreme Court adopted the following very apt statement of Osler, J.A., at p. 103:

> In my view, however, the point is of no importance. If admissible at all, the evidence might, by leave of and in the discretion of the trial judge, be given at either stage of the case for the purpose of disproving honesty of motive, if that were the defence relied upon, or of rebutting a defence of accident or mistake, or to contradict the defendant on a point material to the charge, as in *The King* v. *Higgins* (1902), 7 Can. C.C. 68.

The significance of that decision is that the appellant's counsel took a position before the Ontario Court of Appeal exactly opposite to that now taken before us and had

> strongly urged . . . that the evidence objected to, if admissible at all, should have formed part of the Crown's case in the first instance, and that it was erroneous to admit it in reply.

In other words, that the Crown could not split its case (*Rex* v. *Simpson* (1826), 2 Car. & P. 415) by giving in rebuttal instead of in chief confirmatory evidence in its possession, and on this Osler, J.A. remarked:

> Whether in the *Bond* case Taylor's evidence was given by anticipation, on the opening of the case for the prosecution, knowing the defence intended to be relied upon, or, as here, in reply after the close of the defendant's case, does not clearly appear from any of the numerous reports of the decision, though from the judgment of Darling, J., it may perhaps be inferred that the course of the proceedings was similar to that in the present case. In my view, however, the point is of no importance. . . .

The *Higgins* case thus followed was a decision of the six judges of the Supreme Court of New Brunswick, *in banco* on a case reserved (p. 71, Q. 2nd), that the admission of rebuttal evidence was proper as it is in the discretion of the trial judge to determine the order in which he will allow the evidence to be given, and further that even if there had been an error in allowing the Crown to give evidence in rebuttal instead of in chief it was of no vital importance and "in the absence of some substantial wrong or miscarriage" was cured by former section 746 of the Code (p. 82); Gregory, J. assented on this second ground (p. 90), though dissenting on the first.

In *Pollard's* case, Maclaren, J.A., also said, p. 104, after referring to appellant's counsel's said submission:

> From an examination of the reports of the cases in which for certain offences such evidence has been admitted, it appears that in some of them it was produced as part of the evidence in chief on behalf of the Crown; in others it does not appear clearly from the reports whether it was in chief or in rebuttal; but in none of the cases to which we were referred does the report show, as far as I could find, that it had been in rebuttal.
>
> This point is, however, of less importance, in view of the fact that the time or stage of the trial at which evidence may be admitted is in a great measure in the hands of the trial judge, who has a large discretion in this regard: Roscoe's Criminal Evidence, 13th Ed., p. 123. Also in view of sec. 1019 of the Criminal Code, . . .

That Maclaren, J.A. was then correct in his statement of the way that evidence of this nature had been given in chief is fully borne out by numerous decisions, some of which, *e.g.*, are, *Reg.* v. *Geering* (1849), 18 L.J.M.C. 215 (approved by the Privy Council in *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, wherein the difficulty of applying the principle involved to the particular facts is pointed out at p. 65); *Reg.* v. *Cooper* (1849), 3 Cox, C.C. 547, 549; *Reg.* v. *Gray* (1866), 4 F. & F. 1102; *Reg.* v. *Cotton* (1873), 12 Cox, C.C. 400; *Reg.* v. *Roden* (1874), *ib.* 630; *Reg.* v. *Dale* (1889), 16 Cox, C.C. 703; *Reg.* v. *Rhodes* (1898), 19 Cox, C.C. 182; *Reg.* v. *Ollis*, [1900] 2 K.B. 758, 764; *Rex* v. *Smith* (1905), 20 Cox, C.C. 804; *Rex* v. *Boyle and Merchant*, [1914] 3 K.B. 339, 346-7 ("anticipation"); *Rex* v. *Smith* (1915), 84 L.J.K.B. 2153; *Rex* v. *Lovegrove*, [1920] 3 K.B. 643 (wherein the evidence of a single witness of one prior act was admitted in chief); *Rex* v. *Armstrong*, [1922] 2 K.B. 555 (following *Geering's* case,

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supra); *Rex* v. *Petrisor* (1931), 56 Can. C.C. 389; *Rex* v. *Hamilton,* [1931] 3 D.L.R. 121; and finally the very recent decision of *Rex* v. *Porter* (1935), 25 Cr. App. R. 59, which at p. 65 approves *Cooper's* case, *supra,* and adopts from it the following passage from the judgment of Cresswell, J.:

> The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof is to show that he would be likely to know that a certain result would follow.

On other grounds the conviction in *Pollard's* case was set aside and a new trial ordered, but on the ground now under consideration it has, as already noted, been expressly approved by the Supreme Court, which, it is to be remembered, is now, since appeals to the Privy Council in criminal cases have been abolished, the final Court of Appeal for criminal cases in Canada and the only tribunal whose decisions are binding on us in such cases —*Moore* v. *Attorney-General for the Irish Free State* (1935), 51 T.L.R. 504; and *British Coal Corporation* v. *The King* (1935), *ib.* 508; therefore its relevant reasoning should be applied to this case; and that we should only interfere where the exercise of the discretion respecting the admission of the evidence has resulted in "a real injustice" to the accused and a "miscarriage of justice" appears by the said judgment of Anglin, J. at p. 109, and the citation from *Rex* v. *Crippen* (1910), 27 T.L.R. 69 there given, and from many additional cases, *e.g., Rex* v. *Foster* (1911), 6 Cr. App. R. 196, 198; and particularly, the judgment of Avory, J. *per curiam,* in *Rex* v. *Sullivan,* [1923] 1 K.B. 47 at pp. 57-8.

In the present case, however, we are not faced with that aspect of the matter because the learned judge below did not exercise any discretion but unreservedly rejected the evidence as being inadmissible at any time, being of the said erroneous opinion that it could not be admitted except in rebuttal, and wrongly treated the case as one in which an admission of committing the act complained of had been made, whereas no admission of any kind "of any fact alleged against the accused so as to dispense with proof thereof" was made under section 978 of the Code, or otherwise: on the contrary, the only defence put forward below, as it was put before us, was that the accused "denies that she did it at all," as her counsel stated to us, which is nothing more

or less than persisting in the general issue raised by her plea of "not guilty" which entitles her to raise any one of at least half a dozen defences, which will occur to the experienced criminal lawyer, beginning with an *alibi,* as in *Thompson* v. *Regem,* [1918] A.C. 221, and including others which, in the public interest, I do not mention.

In the face of such an indefinite situation, and under the particular circumstances (which it has been laid down repeatedly govern the proper action to be taken by the trial judge) the Crown counsel was justified in tendering the evidence in chief and the judge could and should in the proper exercise of his discretion have admitted it when so offered, or at least, in his discretion, reserved the question of its admission for later consideration when the defence had been clearly set up or developed to such an extent that it had become apparent what it precisely was, thereby leaving no openings for misunderstanding and confusion (as present herein) or loop-holes for escape: to put the matter in a nutshell, the learned judge, as Lord Justice Scrutton used to say, "struck too quick."

The peculiarity of this case is that while the accused not only made no admissions at all but denied at large all culpability and connexion with the matter, yet some sort of advantage was sought to be gained from the mere statement of her counsel that in the light of such an undefined defence, left *in nubibus* so to speak, the question of innocent or guilty intention did not arise, but that is merely begging the question because until the defence was clearly set up and defined either by unequivocal admissions or by evidence, it was impossible for the prosecution to know what the real defence was that it had to meet and forestall if necessary. This omission, either by inadvertence or design, placed the prosecution and the Court in a position so very unusual (and also unsatisfactory) that in none of the many cases that I have consulted have I been able to find anything like it: in all of them the exact defence had been stated and founded on definite admissions or the evidence of the accused, or both, as, *e.g.,* in *Brunet's* case, *supra,* and *Perkins* v. *Jeffery,* [1915] 2 K.B. 702 (much relied upon by respondent) wherein the evidence of the accused, setting up mistaken identity, is given at p. 704, and the statement of his counsel thereupon at p. 705, that "his defence

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throughout was that the prosecution had arrested the wrong man," and on that sole question of identity the judgment was based as pointed out in *Rex* v. *Armstrong, supra,* where the decision is explained and restricted at p. 566; and at p. 565 the important statement is made, *viz.*:

> Now, in the opinion of the Court, an intimation given by counsel at an early stage of the case as to the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tended to prove design must of necessity tend to negative accident and suicide. . . .

But in the present case not even an "intimation," of any definite or practical value, that the prosecution could "rely" on was given.

In this connexion *Lovegrove's* case, *supra,* is of importance, because though the defence therein was "a complete denial of the allegations of the prosecution," p. 645-6, yet evidence of a prior illegal operation on another woman (Mrs. Type) was given in chief, and though it was "definitely denied" by the accused yet under the circumstances the Court of Appeal, *per* Lord Reading, C.J., affirmed the conviction, saying, p. 647:

> In our opinion Mrs. Type's evidence tended to prove that Purcell's account of what took place at the first interview was true, and that the appellant's version of the interview was untrue; it also tended to prove that Purcell did take his wife to the appellant's house in the evening of the same day for the purpose of having an illegal operation performed by the appellant.
>
> The evidence was, therefore, rightly admitted, and this ground of appeal fails.

It is noteworthy that the same Court in *Rex* v. *Smith* (1915), *supra* (well known as the "Brides in the Bath" case) had before held that the prosecution in a murder case could, after establishing a *prima facie* case, "reinforce" it by giving evidence in chief that the accused had already killed two other women in the same way, by drowning them in a bath, saying, p. 2156:

> Here the evidence relating to the deaths of the two women, Burnham and Lofty, was admitted on the ground that it tended to show that the appellant was guilty of the act with which he was charged—namely, the murder of Mundy. It is sufficient for the purposes of this case to say, with regard to this point, that it has not been disputed, and could not have been disputed, by counsel for the appellant that, if as a matter of law there was *prima facie* evidence that the appellant had committed the murder of Mundy, the evidence relating to the deaths of the two other women thereby

became admissible. In our opinion there was such a *prima facie* case, apart altogether from the evidence relating to the deaths of Burnham and Lofty. Viewing the case solely upon the evidence relating to the death of Mundy, we are of opinion that there was a case which the judge would have been bound in law to have submitted to the jury for their decision. That case was reinforced by the evidence relating to the deaths of the other women. In our judgment the evidence was properly admitted, and the judge was careful to point out to the jury the use that could properly be made of it. That being so, this point fails.

This was the ruling upon the appeal and argument of distinguished counsel, p. 2155, that "the evidence should not have been admitted [because] no defence, such as accident, to rebut which the evidence might have become admissible, had been indicated," and *Perkins* v. *Jeffery, supra,* was among the cases relied upon, as it was herein. In a case, like the present, without a jury, the judge would, of course, direct himself on "the use that could properly be made of it."

In *Pollard's* case, *supra,* also, the accused gave evidence on their own behalf denying the charges, but in *Hamilton's* case, *supra* (also a non-jury trial) he did not do so, which led Middleton, J.A. to remark, p. 131:

> Upon the evidence accepted by the trial judge as credible, the guilt of the accused seems clearly proven, and there is no evidence to the contrary as the prisoner himself did not choose to deny his guilt.

In the case at Bar, the learned judge dismissed the charge, on motion by the accused's counsel, without having any denial by the accused (or any evidence at all on her behalf), of the truth of the evidence given against her by Mrs. Sinclair, which, unless it were for good cause rejected as unworthy of belief, completely established the Crown's case, because, as was said in *Brunet's* case, p. 96, it

> furnished cogent proof of a miscarriage having followed the use by the defendant upon [her] person of instruments adapted to procure it . . .

The result is that the case for the Crown not only still stands uncontradicted, but we still do not know what the defence was, and, with every respect, I find myself unable to follow the reasons for judgment wherein, be it noted, there is no suggestion that Mrs. Sinclair was in any way an unsatisfactory witness.

I can only gather from his reasons (which, with respect, I find obscure in essentials) that the learned judge seemed to lay undue stress, under the circumstances, upon a lack of corroboration (which even viewing the complainant as an accomplice is

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not necessary though desirable, assuming there was none) and to have been mistakenly affected, in the way he describes, by the mere fact that said evidence had been tendered even though he rejected it.

Under all the circumstances of this very unusual case the proper course, in my opinion, for us to take to remedy the miscarriage of justice that has occurred, is, under section 1013, subsections 4 and 5, to allow the appeal from the judgment of acquittal, to set the same aside, and to direct a new trial.

MCPHILLIPS, J.A. would direct a new trial for the reasons given by MARTIN, J.A.

MACDONALD, J.A.: The charge was that "with intent to procure the miscarriage of a woman" the accused did "unlawfully use an instrument." The Crown submitted evidence of similar acts alleging that on previous occasions instruments were used by the accused on other women with like intent. The trial judge, however, rejected this proffered evidence and acquitted the accused.

The governing principles were discussed in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57 and other cases and the only difficulty arises in their application to the facts of each case. Mr. *Maclean* submitted that as the only defence was whether or not the accused as a physical fact used an instrument as alleged no question of "intent" or "design" could arise. If she adopted as a defence the plea that the instrument had been used, but only for an innocent purpose, then evidence of similar acts might he submitted be admitted to rebut it, but not otherwise.

More, however, is involved in the charge than the simple question of deciding a physical fact. It is part of the Crown's case, whatever may be the attitude of the accused when called upon to defend, to show "intent" and the "unlawful" use of an instrument. Any evidence, therefore, bearing on intent, design or unlawfulness is part of the *res gestæ*. The accused is not a medical practitioner and although it is unlikely that an instrument would be used by her except for the sole purpose of producing a miscarriage it is still conceivable that it might be honestly used, however mistakenly, to relieve a local condition

of an innocent nature wholly disassociated with pregnancy. "Intent" and "design" therefore being a necessary element in establishing guilt any evidence disclosing it is admissible in the original presentation of the case by the Crown. It is not necessary to withhold it until the defence puts forward a case of innocent or lawful purpose. It is always, as pointed out by Idington, J. in *Brunet* v. *Regem* (1918), 57 S.C.R. 83 at p. 85, "the particular circumstances of each case" that determines "whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal."

While, therefore, the use of an instrument on a single occasion might be consistent with innocent purpose it is so improbable that such occasions would repeatedly arise that evidence of similar acts may be received to show unlawful use and purpose. Repeated use tends to make it more probable that the "intent" or "design" was of a criminal nature. "Intent" is a state of mind beyond the reach of direct evidence. Facts may therefore be adduced from which it may be inferred. It follows that it is evidence relevant to an issue in the case, and, as often pointed out, the mere fact that it tends to show the commission of other crimes is not material. It tends also to show a system or course of conduct on the part of the accused negativing honest purpose on her part.

I would direct a new trial.

McQUARRIE, J.A. agreed that there should be a new trial for the reasons given by MARTIN, J.A.

New trial ordered.

Solicitor for appellant: *M. B. Jackson.*
Solicitor for respondent: *H. A. Maclean.*

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Sept. 16, 23.

REX v. WASHINGTON.

Criminal law—Vagrancy—Information—Description of offence—Sufficiency —Criminal Code, Secs. 238 (f) and 239.

Section 238 of the Criminal Code provides: "Every one is a loose, idle or disorderly person or vagrant who, . . . (*f*) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing," etc.

An information recited "that J. B. Washington . . . did unlawfully cause a disturbance in a public place by swearing contrary to section 238, subsection (*f*) of the Criminal Code of Canada."

Held, that the information discloses an offence which on proof is punishable by section 239 of the Code.

MOTION by accused that an information does not disclose an offence. The facts are set out in the reasons for judgment. Heard by ELLIS, Co. J. at Vancouver on the 16th of September, 1935.

Nicholson, for the motion.

Donaghy, K.C., for the Crown. *Cur. adv. vult.*

23rd September, 1935.

ELLIS, Co. J.: Counsel for the accused objects to the information, alleging that it does not disclose an offence.

The information says " . . . that J. B. Washington . . . did unlawfully cause a disturbance in a public place by swearing contrary to section 238, subsection (*f*) of the Criminal Code of Canada."

Section 238 says: [already set out in head-note.]

During the interesting and comprehensive argument that followed counsel for both the Crown, and for the accused, relied on the same case, namely, *Rex* v. *Jackson* (1917), 40 O.L.R. 173. Each was justified in doing so as each can quote judicial authority from that case in support of his contention.

The point which I have to decide is simply this: Is the offence for which a punishment is provided by section 239 of the Code, the offence of being a loose, idle or disorderly person, or vagrant or the offence of doing one or another of the things mentioned

and set out in subsections (*a*) to (*j*), the doing of which brings the person so doing within the definition of a loose, idle or disorderly person or vagrant.

I have read carefully the judgments in *Rex* v. *Jackson, supra,* dealing with the issue before me and must at once confess that I am unable to follow the conclusions arrived at in later decisions. It appears to me, with great deference, that the disposition has been to follow the decision of Rose, J. without giving consideration to the judgment of Meredith, C.J.C.P. This may be due, to some extent, to the manner in which the reporter set out and arranged the head-note.

Dealing with the point at issue, Meredith, C.J.C.P. says at pp. 185-6:

> The whole description of the offence is that, on the 28th day of February, 1917, Elsie Jackson unlawfully was a loose, idle, or disorderly person, being a common vagrant. Not a word is said about the real character of her offence, nor is the clause under which she was prosecuted and convicted referred to, although there formerly were 12 clauses, and now are 10, of the same section, each covering an entirely different character of offence. It is true that the section provides that: "Everyone is a loose, idle or disorderly person or vagrant" who commits any of the offences set out in the clauses; and that sec. 239 provides that: "Every loose, idle or disorderly person or vagrant is liable on summary conviction, to a fine not exceeding $50 or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both: . . . " but the first principles of the administration of justice in criminal cases make it plain that the real offence with which a person is charged shall be set out; that there must be certainty as to the offence charged, certainty as to the offence tried, and certainty as to the offence of which the accused person is convicted or acquitted: . . . and how can there be any kind of certainty in a charge of being a loose, idle or disorderly person or vagrant, and when such a description, if it do not cover quite a multitude of sins, does cover 10 now, 12 formerly, of these widely different characters: no visible means of support; . . . disorderly conduct; . . . The clause (*i*) describes her offence; and, as a loose person, sec. 239 provides for her punishment. . . . But it can hardly be needful to pursue this elementary matter further; except to point out that the contention that the conviction describes the offence in the words of the enactment creating it is manifestly erroneous; the words of the Act which make the appellant a criminal wrongdoer are the words of clause (*i*)—without them there is no offence: the first words of the section may give her the name of a loose person, and sec. 239 may provide for her punishment under that name, but the only description of her offence is that contained in clause (*i*).

So much for Meredith, C.J.C.P.

Rose, J., at p. 191, says:

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After a great deal of hesitation, I have reached the conclusion that the offence for which a punishment is provided by sec. 239 of the Criminal Code is, as was held by the learned Chief Justice of the King's Bench, the offence of being a loose, idle, or disorderly person or vagrant, and not the offence of doing one or another of the things the doing of which brings the person doing it within the definition in sec. 238 of a loose, idle, or disorderly person or vagrant. This seems to me to be the literal meaning of the two sections referred to; and, while it is against some of the decisions cited I do not think it is contrary to the Ontario authorities.

In *Rex* v. *Buhay* (1929), 52 Can. C.C. 263, Garrow, J. follows Rose, J. but does not appear to have given any consideration to the judgment of Meredith, C.J.C.P. The same may be said of the decision in *Rex* v. *Fleury* (1933), 60 Can. C.C. 32.

I have quoted extensively from the decision of Meredith, C.J.C.P. in the *Jackson* case. It cannot be denied that he and his brother judge, Rose, J., do not come to the same conclusion. Rose, J. admits, however, he arrives at his decision after a great deal of hesitation.

I am very strongly of the opinion that the reasoning of Meredith, C.J.C.P. is correct, that his conclusions are more consonant with the words of the Code, and that therefore the information does disclose an offence which on proof is punishable by section 239 of the Code.

Mr. *Nicholson's* motion is therefore refused and Mr. *Donaghy's* application to amend is allowed.

Motion refused and application to amend allowed.

FENTON v. HASKAMP.

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Sept. 26; Oct. 3.

Male Minimum Wage Act—Wages—Occupation—"Construction industry"—Interpretation—Board of Industrial Relations—Clause 1 of order 12—R.S.B.C. 1924, Cap. 193.

Clause 1 of order 12 issued by the Board of Industrial Relations provides "That where used in this order the expression 'construction industry' includes construction, reconstruction, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gaswork, waterways, or other work of construction as well as the preparation for or laying the foundations of any such work or structure."

Any labourer coming within the order is entitled to 40 cents per hour for the time he worked.

The plaintiff, a labourer, was engaged by the defendant in the construction of a building for which he was to receive $1.50 per day of seven hours. The work included carpentry work and painting.

In an action under the Minimum Wage Act for 40 cents per hour for the time he worked:—

Held, that painting does not come within the terms of clause 1 of order 12, and the plaintiff is entitled to 40 cents per hour for the work he did in actual construction of the house, but he is only entitled to $1.50 per day while engaged as a painter.

ACTION for additional wages under the Male Minimum Wage Act. The facts are set out in the reasons for judgment. Tried by ELLIS, Co. J. at Vancouver on the 26th of September, 1935.

Layton, for plaintiff.
L. H. Jackson, for defendant.

Cur. adv. vult.

3rd October, 1935.

ELLIS, Co. J.: The plaintiff, who describes himself as a labourer, was engaged by the defendant in the construction of a building for the defendant at Garden Bay in the Province of British Columbia. The plaintiff was to receive $1.50 per day of 7 hours for the work he did, which work was to consist in helping to erect a building for the defendant and was to include carpentry work, painting, etc. There was no dispute as to the facts. The defendant, in fact, did not appear in person at the trial and gave no evidence but was represented by counsel.

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After the work was finished the defendant was advised when he came to Vancouver that he was entitled to more than he received by virtue of the provisions of the Male Minimum Wage Act and orders made thereunder. While the balance sued for is small, the principle involved is an important one. The plaintiff relies on order No. 12 issued by the Board of Industrial Relations and dated 28th September, 1934. Clause 1 of the order reads as follows: [already set out in head-note.]

If the plaintiff comes within the order he is undoubtedly entitled to 40 cents an hour for the time he worked. The neat point is whether the plaintiff is entitled to receive 40 cents an hour for the time he actually did painting on the house in question. In other words, does painting come within any of the words used in clause 1 of order No. 12. It seemed to be common ground on the part of counsel for both plaintiff and defendant that there has been no order issued by the Board of Industrial Relations relating to painting and I must, therefore, hold that there is no such order. It seemed to be conceded that if a painter were engaged to do work on a building already constructed the person engaging him could pay any price agreed upon between them and would not be liable to the provisions of the Male Minimum Wage Act. If this is so and the contention of counsel for the plaintiff is correct, *i.e.*, that painting comes within the terms of clause 1 of order No. 12 it creates the anomalous position that a painter cannot claim the provisions of the Act if he does work on a building already constructed but can claim it if he does painting and other work during the construction of a building. I agree with the contention of counsel for the defendant that the Act is a penal Act and the employer under some conditions may suffer a term of imprisonment. This punishment may arise on summary conviction but could not be invoked in a civil action where the employee is claiming wages under the Act. This, however, cannot in my opinion affect the principles which must be employed in construing the Act. It, being a penal Act, must be construed strictly and I am not satisfied that painting comes within the terms of clause 1 or order 12. If the Board of Industrial Relations intended that a painter comes within the order it should have said so in clear and unequivocal language.

The case of *Davenport* v. *McNiven* (1930), 42 B.C. 468, relied on so strongly by counsel for defendant, does not consider the issue raised in the case at Bar. The question is not one as to whether painter comes under the term "occupation," on which there can be no doubt, but whether clause 1, order 12, of the Board can be held to embrace the work done by painters. The plaintiff is, therefore, entitled to be paid at the rate of 40 cents an hour for the work he did for the defendant in the actual construction of the house and be paid the contract price, *viz.*, $1.50 per day, during the hours he was engaged as a painter. Judgment accordingly.

Judgment accordingly.

TIBBITS v. TIBBITS.

Divorce—Wife's petition—Order making woman charged a respondent—Costs—R.S.B.C. 1924, Cap. 70, Sec. 13.

On an application in a wife's suit for divorce, that a married woman with whom the husband is alleged to have committed adultery, be made a respondent so that if the petitioner is successful, an order for costs may be made against her:—

Held, that all that is necessary in the way of material upon which the Court may exercise its discretion, is to show that there is a claim for costs in the petition and that a copy of the pleadings has been served on the woman.

Held, further, that it is no longer necessary to allege she has separate estate.

APPLICATION by the petitioner in a divorce action for a direction that Mrs. D., with whom it is alleged her husband committed adultery, be made a respondent under section 13 of the Divorce Act. Heard by ROBERTSON, J. in Chambers at Vancouver on the 11th of September, 1935.

Dickie, for petitioner.
McKenna, for intervener.

Cur. adv. vult.

14th September, 1935.

ROBERTSON, J.: The petitioner applies under section 13 of

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the Divorce Act for a direction that Mrs. D. with whom, it is alleged, in the petition, her husband committed adultery, be made a respondent, so that, if the petitioner is successful, an order for costs may be made against her. In her petition the petitioner asks that Mrs. D. be ordered to pay costs.

In accordance with rule 17, a sealed copy of the pleadings was delivered to Mrs. D. Section 13 empowers the Court to make the order asked for "if it sees fit." It is submitted that the order should not be made on two grounds: (1) That no material has been filed upon which the Court may exercise its discretion in making such order and (2) that the order should not be made unless it is first shown that Mrs. D. has separate estate. I think the material is sufficient. I do not think it is necessary for the petitioner to show more than the claim for costs in the petition and the service of the copy of the pleadings on Mrs. D. The practice on this point is set out in England in Brown & Latey on Divorce, 11th Ed., 529. Apparently nothing is required there, except the summons, since the Married Women's Property Acts. In an action against a married woman, it is no longer necessary to allege she has separate estate. The order will go as asked. Costs reserved to the trial judge.

The respondent raised a preliminary objection, *viz.*, that the notice of motion was not in accordance with the Form No. 18, Appendix B, and he cited in support thereof *Barker* v. *Jung* (1918), 26 B.C. 352. In that case, it was clear, that the notice was not a notice of motion at all. The notice of motion in this case reads as follows:

> TAKE NOTICE that this Honourable Court will be moved in Chambers by counsel on behalf of the above-named petitioner (at the hour of 10:30 o'clock in the forenoon or so soon thereafter as counsel may be heard) on Wednesday the 11th day of September, 1935, at the Court House, City of Vancouver, for an order.

Plaintiff's counsel says the words "in Chambers" were put in to describe the place, in the Court House, where the motion was to be made, *viz.*, in the Chamber Court room. However this may be, I think the words "in Chambers" may be treated as mere surplusage and the notice of motion, with these words left out, is substantially according to the form in the Schedule. I therefore rule against the preliminary objection.

Application granted.

RICHARDS v. HANSON AND HANSON.

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Sept. 3, 12.

Landlord and tenant—Chattel mortgage—Provision for seizure if feeling of insecurity by mortgagee—Bailiff—Collection agency—Collection Agents' Licensing Act—B.C. Stats. 1930, Cap. 31, Sec. 4—Applicability—Lease—Wrongful cancellation.

A chattel mortgage provided that if the mortgagee should feel unsafe and insecure or deem the goods and chattels thereby covered in danger of being sold or removed, then it shall be lawful for him to seize said goods and chattels; there was also the right to seize on any default in payment, and the mortgagee was authorized on a seizure being made to sell the goods and retain "such moneys as may be due" plus expenses incurred; there was also the provision that on default in payment the mortgagee would become absolute owner of the goods in law apart from equity.

Held, that the right to seize because of a feeling of insecurity was not dependent upon there being a default in payment at the time of the seizure, but was a power separate from and independent of the powers arising on such default.

Where one acts as a bailiff on a single occasion he is not being "engaged in the business of a collection agent" within the meaning of section 4 of the Collection Agents' Licensing Act.

ACTION for wrongfully seizing and taking possession of the plaintiff's stock-in-trade and fixtures and converting same to his own use and depriving the plaintiff of use thereof, for damages for assault and for damages for cancellation of lease. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 3rd of September, 1935.

J. W. deB. Farris, K.C., for plaintiff.
Nicholson, and *Denis Murphy,* for defendants.

Cur. adv. vult.

12th September, 1935.

MURPHY, J.: The defendant Hanson owned and operated a store at Penticton, B.C., known as the "Variety Store." The store had lost money—not any large sums but continuously from January, 1934. The premises in which the business was carried on were owned by the defendant, Mrs. Hanson, who rented them

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to her husband at $40 a month. On September 10th, 1934, defendant Hanson sold the business to the plaintiff for $2,428. Plaintiff paid $500 cash and executed a chattel mortgage covering the stock-in-trade and fixtures for the balance of $1,928, payable $100 on October 31st, 1934, and $100 on the 31st day of each and every month thereafter. The fixtures had cost defendant Hanson about $750 but their sale price to the plaintiff was $350. On the same day defendant, Mrs. Hanson, executed a lease of the premises to the plaintiff for three years at a rental of $40 per month payable in advance, the first payment to be made on September 10th, 1934, and thereafter on the 10th of each and every month. After plaintiff had made the cash payment of $500 he was short of funds and was unable to pay the first month's rental to defendant Mrs. Hanson until some two weeks after the due date. Defendant Hanson was aware of this fact. On taking over the business plaintiff redecorated the premises and altered some of the fixtures and had others made. He expended over $400 in this connection. The business was what might be called a notion store. A large percentage of the stock consisted of articles, the sale price of which ranged from 5 cents to 25 cents. At the time of the seizure hereinafter spoken of 50 per cent. of plaintiff's stock-in-trade was goods of this character. The best business months for such a store are November and December because of the Christmas trade. The business did quite well in November and December but in January it fell off materially. Plaintiff that month was unable to pay his rent until over two weeks after the due date. Defendant Hanson was aware of this. Plaintiff, however, made his monthly payments on the chattel mortgage regularly as they fell due. In February he had defendant attend at the bank in an endeavour to have the payments modified but no change was made. In January defendant Hanson asked plaintiff for an inventory of his stock-in-trade. Plaintiff stated he did not have one. Defendant Hanson insisted that plaintiff should take one. Eventually plaintiff did so. In taking it, however, he did not put his stock-in-trade in at cost price, which I think is the usual custom followed by merchants. Instead he took the sales price and deducted therefrom a percentage thereof representing his write-up, *i.e.*, the difference between the cost to him and the price

at which he proposed to sell the goods. It was contended on defendant Hanson's behalf that the result of so doing was to make the inventory show goods on hand of greater cash value than was actually the case. Whilst this is probably so to some extent I do not regard it as a factor of particular importance in the case.

In February plaintiff put on a ten day nine cent sale. His financial position at the beginning of March was that he owed approximately $1,000 in addition to the amount accruing due under the chattel mortgage. Of this $1,000 something more than one-half was owing for goods purchased for the business. There is no evidence that defendant Hanson was aware of this indebtedness. Plaintiff swore that if hard pressed he could get money from his parents.

When the March rent became due plaintiff gave to the defendant Mrs. Hanson a cheque for $40. She took it to the bank to cash it. On presenting it, the teller, instead of giving her the money, went into the manager's room with the cheque and only paid it on his return to the teller's box. Defendant Mrs. Hanson told this to defendant Hanson. He inferred that what occurred in the bank showed that the cheque over-drew plaintiff's account. This was in fact the case.

Early in March plaintiff heard that F. W. Woolworth Co. Ltd. intended to open a store in Penticton in which would be sold articles priced from 5 cents to 25 cents. Plaintiff felt that he could not compete with F. W. Woolworth Co. Ltd. He accordingly put an advertisement in the "Herald Shopping News," a Penticton advertising medium, which was circulated *gratis* in the town, announcing a complete close-out sale of all small wares in his 5 to 25 cents department. It was stated in the advertisement that he did not intend to go out of business but that owing to the F. W. Woolworth Co. Ltd. opening a store in Penticton he had to make a complete change in his business policy. A copy of this advertisement was delivered at defendant Hanson's house on March 15th. Hanson read it. The next day he went to plaintiff's store. He found it crowded with customers and the shelves being rapidly depleted of goods. Numerous placards hung in the store, one of which (Exhibit 13) read "Entire stock out on sale." Plaintiff had engaged a sales expert to conduct the

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sale and had hired four extra clerks. Defendant Hanson interviewed plaintiff with regard to what was going on. There is a conflict of evidence as to what was said between them. I do not accept plaintiff's statement that he told defendant Hanson that he was selling out his small wares intending to replace them with new stock that would sell at a price above 25 cents and that defendant Hanson agreed to his doing so. On the contrary I hold that defendant Hanson was seriously perturbed about his security and that the conversation between him and the plaintiff was so unsatisfactory as to materially increase his fears with regard to the money secured by the chattel mortgage. The facts were that on that day 50 per cent. of plaintiff's entire stock was in small articles, the selling price of which would range from 5 cents to 25 cents, and that plaintiff sold on that one day $335 worth of goods, 65 per cent. of which consisted of such small articles and 35 per cent. of wares selling at larger prices. No part of this $335 was paid or offered to defendant Hanson. March 17th was a Sunday. Early Monday morning, March 18th, defendant Hanson went to Summerland to see his solicitor, Mr. *Kelley,* and laid the situation before him. *Kelley* gave defendant Hanson Exhibit 6, which is a warrant to a bailiff to seize plaintiff's stock-in-trade under the chattel mortgage, and also Exhibit 7, which is a notice from the bailiff to plaintiff of the fact of such seizure. The notice further stated that in default of payment of the sum then due under the chattel mortgage, *viz.,* $1,428, and expenses the goods and chattels so seized would be realized upon according to law. *Kelley* had inserted in these documents the name of one Laird, as bailiff. Defendant Hanson asked *Kelley* whether in case he could not find Laird he might insert in Exhibits 6 and 7 the name of one Adams and *Kelley* told him he could do so. Strictly speaking this conversation is not evidence but its admission is immaterial and it explains why the name of Laird is stricken out and that of Adams inserted in Exhibits 6 and 7. Armed with these documents defendant Hanson returned to Penticton. He could not find Laird and went to interview Adams. Adams is a carpenter who has followed that trade for 30 years with the exception of two years many years ago during which time he acted on the police force of Vernon and I think there was one other comparatively

short interval when he was not following his trade. Adams was unwilling to act as bailiff but was eventually persuaded to do so. He had never acted in that capacity before. Adams and defendant Hanson drove to the office of Magistrate Gourley from whom they enquired whether Adams would require to have a licence to act as bailiff and were informed he would not. They then drove to plaintiff's store. The sale was in progress and some 15 customers were present. Defendant Hanson left Adams outside in the car whilst he went into the store and had another short conversation with plaintiff. Again there is a conflict of evidence as to what was said but I hold that the conversation was of such a character as to confirm defendant Hanson in his feeling that he was unsafe or insecure with regard to the balance of the money due him and secured by the chattel mortgage and in his feeling that the goods thereby covered, or a large part of them, were in danger of being sold or removed by the sale then going on. He came back to the door, called Adams in and put him in charge of the stock-in-trade. He made an attempt at the trial to show that he had made the seizure himself and that Adams was acting merely as his agent. He took this attitude, I think, because he had in some way become aware of the provisions of the Collection Agents' Licensing Act, B.C. Stats. 1930, Cap. 31. I hold, however, as a fact, that he did appoint Adams as his bailiff and that Adams so acted and made the seizure himself as such bailiff. Plaintiff thereupon left the premises which were closed for the week. During this time Adams and defendant Hanson took an inventory of the goods then on hand (Exhibit 12). This shows the cost price of goods seized to be $932.91. I find this to be a correct inventory and properly made. In addition the fixtures were seized. There was a conflict of evidence as to their value. In my opinion their outside realizable value did not exceed $400. As the amount secured by the chattel mortgage was for $1,428, it follows that, in my opinion, when the seizure was made, had the stock-in-trade and fixtures been sold, the proceeds would have been less than the amount so secured. By Exhibit 7 plaintiff had been given five days within which to pay the $1,428 and had been notified that after the lapse of that time Adams, the bailiff, would proceed to realize on the seized goods and chattels according to law. Defendant

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Hanson seems to have thought that after the five days had elapsed plaintiff would have no further interest in the goods and chattels. On Saturday, the sixth day after the seizure, the store being still closed to the public, plaintiff, who had kept in his possession a key to the premises, unlocked the front door and walked in. Hanson was in the store with two girl clerks. Again there is a conflict of evidence as to what occurred. I find that Hanson seized plaintiff by the arm, marched him to the front door, which Hanson unlocked (the lock being a spring one) and pushed him out. No blows were struck and I doubt that any were threatened either by words or gesture. I hold that defendant Hanson thereby committed an assault upon plaintiff. I hold further, however, that in so assaulting plaintiff he was not acting as an agent for defendant Mrs. Hanson with a view to evicting plaintiff from the premises. I hold this assault had no connection with the attempted cancellation of the lease by defendant Mrs. Hanson, to be hereafter spoken of. The defendant Hanson, in my opinion, put plaintiff out of the store because he thought that plaintiff, the five days' grace having elapsed, had no further right in the stock-in-trade and that he ejected him not because he wished to obtain possession of the premises for defendant Mrs. Hanson but because he felt that plaintiff had no longer any legal right to meddle in any way with the stock-in-trade or even to discuss that matter further with him. On the same day, March 23rd, defendant Mrs. Hanson mailed to plaintiff Exhibit 8, being a notice purporting to cancel the lease she had given to plaintiff for three years of the premises in which the store business referred to had been carried on. She sent this notice because she had read the lease and had found therein a clause to the effect that if the term thereby granted should at any time be seized or taken in execution the lease would be forfeited and void. She did not take legal advice but interpreted this clause to mean that because of the seizure under the chattel mortgage the lease had been forfeited. She discussed this matter with the defendant Hanson, her husband, and he agreed with her view. It was he who mailed the notice. Of course this was an entirely erroneous view of the legal effect of the clause.

Adams, the bailiff, did not proceed to realize on the goods and chattels. Apparently he dropped the matter after the five days

were up and left defendant Hanson in possession. Defendant Hanson has carried on the business since and states he has not yet realized upon all the goods and chattels seized from plaintiff and that he will be in a position to account to the plaintiff for the realization of said goods and chattels as soon as such realization has been completed.

The foregoing statements embody my findings of facts herein.

The pleadings set up what are in reality three distinct and separate causes of action but as they are closely related it was desirable that they should be all tried at once. In deciding the matter, however, they must be dealt with *seriatim*.

The first action is by the plaintiff against the defendant for wrongfully seizing and taking possession of plaintiff's stock-in-trade and fixtures and converting same to his own use and depriving plaintiff of the use thereof. The defendant Hanson admits the seizure but maintains that it was authorized by the terms of the chattel mortgage. The case on this phase depends first on the construction of the document constituting the chattel mortgage. There was no money due under its terms at the time the seizure was made but the chattel mortgage provides that in case defendant Hanson "shall feel unsafe or insecure or deem the goods and chattels thereby covered in danger of being sold or removed then it shall be lawful for him to seize said goods and chattels." I find that defendant Hanson did *bona fide* feel unsafe and insecure and that he did deem that a large part of said goods and chattels were in danger of being sold or removed and I hold further that he was justified in these beliefs though I do not think this latter finding necessary to render the seizure lawful. It is argued on behalf of the plaintiff that the right to seize because of a feeling of insecurity is dependent upon the proviso that there should be some default in payment and admittedly no default existed at the time of the seizure. I do not so read the chattel mortgage. The power to seize because of feeling unsafe or insecure is, I think, a separate and independent power conferred upon defendant Hanson irrespective of whether or not there had been any money default under the chattel mortgage. If this is not so then the words as to seizing because of a feeling of insecurity must be treated as surplusage since the document unquestionably gives a right to seize on any default in payment

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occurring *simpliciter*. I think the rule of construction is that effect must be given to all words in a document when it is possible to do so without doing violence to other provisions contained therein. It is urged that the view above stated cannot be correct because the document provides that on seizure being made the defendant Hanson is authorized to sell and retain only "such money as may be due" by virtue of the chattel mortgage plus expenses incurred by him and is bound to pay over any balance to plaintiff. It is to be noted, however, that defendant Hanson, whilst he is empowered to sell, is not compelled to do so. In answer to this it is argued that the document provides that it is only in the case of default of payment of money due under the chattel mortgage that defendant Hanson becomes owner of the goods in law whatever may be said of such proviso in equity. Full effect, I think, can be given to all the language of the chattel mortgage by holding that defendant Hanson is thereby authorized, if he *bona fide* feels unsafe or insecure, to seize and hold the goods and chattels as a pledge. Possibly he could not sell them nor would he thereby become absolute owner thereof in law apart from equity, as the proviso states would be the case if there had been default in payment, but he would have the right to retain possession until he was paid off. When and so soon as money default took place he could proceed to sell the goods under the other power to that effect contained in the chattel mortgage. If after seizure, and before there was any money default he proceeded to sell the goods, it is possible that plaintiff might have a cause of action for his so doing but that is not the case at Bar and was not gone into at the trial and so does not call for decision by me. I am fortified in my view of the case by the decision in *Ex parte National Guardian Assurance Company. In re Francis* (1878), 10 Ch. D. 408, at p. 412; 40 L.T. 237. The language in the deed construed in that case is quite similar though not identical with the language in the chattel mortgage under consideration. Here, as there, the mortgagee became the legal owner of the goods. There is no proviso in the chattel mortgage here that plaintiff shall be entitled to retain possession of the goods until default but such proviso would, I think, on the facts, be inferred: *Bingham* v. *Bettinson* (1879), 30 U.C.C.P.

438. The consequence is that, as the matter is put in the *National* case, *supra* (p. 413):

> The mortgagees became the legal owners of the goods, and as such would have the right to take possession of them. . . . That is to say, the mortgagor had a kind of term in the goods granted to him by way of a charge upon the absolute ownership of the mortgagees. But in the same deed there is an express provision enabling the mortgagees, on the happening of a number of different contingencies, to take possession of the goods and to sell them.

In the case at Bar it is questionable whether there is power to sell where there has been no default in payment until such default took place subsequently (despite the express authority given in the document to sell on seizure being made) because of the provisions as to disposal of the proceeds of such sale but, as already pointed out, that is not the cause of action set up here and that phase of the case was not gone into at the trial. In support of the view that what is said above expresses the real effect of the chattel mortgage, it is to be noted that by one of its provisions the plaintiff put defendant Hanson in full possession of the said goods and chattels by delivering to him the chattel mortgage in the name of all the said goods and chattels at the sealing and delivery thereof. I hold, therefore, that the seizure was authorized by the terms of the chattel mortgage. Then it is objected that the seizure was unlawful because it was made by Adams, as a bailiff, who admittedly held no licence under the Collection Agents' Licensing Act and that he was therefore a trespasser *ab initio*. This statute was before the Supreme Court recently in *Shadin* v. *David Spencer Ltd.*, 50 B.C. 55; [1935] 1 W.W.R. 693, but the point that comes up in the case at Bar was not passed upon. The business of a collection agent is by section 2 of the Act defined as meaning:

> . . . the business of collecting debts for others, and includes the offering or undertaking to collect debts for others, the soliciting of accounts for collection, and the business of doing such work, either in whole or in part, as is ordinarily done by bailiffs.

Section 4 (1) provides that:

> No person shall within the Province engage in or advertise himself as engaged in the business of a collection agent in this Province, or in any way hold himself out as so engaged, unless he is the holder of a collection agents' licence under this Act.

In order that a person may be found guilty of contravening the Act, therefore, it must be shown that he engaged or advertised himself as engaged in the business of a collection agent. On the

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facts found by me I do not think that Adams in acting on a single occasion as a bailiff contravened the Act. Had he been summoned under it, in my opinion, on the facts, as found, he must have been acquitted. He did not engage in the business of a collection agent when he on a single isolated occasion acted as a bailiff. It is true that he was occupied in the matter for a period of five days but that resulted only from his making a single isolated seizure. If Adams did not contravene the Act he was not a trespasser *ab initio* when he made the seizure. I hold that the seizure was legal and that this cause of action fails.

I hold that defendant Hanson did commit an assault upon the plaintiff. Such assault, however, was not of a serious character. I assess the damages at $50. I hold that the plaintiff is entitled to succeed against defendant Mrs. Hanson on his claim for damages for cancellation of the lease. It is argued on her behalf that the pleadings allege only a breach of the covenant of quiet enjoyment and eviction and that in consequence the action must be dismissed because there was no eviction and because there was no physical interference with plaintiff's enjoyment of the premises. Whilst this is true, so far as the prayer for relief is concerned, in paragraph 15 of the statement of claim there is an allegation that defendant Mrs. Hanson wrongfully terminated the demise herself which, in my opinion, amounts to an allegation of breach of contract. Plaintiff then, I think, had the legal right to take her at her word and to sue her for damages: *J. A. McIlwee & Sons* v. *Foley Bros., Welch & Stewart* (1915), 22 B.C. 38. It is argued that plaintiff did not so elect because he kept the key to the premises. I think, however, this is but one fact to be considered in deciding whether he did or not. The fact that he brought action for damages within two days of the receipt of the notice is, I think, conclusive. Defendant Mrs. Hanson attempted to remedy the situation by acknowledging her error in her pleadings. She did not, however, pay into Court any damages. The measure of damages is, I think, the loss to the plaintiff because of the cancellation. There was no evidence adduced that plaintiff could sublet the premises at any higher rent than that reserved by the lease assuming that the lease permitted him to do so. Inasmuch as I have held the seizure by defendant Hanson of the stock-in-trade to have been legal, in my opinion,

the continuance of the lease would have been a burden rather than a benefit to the plaintiff since admittedly he was in no position to pay off the balance due and redeem the goods. He would have remained liable for a rental of $40 a month and, so far as the evidence shows, he could make no profitable use of the premises. Still he is entitled to nominal damages for breach of contract. I assess such damages at $5.

There remains the question of costs to be dealt with. As stated, there are in this matter really three separate actions and I think that the fairest way to adjudicate on the costs is to do so as if there had been separate proceedings throughout. On the action based on illegal seizure the defendant Hanson is entitled to costs. Had this action been tried alone it would have occupied more than one day. In taxing the costs, therefore, defendant Hanson should be allowed a counsel fee for two days. Plaintiff on the assault case is entitled to costs to be taxed on the County Court scale. Whilst the amount of damages assessed by me in favour of plaintiff in his action against Mrs. Hanson is nominal yet it follows that his action, in my opinion, is well founded and in view of all the circumstances I think the bringing of it in the Supreme Court was justifiable. I grant him a certificate to recover his costs, same to be taxed under column 1 of Appendix N. As this action could have been disposed of in one day he is to be allowed counsel fee for but one day. There is to be a set-off of the costs as between plaintiff and defendant Hanson. There is an allegation in the pleadings of a conspiracy between the two defendants in regard to the cancellation of the lease. No claim for damages, however, is made against the defendant Hanson because of such conspiracy. In my opinion no conspiracy was proven. It is true that defendant Hanson did advise his wife that she had a right to cancel the lease, but this, I think, is merely what would ordinarily occur between husband and wife under the circumstances. In my opinion there was no bad faith on the part of either defendant so far as the attempted cancellation of the lease was concerned. The wife misconceived her legal position and so did her husband.

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RUTHERFORD AND MACDONALD'S ORPHEUM GARAGE v. STEWART-WARNER SALES CO. LTD.

Damages—Car left for repairs—Stolen—Damaged when in hands of thieves—Cost of repairs—Negligence.

The plaintiff R.'s car was left in the defendant's care for repairs, and while there was stolen. The car was parked in a shed belonging to the defendant at the rear of the defendant's repair shop and the key was not removed from the ignition lock. One of the defendant's workmen had taken the speedometer off the car for repair and no one was in attendance to protect it from theft for half an hour. The shed was an open one leading to a lane. In an action to recover moneys paid to repair the damage suffered by the automobile while in the hands of the thieves:—

Held, that in the circumstances proper precautions had not been taken against theft and the defendant company was liable for the amount claimed.

ACTION to recover the cost of repair of an automobile for damages suffered during the time it was in the hands of thieves, the car having been stolen when left in the defendant's care for repairs. The facts are set out in the reasons for judgment. Tried by LENNOX, Co. J. at Vancouver on the 31st of October, 1935.

Tysoe, for plaintiffs.
Adam Smith Johnston, for defendant.

Cur. adv. vult.

6th November, 1935.

LENNOX, Co. J.: This is an action for recovery of moneys paid to repair an automobile belonging to the plaintiff Rutherford which had been left by the plaintiff, MacDonald's Orpheum Garage in the defendant's care for repairs to the speedometer and which was stolen while there. The repairs for which the claim is made were on account of the damage suffered by the automobile during the time it was in the hands of the thief or thieves.

It is agreed or proved that the automobile was left in the defendant's possession; that it was parked in a shed belonging to the defendant company at the rear of the repair shop of the

defendant company; that the key (with the knowledge of the defendant company) was not removed from the ignition lock; that for a period of from 20 minutes to a half hour no person was in attendance to protect it from theft; that the shed, which was an open one to a lane, had no protection to prevent anyone coming into it from the lane and that the automobile was stolen from the shed.

The matter to be decided is, as to whether or not the defendant company was guilty of actionable negligence in the circumstances.

Mr. *Adam Johnston,* for the defence, argued that the car being on the defendant's private property and there being workmen in the repair shop adjoining, they were not guilty of any negligence in leaving the car unattended for a short time with the key in the ignition lock; that the manager of the defendant company left his own car at all times in the same open shed with his key in the ignition lock, and that it was customary, for the sake of convenience, to so leave cars.

On the other hand Mr. *Tysoe* for the plaintiffs urged that the defendant company had shown actionable negligence in leaving the car unattended with the key in the lock, and that if, as they said, it was for their convenience that the key was so left (in order to enable them to move cars about as desired on the lot) then they should have taken other precautions for the safety of the car from theft, such as for instance, having a man in attendance to see that cars could not be stolen, or a locked gate provided on the lane end of the shed. Further, that if the workmen or any of them were entrusted with the duty of seeing that cars were not stolen, then they were derelict in their duty on this occasion and the employer was liable.

Mr. *Johnston* referred me to the case of *Northern Elevator Co.* v. *Western Jobbers Clearing House Ltd.* (1915), 9 W.W.R. 343 on the point that gross negligence must be shown. This was a case where money belonging to the plaintiff was deposited for safe keeping in the defendant's safe; that a clerk opened the safe and took a book therefrom leaving the door open, and that a fire occurred and the money was destroyed. This decision being on appeal, the circumstances surrounding the occurrence were not reported, and in consequence gives little assistance. He also referred me to Addison on Contracts, 7th Ed., 680 and 681 on

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the question of a bailee being required to use only reasonable care and also to the case of *Romano* v. *Columbia Motors Ltd.*, 42 B.C. 168; [1930] 1 W.W.R. 159.

Mr. *Tysoe* submitted that the defendant company as bailee must prove that the proper precautions were taken and referred me to Beal on Bailments 239, and Halsbury's Laws of England, 2nd Ed., Vol. I., p. 751, sec. 1234 and p. 770, sec. 1260; also to Addison on Contracts, 11th Ed., 899.

The principles of the law of negligence must be applied in conjunction with the circumstances of the case at Bar. In this case it has to be decided as to whether or not the defendant company took all reasonable care in the circumstances and whether it has discharged the *onus* upon it of so proving.

Now there is no doubt that it is almost inviting automobile thieves to carry on their nefarious practices if a car is left with the key in the ignition lock and the doors unlocked, and anyone who does so leave his car in a position where thieves can get to it, is negligent in so doing. All the more so is it negligence for one who is entrusted with a car not his own, to leave it in such circumstances. The lot was easily accessible from the lane and a car parked in the lot could easily be stolen if there was no one present and if the car was in such a condition that it could be driven away. There were three workmen in the premises, two of them working in the front of the repair shop, quite out of view of the lot at the rear where the car was parked, and the third, who had taken off the speedometer of the car to repair it, had gone into the repair shop and was there from 20 minutes to a half hour and, as he states, during that period was unable to see what was happening to the car.

I find, in the whole circumstances of the case, that the defendant company was guilty of actionable negligence. I may say that, in my opinion, the same would apply in similar circumstances to any bailee whether he has taken over the custody of the car for repair or for storage,—he would not be taking proper precautions against theft, which he must take, in order to escape liability if the car is stolen.

There will be judgment for the amount claimed ($90) with costs.

Judgment for plaintiffs.

REX v. MINOGUE.

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Criminal law—Unlawfully keeping liquor for sale—Evidence—Answers to questions put by police before arrest—Tantamount to command—R.S.B.C. 1924, Cap. 146, Secs. 91 and 92 (1).

A police officer entered a house in the execution of a search warrant, and after finding a quantity of liquor he called together the accused, and a woman who was there, and without any warning asked them which of the two was the responsible tenant, to which the accused replied that he was, and the woman also stated that this was so. No charge had been made nor was the accused under arrest at the time.

Held, that the question was tantamount to a command, and that being so the statements were not voluntary and therefore were not properly admitted in evidence against him.

The Crown established proof of the fact that the accused had in his possession or charge or control liquor in respect of or concerning which he was being prosecuted.

Held, that by proof of that fact, the Crown, by virtue of sections 91 and 92 (1) of the Government Liquor Act, established a *prima facie* case, and that thereupon the burden was upon the accused to prove that he did not commit the offence with which he was charged. As he failed to satisfy the *onus* which these sections placed upon him, he was rightly convicted.

APPEAL by accused by way of case stated from his conviction by *John F. Burne,* Esquire, police magistrate at Kelowna, on a charge of unlawfully keeping liquor for sale. The facts are set out in the reasons for judgment. Argued before McDONALD, J. at Vancouver on the 15th of October, 1935.

Maitland, K.C., for accused.
L. St. M. Du Moulin, for the Crown.

Cur. adv. vult.

22nd October, 1935.

McDONALD, J.: This is an appeal by one Edward Willis Minogue, by way of case stated, from his conviction by *John Ford Burne,* Esquire, police magistrate in and for the City of Kelowna, in the County of Yale, Province of British Columbia, on the 9th of April, 1935, for that the said Edward Willis Minogue, on the 24th of March, 1935, at the said City of

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Kelowna, did unlawfully keep liquor for sale, contrary to the provisions of the Government Liquor Act, on the ground that the said conviction is erroneous in point of law, the questions submitted for the judgment of this Court being:

(a) Were the statements alleged to have been made by the accused on March 24th, 1935, to sergeant Macdonald of the Kelowna police properly admitted in evidence against the accused?

(b) Were the statements alleged to have been made by one Mrs. Zubick to the said sergeant Macdonald on March 24th, 1935, in the presence of the accused properly admitted in evidence against the accused?

(c) Were the statements alleged to have been made by the accused on March 24th, 1935, to constable Butler of the Kelowna police properly admitted in evidence against the accused?

(d) Did the prosecution discharge the *onus* resting upon it of showing that the said statements were voluntary?

(e) Was there any evidence that the said statements were voluntary?

(f) Was there any evidence to support the said conviction?

(g) Should I have held that in order to succeed the prosecution must prove an overt act of an illegal nature on the part of the accused?

(h) Was any such overt act of an illegal nature proved by the prosecution?

(i) Should I have held that the *onus* provided for in section 91 of the Government Liquor Act rested upon the accused under the facts of the said case only when an overt act of an illegal nature had been committed by the accused?

(j) Was I right in holding that the fact that the liquor referred to was in the house of which the accused was stated by the police to have admitted that he was a tenant, under the facts of the said case, cast an *onus* upon the accused to prove his innocence?

(k) Was I right in holding that the finding of the liquor in the said house which contained other inmates besides the accused, under the facts of the said case, proved possession of the said liquor by the accused or that he was in charge or control of the same?

(l) Was I right in holding as I did that the judgment of His Honour Judge Thomson in *Rex* v. *Zawada*, [1930] 1 W.W.R. 92 and the judgment of His Honour Judge Robertson in *Rex* v. *Ceal*, [1929] 1 W.W.R. 797 did not apply under the facts of this case?

(m) Was there any evidence of possession of the said liquor by the accused or that he was in charge or control of the same?

(n) There being no evidence that the said liquor had been illegally purchased, was I right in holding upon the facts of the said case that there was an *onus* on the accused to prove that the said liquor was not kept for sale?

(o) Was I right in holding that "in view of the fact proved by the police that he (the accused) was at least an occupant of the house; the fact that he claimed to be the tenant of the house, backed up by Mrs. Zubick, and the fact that there were these number of people drinking on the premises," that I could not come to any other conclusion than that he had this liquor there for sale?

(p) Do sections 86, 90, 91 and 92 of the Government Liquor Act, or any of them, apply to this charge?

(q) Should the accused have been convicted of the said charge?

On behalf of the Crown, evidence was given that, shortly after midnight on the 23rd of March, 1935, sergeant Macdonald, a Provincial police officer, in the execution of a search warrant authorizing him to make a search of certain premises of one Bertha Zubick in the City of Kelowna, and accompanied by constables Butler and Bellhouse, of the Provincial police, went to the said premises, where they were met at the door by the accused, and upon entering found a number of people, residents of Kelowna, both in a front and back room of the house, and several bottles and glasses containing beer, reposing upon tables in these rooms, and also empty beer bottles. Some of the persons were in the act of consuming beer. In the pantry on a shelf, a quantity of whisky, gin, rum and two or three bottles of beer, and a small measuring glass were found. The unopened bottles of whisky, gin and rum were sealed with the Government Liquor Control Board seal, and the opened bottles had also been so sealed. Bertha Zubick was also present at the time. While constable Butler was removing this liquor to the police car, the accused came along with a writing pad, and the constable offered him a pencil, as he appeared to be about to make a list of the liquor, stating to the constable that he was responsible for the same, as some of it had been brought by other people, and that he might have to give it back. The accused did not, however, make a list. Before leaving the premises, sergeant Macdonald called the accused and Bertha Zubick together and enquired of them which of the two was the responsible tenant, or words to that effect, to which the accused replied to the effect that he was, and that he paid the rent, and Bertha Zubick stated in the presence of the accused that that was so. The accused was not warned before these statements were made, and on the trial objection to their admissibility was taken by his counsel. Evidence was also given that the accused occupied the said premises, and that he resided there.

No evidence was given by or on behalf of the accused.

With regard to the statement made by the accused to sergeant Macdonald, while no charge had been laid against the accused,

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and he was not under arrest at the time, he and Bertha Zubick had been "called together" by sergeant Macdonald, and in my opinion the question in response to which the statement was made was really tantamount to a command, and, this being so, I hold that the statement was not voluntary, and therefore was not properly admitted in evidence against the accused. *Prosko* v. *Regem* (1922), 63 S.C.R. 226; *Rex* v. *Bellos,* [1927] S.C.R. 258; *Sankey* v. *Regem, ib.* 436. Also, as a consequence, I hold that the statement made by Mrs. Zubick to sergeant Macdonald in the presence of the accused was not properly admitted in evidence against the accused.

As to the statement made by the accused to constable Butler, I consider that, under the circumstances, it was made voluntarily and so was properly admitted in evidence against the accused: *Rogers* v. *Hawken* (1898), 19 Cox, C.C. 122; *Rex* v. *Kay* (1904), 11 B.C. 157; *Ibrahim* v. *Regem,* [1914] A.C. 599; *Rex* v. *Rodney* (1918), 42 O.L.R. 645.

Then, turning to the case as a whole, I consider from the evidence that the Crown established proof of the fact that the accused had in his possession or charge or control liquor in respect of or concerning which he was being prosecuted, and I hold that, by proof of that fact, the Crown, by virtue of sections 91 and 92 (1) of the Government Liquor Act, established a *prima facie* case, and that thereupon the burden was upon the accused to prove that he did not commit the offence with which he was charged, and remained upon him until he reasonably satisfied the *onus* to the magistrate's satisfaction. As he failed to satisfy the *onus* which these sections placed upon him, he was rightly convicted. In so holding, I follow *Rex* v. *Jones,* [1934] 2 D.L.R. 499, a decision of the Appeal Division of the Supreme Court of New Brunswick, affirming a conviction under The Intoxicating Liquor Act, R.S.N.B. 1927, Cap. 28, and amending Acts, sections 108 (1) and 109 (1) of which are similar to sections 91 and 92 (1) of the Government Liquor Act of this Province.

I therefore affirm the conviction.

Conviction affirmed.

JAMIESON v. TYTLER.

C. A.
1935
Oct. 2.

Divorce—Decree absolute—Petitioner agrees to assume costs—Subsequent application by petitioner to tax costs—Refused by registrar—Application for order to tax costs refused—Appeal—Jurisdiction.

On the 7th of November, 1925, the petitioner in a divorce action signed a document declaring that "If my husband . . . . does not contest, 'The Divorce' which I have pending, I will on my part, assume all costs of said case, not to ask for any alimony nor support for myself or children" and on the 16th of November following a decree absolute was granted which included an order that the respondent pay the petitioner's costs of the action. On the 19th of June, 1935, the petitioner's solicitor took out an appointment to tax the petitioner's costs of the action, but on the day appointed the deputy registrar refused to proceed with the taxation. An application by the petitioner for an order that the registrar do tax the costs in accordance with the terms of the decree, was dismissed.

Held, on appeal, on preliminary objection by the respondent, that there was no jurisdiction to hear the appeal.

APPEAL by petitioner from the order of McDONALD, J. of the 28th of June, 1935, dismissing the petitioner's application for an order that the district registrar do tax the costs of the petitioner herein of her proceedings in the cause pursuant to the decree of this Court of the 16th of November, 1925. By said decree it was ordered that the respondent pay the petitioner's costs of the action. Pursuant to appointment to tax the petitioner's costs on the 21st of June, 1935, the deputy registrar refused to proceed with the taxation on the ground that the matter was *res judicata* by reason of a previous ruling by him of December 22nd, 1932, when he refused to tax a similar bill of costs presented on petitioner's behalf by reason of an agreement of the 7th of November, 1925, under the terms of which the petitioner agreed that she would assume all costs in connection with the divorce proceedings herein.

The appeal was argued at Vancouver on the 2nd of October, 1935, before MARTIN, McPHILLIPS and McQUARRIE, JJ.A.

Woodworth, for appellant.

O'Brian, K.C., for respondent, took the preliminary objection

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that there was no jurisdiction to hear the appeal. This was a motion to make an officer do his duty. The petitioner signed a document agreeing to pay the costs of the action. They now attempt to set it aside on the ground that it was a collusive agreement. This is an appeal from a judge exercising divorce jurisdiction. That there is no jurisdiction to hear the appeal see *Scott* v. *Scott* (1891), 4 B.C. 316; *Sheppard* v. *Sheppard* (1908), 13 B.C. 486; *Watts and Attorney-General for British Columbia* v. *Watts,* [1908] A.C. 573; *Brown* v. *Brown* (1909), 14 B.C. 142; *Laird* v. *Laird* (1920), 28 B.C. 255; *Claman* v. *Claman* (1925), 35 B.C. 137.

Woodworth: Under the case of *Laird* v. *Laird* (1920), 28 B.C. 255, we are entitled to the order asked for. See also *Hyman* v. *Hyman,* [1929] A.C. 601 at pp. 612 and 629.

Per curiam: We think that we should continue to follow the decisions of the old Full Court in *Scott* v. *Scott* (1891), 4 B.C. 316, and *Brown* v. *Brown* (1909), 14 B.C. 142, since they have been followed by this Court in *Laird* v. *Laird* (1920), 28 B.C. 255, and *Claman* v. *Claman* (1925), 35 B.C. 137, affirmed in [1926] S.C.R. 4, and hold that we have no jurisdiction to entertain appeals in Divorce and Matrimonial Causes. At the same time we do not disregard the weighty doubts that have been expressed by members of this Court (*e.g.,* in *Claman's* case) as to the soundness of the decision in *Scott* v. *Scott,* but it has been given effect to for so long that, in our opinion, we should not disturb it till our adoption of it has been declared erroneous by a higher tribunal, or till apt legislation has been passed making it our duty to do so.

With respect to the submission that in any event this case comes within the scope of our decision in *Laird's* case, *supra,* as involving only the exercise of the ordinary jurisdiction of the Court below, and therefore appealable to us, we are of opinion that the facts in *Laird's* case are radically different from those before us which involve the validity of a supplemental order purporting to alter the disposition of the costs made by the original decree between the same parties and therefore is one made wholly in the same case and in the further exercise of the

same jurisdiction, and hence is subject only to the same appellate tribunal to which the decree is subject, which, for the reasons aforesaid, we hold is not this one, as the law now stands.

It follows that the objection to our jurisdiction should be sustained and the appeal dismissed.

Appeal dismissed.

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1935
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TROSELL *ET AL.* v. GREGOV.

C. C.
1935
Nov. 13, 23.

Practice—County Court—Garnishee order—Application to set aside before filing dispute note—Status—R.S.B.C. 1924, Cap. 17—County Court Rules, Order V., r. 1B; Order I., r. 14; and Order XXIII., r. 3.

On an application by the defendant in the County Court to set aside a garnishee order preliminary objection was taken by the plaintiff that as there was no appearance by the defendant to the action, either by filing a dispute note or otherwise, he had no *status* in the action and was not entitled to take any step in the action until that *status* was acquired.

Held, that the defendant is not, by this application, taking a step in the action, that the preliminary objection be dismissed and the defendant be allowed to proceed with his application.

APPLICATION to set aside a garnishee order. The facts are set out in the reasons for judgment. Heard by LENNOX, Co. J. at Vancouver on the 13th of November, 1935.

Eades, for the application.
Coburn, contra.

Cur. adv. vult.

23rd November, 1935.

LENNOX, Co. J.: The plaintiffs obtained a garnishee order on the New England Fish Company and, following thereon, the sum of $117 was paid into Court. Neither the plaint and summons nor the garnishee order were served on the defendant.

This was an application by the defendant (through Mr. *Eades,* his counsel) to set aside the garnishee order on grounds of irregularity, but a preliminary objection to the application was taken by Mr. *Coburn* as counsel for the plaintiffs, that, as

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Lennox,
Co. J.

there was no appearance by the defendant to the action, either by filing a dispute note or otherwise, he (the defendant) had no *status* in the action and was not entitled therefore to take any step in the action until that *status* was acquired and that this was a step in the action. Decision on the preliminary objection was reserved.

The first point argued was as to whether such an application is a step in the action. On this question I was referred to the case of *McDonald* v. *Cocos Island Treasures Ltd.* (1932), 46 B.C. 360, where an application almost on all fours with the present application was made, except that it was in the Supreme Court. Mr. Justice W. A. MACDONALD there says:

> He is not, by the application, really taking a step in the action but, in defence of the result that may be obtained by the plaintiff in the action, he is, in effect, doing so because . . .

I cannot come to the same conclusion as the learned judge, quoted above, but I do subscribe to the first part of his finding, namely, that the defendant "is not, by the application, really taking a step in the action." It is true that the garnishee proceedings are entitled in this action, but the proceedings originate under a special statute giving a specific remedy or right which is not the plaintiffs' at common law or under the Courts Acts, namely, the Attachment of Debts Act, R.S.B.C. 1924, Cap. 17. It is to be noted that the provisions of this statute can be invoked either before or after judgment and (by section 19) that:

> All matters referred to in sections 2 to 18 shall be governed by this Act, notwithstanding any Rules of Court upon the subject.

If, however, I am wrong in this there is still the question to be decided as to the necessity of filing a dispute note before making this application, even if the application is a step in the action.

In the County Court there is no requirement as to entering appearance as there is in the Supreme Court. The dispute note is in the County Court what the defence is in the Supreme Court. The appropriate Supreme Court procedure as to appearance is dealt with in the Annual Practice, 1932, p. 127, partly as follows:

> Until therefore the defendant enters his appearance he is not entitled to take any step in the action.

Mr. *Coburn* submitted that County Court Order V., r. 1B is the only rule which authorizes a step in the action before the filing of the dispute note (namely as to setting aside the service

of the summons or of the notice of the summons, or to discharge the order authorizing such service) and that therefore all other steps must be preceded by the filing of the dispute note. But is that the only rule? Order I., r. 14, provides for the obtaining of further particulars of the claim—"At any time previous to five clear days from the date fixed for the trial" and further provides that "the judge, upon application, may make such order . . . as may be just," that is that such an application may be made between the time when the plaint was served and the time for filing the dispute note. It therefore does not seem to me that because Order V., r. 1B is in existence, it necessarily follows that a dispute note must be filed before any other step is taken. Unless such is specifically laid down, it would be unjust under the existing rules to compel a defendant to disclose his defence (see County Courts Act, Sec. 82) before being allowed to attack extraneous proceedings whereby his means of livelihood or his capital are seized and tied up beyond his control. Mr. *Coburn,* however, submits further that if the defendant wants to take a step in the action before filing his dispute note he may proceed to do so if he has given the notice provided for in Order XXIII., r. 3, and that this rule, if taken advantage of, would have the same result as the entry of appearance in the Supreme Court. I do not agree. In my opinion this rule does nothing more than relate to the service of documents, whereby the defendant can have any documents served on a solicitor instead of on him personally whether or not he subsequently enters a dispute. It is well to notice the difference in the wording of this rule and of the Supreme Court rule (Order XII., r. 1): in the former "may give notice," and in the latter "shall enter his appearance."

In addition to the above I am advised that it has been the practice in this Court to hear such an application before filing of the dispute note, and (though if I were of opinion that the practice was wrong I would not hesitate to disturb it) with my views as they are I commend the practice.

The plaintiffs' preliminary objection is dismissed, and the defendant has leave to proceed with his application.

Application granted.

S. C.
1935
Oct. 16;
Nov. 15.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE ROYAL BANK OF CANADA AND ISLAND AMUSEMENT COMPANY LIMITED.

Bona vacantia—Company—Dissolution—Company funds in bank—Subsequent order for restoration to register—Motion for declaration that moneys property of Crown—Refused—R.S.B.C. 1924, Cap. 38, Secs. 167 and 168—B.C. Stats. 1929, Cap. 11, Secs. 199 and 200.

The Island Amusement Company Limited incorporated in British Columbia, was struck off the register in 1928 pursuant to section 167 of the Companies Act, and by order of the 5th of April, 1935, pursuant to section 168 of said Act, the company was restored to the register, the order containing the proviso that it was "without prejudice to the rights of parties acquired prior to the date on which the company is restored." After the striking off, but before its restoration to the register, the Crown demanded from the defendant bank, as *bona vacantia*, moneys on deposit with it to the company's credit at the time of the striking off and which were still so deposited after the company was restored to the register. In an action for a declaration that upon the dissolution of the company the Crown had a right to the moneys as *bona vacantia* and that the "without prejudice" clause in the order renders the restoration of no avail against the Crown's claim:—

Held, that although the right of the Crown to *bona vacantia* is, no doubt, a right of property, the "right" protected by the "without prejudice" clause does not include a right of this sort but would cover rights such as a contractual right acquired from the company or a right obtained by legal proceedings against the company or the right of a purchaser from the Crown or a right obtained from someone who has acquired title to some part of the company's property between its dissolution and restoration to the register, and therefore the action fails.

ACTION by the Crown for a declaration that the moneys deposited with the defendant bank to the credit of the defendant company, at the time said company was struck off the register in 1928 pursuant to section 167 of the Companies Act, is the property of His Majesty the King in the right of the Province. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria on the 16th of October, 1935.

H. Alan Maclean, for plaintiff.
D. M. Gordon, for defendants.

Cur. adv. vult.

15th November, 1935.

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Robertson, J.

ROBERTSON, J.: The Island Amusement Company Limited, incorporated in British Columbia under the Companies Act, was struck off the register in 1928, pursuant to section 167 of Cap. 38, R.S.B.C. 1924, which provided that upon certain default of the company the registrar might strike a company off the register and after publication in the "Gazette" of a notice thereof for a certain period "the company shall be dissolved." Under section 168 of that Act the company, or, any member or creditor aggrieved by such striking off, might obtain an order for its restoration to the register, after publication in the "Gazette" of notice of the application. Thereupon, the section provided that the company "shall be deemed to have continued in existence . . . as if it had not been struck off." The section further empowered the Court to give directions and make such provisions in its order as might seem just for placing the company and all other persons in the same position as nearly as might be as if the company had not been struck off but "without prejudice to the rights of parties acquired prior to the date on which the company is restored." The Companies Act, Cap. 11, B.C. Stats. 1929, replaced this Act. Sections 199-200 of the latter Act are practically the same as sections 167-168 of the first-mentioned Act. The language in the former Act setting out the effect of restoring a company to the register, the power of the Court to give directions and make provisions in its order, and that the order is to be without prejudice to the rights of parties acquired, etc., is exactly the same in the present Act. The company was restored to the register on the 5th of April, 1935, and the order contained the "without prejudice" provision but no "directions" or "provisions" are to be found in it.

After the striking off, but before its restoration to the register, the Crown demanded from the bank, as *bona vacantia*, moneys on deposit with it, to the company's credit, at the time of the striking off and which were still in its hands, after the company was restored to the register. The bank, although making no claim to the money and prepared to pay it to the person entitled thereto, was unwilling to accede to the Crown's request as it doubted the Crown's right to the money. Subsequently this action was commenced against the bank and the company. The

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Robertson, J.

Crown then moved for a declaration that the moneys in question had, since the date of the striking off, *viz.*, 25th October, 1928, been the property of His Majesty the King in the right of the Province of British Columbia and asks judgment accordingly.

Counsel for the Crown submits that upon the dissolution of the company the Crown had a right to the moneys as *bona vacantia* and therefore the "without prejudice" clause in the section renders the restoration of no avail against the Crown's claim.

It was further submitted that it was necessary to advertise notice of intention to apply to restore the company to the register and that creditors and other persons claiming rights in the company's property might have appeared then and the Court upon being satisfied of such rights might in its order have given directions and made such provisions as were necessary to protect same, and that as no such direction or provisions were contained in the order, the Crown's rights to *bona vacantia* were not affected.

There is no doubt that, generally speaking, when a company is dissolved its personal assets, as *bona vacantia,* become the property of the Crown. See *In re Wells* (1932), 101 L.J. Ch. 346.

Counsel have not been able to refer me to, and I have not been able to find, any decision directly in point and it appears to be a case of first impression. The nearest analogy to the position here is found in cases under the Companies Act where the time for filing a mortgage securing debenture issues is extended. There it was the practice of the Court to insert a clause as follows:

> Without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered:

see *In re Joplin Brewery Company, Limited,* [1902] 1 Ch. 79 at p. 81. See also *In re Spiral Globe, Limited, ib.* 396.

In *In re Ehrmann Brothers, Limited,* [1906] 2 Ch. 697, the facts were that an unsecured creditor maintained that he was entitled to rank *pari passu* with the debenture-holders. He had not taken any steps to enforce his debt and there had been no winding-up. The order extending the time of registration of the debentures contained a clause to the same effect as that described

in the last two mentioned cases. At p. 704 Vaughan Williams, L.J. said:

I believe that those words merely intend to protect intervening rights, rights which intervene between the time, the end of the twenty-one days within which the statute requires registration, and the time of registration under the order for extension of the time. One sees, of course, that if there is an order for extension of time, and before the registration actually takes place, there intervenes a winding-up, these words would protect the rights of property so acquired in that interval. But it may also be, besides the acquisition of rights of property in this way, that other rights of property had been acquired by contract or otherwise. I say nothing about such rights of property being excluded from the benefit of this protection. All that I say is that, according to my reading of this order, the protection is given only to those who have acquired rights of property or rights against property, and this, as it seems to me, clearly does not include unsecured creditors who have no right against the property in question and no charge against it. I am now merely dealing with the construction of this particular order.

Romer, L.J., pp. 707-8, said:

Now when you consider the circumstances under which the Court has power to grant an extension, I think you would naturally expect that the kind of condition the Court would impose would be one to protect any rights that might have been acquired against the property charged in the meantime before the debentures are actually registered, and accordingly one finds that a form has been settled as to the kind of condition which the Court usually imposes in those cases extending the time. The condition in the present case followed the usual form, and provided that the order was to be without prejudice to the rights which might have been or might be acquired against the holders of the debentures before actual registration. Now to my mind the true effect of that condition is that it was only intended to protect rights acquired against or affecting the property charged by the debentures. In my opinion that condition did not mean that after registration the registration was to be of no effect whatever as a charge against all creditors then existing. It appears to me that the very object of the extension of time being granted was to prevent its being said that the debentures were void generally as a charge. After the registration within the time extended it could not have been validly contended that the debentures were to be treated as void as charges generally. I think that they were intended to be treated as valid charges subject only, as I have said, to rights acquired which could have been enforced in some way against the property had not the extension of time been granted. The word "right" used in the order means something affecting the debenture-holders as security holders, and something which the Court could recognize and enforce; it cannot mean something—if I may so call it—in the air, some claim or contention which the Court could not recognize or give effect to in any valid proceeding.

Cozens-Hardy, L.J., said, pp. 709-10:

The question is this, What is the meaning of the words "rights which may have been or may be acquired against the holders of debentures"? In my

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view that must mean rights acquired against the property of the company or affecting the property of the company intervening between the expiration of the twenty-one days and the extended time allowed by the order. In no other case, it seems to me, can the word "rights" be accurately and properly used. My baker or my butcher cannot be said to have in any proper sense at the time when the debt is incurred any right against my property, although if they hereafter sue me and issue execution or take other proceedings they will then acquire a right against my property. There must be some intervening definite act, either by the individual creditor or by some proceedings taken on behalf of the creditors as a body, in order to justify those words "rights acquired." . . .

If it were held to mean that the property which had estreated or become *bona vacantia* was not restored to it when it was again on the register there would be no meaning in the words "deemed to have continued in existence as if it had not been struck off." The company in such a case would be a mere shell without any assets, and it is difficult to see any reason, under such circumstances, for anyone wishing to restore it to the register. Although the right of the Crown to *bona vacantia* is, no doubt, a right of property, I am of the opinion that the "right" protected by the "without prejudice" clause does not include a right of this sort but would cover rights such as a contractual right acquired from the company or a right obtained by legal proceedings against the company or the right of a purchaser from the Crown or a right obtained from someone who had acquired a title to some part of the company's property, between its dissolution and restoration to the register.

I think, therefore, the action fails.

The bank asks for costs submitting that it is a trustee within the meaning of rule 976. In my opinion when the company was restored, the bank was then in the ordinary position of a banker to its customer, *viz.*, a debtor; and not a trustee—see Falconbridge's Banking and Bills of Exchange, 5th Ed., 297. It is not entitled to costs.

Action dismissed.

ROMANO v. MAGGIORA. (No. 2.)

S. C.
In Chambers
1935
Oct. 21, 22.

Practice—Evidence—Material witness resident abroad—Plaintiff's application to take evidence on commission—Grounds in support—Sufficiency.

The plaintiff having obtained judgment against the defendant in an action brought in the State of Washington, applied under Order XIV. for leave to sign judgment thereon, when the defendant swore that he had a *bona fide* defence and that he was not served with process in the Washington action and knew nothing of the proceedings in the Washington Courts until apprised thereof in the course of the proceedings in this action. It was held that there was a triable issue and the defendant should be given leave to defend. One Kenneth Hanna, who lives in Kalamazoo in the State of Michigan, made the affidavit of service on the defendant of the complaint and summons in the Washington action, and the plaintiff now applies to have Hanna examined as a witness in Kalamazoo in the State of Michigan. The affidavit in support of the application recites that "it is not possible to compel him to attend here at the trial, and in any event the expense of such an attendance is prohibitive."

Held, that it is necessary for the purposes of justice that the ordinary mode in which evidence is to be taken should be departed from, and that the order as asked for should be made.

Stewart Iron Works Co. v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515, distinguished.

APPLICATION for an order to have a witness examined in the State of Michigan, U.S.A. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Victoria on the 21st of October, 1935.

H. W. R. Moore, for the application.
Finland, contra.

Cur. adv. vult.

22nd October, 1935.

FISHER, J.: This is an application by the plaintiff for an order to have a witness Kenneth Hanna examined at Kalamazoo, Michigan, U.S.A. I have already indicated in Chambers that I would make the order but on request of counsel on behalf of the defendant I am now giving my reasons for judgment in order that same may be recorded.

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Fisher, J.

According to the statement of claim the plaintiff's claim is as follows:

By a judgment rendered in favour of the plaintiff in this action against the defendant in this action, and numbered 275989 and dated October 20, 1934, the Superior Court of the State of Washington for King County, in the United States of America, the defendant in this action was ordered to pay forthwith to the plaintiff in this action the sum of $3,000 together with interest amounting to $74.67, and attorney fee of $250 and $8 disbursements, totalling $3,332.67 with interest thereon at 10 per cent. per annum until paid.

There remains unpaid in respect of the said judgment the said sum of $3,312.49.

It would appear that the plaintiff having obtained judgment against the defendant in an action brought in the State of Washington applied some time ago to this Court under Order XIV. for leave to sign judgment thereon and on the application the defendant swore that he was not served with process in the Washington action and had no knowledge of the said alleged proceedings in the Washington Courts until apprised thereof in the course of the proceedings in this action.

The judgment on such application is reported in (1935), 50 B.C. 66, in which the head-note reads, in part, as follows:

Held, that the failure to serve the defendant or give him notice of the proceedings in the Washington Courts was a substantial injustice committed against him, and such a defence, if made out would be an answer to the foreign judgment. This is a triable issue that must be tried out in the ordinary way, and the defendant should be given leave to defend.

In connection with said triable issue the said Kenneth Hanna is undoubtedly a material witness and on such an application as the present one the rule seems to be clear that the order will not be made unless it shall appear necessary for the purposes of justice that the order should be made. Counsel on behalf of the defendant has referred to a number of cases including *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515, in which it was held according to the head-note that where the plaintiff seeks to have a material witness examined abroad and the nature of the case is such that it is important that he should be examined here the party asking must show that he cannot bring him to this Province to be examined on the trial. In such case MARTIN, J.A. said at p. 519:

According to the material before us in the affidavits, both of the president of the company and of the solicitor, it appears that the witness is one whose

evidence is necessary to prove certain facts of a controversial nature in several respects, and I think that the affidavits should have shown such facts as would have enabled the learned judge below, and also ourselves, to have drawn the inference that there was reasonable ground why the witness could not attend before the Court and be examined in the usual way. That is what I consider is the defect in this affidavit. The latest case on the subject is *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71, which I have already referred to.

In the *Macaulay* case, Kekewich, J., said he considered he would be going far beyond any previous decisions were he to allow a commission solely on the ground of saving expense and for no other reason. It may be noted, however, that in such case Kekewich, J. stated that upon the application he would not deal with the examination of any of the witnesses except the plaintiff and I do not understand the case as reported to mean that the material on the application showed that the expense was prohibitive. In the present case I have before me the affidavit of Mr. *H. W. R. Moore* who states that he is solicitor for the plaintiff herein and that as such he has knowledge of the matters hereinafter referred to. In paragraph 7 of his affidavit Mr. *Moore* says that Mr. Kenneth Hanna, being the witness plaintiff desires to examine, is located at Kalamazoo, Michigan, U.S.A., and then Mr. *Moore* goes on to say "but it is not possible to compel him to attend here at the trial and in any event the expense of such an attendance would be prohibitive." I think, therefore, the affidavit shows such facts as enable me to draw, as I do, the inference that there is reasonable ground why the witness cannot attend before the Court and be examined in the usual way. I would not consider therefore that the affidavit before me in this case has the defect noted by MARTIN, J.A. in *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co., supra,* but would consider it sufficient. In my opinion the affidavit means that the refusal of the order would practically prevent the said proposed witness from giving his evidence at all as the expense of his attendance would be prohibitive as stated in the affidavit.

According to the affidavit already referred to Kenneth Hanna is the man who made the affidavit of service in the action in the Washington Courts and his evidence would appear to be the only evidence that could be given on behalf of the plaintiff with respect to what was said and done at the time of the service of

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the complaint and summons in the Washington action. In any event it would appear as stated in the said affidavit that without such evidence the plaintiff's case would be greatly prejudiced.

On the evidence before me, therefore, I have arrived at the conclusion that it is necessary for the purposes of justice that the ordinary mode in which evidence is to be taken should be departed from and that the order as asked for should be made.

Application granted.

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TILLEY v. WILSON.

Negligence — Damages — Struck and run over by motor-car — Contributory negligence—Car standing on highway through engine trouble—Duty to warn on-coming cars—B.C. Stats. 1925, Cap. 8.

The plaintiff was driving his truck north between Vanderhoof and Prince George with N. sitting beside him, when owing to engine trouble it stopped about 1,000 feet from the bottom of Peden's Hill about 11.30 p.m. From conflicting evidence it was found that the larger portion of the truck was to the left of the centre of the road. The plaintiff got under the truck to make repairs while N. watched for on-coming cars. When the lights of the defendant's car (going north) appeared behind the truck N. warned the plaintiff who got from under the truck and ran back about 30 feet to signal the defendant. When the defendant, going at about 30 miles an hour, came close to him the plaintiff jumped to the east side of the road and the defendant on seeing him turned sharply to the same side of the road and struck and ran over him.

Held, that the defendant was negligent in not keeping a proper look-out and therefore failing to see the plaintiff when he was running towards him in the glare of his head-lights, and the plaintiff was guilty of contributory negligence in remaining on the highway too long before stepping off the road. The plaintiff was found 40 per cent. and the defendant 60 per cent. to blame.

ACTION for damages for injuries sustained by the plaintiff through being struck and run over by a car driven by the defendant on the road between Vanderhoof and Prince George on the 11th of June, 1935, at about 11.45 p.m. The facts are set out

in the reasons for judgment. Tried by ROBERTSON, J. at Prince George on the 30th and 31st of October, 1935.

Reid, K.C., for plaintiff.
Nicholson, for defendant.

Cur. adv. vult.

30th November, 1935.

ROBERTSON, J.: The plaintiff sues for damages for injuries sustained by him by being struck and run over on the 11th of June last, at 11.45 p.m. by a motor-car driven by the defendant on the road from Vanderhoof to Prince George. The road, where the accident took place, runs approximately north and south. The plaintiff, accompanied by his father-in-law, Nash, was driving his truck north, towards Prince George. The truck had a "cab" in the front, the roof of which was over six feet from the ground and behind this there was a "deck" 7.4 feet wide and 10 feet long and 3½ feet from the ground. The night was dark: there had been a little rain but it was not raining at the time of the accident.

When I speak of the right or left side of the truck I have reference to the side of the truck to the right or left of the driver as he was driving north towards Prince George.

The plaintiff's evidence is that the truck's engine developed trouble and finally came to a full stop 1,000 feet from the foot of Peden's Hill and 800 feet from the side road running west to the foothills; that the truck was then on the east side of the road with its right wheels close to the edge of the gravelled roadway. Shortly after this two men—Mann and Smith—came along from the south in a car. He signalled them to stop, and they did, and then this car proceeded north on its way to Prince George, passing his truck on its left side. After this his attention was called to a car proceeding south. This car turned off to its right on the side road to the foothills; a moment later Nash shouted that a car was coming north and he came out from under the truck where he had been working to repair it and went behind his truck 25 to 30 feet on the east side of the road to flag this car. While in this position he turned his head towards Prince George and he could see along the left side of his truck. He, further, says at the same time he noticed the lights of the

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other car "two or three blocks" off the main road, on the foothills road about 800 to 1,000 feet away.

Mann says the truck was on the east side, six to eight inches from the ditch, and part of it was in the centre of the road and that his car after being flagged and stopped passed on the left-hand side of the truck as he proceeded to Prince George. Smith also agrees with this.

On the other hand Nash who actually moved the truck off the road, after the accident, signed a written statement dated the 11th of June in which he said, speaking of where the truck stopped "We stopped in the middle of the road." On the 12th of June he signed another statement in which he said "as near as I could judge the truck was stopped in the middle of the road" and that he told Homewood who helped him to remove the truck, that the truck was "on the middle of the road."

Shortly after the accident Homewood who was driving his car north towards Prince George, was flagged by Nash. He stopped his car 20 to 40 feet behind the truck which he says was in the centre of the road, two-thirds of it being to the left of the centre line; that he drove to the right of the truck at an angle of 45 degrees to look for a crank-handle and that the truck was then on the left of his car. He further says his car could not have passed on the left-hand side of the truck. Miss Lawlor, who was with Homewood, says the truck was a little to the left of the centre of the road and that there was room on the road for a car to pass to the right of the truck. Constable Smith who arrived at the scene of the accident about 12.30 a.m., on the morning of the 12th of June, which would be within an hour after the accident, made a careful examination of the tire marks on the ground and he noticed particularly a cut and hole in one of the tires of the truck. He followed the course of the truck from where it had been moved by Nash, off the road, back to where it had been standing on the road and he says the left wheel of the truck was then 4.9 feet to the left of the main centre of the "travelled" portion of the highway, and the right wheels must have been practically in the centre of the road. In addition to this there is the evidence of the defendant who says the "bulk of the truck was to the left of the road."

It may be that Mann and Smith saw, and passed, the truck when it was stopped at some point before it finally came to the place where the accident occurred, for, while the plaintiff says that the truck only stopped once, Nash says that they had to stop two or three times on the way home. However this may be, on the contradictory evidence I find that the plaintiff's truck was not on the right side of the road at the time of the accident but its right wheels were practically in the centre of the road and its deck projected at least a foot east of the centre line. Assuming this to be so, did it constitute negligence on the part of the plaintiff, and if so, was it a factor in the accident? The truck had stopped, involuntarily, because of trouble with the carburettor. It was not left unattended. The plaintiff and Nash were on the look-out for cars and were doing their best to give warning, with the means at their command.

Mann said that when he was coming down the hill, hundreds of feet away from the scene of the accident, although his lights were not shining on the road where the accident took place, he could see an object on the road and when he turned into the straight road he could see the truck in the road. He says he was 200 feet from the truck when his head-lights picked it up. William Smith who was with Mann said the head-lights of Mann's car picked up the truck when they were 400 feet away. I see no reason why the defendant should not have seen the truck when his car was at least 150 feet south of it.

In *Atwood* v. *Lubotina* (1928), 40 B.C. 446, the facts were the defendant left his truck close to the curb-line near his home on the outskirts of Vancouver without a tail-light. The plaintiff stopped his car to let a friend out about 60 feet behind the defendant's truck on the same side of the street. He then started his car and while still in low gear he ran into defendant's truck damaging his car. As I read the judgments of their Lordships, the majority of the Court of Appeal decided the case on its particular facts, the Chief Justice stating that the case was pretty close to the line. Mr. Justice MARTIN in his dissenting judgment said at p. 448:

> The plaintiff's position is, that 60 feet from there in those circumstances he undertook to drive along the same side of the street, and yet, though his lights had a range of 50 feet he nevertheless ran into this big object, five

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feet wide and twelve feet long, without seeing it. To me that is absolutely inexplicable. Under no circumstances that I can bring before my mind can I justify such a thing as that. To say that in 60 feet a person cannot navigate such a position without distinguishing an object of that kind is, to my mind, only consistent with the view that he did not keep a good look-out.

In *Perdue* v. *Epstein* (1933), 48 B.C. 115 the head-note is as follows:

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

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

See also *Crosbie* v. *Wilson and Langois, infra.* In *Swartz Bros. Ltd.* v. *Wills,* [1935] 3 D.L.R. 277, Cannon, J. with whom the rest of the Court agreed, said at p. 281:

Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible.

Here I find the truck should have been clearly visible.

The defendant says he would have seen the truck earlier if it had been on the right side. Now the gravelled portion of the road was 15 feet wide, and the travelled portion 18 feet. The police evidence shows the defendant's car was travelling 2 feet 6 inches from the east side so that the truck would have been almost in front of the left side of his car. Regulation 3 (c) (Exhibit 9) provides, in part, as follows:

The head-lights shall be so constructed, equipped, mounted, and adjusted that they will under normal atmospheric conditions and on a level, straight highway produce sufficient white or clear driving light to render clearly discernible a substantial object on the highway two hundred feet ahead. . . .

The atmospheric conditions were normal. The truck was undoubtedly "a substantial object" and the highway was level and straight. The defendant's lights were examined by con-

stable Smith within a few hours after the accident. He said the lights would show 150 to 200 feet in the condition they were that night, and no doubt constable Smith was satisfied they complied with this regulation.

The defendant says that long before he approached the truck he was well over to the right-hand side of the road and that when he first saw the truck he had ample room to pass to the right of it. In my opinion, the position of the truck on the road was not negligence on the part of the plaintiff under the circumstances I have set forth. In any event it was not a contributing cause to the accident.

The tail-light of the truck was disconnected. Did the failure to maintain a tail-light constitute negligence under the circumstances?

In *Crosbie* v. *Wilson and Langois* (1933), 47 B.C. 384, MACDONALD, C.J.B.C., said, p. 386:

> The evidence appears to be that there was sufficient light at the point where the accident occurred to have enabled Wilson to have seen the car distinctly; the mere absence of the red light on the back of the car would not deceive him if he had been looking out; if he had been taking notice of where he was going and kept a proper look-out he would have seen this obstruction, and he had every opportunity to avoid it.

MARTIN, J.A., agreed with the Chief Justice. MACDONALD, J.A. said at p. 389:

> It is of no avail to say that the tail-light was out. It was put out of commission by the collision, and being disabled it was the same as any other obstruction on the highway.

In view of my finding, *supra,* that the defendant should have seen the truck when 150 feet away, I do not think the absence of the tail-light, even if it constituted negligence under the circumstances, contributed in any way to the accident.

Where did the impact take place? The defendant says his lights and brakes were in good shape. As he was coming slowly down Peden's Hill he could see a considerable distance ahead. He then noticed the lights of a car a long way off, coming south, which was the one which turned off to the foothills. When he got to the bottom of the hill, while he could no longer see the lights of this car, as he expected to meet it, he took the extreme right of the road. The lights of the on-coming car reappeared when he was several hundred feet from the bottom of the hill, but he was not blinded by them; almost immediately after this

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the first thing which drew his attention was an unlighted object to the left of the centre of the road about 50 feet ahead. He was then on the extreme right of the road. There were no lights on the truck. He could see he had ample room to pass safely on the right. He put his foot down hard on the brakes when he saw the truck to decrease his speed, which was not more than 30 miles per hour. Almost instantly the plaintiff emerged from the shadow of the truck and came running towards him waving his hands. He was exactly in the centre of the space between the truck and the right side of the road. He might have been 20 to 30 feet away. It was a shock to him. He could not turn to the left as the truck was there. He turned his car to the right "sharply into the ditch and off the road." Just as he did this the plaintiff jumped into the ditch where the defendant thinks the plaintiff must have been when he struck him. His brakes were full on and had been so ever since he saw the truck.

Plaintiff says that when Nash yelled to him there was a car (defendant's) coming from the south. He got out as quickly as he could from the right side of the truck, placed a pail of gasoline which he had in his hand on the rear of the truck and rushed to the rear to signal. He says that defendant's car was "coming down the hill with its head-lights on" and he was running at the same time; and could not say definitely how far defendant's car was away because the car was travelling and "I was running to flag him at the same time." He says he went 20 to 30 feet south of the truck and was in the full glare of the head-lights of the on-coming car; that he stepped off the gravel on to the shoulder of the road. When defendant's car was 15 to 20 feet from him it turned "violently" to the right and struck him.

Taking the defendant's own evidence, if he saw the truck when 50 feet away and immediately afterwards saw the plaintiff who was then 20 to 30 feet from him, the plaintiff must have been 20 to 25 feet south of the rear of the truck. I find that the point of impact must have been about 20 feet south of the truck on the shoulder of the road on the east side.

The truck was 17½ feet over all in length. The plaintiff came out from under it on the right side. Assuming that he came out from under it at a point five feet north from the rear end he

must have walked or run at least 25 feet to the point of impact. Assuming that his speed was five miles per hour and the speed of the defendant's car 30 miles per hour (the defendant says it was never more than that) the defendant's car would have travelled six times the distance the plaintiff travelled or 180 feet so that the defendant's car must have been over 200 feet from that part of the right side of the truck where the plaintiff started walking or running towards him. I find that the defendant was negligent in not keeping a proper look-out and therefore failed to see the plaintiff when he was running towards him in the glare of his head-lights.

I also think the plaintiff was guilty of contributory negligence. The defendant pleaded that the plaintiff was negligent in not taking "adequate measures to warn traffic approaching on the highway of the presence of the truck" and cited in support of this *Empey* v. *Thurston* (1925), 58 O.L.R. 168, approved by the Appellate Division in *Comrie* v. *Fisher* in the same report at p. 228.

The plaintiff went to flag defendant's car because he thought either the truck or the car was in danger because of the abnormal speed of the car.

If I am right that the defendant was 180 feet away from the point of impact when he should have seen the plaintiff and he maintained a speed of 30 miles per hour, which he said he did, until the accident, he would have reached the point of impact in a little less than five seconds. The plaintiff says it was a matter of a few seconds from Nash's yell to the time of the accident.

It was said in *Swartz Bros. Ltd.* v. *Wills, supra,* at p. 279, "distances must be translated into time in order to determine what are the rights of the parties."

Applying this to the present case, the plaintiff must have known that the defendant's car would reach him in a very few seconds and his duty was to take care not to be in the way of the on-coming car. At the same time he was entitled to assume that the defendant was keeping a proper look-out and would see him in ample time to bring his car to a stop. While it was prudent of the plaintiff to try to warn the defendant, I think he was negligent in remaining upon the highway too long before

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stepping off the road. The plaintiff pleaded that if it was found that there was any contributory negligence on his part the defendant with the exercise of ordinary care would have avoided the injuries complained of. I do not think that either party could have done anything to have avoided the accident as the two acts of negligence came so close together. The plaintiff tried to avoid it by stepping off the road. The defendant tried to avoid it by turning his car off the road. There was really no time in which either the plaintiff or defendant could have avoided the negligence of the other. I refer to the speech of Viscount Birkenhead in *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at p. 144, where the Lord Chancellor said:

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

As to the degree of fault I find that the plaintiff was 40 per cent. and the defendant 60 per cent. to blame.

The plaintiff is a young man 34 years of age. The evidence as to his earnings is entirely unsatisfactory. His injuries are of a terrible nature and there is no hope of his recovery. He will probably live not more than 18 months. He will have to be in hospital all the time.

In view of all the circumstances I assess the general damages at $20,000.

I allow the following special damages:

Prince George Hospital	$ 624.00
Prince George Drug Store.....	24.40
Violet Kerr, Nurse	5:00
Dr. Lyon	708.00
	$1,361.40

which I think were all that were claimed.

There will be judgment for the plaintiff for $12,000 general damages, and $816.80 special damages.

Judgment for plaintiff.

IN RE ESTATE OF KATHERINE DIXON, DECEASED.

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Sept. 6, 10.
C. A.
Oct. 30, 31;
Nov. 28.

Will—Construction—Devises and bequests—Whether free of probate and succession duties—Petition for opinion, advice and directions—Appeal—Jurisdiction—Costs—R.S.B.C. 1924, Cap. 262, Sec. 79.

A will contained the following clause: "I direct my executors to pay from and out of my estate as soon as may be convenient, all my just debts, funeral and testamentary expenses as well as succession and probate duties (if any) which may be assessable or chargeable against any gift, devise, bequest or legacy herein provided for." Thereafter following a number of bequests and devises appears this clause: "Subject to the bequests of this my will heretofore made, I direct my trustees to divide all the rest and residue of my estate together with any devises or bequests that may lapse, equally among the Salvation Army and the Crippled Children's Hospital Home, both of the City of Vancouver."

On petition of the executors for the opinion, advice and direction of the Court on the following questions: "1. Does the above-mentioned direction in the will of the said deceased amount to a direction that the devises and bequests made in the will of the said deceased are to be free of probate duties? 2. Does the above-mentioned direction in the will of the said deceased amount to a direction that the devises and bequests made in the will of the said deceased are to be free of succession duties?" the answer to both questions was in the negative.

Held, on appeal, that the petition presented under section 79 of the Trustee Act and the opinion, advice or direction thereupon given by the judge to whom it is presented is not a judgment, order or decree within the meaning of section 6 (*a*) of the Court of Appeal Act, and therefore cannot be entertained by the Court of Appeal.

APPEAL by Frances McGregor, Louisa M. Price, and the nieces, nephews, grand-nieces and grand-nephews of Katherine Dixon, deceased, and Alfred E. Price and the beneficiaries under the will of said Katherine Dixon, deceased, consisting of strangers to the said deceased and represented by said Alfred E. Price, from the decision of ROBERTSON, J. on the petition of the executors, heard by him at Vancouver on the 6th of September, 1935. Katherine Dixon died on the 10th of December, 1934. Her executors applied by petition for the opinion of the Court as to whether or not her devises and bequests are to be free of probate and succession duties. The will contained a clause as follows:

I direct my executors to pay from and out of my estate, as soon as may

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IN RE ESTATE OF KATHERINE DIXON, DECEASED

be convenient, all my just debts, funeral and testamentary expenses, as well as succession and probate duties (if any) which may be assessable or chargeable against any gift, devise, bequest or legacy herein provided for.

Following a number of bequests appears this clause:

Subject to the bequests of this my will heretofore made I direct my trustees to divide all the rest and residue of my estate, together with any devises or bequests that may lapse equally among the Salvation Army and the Crippled Children's Hospital Home, both of the City of Vancouver, in the Province of British Columbia in loving memory of my late husband Joseph Dixon.

The following questions were submitted by the petition:

1. Does the above-mentioned direction in the will of the said deceased amount to a direction that the devises and bequests made in the will of the said deceased are to be free of probate duties?

2. Does the above-mentioned direction in the will of the said deceased amount to a direction that the devises and bequests made in the will of the said deceased are to be free of succession duties?

Remnant, for the executors of the estate of Katherine Dixon, deceased.

Hossie, K.C., for Frances McGregor.

J. E. Beck, for Alfred E. Price.

McKenna, for Louisa M. Price.

Thomas E. Wilson, for the Crippled Children's Hospital Home.

R. A. Sargent, for the Salvation Army.

Cur. adv. vult.

10th September, 1935.

ROBERTSON, J.: Katherine Dixon died on the 10th of December, 1934, and her executors duly obtained probate of her will, dated 28th May, 1934, and now apply for the opinion of the Court as to whether or not her devises and bequests are to be free of probate and succession duties. The will appointed the petitioners as executors and trustees and then contained this clause:

I direct my executors to pay from and out of my estate, as soon as may be convenient, all my just debts, funeral and testamentary expenses, as well as succession and probate duties (if any) which may be assessable or chargeable against any gift, devise, bequest or legacy herein provided for.

Thereafter, following a number of bequests and devises, appears this clause:

Subject to the bequests of this my will heretofore made I direct my trustees to divide all the rest and residue of my estate, together with any devises or bequests that may lapse equally among the Salvation Army and the Crippled Children's Hospital Home, both of the City of Vancouver, in

the Province of British Columbia in loving memory of my late husband Joseph Dixon.

One of the legatees under the will, L. M. Price, made an affidavit in which she said that from conversations with the testatrix she thought it was the deceased's intention that the legacies should be free of "death duties" which should be paid out of the residue. A similar affidavit was filed by F. McGregor, also a legatee. In my opinion this evidence is not admissible as it does not fall within the "equivocation rule." See Williams on Executors, 12th Ed., Vol. II., p. 742 where the rule is set forth and *Doe d. Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363 is referred to. At pp. 368-9 of that case it is said:

> Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will,) the testator intended to express.
>
> Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," *i.e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.
>
> It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

It was submitted that the direction of the executors "to pay from and out of my estate" and the words "as well as succession and probate duties" indicate the intention of the testatrix to give all her bequests and devises free of succession and probate duties and that this is further shown by the fact that, after the bequests and devises, the will then proceeded "subject to the bequests of this my will heretofore made I direct my trustees to divide all the rest and residue," etc. It was pointed out that there was no bequest or devise to the Salvation Army and the Crippled Children's Hospital Home but merely a request to "divide." I cannot see the force of the last submission for the

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Robertson, J.

will provides that the trustees are to convert all the property, other than that specifically devised or bequeathed, into money. It seems to me that a direction to divide this balance is of no peculiar significance. It is in effect a bequest.

As to the first submission I refer to the case of *In re Kennedy*, [1917] 1 Ch. 9 in which the Court considered a will wherein the testator devised and bequeathed all his estate to trustees upon trust for sale and conversion and directed (p. 10)

> out of the money to arise from such sale and conversion . . . pay my funeral and testamentary expenses death duties and debts and the legacies and annuities hereby or by any codicil hereto bequeathed.

Speaking of this clause Warrington, L.J. said at p. 15:

> As to clause 7, I think the provisions of this clause as to payment of debts, legacies, and death duties do not affect the question one way or the other. They are merely administrative provisions telling the trustees to do what it would be their duty to do without such a provision. Moreover, such provisions as these cannot be complied with literally. There are many payments which in the nature of things cannot be made until after the investment of the proceeds of conversion has been carried out. It would, in my opinion, be wrong to give to the details of such provisions a determining effect on the beneficial interests conferred by the will.

Lord Justice Scrutton concurred in this judgment.

Section 23 of the Succession Duty Act, Cap. 61, B.C. Stats. 1934, provides that the duties imposed by the Succession Duty Act constitute a lien and charge in favour of the Crown and section 27 of the same Act makes it the duty of the executors to deduct and pay to the minister of finance the duty payable under the Act. By virtue of section 6 of the Probate Act, Cap. 56, B.C. Stats. 1934, probate duties are in the same position as succession duties. I can see no difference between the clause under consideration in the *Kennedy* case and the clause in Mrs. Dixon's will.

The answer to the questions 1 and 2 is, No.

From this decision Frances McGregor, Louisa M. Price and Alfred E. Price and the beneficiaries represented by them appealed.

The appeal was argued at Vancouver on the 30th and 31st of October, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Hossie, K.C., for appellants.

R. A. Sargent, for respondent Salvation Army, took the preliminary objection that there was no jurisdiction to hear the appeal: There is no appeal from the opinion of the Court pursuant to section 79 of the Trustee Act. This is not a judgment or order. That no appeal lies see Pemberton on Judgments, 4th Ed., 783; Seton on Decrees, 5th Ed., 1007-9; Daniell's Chancery Practice, 6th Ed., Vol. 2, pp. 22 to 32; *In re Spiller* (1860), 6 Jur. (N.S.) 386 at p. 387; *In re Green* (1860), 2 De G. F. & J. 121; *Re*—— (*a lunatic*) (1860), 8 W.R. 333. In the *Spiller* case there was no appeal. Vice-Chancellor Wood referred the matter to the Lords Justices. See also *In re Knight and Tabernacle Permanent Building Society,* [1892] 2 Q.B. 613 at p. 614; *City of London* v. *Holeproof Hosiery Co. of Canada Ltd.,* [1933] S.C.R. 349 at p. 353; *In re Estate of Hugh Magee, Deceased* (1935), 49 B.C. 481 at p. 489; *Re Mockett's Will* (1860), Johns. 628 at p. 630; *Re Lorenz's Settlement* (1861), 1 Dr. & Sm. 401. This was brought as an interlocutory appeal and proper notice was not given.

Hossie: The jurisdiction under section 79 was limited to matters that were not *inter partes.* From 1890 they ceased to be called "judicial opinions" and became "orders" and were appealable: see *In re Tyrrell's Trusts* (1889), 23 L.R. Ir. 263; *In re Dougan Estate* (1921), 30 B.C. 334; *In re Williams* (1866), 1 Ch. Ch. 372; *In re Cæsar's Will* (1867), 13 Gr. 210; *Barclay et al.* v. *Zavitz et al.* (1885), 8 Ont. 663; *Re Rally* (1911), 25 O.L.R. 112 at 114; *Re Tecumseh Public Utilities Commission and MacPhee* (1930), 66 O.L.R. 231; *Ohene Moore* v. *Akesseh Tayee* (1934), 104 L.J.P.C. 38; [1935] A.C. 72; [1935] 1 W.W.R. 637 at p. 639. The section of the Ontario Act is the same as ours. Under section 6 of the Court of Appeal Act there is the right of appeal: see *Brigman* v. *McKenzie* (1897), 6 B.C. 56.

Sargent, replied.

Cur. adv. vult.

On the 28th of November, 1935, the judgment of the Court was delivered orally by

MARTIN, J.A.: We have come to the conclusion that the pre-

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liminary objection to our jurisdiction is sound because, in our opinion, the petition herein presented under section 79 of the Trustee Act involves only an "opinion, advice or direction given" thereupon by the judge to whom it was presented, and therefore it is not a "judgment, order or decree" within the meaning of section 6, subsection (*a*) of our Court of Appeal Act, and, consequently, this appeal cannot be entertained by us. Our view of the real nature of section 79 is largely derived from the opinion of Vice-Chancellor Sir W. Page Wood, in *Re Mockett's Will* (1860), Johns. 628, which was cited to us.

In coming to this conclusion we bear in mind that both counsel have expressed the view that if this matter had been initiated by an originating summons then there would have been an appeal to us, but however that may be, no appeal is given from a petition of this special kind, doubtless because of the fact that a more ample remedy is now available by the modern procedure of an originating summons. It is also to be borne in mind that (though the present procedure by an originating summons did not then exist) the Vice-Chancellor in the case just mentioned shows that another procedure was open there, *i.e.*, a bill in equity, for which would now be substituted an action, should the facts of the case support it.

It follows that the appeal must be quashed.

Appeal quashed.

Solicitors for Frances McGregor: *Davis & Co.*

Solicitor for Louisa M. Price and Alfred E. Price: *J. E. Beck.*

Solicitor for executors of estate: *S. J. R. Remnant.*

Solicitor for Crippled Children's Hospital Home: *Thomas E. Wilson.*

Solicitor for Salvation Army: *R. A. Sargent.*

McKEE v. WILSON.

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Oct. 2, 3.

Costs—Taxation—Claim and counterclaim—Dismissal of both with costs—Set-off—Plaintiff's costs in defence of counterclaim—Appendix N, Column 1—Rule 977.

Both action and counterclaim were dismissed with costs, with right of set-off. The plaintiff's bill of costs in defence of the counterclaim included the amounts in Column 1 of Appendix N of the Tariff of Costs for Items 2, 9, 10, 13, 14 and 19, which were allowed by the taxing officer. An application for a review of the taxation of the bill was dismissed.

Held, on appeal, affirming the decision of McDONALD, J., that the items of the block tariff are in the circumstances of the case intractable and it is not open to the Court of Appeal to make any variation.

Held, further, that relief can be granted "wherever practicable" in such cases under rule 977 to any person who has an apprehension of hardship to be created, if application is made at the trial.

APPEAL by defendant from the order of McDONALD, J. of the 10th of July, 1935, dismissing the defendant's application for a review of the taxation of the plaintiff's bill of costs in defence of the counterclaim. By the judgment in the action the plaintiff's action was dismissed with costs, the defendant's counterclaim was dismissed with costs, and there was an order providing for set-off. The plaintiff's bill of costs in defence of the counterclaim included the amounts in Column 1 of Appendix N for Items 2, 9, 10, 13, 14 and 19, which were allowed by the taxing officer.

The appeal was argued at Vancouver on the 2nd of October, 1935, before MARTIN, McPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: Under the judgment the defendant was entitled to the costs of the action and the plaintiff the costs of the counterclaim, but the plaintiff's costs were taxed as though she won both action and counterclaim. (1) The taxing officer is bound by the directions of the judgment; (2) the proper interpretation of the judgment is that the plaintiff should only receive the amount by which the costs are increased by adding to the action the counterclaim. The items in the plaintiff's bill wrongly include items not occasioned by the counterclaim; it

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should only include the additional items occasioned by the counterclaim: see *Saner* v. *Bilton* (1879), 11 Ch. D. 416; *Atlas Metal Company* v. *Miller,* [1898] 2 Q.B. 500; *Wilson* v. *Walters,* [1926] 1 K.B. 511; *Medway Oil and Storage Co.* v. *Continental Contractors,* [1929] A.C. 88. There was in fact no increase of costs by reason of the counterclaim.

Beeston, for respondent: The cases referred to by appellant do not contemplate the block system: see *McGuire* v. *Crestland Trust Co. Ltd.* (1934), 48 B.C. 323 at p. 324.

MacInnes, replied.

Cur. adv. vult.

3rd October, 1935.

MARTIN, J.A.: We are of the opinion that the appeal should not prevail because the ruling of the registrar was rightly affirmed. My point of view, to put it briefly, is this: that the item of the block tariff is, in the circumstances of this case, intractable, and it is not open to us to make any variation of it. I shall just refer to the observations of Lord Haldane at p. 98 of the *Medway* case as an illustration of the working out of a rule of this kind, which is that while there may be hardship arising out of it "in exceptional cases" which cause a disadvantage in one aspect, yet on the other hand there are general advantages, as the learned Lord pointed out. But in such circumstances remedial directions can "wherever practicable" be given under rule 977, if application is made at the trial. Having regard to that rule, if any person has an apprehension of hardship to be created, that is the time, as the learned Lord pointed out, for him to bestir himself and see that such a consequence is in due and ample time averted. I will only add that these remarks are based upon the assumption that the present counterclaim so-called is in reality a counterclaim, and not something which in reality is a set-off, or something of so unsubstantial or frivolous a nature that it would be considered to be a sham in pleading, under which circumstances it would be open to the trial judge to give an appropriate direction.

MCPHILLIPS, J.A.: I am in entire agreement with the reasons

given by my learned brother the acting Chief Justice. During the argument I voiced my view in accordance with what has been stated by my learned brother. I would dismiss the appeal.

MACDONALD, J.A. (oral): There are two subject-matters, one the plaintiff's action, and in addition a different subject-matter, *viz.*, a counterclaim. In either case the item of $50 may be taxed. I think Tariff Item 2 in Appendix N is open to that construction. It is true it leads to an injustice in this case, but to construe it otherwise would lead to injustice in other cases discussed during the argument, namely, where there was a substantial counterclaim involving considerable time and labour. If the parties desire relief from these anomalies they should have recourse to rule 977, under which the judge may vary the ordinary rule as to costs.

Appeal dismissed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondent: *Noble & Beeston.*

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July 11, 12;
Nov. 6, 13.

VANCOUVER WATERFRONT LIMITED v. VANCOUVER HARBOUR COMMISSIONERS.

Trespass — Mandatory injunction — Overflow of railway right of way embankment material upon foreshore of adjoining owner—Damages as appropriate remedy—Granting of injunction without hearing defendants' evidence thereon.

Plaintiff under an agreement of exchange conveyed to defendants a 90-foot strip of land and foreshore for the railway right of way of defendants in exchange for an extension seaward of plaintiff's adjoining water-lot on the south shore of Burrard Inlet. Defendants in constructing the railway earth embankment upon the strip allowed the spill or slope of rest of the embankment to extend some 70 feet over upon the foreshore and land covered by water of the plaintiff. Plaintiff brought action for a mandatory injunction for the removal of the spilled material and for damages. The defendants contended that the appropriate remedy was in damages upon which evidence should be heard. The trial judge without hearing defendants' evidence granted a mandatory injunction.

Held, on appeal, that the granting of the injunction be affirmed subject to the qualification that compliance therewith be postponed for two years and that the defendants pay the plaintiff $200 per month until the fill be entirely removed.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 26th of March, 1935, in an action for damages for wrongfully entering upon the plaintiff's lands adjacent to Trinity Street in Vancouver, B.C., and depositing earth and other material thereon, and for an injunction directing the removal thereof and restraining the defendants from continuing the trespass. The plaintiff owns portions of the foreshore on and land under Burrard Inlet shown as parcel "C," reference plan No. 2344 and parcel "D," reference plan No. 2347, lying in front of lots 1 and 2, block 1, District Lot 184, group 1, New Westminster District, according to plan registered under No. 178. The defendants occupy a strip of land lying to the south of the above described water-lots, designed for use by them as a terminal railway for the harbour of the city, and the plaintiff claims the defendants have trespassed on its lot by depositing earth and other material thereon since July 15th, 1934, for about 70 feet northward from and along the southern boundary of its lots. The defendants claim the plaintiff's lots were acquired by grant

pursuant to an agreement with the defendants as administrators for the Crown in exchange for the strip of land to the south and adjoining said lots which was the property of the plaintiff, and the plaintiff when entering into this agreement knew the strip was required for a right of way for a railway and a fill had to be constructed on said strip involving a bank or slope of rest extending seaward and north from the strip and over the plaintiff's lots. The fill was constructed in accordance with good engineering practice and the resultant accumulation of material complained of on the plaintiff's lots was confined to the slope of rest actually required to support the fill. At the trial counsel for the plaintiffs stated that they were not asking for damages but were asking for an injunction for removal and after the evidence of two witnesses for the plaintiff had been given an argument took place as to what was the proper remedy, counsel for plaintiffs contending for an injunction and counsel for the defendants contending that the case should be dealt with on the basis of damages which he stated were small and could be estimated in money and adequately compensated for in money and he also stated that he was ready with witnesses to give evidence as to damages. The costs of removal were stated to be about $20,000. An injunction was granted and the defendants were given three months within which to remove the material from the plaintiff's lots.

The appeal was argued at Victoria on the 11th and 12th of July, 1935, and further argued at Vancouver on the 6th of November, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Burns, K.C., for appellants: It is a question of the circumstances whether damages or a mandatory injunction should be applied as the appropriate remedy. The working rule is as laid down by A. L. Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Company* (1894), 64 L.J. Ch. 216; [1895] 1 Ch. 287 at p. 322. Witnesses of the defendants were in Court and were offered to shew that the material was really a benefit to the plaintiff's land, or that the damage, if any, was small. In such circumstances damages would be the appropriate remedy, if

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trespass. To compel the removal of the material at a cost of about $20,000 with no resultant benefit to the plaintiff would not be just or reasonable. The granting of an injunction is in the discretion of the Court: see Salmond on Torts, 8th Ed., 177, 194-5; Kerr on Injunctions, 6th Ed., 32, 35 and 153; *Gross* v. *Wright,* [1923] S.C.R. 214 at p. 231.

A. Alexander, for respondent: In the circumstances there is no discretion to do other than grant a mandatory injunction. Under section 12 of The Vancouver Harbour Commissioners Act, Can. Stats. 1913, Cap. 54, the board may acquire by expropriation any property required for the harbour, and it was their duty to expropriate this property for the support of their fill. It is shown there is substantial injury to the property in its character as a water-lot for navigation purposes. The rule as to discretion does not apply to a public company clothed with statutory power to expropriate the property they require: see *Saunby* v. *London (Ont.) Water Commissioners,* [1906] A.C. 110; *Champion & White* v. *City of Vancouver* (1916), 23 B.C. 221, and on appeal [1918] 1 W.W.R. 216. If there was the right to exercise discretion the learned Chief Justice came to the right conclusion: see *Gross* v. *Wright* (1922), 31 B.C. 270, and on appeal [1923] S.C.R. 214; *Woodhouse* v. *Newry Navigation Co.,* [1898] 1 I.R. 161; *Cowper* v. *Laidler,* [1903] 2 Ch. 337. The owner's rights must be protected: see *Shelfer* v. *City of London Electric Lighting Company,* [1895] 1 Ch. 287 at pp. 310 and 322; *Goodson* v. *Richardson* (1874), 43 L.J. Ch. 790; *Attorney-General* v. *Acton Local Board* (1882), 22 Ch. D. 221; *Eardley* v. *Granville* (1876), 3 Ch. D. 826; *Wood* v. *Conway Corporation,* [1914] 2 Ch. 47. It is impossible to measure the damages and there must be a refusal to allow evidence of damages. He did not press his claim to give evidence of damages.

Burns, in reply: The trial proceedings clearly disclose there was a refusal to hear the defendant's evidence offered. It was open to the defendant to shew that it would be oppressive to grant an injunction. In *Saunby* v. *London (Ont.) Water Commissioners,* [1906] A.C. 110, expropriation proceedings were commenced but not followed up. There is no rule that discretion is not to be exercised because of expropriation being open, and

involved in the exercise of discretion is the duty to hear all the evidence bearing on the circumstances.

[On further argument MARTIN, J.A. referred to *Fishenden* v. *Higgs and Hill Limited* (1935), 153 L.T. 128, delimiting *Shelfer's case* [*supra*]; *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board,* [1912] A.C. 788 at p. 795; *Great Central Railway* v. *Doncaster Rural Council* (1917), 87 L.J. Ch. 80; *Frost* v. *King Edward VII. Welch &c. Association,* [1918] 2 Ch. 180 at p. 195; *Gross* v. *Wright,* [1923] S.C.R. 214 at p. 232]. *Cur. adv. vult.*

On the 13th of November, 1935, the judgment of the Court was delivered orally by

MARTIN, J.A.: We are all of opinion that the justice of this case will, in its unusual circumstances, including the present depression, be fully met by permitting the judgment pronounced below to stand in so far as it grants a mandatory injunction for the removal by the defendants of the rock and earth fill that they have wholly unjustifiably deposited upon the plaintiff's property, but with the qualification that compliance with such injunction be postponed for two years, unless that term be shortened upon application to be made below.

And we also adjudge that the defendants shall pay to the plaintiff the sum of $200 per month beginning from the date of the judgment below until the said fill is entirely removed.

The costs below shall be to the plaintiff and the costs of this appeal shall be thus apportioned: two-thirds to the defendants appellants and one-third to the plaintiff respondent.

I might add, as an individual addition of my own, something that occurred to me during the long and interesting discussion we had (wherein we were very pleased to see that both counsel adopted such a reasonable attitude as a result thereof) and the case I had then in mind, but not immediately at hand, was *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation,* [1908] A.C. 323, wherein Lord Chancellor Loreburn at p. 326 used language which I think is very appropriate to the present case, *viz.*:

> Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason.

Appeal dismissed.

Solicitor for appellants: *W. E. Burns.*

Solicitors for respondent: *Tiffin & Alexander.*

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Nov. 15, 18, 22.

IN RE LEGAL PROFESSIONS ACT AND P. C. BARKER v. SKRINE AND SKRINE.

Solicitor and client—Costs—Retainer—Conflict of evidence between solicitor and client.

On the question of the retainer of a solicitor to bring an action, where the evidence in favour of the solicitor has not advanced beyond that of grave doubt there is no other course open to the Court than to hold that the solicitor has not satisfied the *onus* which is upon him and declare that the retainer did not exist.

MacGill & Grant v. *Chin Yow You* (1914), 19 B.C. 241, followed.

APPEAL by defendant J. H. Skrine from the order of MCDONALD, J. of the 17th of July, 1935, whereby the report and certificate of the deputy district registrar at Vancouver of the 10th of July, 1935, was in part reversed and set aside. Mr. and Mrs. Skrine with one Banks were injured in an automobile accident and Skrine went with Banks to Mr. *Barker's* office where they gave particulars of the accident to one Bethel, a law clerk in *Barker's* office. *Barker* was acting for Banks, and while Bethel was interviewing Banks and Skrine *Barker* went into the room when Bethel said "Mr. Skrine also wishes us to act for him." Subsequently *Barker* issued a writ on behalf of Skrine and his wife. When Skrine learnt of this he employed another solicitor named *Davidson* who wrote *Barker* saying that Skrine intimated he left instructions with him (*Barker*) to negotiate a settlement, but any offer was to be confirmed by him and he did not give instructions to issue a writ. At the instance of *Barker* an order was made by MURPHY, J. on the 15th of March, 1935, that the solicitor's bill of costs delivered to Mr. and Mrs. Skrine by *Barker* be referred to the district registrar for taxation. The deputy district registrar reported that there was no retainer and there was nothing due by the clients or either of them to the solicitor. On appeal from the deputy registrar's report that there was no retainer, it was reversed as to the defendant J. H. Skrine, and that he proceed with the taxation of the solicitor's costs as against J. H. Skrine. From this order J. H. Skrine appealed.

The appeal was argued at Vancouver on the 15th and 18th of November, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

J. A. MacInnes, for appellant: It is admitted there was no written retainer. *Barker* acted without authority and the registrar so found. Skrine did not know of the action until an order for discovery was made. Where there is no retainer and a conflict arises between solicitor and client, the client has the benefit of the doubt: see *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241; *Scribner* v. *Parcells* (1890), 20 Ont. 554. A solicitor has no authority to retain any one on behalf of his client: see *Wray* v. *Kemp* (1884), 26 Ch. D. 169; *In re Becket. Purnell* v. *Paine,* [1918] 2 Ch. 72. The registrar should not be reversed on a question of fact. He first had to find whether there was a retainer: see *In re Dickie, De Beck & McTaggart and Sherman* (1916), 23 B.C. 538.

Todrick, for respondent: There is complete evidence to show *Barker* was retained by Skrine. The registrar did not stay to hear all of *Barker's* evidence. The retainer need not necessarily be in writing: see *Wiggins* v. *Peppin* (1837), 2 Beav. 403; *In re Legal Professions Act and A. E. Beck* (1925), 36 B.C. 76; *Macdonald* v. *Bellhouse,* [1920] 1 W.W.R 597.

MacInnes, in reply: The authorities cited in *Scribner* v. *Parcells* (1890), 20 Ont. 554 should be examined.

Cur. adv. vult.

On the 22nd of November, 1935, the judgment of the Court was delivered orally by

MARTIN, J.A.: This appeal raises the question of the retainer of a solicitor to bring an action on behalf of his alleged clients, and we have given careful consideration to the matter which here is one purely of fact. After considering the evidence, both oral and written, we can reach no other conclusion than that the matter is not advanced in favour of the solicitor beyond that of grave doubt, and in such case, having regard to our prior decisions in *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241 and *In re Dickie, De Beck & McTaggart and Sherman*

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IN RE LEGAL PROFESSIONS ACT AND P. C. BARKER v. SKRINE

(1916), 23 B.C. 538, we have no other course open to us than to hold that the solicitor has not satisfied the *onus* which is upon him in these cases, and we therefore declare that the retainer did not exist, with the result that the appeal must be allowed and the original ruling of the registrar, finding there was no retainer, restored.

It is to be observed, and it is unfortunate, that when this question of the retainer came first before the registrar, instead of its being settled, as is usually the case, and was, *e.g.*, in *Dickie's* case (p. 540), by the registrar's finding after hearing the respective witnesses in person, their evidence, we are told, was taken on depositions in his absence, and therefore we are without the full benefit of an original and complete finding of fact that would have been very helpful to us in disposing of this difficult controversy.

Appeal allowed.

Solicitor for appellants: *E. Stuart Davidson.*
Solicitor for respondent: *Thomas Todrick.*

S. C.
In Chambers
1935

Nov. 20; Dec. 20.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF WILLIAM PRIDMORE, DECEASED.

Testator's Family Maintenance Act—Will—Husband and wife—Five children by previous marriage—Application of Act—R.S.B.C. 1924, Cap. 256.

A testator was survived by his wife and five children by a previous marriage, who were of age and in comfortable circumstances. His estate amounted to about $4,800, and by his will he directed that his real and personal property be sold and the income derived from the investment of the proceeds be paid to his wife for life, and thereafter the property be divided among his children. On petition of the wife whose only asset was a Dominion bond for $500 for relief under the Testator's Family Maintenance Act, it was held that the testator did not make adequate provision for her maintenance, and an order was made that: (1) In addition to the income from her bond the petitioner is to have until further order sufficient money from the estate to make up on the whole a monthly income of $50, using in the first instance her own money until

it is exhausted to make up the difference between the present income from the estate and $50 per month; (2) the capital of the estate to be charged to meet any payments to be made under any further order which the Court may make; (3) the further consideration to be reserved so that the Court may be in a position to deal with any contingency that may arise.

PETITION by the widow of the late William Pridmore who died on the 9th of September, 1935, under the Testator's Family Maintenance Act for further provision for her maintenance and support. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 20th of November, 1935.

Patton, for petitioner.
R. S. Yates, for executors.
Bullock-Webster, for children of testator.

Cur. adv. vult.

20th December, 1935.

ROBERTSON, J.: This is a petition under the Testator's Family Maintenance Act by Lucy Pridmore, widow of the late William Pridmore. The deceased left an estate of approximately $4,800. Part of this consists of the home where he and his wife had lived, since their marriage in July, 1916, to the 9th of September, 1935, when he died. He had no one dependent upon him except the petitioner. In his will he directed that his real and personal property should be sold and the income derived from the investment of the proceeds should be paid to his wife for life or until she should remarry and thereafter the property to be divided among his children. He left him surviving, four daughters and one son by a previous marriage who are all of age and in comfortable circumstances.

The petitioner is 70 years of age and owing to this, and her physical condition, is unable to work. Her only asset is a Dominion bond for $500 from which she receives $25 per year. Upon these facts I am of the opinion that the testator did not make adequate provision for the proper maintenance and support of his wife. Under the will she is entitled to continue to live in the house with the use of one acre of land free until it is sold or disposed of. The house is old and in a bad state of repair.

S. C.
In Chambers
1935

IN RE ESTATE OF WILLIAM PRIDMORE, DECEASED

Robertson, J.

There are no conveniences such as bath, toilet, water or light. Under these conditions the petitioner cannot live alone. She says it would take not less than $50 per month to provide her with comfortable board and lodging, clothes, medical attendance and other necessities of life. I think she is entitled to this amount per month.

The executors have leased part of the property for one year from the 1st of November, 1935, at a rental of $225 payable as to one-half on the 1st of November, 1935, and the balance on the 1st of May, 1936. Out of this sum it will be necessary to pay the taxes amounting to $105.44, so that the executors will be able to pay her approximately $10 per month for one year. She will also have a small income from her bond. She must use her own money to make up the difference per month until it is exhausted. See my decision in *In re Morton, Deceased* (1934), 49 B.C. 172. I direct then that the executors continue to pay her the rental to which she is entitled. At the expiration of the year and when her $500 bond has been exhausted I direct that the executors pay her a monthly sum of $50, using in the first instance, for such purpose, the money in the bank.

In conclusion I make the same order as set out in *In re Estate of G. H. Ramsey, Deceased* (1935), [*ante*] 83 at p. 89, with appropriate changes.

Costs of all parties out of the estate.

Order accordingly.

LANGFORD v. LANGFORD.

S. C.
In Chambers
1933
June 17, 30.

Divorce — Maintenance or alimony — Divorce Rules 65 to 70 inclusive— Validity—Duties of registrar under rule 69 (a)—B.N.A. Act, Secs. 91 and 92.

Divorce is a matter of *status* which, as such, does not involve alimony. Maintenance or alimony is a matter of property and civil rights and so within the jurisdiction of the Province. Divorce Rules 65 to 70 inclusive are *intra vires* of the Legislative Assembly and confer on the Court power to make orders for maintenance or periodical payments.

The proper construction of subsection (*a*) of rule 69 is that the registrar may, if he so wishes, suggest to the Court what, in his opinion, would be a proper allowance, and that it in no way attempts to confer jurisdiction upon the registrar to himself make an order for maintenance or alimony.

APPLICATION to the Court to confirm the action of the registrar who, acting under rule 69 (*a*) of the Divorce Rules, directed that an order for payments of $25 per month to the petitioner should issue against the respondent. Heard by MURPHY, J. in Chambers at Vancouver on the 17th of June, 1933.

Hamilton Read, for petitioner.
Bray, for respondent.

Cur. adv. vult.

30th June, 1933.

MURPHY, J.: As the question of the constitutionality of Divorce Rules 65 to 70 inclusive is largely decisive of all the points raised herein, I deal first with that matter. Respondent's counsel does not, I think, seriously contend that the Divorce Act, Cap. 70, R.S.B.C. 1924, is not now in force in British Columbia. What he does contend is that the provisions of that Act particularly section 17 thereof do not authorize the making of an order for partial payments or in fact any payments at all to the wife by way of alimony and consequently rules 65 to 70 aforesaid have no validity because authority to enact them by the Provincial Legislature must rest on the Divorce Act since jurisdiction in divorce is exclusively assigned to the Dominion under the

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British North America Act. The error here, in my opinion, arises in confusing divorce with alimony or maintenance. Divorce is a matter of *status* which, as such, does not involve alimony at all. Maintenance or alimony is a matter of property and civil rights and so within the jurisdiction of the Province—*Rousseau* v. *Rousseau,* [1920] 3 W.W.R 384. I therefore hold said rules to be *intra vires* of the Legislative Assembly. There can, I think, be no doubt that rules 65 to 70 read as a whole confer on the Court power to make orders for maintenance or periodical payments. These rules have been validated by statute of the Provincial Legislature. The registrar in this case acting under rule 69 (*a*) has directed that an order for payment of $25 per month to the petitioner should issue against the respondent and this is an application to the Court to confirm his action. If rule 69 (*a*) is to be construed as giving the registrar jurisdiction to in effect make an order for alimony then I think there is grave reason to believe that portion of said rule which can be relied upon in support of this contention is *ultra vires.* Such an enactment by the Legislative Assembly would amount to appointing the registrar a judge since there can, I take it, be no doubt that the making of such an order is a judicial act.

This is not, however, the construction which I would put upon said subsection (*a*) of rule 69. In my view all that said subsection (*a*) means is that the registrar may, if he so wishes, suggest to the Court what in his opinion would be a proper allowance and that it in no way attempts to confer jurisdiction upon the registrar to himself make an order for maintenance or alimony.

So construed said subsection harmonizes with subsection (*c*) of the same rule directing the registrar to report his findings to the judge. This report of findings by the registrar I hold to be obligatory because necessary to enable the judge to perform his proper function. The judge then himself judicially determines the question and makes such order as he deems proper. In the case at Bar the registrar has not specifically reported to me his findings upon the averments contained in the pleadings regarding alimony and the matter is remitted to him that he may do so.

The objection that the alimony proceedings are out of time is answered by the finding that the impugned rules are *intra vires* of the Provincial Legislature since rule 65 specifically authorizes the course adopted by the petitioner herein.

There is no substance in the contention that the alimony petition must, under the rules, be referred to the registrar by a judge's order before that official can act.

In my opinion the Legislature has directed the registrar to act without any such order by the opening words of rule 69 (*a*). In view of the provisions of rules 65 to 70 the obtaining of such an order would be a mere formality and therefore a cause of useless expense. The argument that even if maintenance is a matter of property and civil rights, it is also so connected with divorce as to fall under the jurisdiction of the Dominion as ancillary to its exclusive divorce jurisdiction even if correct (as to which I am not called upon to express an opinion) is of no moment in the determination of the matter now under consideration, because the Dominion has enacted no legislation dealing with alimony or maintenance ancillary to divorce legislation passed by that body. Chapter 127 of R.S.C. 1927 does not even mention maintenance or alimony. It is, of course, trite law that where a matter is incidental or ancillary to one of the enumerated subsections of 91 and is also within one of the enumerated subsections of section 92 if the field is clear Provincial legislation will be valid in the absence of legislation by the Dominion. *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A.C. 189; *Tennant* v. *Union Bank of Canada*, *ib.* 31. In view of the facts of this case and of the necessity to refer this particular feature of it back to the registrar as hereinbefore set out I deem it just and expedient that an injunction issue to prevent respondent dealing in any way with any real property in which he has any beneficial interest, legal or equitable, until this question of petitioner's alimony has been decided by me and I so order. The matter is referred back to the registrar to report to me his findings as hereinbefore set out.

Order accordingly.

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Divorce—Petition—Respondent's answer—Prayer for dissolution—Application to strike out—B.C. Stats. 1925, Cap. 45, Sec. 2 (3)—Divorce Rules, 1925, rr. 17 and 22.

In answer to a wife's petition in a divorce action, the respondent alleged she committed adultery and prayed that her petition be dismissed and the marriage dissolved. The petitioner's application to strike out that part of the prayer asking for dissolution on the ground that the respondent can only obtain such relief by filing a petition was granted.

The construction applied by the English Courts to the rules made pursuant to the provisions of the Judicature Act which authorized the making of rules to regulate the "procedure and practice" should be applied to our divorce rules, *viz.*, that rules of practice and procedure do not confer a new jurisdiction or affect the rights of parties.

APPLICATION by petitioner in a divorce action to strike out that part of respondent's prayer asking for dissolution of marriage. Heard by ROBERTSON, J. at Victoria on the 27th of November, 1935.

Beckwith, for petitioner.
Patton, for respondent.

Cur. adv. vult.

8th January, 1936.

ROBERTSON, J.: The respondent in his answer to his wife's petition alleges she committed adultery and prays that her petition be dismissed and the marriage dissolved.

The petitioner now applies to strike out that part of the prayer asking for dissolution, on the ground that the respondent can only obtain such relief by filing a petition. Our Act is the same in all material particulars as the English Act (20 & 21 Vict., Cap. 85) passed in 1857. Under that Act it was impossible for a respondent to obtain such relief in the petition against him, the reason being that there was no power given to the Court by the statute, except to grant or reject the prayer of the petition. He had to commence a cross suit which two suits were usually consolidated. To overcome this difficulty, the

English Act was amended in 1866 (see Sec. 2, Cap. 32 of 29 & 30 Vict.) so as to permit the respondent in any suit for dissolution of marriage when it was opposed on the ground, *inter alia*, of adultery of the petitioner, to obtain such relief as he or she would have been entitled to, in case he or she had filed a petition asking such relief. See Browne & Watts on Divorce, 10th Ed., 316-17.

Counsel for the respondent points out that subsection (3) of section 2 of Cap. 45, B.C. Stats. 1925, enacts that the "Divorce Rules, 1925, shall regulate the procedure and practice in the Supreme Court" and he refers particularly to rules 17 and 22 which are as follow:

17. Where a husband is charged with adultery with a named person, a sealed copy of the pleading containing such charge shall be delivered to the person with whom adultery is alleged to have been committed, endorsed in lieu of notice to appear with notice that such person is entitled, within eight days after delivery thereof, to apply for leave to intervene in the cause. Such delivery and notice may only be dispensed with by order upon summons for cause shewn. A form of notice is contained in Appendix V.

22. (*a*). Every answer which contains matter other than a simple denial of the facts stated in the petition shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter so far as he or she has personal cognizance thereof and deposing to his or her belief in the truth of the rest of such other or additional matter, and where the respondent is husband or wife of the petitioner shall further state that there is not any collusion or connivance between the parties; and such affidavit shall be filed with the answer.

(*b*) Where the answer of a husband alleges adultery and prays relief, the alleged adulterer must be served personally with a sealed copy thereof bearing a notice to appear in like manner as a petition. Where in such a case no relief is claimed the alleged adulterer shall not be made a co-respondent, but a sealed copy of the answer shall be delivered to him endorsed with notice as under Rule 17 that such person is entitled within eight days to apply for leave to intervene in the cause, and upon such application he may be allowed to intervene, subject to such directions as shall then be given.

He points out that the provisions of rule 22 (*a*), compelling the respondent to verify by affidavit the "additional matter" in his answer, and to swear there is no collusion or connivance, are the same sort of requirements which the petitioner is bound to comply with, as regards his petition, by reason of rule 2; that rule 22 (*b*) makes it necessary, where the respondent alleges adultery and claims relief, to make the alleged adulterer a co-respondent, which is like rule 4 which provides that in every

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petition for dissolution an alleged male adulterer must be made a co-respondent. He further points out the right to intervene given by rule 22 (*b*) and rule 17. He submits that these rules throw the same safeguards about an answer as are provided in the case of a petition for dissolution and that they were unnecessary if dissolution could not be decreed in favour of a respondent who prayed for it in his answer. Further, he refers to the form of answer—Appendix VI. in the Schedule in which the prayer reads:

> Wherefore this respondent humbly prays that Your Lordship will be pleased to reject the prayer of the said petition and decree, *etc.*

and he says that the word "decree" is broad enough to include dissolution of the marriage and that its use shews that the respondent is entitled to ask for such relief.

Section 6 of our Act provides that in all proceedings, other than proceedings to dissolve any marriage, the Court shall proceed and act and give "relief" on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief, subject to the Act, and to the rules and orders under the Act. It is clear that the Ecclesiastical Courts never had power to dissolve a marriage. Only Parliament could do this. The Ecclesiastical Courts could give various kinds of relief to a respondent when prayed for in the answer. Two instances of this are given in Browne & Watts on Divorce, 10th Ed., 317, as follows:

> To a petition for restitution of conjugal rights, an answer might be filed, alleging adultery against the petitioner, and praying for a judicial separation; and on such an answer the Court could, . . . give the respondent the relief desired.

Again:

> Damages against an alleged adulterer may be claimed in an answer by a husband to a petition for judicial separation.

Petitioner's counsel submits this is the kind of relief which is authorized by rule 22 (*b*) and that this rule can be given full effect to by limiting it to the relief which the Ecclesiastical Courts could give. I think this is correct.

Section 53 of the English Act provides:

> The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, . . .

The first rules, made under the English Act, are to be found in 30 L.T. Jo. xxi., 6th February, 1858, and rules 15 and 16 (which are exactly the same as rules 15 and 16 in our Divorce Rules, 1912) are as follow:

15. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter, and such affidavit shall be filed with the answer.

16. In cases involving a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, the respondent shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the other party to the marriage.

The form in the Schedule under the English Rule 16 is practically the same as that following our rule 16 in the 1912 Rules. The English Rules were re-enacted in 1865. See Browne & Watts on Divorce, 8th Ed., 657. But so far as the present question is concerned rules 15 and 16 continued in the same form, with some changes which are not material here, down to 1923 when new provisional rules were enacted, which, in turn, were replaced by the Matrimonial Causes Rules, 1924—see Browne & Watts, 8th Ed., *supra,* 657 to 691. Likewise our rules 15 and 16 continued, without change, until the passage of the new rules in 1925, when those rules were combined as 22 (*a*).

English Rules 17 and 22 are practically the same as our rule 22, *supra.* It will be noticed that rule 22 (*a*) is a combination of rules 15 and 16. In England down to 1924 there was no such rule as 22 (*b*). The Court exercised its power to grant dissolution under section 2 of the 1860 Act to a respondent. English rule 22 (*b*) could not therefore have been intended to confer any new power. It dealt merely with procedure. Now our rules, passed under section 37 of the Divorce Act which is exactly the same as the English section, *supra,* were only to govern practice and procedure. Down to 1925 we had no such rule as 22 (*b*). As I have pointed out, it was necessary to amend the English Act to give power to the Court to grant dissolution if prayed for in the respondent's answer. Assuming the Province had jurisdiction to amend our Act so as to confer this power on the Court it does not seem likely that it would be sought to attain this object by amendment of the Rules. In my opinion this

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power could only be given by an Act passed by the proper authority.

Finally I think the principle of construction applied by the English Courts to the rules made pursuant to the provisions of the Judicature Act which authorized the making of rules to regulate the "procedure and practice" should be applied to our Divorce Rules, *viz.*, that rules of practice and procedure do not confer a new jurisdiction or affect the rights of parties. See Annual Practice, 1936, p. 2, and cases referred to.

The application is granted.

Application granted.

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Practice — Arbitration — Award — Doubt as to validity — Application to enforce summarily—R.S.B.C. 1924, Cap. 13, Sec. 15.

Section 15 of the Arbitration Act provides that "an award or a submission may by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect."

On application under said section 15 an order was made to enforce an award in the same manner as a judgment or order.

Held, on appeal, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. This is not a case where the right to proceed on the award is so clear that leave should be given to enforce it in a summary manner.

In re Boks & Co., and Peters, Rushton & Co., Lim., 88 L.J.K.B. 351; [1919] 1 K.B. 491, followed.

APPEAL by defendant from the order of MCDONALD, J. of the 19th of June, 1935, whereby he ordered that the order made by His Honour Judge THOMPSON of the 18th of June, 1934, be enforced in the same manner as a judgment. Plaintiffs brought action in the Supreme Court against the defendant and then by consent of the parties THOMPSON, Co. J. made an order that he

should try the action under section 24 of the County Courts Act. He tried the action and gave judgment in favour of the plaintiffs. The defendant then appealed, and it was held by the Court of Appeal that section 24 of the County Courts Act did not authorize the making of the order, that in trying the case by consent of the parties he was acting as an arbitrator and there was no appeal: see 49 B.C. 456. The plaintiffs then applied for an order to enforce the award under section 15 of the Arbitration Act.

The appeal was argued at Vancouver on the 13th and 14th of November, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Griffin, K.C., for appellant: Section 24 of the County Courts Act only relates to actions about to be brought and not actions that have been brought. This is an award that should not be enforced under section 15 of the Arbitration Act, as it is a matter of grave doubt. Their remedy is by action to enforce the award: see Russell on Arbitration and Award, 12th Ed., 273; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 670, sec. 1123; *In re Boks & Co., and Peters, Rushton & Co.*, [1919] 1 K.B. 491; *May* v. *Mills* (1914), 30 T.L.R. 287. If we can show that the validity of the award is in doubt it should not be enforced and an action should be brought. There was no submission under the Arbitration Act, all that he did was "*qua* judge" and is a nullity: see *Overn* v. *Strand* (1929), 44 B.C. 406, and on appeal (1930-31), *ib.* 47; [1931] S.C.R. 720 at p. 732. If there was no submission there was no valid award. The County Court cannot act other than judicially; the submission was to a Court and there was no power for the Court to act: see *Brand* v. *National Life Assurance Co. of Canada*, [1918] 3 W.W.R. 858. In making the award the County Court judge acted as a judge of the Supreme Court and was without jurisdiction: see *Spencer* v. *City of Vancouver* (1921), 30 B.C. 382; *City of Slocan* v. *Canadian Pacific Ry. Co.* (1908), 14 B.C. 112; *Roddy* v. *Lester* (1856), 14 U.C.Q.B. 259 at p. 264; *Kemp* v. *Henderson* (1863), 10 Gr. 54; *Township of Waterloo* v. *Town of Berlin* (1904), 8 O.L.R. 335. There was no jurisdiction to order a reference. An arbitrator cannot delegate his authority: see Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 679, sec. 1133;

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Lingood v. *Eade* (1742), 2 Atk. 501 at p. 504; *Eastern Counties Railway Co.* v. *Eastern Union Railway Co.* (1863), 3 De G. J. & S. 610. Uncertainty makes the award bad: see Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 678, sec. 1133; Russell on Arbitration and Award, 12th Ed., 233. The award purports to decide a matter not submitted: see 1 C.E.D. (Ont.) 277. The award purports to enforce an illegal agreement to deceive a public officer in the exercise of his duty: see *Foster* v. *Driscoll,* [1929] 1 K.B. 470 at pp. 501 and 510.

J. A. MacInnes, for respondents: A binding adjudication has been made in the nature of an award. You have the consent to the adjudication of the matter by a judge and adjudication then by the judge makes it a valid award. Under section 15 of the Arbitration Act it can be enforced. He must go further than to show you difficulties. It is a settlement of differences in a concise way by the pleadings: see *Loane* v. *The Hastings Shingle Mfg. Co.* (1925), 35 B.C. 485. There was something done which was binding: see Russell on Arbitration and Award, 12th Ed., 36; *Harris* v. *Harris* (1901), 8 B.C. 307. It is the judge in person who gives the award: see *Overn* v. *Strand* (1930-31), 44 B.C. 47 at p. 50. As to the reference to the registrar, this is clearly severable: see Russell on Arbitration and Award, 12th Ed., 243. Illegality must be pleaded. If they agree to any one taking the position of arbitrator they are bound: see *Delver* v. *Barnes* (1807), 1 Taunt. 48; *Wohlenberg* v. *Lageman* (1815), 6 Taunt. 251. Where a matter of grave difficulty arises the Court must deal with it, but where the award is regular on its face it stands: see *City of Cumberland* v. *Cumberland Electric Light Co., Ltd.,* 43 B.C. 525 at p. 534; [1931] S.C.R. 717. In any event an order by the Supreme Court under section 15 of the Arbitration Act is a matter of discretion and there is no excess of jurisdiction in enforcing an award.

Griffin, replied.

Cur. adv. vult.

15th November, 1935.

MARTIN, J.A. (oral): The Court is of opinion that this appeal should be allowed, our brother MCPHILLIPS dissenting.

My observations shall be brief because there is in the case of

In re Boks & Co., and Peters, Rushton & Co., Lim. (1919), 88 L.J.K.B. 351, a very apt decision of the English Court of Appeal upon exactly the same section in their Arbitration Act as our section 15, which we have taken from their Act, and we are very fortunate to have a decision upon a point of practice by an appellate tribunal in England arising out of a section of a statute identical with ours.

I adopt that case as a safe guide as to what we should do here, and therein it is said by the Master of the Rolls, Lord Justice Scrutton agreeing, that (p. 354):

> It is well settled that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. Where there is no objection to the award or where the objections raised are such as can be easily disposed of, the summary procedure is prompt and convenient; . . .

Then I pass to the observations of the late lamented Lord Justice Scrutton, a truly distinguished judge, where he says, pp. 354-5:

> This summary method of enforcing awards is only to be used in reasonably clear cases. It is not intended, on the application for leave to enforce an award, to try a complicated or disputed or difficult question of law. If it is not reasonably clear that the award should be enforced, the party seeking to enforce it must be left to his remedy by action when the matter can be raised on proper pleadings, and dealt with in a proper form. Without expressing any opinion as to what may ultimately happen, it seems to me this is not a case where the right to proceed on the award is so clear that leave should be given to enforce it in a summary manner.

I shall not attempt to add anything to language so specially appropriate to the complicated and difficult case before us.

MCPHILLIPS, J.A. (oral): I would dismiss this appeal and I do so without hesitancy. Shortly, the case may be presented in this way: both parties made a mistake in law; both parties thought they were in a Court, the Supreme Court or the County Court, it is immaterial, but they thought they were in a Court and it turns out they were not in Court at all, and the result is what was done amounts not to a judgment but to an award of an arbitrator, the judge so acting. He happens, descriptively, to be a judge, but he was an arbitrator and arbitrator only and it was an award of an arbitrator. That being the case now one of the parties comes forward and says many things that could have been said before the arbitrator, many things that could

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have been referred to a judge to pass upon as a question of law, but now, at the end of things, they come in having had the opportunity to take advantage of the arbitrator's decision which, if it had been favourable to them, certainly we would not see them in this Court, but they now wish to go back over the whole subject and be allowed to raise defences which they are now precluded from in law as I view it.

With regard to the cases cited by my learned brother the acting Chief Justice, I, with great respect have to say that it is confined to a question where there is a doubt—there must be doubt. Where is the doubt here? There is absolutely no doubt here. There is an award good on its face. If the arbitrator was going upon a wrong principle of law or that there was illegality, then it was incumbent upon the parties to go to the Court and have that matter determined. Here, dissatisfied with the award, they come to this Court and ask that the whole matter should be agitated again.

I refer to a case in which I took part and which as a matter of fact went to the Supreme Court of Canada and was sustained. My learned brother the acting Chief Justice took a different view. He dissented in the case. Now, in this case, the *City of Cumberland* v. *Cumberland Electric Light Co., Ltd.* (1931), 43 B.C. 525 at pp. 534-5, in my judgment I quote this judgment of the House of Lords:

> The Lord Chancellor said in *Tabernacle Permanent Building Society* v. *Knight*, [1892] A.C. 298 at p. 302: "I think the object of section 19 of the Arbitration Act 1889"

(he is dealing with the self-same section we are dealing with in our Act)

> "[section 22 Arbitration Act of B.C., R.S.B.C. 1924] though in one sense it may be said to have for its object the same result, was rather to hold a control over the arbitration while it was proceeding by the Courts, and not to allow the parties to be concluded by the award, when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made, although they might have had a right to repudiate the arbitrator if they had done so before the completion of the award."

All these questions could have been agitated, but they were not agitated and it was hopeless for them to endeavour to reagitate them. Now, that is exactly what is being asked here, and I say it would be a reversal of well-understood authority and we have the Supreme Court of Canada approving the majority

decision in the case that I have referred to. We are bound by the Supreme Court of Canada decision.

I would dismiss the appeal.

McQUARRIE, J.A. (oral): I agree with my learned brother the acting Chief Justice that the appeal should be allowed. I think that he has exactly stated the law in connection with matters of this kind.

Counsel for the appellant argued a number of grounds which he said supported his case. He did so in a very clear and logical manner, I must say. Whether he was correct in regard to all or any of them I am not prepared to say, but he convinced me that there was at least some doubt and according to the authorities quoted by my learned brother the acting Chief Justice apparently in a case that is doubtful there should be an action to determine the rights of the parties.

I listened to the remarks of my learned brother McPHILLIPS who has looked into this matter very carefully. His views always have great weight with me, but at the same time I feel it was always understood, and as a matter of fact agreed that there should be a right of appeal here at least. In fact, it appears that the agreement was entered into on that understanding. I am looking at page 17 of the appeal book, which contains an affidavit of *Almond Marcus Grimmett,* solicitor and counsel for the defendant in the trial in which he says at paragraph 3:

> That at the time the consent to the trial of this action in the County Court was signed, the question of right of appeal was raised and discussed before His Honour Judge G. H. Thompson and it was agreed between counsel that the trial of the action as aforesaid would not prejudice the right of appeal of the parties to the said action and His Honour Judge Thompson expressed a similar opinion.

Now, that goes a little bit further than some of the cases that have been quoted. You might almost say that the defendant signed the consent under representations which were not at all correct. That being the case then it is rather difficult for the other side to urge, it seems to me, that this is an award and that there is no appeal. I think the matter certainly is worthy of being settled by an action.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. M. Grimmett.*

Solicitor for respondents: *E. A. Boyle.*

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BENNETT v. GENERAL ACCIDENT ASSURANCE COMPANY.

Insurance, automobile—Automobile owned by company and policy issued to company—Car turned over to employee for his sole use on company's business—Employee's son with leave of father drives car—Accident—Liability under policy—B.C. Stats. 1925, Cap. 20, Sec. 159F (1) (a), (b) and (2).

The plaintiff's father, a salesman in the employ of the Hudson's Bay Company, was entrusted by the company with an automobile for carrying on his work as a salesman, his employment necessitating almost continuous journeys to various parts of the Province. He was allowed the keep of the car in his own garage, was paid a flat rate for its maintenance, the company paying for all major repairs required. The company remained the owner of the car, the licence being taken out by it and the insurance policy issued by the defendant in the company's name. At no time was permission asked or direct authority given by the Hudson's Bay Company for the plaintiff to drive the car. On the 10th of March, 1934, the plaintiff, with the consent of his father, drove the car, and an accident occurred which resulted in judgment being awarded against the plaintiff for damages. In an action by the son against the insurance company for indemnification against loss:—

Held, that under section 159F of the Insurance Act, as enacted by Cap. 20, Sec. 5, of 1932, the Legislature has undertaken to make a statutory contract between the insurer and "every other person" who, with the owner's consent, uses or is responsible for the use of the automobile designated in the policy, and the question here is whether the owner (Hudson's Bay Company) gave its consent, express or implied, to the use by the plaintiff of the car in question. There is nothing in the evidence which would warrant the conclusion that the consent of the Hudson's Bay Company extended to the use of the car by any of the salesman's family. The plaintiff used the car without the consent of the company and the action should be dismissed.

ACTION for indemnity against the defendant on its policy of insurance on a certain automobile to protect the plaintiff against loss or damage. The facts are set out in the reasons for judgment. Tried by HARPER, Co. J. at Vancouver on the 30th of October, 1935.

Beeston, for plaintiff.
Bull, K.C., for defendant.

Cur. adv. vult.

15th November, 1935.

HARPER, Co. J.: This is an action for indemnity sought by the plaintiff against the defendant on the ground that the defend-

ant was obligated by its policy of insurance on a certain automobile, to protect the plaintiff against loss or damage.

The facts are that the father of the plaintiff is a salesman in the employ of the Hudson's Bay Company in Vancouver, and was entrusted by this corporation with the use of an automobile for purposes of carrying on his work as such salesman. His employment necessitated almost continuous journeyings to various parts of British Columbia. The Hudson's Bay Company at all times remained the owner of this automobile, the licence thereof was taken out by it and the policy of insurance issued by the defendant was to the Hudson's Bay Company as owner.

The evidence of Joseph Hubert Bennett, the father of the plaintiff, was to the effect that he was told that the car might be kept by him at his home garage, that he was to take good care of it and generally was to use it as his own. He was paid a flat rate for its maintenance but all major repairs were paid for by the Hudson's Bay Company. He assumed that he was at liberty to use this car for his own personal convenience and that even members of his family could do so although he admitted that no authority had ever been sought or granted for the use of the automobile by his son. Pressed as to the exact conditions upon which he retained possession, particularly in reference to the use by other persons, of this car, the witness answered as follows:

> No, I have not had any real authority, but I have always considered that car to be, to use it as I wished as long as I did not wreck it.

The evidence is uncontradicted that at no time was permission asked or direct authority given for the plaintiff to drive this car.

On the evening of March 10th, 1934, the plaintiff requested the use of this car to take his young lady home. His father consented and instructed his son that, after taking the young lady home, he was to leave the car at Begg's garage in the City of Vancouver to have it greased, oiled and put in proper running condition for the following week.

The plaintiff accordingly took possession of the car and it was whilst *en route* to his young lady's home that the accident occurred which resulted in judgment being awarded against the plaintiff, the amount of which judgment the plaintiff now seeks to recover from the defendant under its contract of indemnity.

The difficulty which confronts me in this action is the inter-

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pretation of section 159F (1) (*a*), (*b*) and (2) as enacted by section 5 of the Insurance Act Amendment Act, 1932, B.C. Stats. 1932, Cap. 20 which is as follows:

159F. (1.) Every owner's policy shall insure the person named therein, and every other person who, with his consent, uses or is responsible for the use of any automobile designated in the policy, against the liability imposed by law upon the insured named therein or upon any such other person for loss or damage:—

(*a*.) Arising from the ownership, use, or operation of any such automobile within Canada or the United States of America, or upon a vessel plying between ports within those countries; and

(*b*.) Resulting from:—

(i.) Bodily injury to or death of any person; or

(ii.) Damage to property; or

(iii.) Both.

(2.) Any person insured by but not named in a policy may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

This amendment to the Insurance Act has apparently never as yet been under judicial review. The scope of this statute was enlarged no doubt as the result of the decision of the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Co.* (1932), 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; [1933] A.C. 70; [1933] 1 D.L.R. 289. The Legislature has undertaken to make a statutory contract between the insurer and "every other person" who with the owner's consent uses or is responsible for the use of the automobile designated in the policy.

Whether the owner gave its consent express or implied to the use by the plaintiff of the car in question must be determined by an analysis of the circumstances existing at the time possession of this car was given to the father of the plaintiff. It is not suggested that anything was ever divulged to the Hudson's Bay Company concerning the use of the car by the plaintiff. The car was entrusted to the father of the plaintiff for the purpose of use in the business of that corporation. The Hudson's Bay Company was not aware at any time that the son of that salesman was using this car for his own personal convenience.

The plaintiff's father was not obligated to make major repairs to this car. Though no express limitations were made by the Hudson's Bay Company against the use of the car by anyone except Bennett, senior, can it reasonably be inferred that it was in contemplation of the parties that such use was to be permitted?

The use contemplated by the Hudson's Bay Company, in the absence of evidence to the contrary, would obviously be use by the father of the plaintiff for journeying about the Province on the business of this commercial corporation. The *onus* of proof that the owner contemplated its private use was upon the plaintiff in this action.

Had the father of the plaintiff been driving the car at the time of the accident the liability of the defendant would have been clear but I can find nothing in the evidence which would warrant the conclusion that the consent of the Hudson's Bay Company extended to the use of the car by any of the Bennett family.

The conditions under which implied consent might be held to have been given are referred to in the judgment of Trueman, J.A. in *Martel* v. *Chartier,* [1935] 1 W.W.R. 305. At p. 312 this learned justice says:

> I appreciate that the owner of a motor vehicle should be held to impliedly consent to the driving of a motor vehicle by another than the borrower when the circumstances show that he is aware that the motor vehicle is acquired by the borrower with the intention of its being driven by another, when the borrower may not be present. Such an instance may be where the owner knows the borrower has a chauffeur. So, where an emergency occurs, as where the borrower is so seriously injured while driving that he is removed from the motor car, and the car is then taken over by a bystander, who while driving it to the home of the owner or the borrower injures another. There has arisen in these circumstances a contingency which, it may be argued, the express or implied consent given by the owner to the borrower should be held to have contemplated.

Is it a reasonable implication from the circumstances existing at the time possession of the car was given to the father of the plaintiff that its use by the son for a purely personal convenience was in the mind of either the father or the officer of the Hudson's Bay Company with whom he dealt? I think not. After consideration of the purpose for which possession was given the father, I cannot conclude that it was ever contemplated by the owner of the car that members of the Bennett family were considered as having its permission for use for their personal convenience and pleasure.

The time when possession was transferred to the father of the plaintiff would be the time when such consent, whether expressed or implied, would have to be given. Express consent was ad-

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mittedly not given and before implied consent can be inferred the intention of the Hudson's Bay Company, that the son of its salesman should be given the privilege of the use of the car, should be made fairly clear from a consideration of all the circumstances. Possession, as I view the facts, was given in connection with and for the purpose of the employment of the father of the plaintiff. The use of the car by the plaintiff on the night of the accident was for a purpose radically different from the business of the owner of the car. The father of the plaintiff describes himself as an out-of-town salesman of the Hudson's Bay Company not doing any work in the City of Vancouver at all. This reasonably explains why permission was given to keep the car in his own garage. It does not, however, extend the consent, as to its use, to members of the Bennett family.

In the construction of the Manitoba statute known as the Highway Traffic Act, which in part declares as follows (Sec. 58 (3)):

> Every person driving such motor vehicle who has acquired possession of it with the consent express or implied of the owner thereof shall be deemed to be the agent or servant of the owner of such motor vehicle.

It was held by Trueman, J.A. in *Martel* v. *Chartier, supra,* p. 312, as follows:

> By the section the relationship between the owner and the driver who acquires possession from him is an immediate one and does not extend to a possession derived by a third person from the person who acquired the motor vehicle from the owner. Implied consent in the section is the consent that exists by reason of the circumstances at the time possession is acquired from the owner by the driver and is not something that can be transmitted through the driver to another who is the driver at the time of the accident. As express consent can refer only to the person the owner directly deals with, implied consent necessarily bears the same meaning. To hold otherwise would mean that while possession acquired by express consent cannot extend to a secondary person, a possession acquired by implied consent does.

In the same case, referring to the facts of that particular case in which one Ray acquired possession from the owner and in which one Chartier acquired possession from Ray, Robson, J.A. says (p. 315): "Ray could not delegate the statutory agency to Chartier," and in another part of his judgment: "The words of the statute cannot be used twice."

After consideration of all the circumstances I cannot find that the Hudson's Bay Company gave its consent either express or implied to the use of the car by the plaintiff on the occasion in question herein.

The action is dismissed with costs.

Action dismissed.

KIRKHAM v. KIRKHAM.

S. C.
In Chambers
1936
Jan. 13, 20.

Garnishment—Divorce—Alimony—Money payable under agreement for sale —Interest—Assignment—Priorities—R.S.B.C. 1924, Cap. 17, Sec. 15.

The first wife of K. obtained a divorce in 1927. In June of the same year she obtained an order for permanent alimony, and by July 5th, 1935, there was due her over $8,500. On June 30th, 1930, K. agreed to sell to P. certain lands for $19,000, $2,000 payable in cash, the balance as follows: $500 on September 30th, 1930; $1,500 on August 31st, 1931; $1,000 on August 31st, 1932; $4,000 on August 31st, 1933, and $4,000 on August 31st, 1934, with interest on unpaid balance payable on the 30th of June and December each year, P. to assume payment of a mortgage on the lands for the balance of $6,000, payable on October 28th, 1932. Only the first payment was paid, but the second payment of $1,500 was further secured by P. giving a chattel mortgage for $1,500. On February 17th, 1932, K. assigned the first two payments of $500 and $1,500 and the chattel mortgage to E. H., but not the interest thereon. On February 27th, 1932, K. assigned to his first wife the payment of $4,000 due on the 31st of August, 1933, and on September 25th, 1933, he assigned to her the interest to fall due thereafter on such payments. On July 5th, 1935, the first wife obtained a garnishee order in this action against P. which was duly served on K. and P. On November 21st, 1935, K. entered into an agreement with his second wife in which, after reciting that there was still $10,500 unpaid under the P. agreement, he assigned to her the agreement for sale together with all moneys and interest payable thereunder and granted to her all his rights in the lands. On December 11th, 1935, P. paid into Court $157.50 interest for the half year ending November 30th, 1935, on $5,000, part of the principal due under the agreement, and $48.75 interest for the same period on money secured by the chattel mortgage. On an issue between the first wife and second wife as to who was entitled to the interest so paid into Court:—

Held, that the time to decide the rights of the parties is when the garnishee order was made, and to enable a judgment creditor to obtain an order compelling a garnishee to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and at the date of the garnishee K. was entitled to sue for the instalments of $1,000 payable on the 31st of August, 1932, and the $4,000 payable on the 31st of August, 1934, making in all $5,000. He was also entitled to sue for interest on the chattel mortgage as he had not assigned this to E. H. Accordingly the interest paid into Court is payable to the first wife.

ISSUE under section 15 of the Attachment of Debts Act as to the claims of the garnishor and the claimants in respect to cer-

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tain moneys paid into Court by the garnishee. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 13th of January, 1936.

Maclean, K.C., for judgment creditor.
Patton, for Harriet T. Kirkham.
Lawson, K.C., for the garnishee.
Carew Martin, for Eli Hume.

Cur. adv. vult.

20th January, 1936.

ROBERTSON, J.: This is a contest between Hannah Collins Kirkham, the first wife of H. O. Kirkham from whom she obtained a divorce, in this suit, in 1927, and his second wife Harriet Theresa Kirkham, as to certain interest paid into Court by the garnishee Pratt. On the 28th of June, 1927, Hannah Collins Kirkham obtained in this suit an order for permanent alimony and by the 5th of July, 1935, there was due to her over $8,500. On the 30th of June, 1930, Kirkham agreed to sell to Pratt certain lands for $19,000, $2,000 to be paid in cash and the balance as follows: (1) $500 on the 30th of September, 1930; $1,500 on the 31st of August, 1931; $1,000 on the 31st of August, 1932; $4,000 on the 31st of August, 1933, and $4,000 on the 31st of August, 1934, together with interest on the unpaid balance for the time being, payable on the 30th of June and December each year, and (2) by Pratt assuming payment of a mortgage for $6,000 secured on the said lands, and due and payable on the 28th day of October, 1932. Pratt covenanted to pay the mortgage when due and also all other moneys and interest payable to Kirkham and Kirkham covenanted upon payment of the purchase price and interest and all other moneys payable to him under the agreement upon the due dates and upon Pratt complying with all the terms of the agreement to convey the lands to him. Apparently the first payment was made. It is not clear whether the second payment of $1,500 was actually made or was further secured by Pratt giving to Kirkham a chattel mortgage for $1,500 to which reference will be later made. In any event there remained due on the said agreement at the time of the garnishee at least $9,000 and interest.

On the 27th of February, 1932, Kirkham assigned to his first wife by way of security the payment of $4,000 due on the 31st of August, 1933, and, by a subsequent assignment dated 25th September, 1933, he assigned to her the interest to fall due thereafter on such payments. On the 17th of February, 1932, Kirkham also assigned to one Eli Hume the first two payments of $500 and $1,500 under the said agreement for sale but not the interest thereon. At the same time he assigned the chattel mortgage for $1,500 (but not the interest thereon) to Hume.

On the 5th of July, 1935, Hannah Collins Kirkham obtained a garnishee order in this suit against Pratt which was duly served on Kirkham and Pratt in July, 1935.

On the 21st of November, 1935, Kirkham made an agreement with his second wife in which after reciting that there was still $10,500 unpaid under the Pratt agreement (which amount would evidently include the $1,500 secured by the chattel mortgage); and the assignment of $4,000 to his first wife, he assigned to his second wife the agreement for sale together with all moneys and interest payable thereunder and granted to her all his rights in the lands.

On the 11th of December, 1935, Pratt paid into Court (1) the sum of $157.50, being $162.50 interest for the half year ending November 30th, 1935, on $5,000 part of the principal due under the agreement less $5, garnishee's costs, (2) $48.75 being interest for the same period on the money secured by the chattel mortgage.

The matter then came on for hearing and it was agreed it should be disposed of summarily pursuant to section 15 of the Attachment of Debts Act.

The first wife now claims all this interest by reason of the garnishee and alternatively, part thereof, by reason of the assignment of the $4,000. The second wife claims all the interest by reason of the assignment of the 2nd of November, 1935. It is submitted that the moneys were not garnishable as they were only payable conditionally. Alternatively, she submits that as the interest was only paid on part of the principal the two wives should share it in proportion to their interest in the capital. No question arises under the Creditors' Relief Act,

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Robertson, J.

as the material shows there was no writ of execution, warrant of execution or certificate under that Act, etc.

No question was raised as to Kirkham's title at the time of the garnishee order. Counsel for Pratt said he was satisfied as to Kirkham's title at the present time but when the time arrived to take a conveyance the position might have changed; for instance, if the second wife registered her deed of the 21st of November, 1935, she would be the one to convey, and the money would be payable to her, and not to her husband. However, the time to decide the rights of the parties is when the garnishee order was made. See *Faas* v. *McManus,* [1929] 3 W.W.R. 598 at p. 601; *Uxbridge Hardware Co. Ltd.* v. *Musselman* (1930), 66 O.L.R. 435.

In *Donohoe* v. *Hull Bros. & Co.* (1895), 24 S.C.R. 683, Sedgewick, J., who delivered the judgment of the Court, said, at p. 688:

> Now one elementary principle runs through all these cases, *viz.*, to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent.

Now, while some question might arise as to Kirkham's right to sue for the whole of the purchase price, before delivering or tendering a conveyance—see *Standard Trust Co.* v. *Little (No. 2)* (1915), 8 W.W.R. 1112 at 1114; *Reed* v. *Renton and Pettinger,* [1924] 2 W.W.R. 223; Bullen & Leake's Precedents of Pleadings, 9th Ed., 284, note (*b*)—there can be no question as to his right to sue for intermediate instalments payable at a date certain where the agreement provides, as here, that the purchaser is not entitled to a deed until payment of the final instalment.

At the date of the garnishee Kirkham was entitled to sue for the instalments of $1,000 payable on the 31st of August, 1932, and the $4,000 payable on the 31st of August, 1934, making in all $5,000. He was also entitled to sue for interest on the chattel mortgage as he had not assigned this to Hume. Accordingly I hold that the interest paid into Court is payable to Hannah Collins Kirkham. She is entitled to the costs of this application.

Order accordingly.

THE KING v. ELLIS.

S. C.
1935
Dec. 10, 20.

Quo warranto—County judge—Recount of votes—Dominion Elections Act, Can Stats. 1934, Cap. 50, Sec. 56 (5)—R.S.C. 1927, Cap. 50, Secs. 10 and 89.

On a motion for an order *nisi* for an information in the nature of a *quo warranto* to inquire by what authority His Honour JOSEPH NEALON ELLIS supports his claim to recount the votes cast at a poll held on the 14th of October, 1935, pursuant to the provisions of the Dominion Elections Act in the electoral district of Vancouver-Burrard, the real inquiry sought by the relator was with respect to whether or not His Honour was the proper person under the Dominion Elections Act to make said recount. The relator made no move in the matter during the seven days the recounting was being made in November, and did not launch these proceedings until the 3rd of December following. In the meantime His Honour declared the recount at an end, certified the result to the returning officer, who in turn made his declaration accordingly and transmitted to the chief electoral officer at Ottawa his return of the member elected. The chief electoral officer then gave notice in the Canada Gazette of the name of the candidate so elected.

Held, that on such a motion the Court has discretion to grant or refuse the order and must consider whether or not the circumstances are such that it should interfere and allow an information to be filed. At the stage above recited the matter comes within the Dominion Controverted Elections Act under which a remedy is provided offering a mode by which the inquiry here sought could be heard and the whole matter dealt with, and the Court in the exercise of its discretion should not allow the inquiry to be brought through a *quo warranto* information. The order applied for is refused.

MOTION for an order *nisi* for an information in the nature of a *quo warranto* to inquire by what authority His Honour Judge ELLIS supports his claim to recount the votes cast at a poll held on the 14th of October, 1935, under the Dominion Elections Act. Heard by FISHER, J. at Vancouver on the 10th of December, 1935.

Bray, and *J. B. Williams*, for the application.
Donaghy, K.C., contra.

Cur. adv. vult.

20th December, 1935.

FISHER, J.: Motion for an order *nisi* on the application of

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Fisher, J.

Mr. William Simpkin as relator for an information in the nature of a *quo warranto* to inquire (as is stated in the notice of motion) by what authority the said His Honour JOSEPH NEALON ELLIS supports his claim to recount and/or make a readdition of the votes cast at a poll duly held on the 14th day of October, 1935, pursuant to the provisions of the Dominion Elections Act in the electoral district of Vancouver-Burrard in the Province of British Columbia for the election of a member of the House of Commons, and by what authority the said His Honour JOSEPH NEALON ELLIS supports his claim to be the Judge of the County Court of Vancouver in the Province of British Columbia within the meaning of the Dominion Elections Act.

In the first place I have to say that I am satisfied that, on such a motion on behalf of a private prosecutor, the Court has the discretion to grant or refuse the order for exhibiting or filing the information. See *The Queen* v. *Cousins* (1873), L.R. 8 Q.B. 216; *Bradley* v. *Sylvester* (1871), 25 L.T. 459 and *Regina* v. *Evans* (1899), 31 Ont. 448.

I have therefore to consider whether or not the circumstances here are such that the Court in the exercise of its discretion should interfere and allow an information to be filed. On such consideration I think it must first be noted that it is obvious from the material before me that the relator does not claim that he has been unjustly excluded from any office and that the real inquiry and declaration he seeks by way of *quo warranto* proceedings is not with respect to whether or not His Honour JOSEPH NEALON ELLIS is improperly holding an office from which he should be ousted but with respect to whether or not he was the proper person under the Dominion Elections Act, Can. Stats. 1934, Cap. 50, to make the said recount. It may be said that the relator has an interest in seeing that the recount should be made by the proper person but it is quite apparent that he made no move in the matter during the seven days the recounting was being made in November last and did not launch these proceedings until the 3rd day of December. In the meantime His Honour JOSEPH NEALON ELLIS made the recount, declared the recount at an end and certified the result of the recount to the returning officer who in turn made his declaration accordingly and transmitted to the chief electoral officer at Ottawa his return of the member elected for the said electoral district. Thereupon, pursuant to subsection (5) of section 56 of the said Act, the chief

electoral officer having received such return, gave notice in the Canada Gazette of the name of the candidate so elected. See Canada Gazette, 1935, Vol. 69, p. 1430. In my opinion the matter then came under the provisions of the Dominion Controverted Elections Act, R.S.C. 1927, Cap. 50—see especially sections 10 and 89—and under such Act a remedy was provided offering a mode by which the inquiry sought by the relator here could take place and the whole matter be dealt with.

Finding the circumstances to be as above set out I have come to the conclusion that the Court in the exercise of its discretion should not allow the inquiry to be brought before this Court through the medium of a *quo warranto* information against the said His Honour JOSEPH NEALON ELLIS and that the order applied for should not be granted.

The motion is, therefore, dismissed.

Motion dismissed.

HARLEY v. BARBERS' ASSOCIATION OF BRITISH COLUMBIA.

C. C.
1936
Jan. 24, 25.

Barbers' association—Board of examiners—Candidate for examination—Failure to pass—Appeal from order of examiners—B.C. Stats. 1924, Cap. 5, Secs. 6 and 7; 1934, Cap. 5, Secs. 7 and 8.

The appellant took an examination before the board of examiners appointed under the Barbers Act. He did not obtain the necessary marks in four of the six subjects submitted to him, and he failed. He then appealed under subsection (4) (*a*) of the Barbers Act as amended by section 7 of the Barbers Act Amendment Act, 1934, claiming that under subsection (4) (*d*) of said section 7 he had the right to have the matter referred to three members of the association appointed by the Court if dissatisfied with the result of the examination.

Held, that there was no evidence of bias or unfairness on the part of the examiners. Where it is shown that the rules of the association had not been observed, that the proceedings of the board were conducted in a manner contrary to natural justice or that the decision of the board had not been come to *bona fide*, then the Court should intervene. The

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mere fact of failure of an applicant for admission does not, in the absence of evidence establishing justification for review of their decision on the grounds above mentioned, justify the Court in remitting the inquiry to another board under subsection (*d*) of section 7 of the 1934 amendment Act.

APPEAL from the order of the board of examiners appointed under the Barbers Act, refusing to pass the appellant on his examinations. He passed in two of the subjects but failed to secure the necessary marks in the four remaining subjects. He appealed under section 7 of the Barbers Act Amendment Act, 1934. Upon the hearing of the appeal the respondent association put in records of the examinations which the appellant had tried. Argued before HARPER, Co. J. at Vancouver on the 24th of January, 1936.

Lefeaux, for appellant: The appellant has the right under subsection (*d*) of section 7 of the 1934 Act to have the matter referred to three members of the association appointed by the Court if he is dissatisfied with the result of the examination.

Maitland, K.C., for respondent: The section does not contemplate an automatic re-examination. The appellant can be examined in the ordinary way at the next examination of the board. Before the Court will order such an examination there must be shown some bias, unfairness or irregularity on the part of the tribunal which held the original examination.

Cur. adv. vult.

25th January, 1936.

HARPER, Co. J.: This is an appeal, under section 7 of the Barbers Act Amendment Act, 1934, by the appellant David Harley from a decision of the board of examiners.

The appellant had undergone both an oral and written examination for admission to the occupation of a barber. On the six subjects submitted, upon which he was tested, he failed to secure the necessary marks in four, passing in two. In one of the subjects on which he failed, *viz.,* haircutting, he secured low marks from each of the three examiners, one examiner making a special notation of his work as being "poor."

The appellant was not acquainted with any of the examiners and it was not alleged that they were prejudiced against him in any way.

It was submitted by counsel for the appellant, that this Court should order that it should be referred to three barbers for inquiry and report pursuant to the power given by subsection (*d*) of section 7 of the 1934 amendment Act.

Subsection (*c*) of section 7 provides that such a report may be ordered by the Court when it is "just and equitable."

No bias of the examiners was alleged nor was the appellant able to produce any evidence of unfairness on their part. In my opinion the board of examiners is a specially constituted tribunal to whom the Legislature has entrusted the power and duty of conducting the examination before enrolment can be made of an applicant for admission to this occupation. Chosen and selected by the association of barbers for this purpose, and more competent to deal with the subjects of examination than the Court can be, an appeal from their decisions should not be entertained merely because an applicant has been unsuccessful. Were it shown that the rules of the association had not been observed, that the proceedings of this board were conducted in a manner contrary to natural justice or that the decision of the board had not been come to *bona fide*, then the Court should and would intervene.

The mere fact of failure of an applicant for admission, does not, in the absence of evidence establishing justification for review of their decision on the grounds mentioned, justify the Court in remitting the inquiry to another board under subsection (*d*) of section 7 of the 1934 amendment Act. Such a proceeding without sufficient justification being shown, would practically nullify the power of this tribunal and submit the parties to additional expense without just cause.

Appeal dismissed.

C. C.
In Chambers

1935
Dec. 16.

1936
Jan. 8.

COULSON AND TAYLOR v. GUNN.

Foreclosure action—Order appointing receiver—Order for occupation rent—Non-payment of—Application in County Court by receiver for possession and that owner be dispossessed under Landlord and Tenant Act—Refused—R.S.B.C. 1924, Cap. 130.

A receiver appointed in a foreclosure action in the Supreme Court applied in the County Court to be given possession under the Landlord and Tenant Act of the property sought to be foreclosed, and to have the owner dispossessed on account of his non-payment of occupation rent fixed in the foreclosure action.

Held, that a receiver in an undetermined foreclosure action has not the same rights as a landlord under the Landlord and Tenant Act. As there is already an action undetermined in the Supreme Court as to the ownership of the property in which the receiver was appointed and the orders made, it is to that Court and in that action that the application should be made to have the Court's orders enforced, and this application should be dismissed.

APPLICATION in the County Court by a receiver appointed in a foreclosure action in the Supreme Court for possession of the property under the Landlord and Tenant Act, and that the owner be dispossessed by reason of non-payment of occupation rent that was fixed in the foreclosure action. Heard by LENNOX, Co. J. in Chambers at Vancouver on the 16th of December, 1935.

Anderson, for the receiver.

Cur. adv. vult.

8th January, 1936.

LENNOX, Co. J.: This is an application made in the County Court on behalf of a receiver, appointed in a foreclosure action taken in the Supreme Court, to be given possession, under the Landlord and Tenant Act, Cap. 130, R.S.B.C. 1924, of the property sought to be foreclosed, and to have the owner dispossessed on account of his non-payment of occupation rent fixed in the aforesaid foreclosure action.

I am of opinion that the receiver cannot take advantage of the provisions of the Landlord and Tenant Act. It is true that the defendant in the foreclosure action can be ordered to attorn to

the receiver and that occupation rent may be fixed, but it does not follow that because these things have been done, the receiver has the same rights as a landlord (lessor) under the Landlord and Tenant Act, and I am of opinion that that was not the intention of the Act. It seems to me that that method of gaining possession of property was not intended to be available where the right to ownership of the property is in dispute between the parties.

In any event, in the case at Bar, there is already an action undetermined in the Supreme Court as to the right of Coulson (on whose behalf the receiver was appointed) to ownership of the property. It is in that action that the receiver was appointed and the orders made, and it is to that Court, and in that action, that application should be made to have the Court's orders enforced.

The authorities to which counsel for the plaintiff referred by no means support the proposition that a receiver appointed by the Court has the same rights as a landlord under the Landlord and Tenant Act.

It may be that an order, if obtainable from the authority appointing the receiver, that in default of payment of the occupational rent the defendant must deliver up possession, might have the same effect but that supposition does not affect the present question.

Under the Landlord and Tenant Act, the landlord is the owner of the premises, so far as the tenant is concerned, and when the tenant is evicted he ceases to have any further interest in the property. It was never intended, it seems to me, that a receiver in an undetermined foreclosure action, should be put in that position.

Under the Act the judge shall "make such order, either to confirm the tenant in possession or to deliver up possession to the landlord." I will do neither of these, but find that the summons is wrongly taken under the Landlord and Tenant Act.

Application dismissed.

Application dismissed.

C. A.

1935

Nov. 20, 21, 28, 29.

MIT SINGH v. KEHAR SINGH GILL.

Capias ad respondendum—Arrest and Imprisonment for Debt Act—Ex parte order to be held to bail—Arrest—"Deposit" in lieu of bail—Release—Order by same judge setting aside writ and for return of deposit—Appeal—R.S.B.C. 1924, Cap. 15, Secs. 3, 7 and 9.

Pursuant to section 3 of the Arrest and Imprisonment for Debt Act the plaintiff sued out a writ of *capias ad respondendum*, after obtaining an *ex parte* order directing that the defendant, about to quit the Province, be taken into custody forthwith and held in special bail for the sum sued for. The defendant was arrested under the writ, but in lieu of giving bail, he deposited with the sheriff under section 9 of said Act the sum endorsed on the writ and $50 to cover costs, and thereupon was discharged from custody, the sheriff paying the money so deposited into Court. On motion by the defendant to the same judge to set aside his said order to hold to bail, to discharge the said writ sued out pursuant thereto and for a return of the money deposited with the sheriff, an order was made setting aside the writ of *capias* and for the return of the deposit. On appeal by the plaintiff mainly on the grounds: (a) That the only motion that could be made against the original order and proceedings taken thereunder was by an application under section 7 of said Act; and (b) that it was not open to the learned judge to review his own original order, even though it was granted *ex parte*, and that it can only be reviewed by the Court of Appeal:—

Held, affirming the decision of HOWAY, Co. J., that as to (a) the proceedings under section 7 of the Act are substantive and original ones on new material and relate to cases where the applicant seeks to be "discharged out of custody." They are not a bar to other proceedings wherein he has already been "discharged from such arrest" under section 9 of said Act, the "deposit" in that section being in its nature distinct from bail and does not involve custody of any kind, close or otherwise, as does bail. The application was properly made to rescind the order and the objection taken to the form of the notice of motion cannot prevail. As to (b) it has been the practice in this Province for half a century for the judge granting such an order to review it at large, *i.e.*, upon irregularities or upon the merits, upon all the materials that were before him and upon new ones, as appears from the leading and essentially identical case of *Hartney* v. *Onderdonk* (1884), 1 B.C. (Pt. 2) 88. The course adopted by the learned judge in reconsidering his own *ex parte* order made under section 3 of said Act was a proper one under the circumstances and as to the conclusion he arrived at to rescind the order upon the facts there fully disclosed to him.

APPEAL by plaintiff from the order of HOWAY, Co. J. of the 16th of September, 1935, setting aside a writ of *capias* issued

against the defendant pursuant to order of the 26th of August, 1935, and ordering that the moneys deposited by the defendant with the sheriff of the County of Westminster and paid into Court to the credit of this action be paid out to the defendant. The plaintiff who lives in California brought action against the defendant for $300, loaned by the plaintiff to the defendant in California on the 13th of October, 1930, which the defendant promised to pay within 60 days. The defendant now resides in New Westminster, British Columbia. The plaintiff instructed his nephew, Delip Singh, who lives in Vancouver, to collect the $300 from the defendant. He saw the defendant who told him that the debt should be paid by one Bishin Singh, but that if Bishin Singh did not pay the money he (the defendant) would pay it. Shortly after Delip Singh saw the defendant's partner who told him the defendant was about to leave the Province for India. Delip Singh then gave instructions to commence this action, and on the 26th of August, 1935, an order was made by HOWAY, Co. J. that the defendant Kehar Singh Gill be taken into custody and held to special bail for $300, and that the plaintiff be at liberty within three days to issue out a writ of *capias,* and on the same day a writ of *capias* was issued. The defendant then applied for an order to set aside the order of the 26th of August, 1935, and for an order setting aside the writ of *capias* and for a return of the moneys paid to the sheriff.

The appeal was argued at Vancouver on the 20th, 21st and 28th of November, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Farrand, for appellant: The plaintiff lives in California and the writ of *capias* was discharged because the plaintiff lived out of the jurisdiction. There was error in this. *Smith* v. *Nethersole* (1832), 2 Russ. & M. 450 was followed, but in that case the writ was different from a *capias* and it does not apply. The money is deposited under section 9 of the Arrest and Imprisonment for Debt Act, and the application for discharge from custody is under section 7. After making the order under section 3 of the Act the learned judge could not discharge the writ, all he can do is to discharge the defendant from custody or make an order for the return of the money deposited: see *Coursier* v.

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Madden (1898), 6 B.C. 125 at pp. 127-8; *Wehrfritz* v. *Russell* (1902), 9 B.C. 79 at p. 80; *Walt* v. *Barber* (1899), 6 B.C. 461 at pp. 462-3; *Oliphant* v. *Alexander* (1912), 2 W.W.R. 908. Once you are within the statute you must apply under section 7: see *McKay* v. *McKay* (1933), 47 B.C. 241. The proper order was discharge out of custody and the return of the money deposited.

Hossie, K.C., for respondent: The material does not show any money was owing. The material must show the cause of action and that there was probable cause to believe he was about to leave the Province: see *Mee Wah* v. *Chin Gee* (1889), 1 B.C. (Pt. 2) 367; *Lenz & Leiser* v. *Kirschberg* (1899), 6 B.C. 533; *Wehrfritz* v. *Russell* (1902), 9 B.C. 50; *Oliphant* v. *Alexander* (1912), 2 W.W.R. 908; *McKay* v. *McKay* (1933), 47 B.C. 241. The practice is clearly established that it is proper to apply to set aside the order and discharge the writ. In all the cases he refers to they were actually in custody. On the general right to discharge an order see *Griffiths* v. *Canonica* (1896), 5 B.C. 48; *Boyle* v. *Sacker* (1888), 58 L.J. Ch. 141; *Serff* v. *Luff* (1884), 28 Sol. Jo. 432; *Colverson* v. *Bloomfield* (1885), 54 L.J. Ch. 817.

Farrand, in reply: No objection was taken below that the requirements of section 3 had not been complied with.

Hossie, disputed that statement, and thereupon the Court adjourned the hearing and directed counsel to wait upon the learned judge below, and ascertain from him exactly what had happened.

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Counsel now reported that they had waited upon the learned judge and he said that the objection of non-compliance with section 3 had been taken.

Hossie, referred to Daniell's Chancery Forms, 7th Ed., 761 (form 1301); *Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341; *Reeves* v. *Butcher*, [1891] 2 Q.B. 509; *Hartney* v. *Onderdonk* (1884), 1 B.C. (Pt. 2) 88; *Thompson* v. *Scollard* (1929), 41 B.C. 206.

Farrand, in reply, referred to *Dansey* v. *Orcutt* (1928), 40 B.C. 97 at p. 98; *Larchin* v. *Willan* (1838), 4 M. & W. 351;

McKay v. *McKay* (1933), 47 B.C. 241; *Ping Lee* v. *Paul Wise* (1929), 41 B.C. 64.

Cur. adv. vult.

On the 29th of November, 1935, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from an order made by HOWAY, Co. J., setting aside a writ of *capias ad respondendum* which the plaintiff had "sued out" pursuant to section 3 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1924, after obtaining from the said judge, on the 26th of August last, an *ex parte* "special order directing that the defendant about to quit the Province shall be held to bail for the sum" sued for ($300). The defendant was arrested under said writ and did not give bail but in lieu thereof "deposited" with the sheriff, in accordance with the special provisions of section 9 of said Act, the sum endorsed upon the writ to hold for bail . . . together with $50 to answer costs, and thereupon was "discharged from such arrest," on the 28th of August last, and the sheriff paid the "money so deposited with him" into Court as required by said section.

On the following 4th of September the defendant moved the same learned judge to set aside his said order to hold to bail, and to discharge the said writ sued out pursuant thereto, and also for a return of the money deposited with the sheriff, on a number of grounds set out in the notice of motion, some of them directed to irregularties in matters of form in the original application and writ, and procedure, and others to various matters of substance, alleging also non-compliance with the requirements of the section to obtain the order in failing to "show to the satisfaction of the judge" that the plaintiff "has a cause of action . . . and that there is probable cause for believing that the defendant . . . is about to quit the Province unless he be forthwith apprehended." In support of the motion and in answer thereto affidavits were filed by both parties and after argument an order was made on the 16th of September setting aside the writ of *capias* and for the return of the deposit. The reasons for this decision do not appear in the record before us but we were told

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by the defendant (appellant's) counsel that the primary, if not only, reason given orally was in upholding the ground (h) taken that the plaintiff was a resident out of the jurisdiction (as appears by the plaint) and therefore could not invoke said section 3, but it is sufficient to say that the plaintiff (respondent's) counsel did not here attempt to support the order for this reason.

Several grounds of appeal were advanced against said second order but, after a long argument, only two of them remained for consideration. The first was, that the only motion that could be made against the original order and proceedings taken thereunder was by an application under section 7; but it is clear that the proceedings under that section are substantive and original ones on new material and relate to cases where the applicant seeks to be "discharged out of custody" and therefore, whatever their full application may be, they are not a bar to other proceedings wherein he has already been "discharged from such arrest as to the action" as provided by said section 9, the special "deposit" in that section being a thing in its nature quite distinct from bail, as indeed the head-note to the section indicates—"Deposit in Lieu of Bail," *i.e.,* instead of—and does not involve custody of any kind, close or otherwise, as does bail, because "he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may reseize him to bring him in"; 2 Hale, P.C., Cap. 15, p. 124; Encyclopædia of the Laws of England, Vol. I., p. 443; and meanwhile he is "constructively in jail," *Reg.* v. *Cameron* (1897), 1 Can. C.C. 169.

The second ground was, that it was not open to the learned judge to review his own original order, even though it was granted *ex parte,* and that it can only be reviewed by appeal to this Court. The answer to that submission is that for over half a century it has been the practice in this Province for the judge granting such an order to review it at large, *i.e.,* upon irregularities or upon the merits, upon all the materials that were before him and upon new ones, as appears from the leading and essentially identical case of *Hartney* v. *Onderdonk* (1884), 1 B.C. (Pt. 2) 88, wherein Mr. Justice GRAY at the request of Mr. Justice MCCREIGHT, being ill, "reconsidered the case" (p.

89) and on the materials before him (p. 94) vacated in effect the original order made by McCREIGHT, J., and ordered that the money deposited with the sheriff and paid by him into Court should be returned to the defendant, and after saying (p. 93) that:

> The only point before me is, whether the plaintiff had any right to have the defendant arrested at the time, under the circumstances, and in the manner in which it was done. . . .

he concluded his very full and instructive judgment by saying:

> . . . I feel assured that if the learned judge had the same material and authorities before him, he would not have granted the original order.

That decision has never been questioned and it established our practice and, it may be added, it is very fitting where personal liberty is concerned that all former remedies should be preserved, and hence it is unfortunate that it was not brought to the attention of MURPHY, J., in *Oliphant* v. *Alexander* (1912), 2 W.W.R. 908, relied upon by the appellant, because if it had been the learned judge would doubtless have followed it entirely instead of resorting to the earlier Ontario case of *Damer et al.* v. *Busby* (1871), 5 Pr. 356, which is at variance with *Onderdonk's* case in several respects and he also would not, doubtless, have relied on *Larchin* v. *Willan* (1838), 4 M. & W. 351, in view of its rejection by GRAY, J., at p. 91: as to *Damer's* case, whatever may be its effect and extent, it is to be noted that the Ontario practice was changed in 1888 and power given to a judge to rescind his own *ex parte* order, as pointed out in *Parsons* v. *Hancock* (1917), 38 O.L.R. 590, 594, and *Canada Lumber Co. Limited* v. *Gaffney* (1923), 25 O.W.N. 45.

In *Oliphant's* case it does not appear from the inadequate report that MURPHY, J., was dealing with his own order: on the contrary, the inference, if any, that can be drawn from it is that he was not doing so; and still further the defendant had given bail after arrest, not by making deposit under said section 9, and therefore the application was properly made under section 7 in that respect at least, though its exact nature and scope are obscure: *Thompson* v. *Scollard* (1929), 41 B.C. 206 was an application under that section also while defendant was in custody, and therefore is not of real assistance on this motion; and the applicant was also in custody, close or bail, in the other

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cases cited, or reported, *viz., Mee Wah* v. *Chin Gee* (1889), 1 B.C. (Pt. 2), 367; *Williams* v. *Richards* (1895), 3 B.C. 510; *Coursier* v. *Madden* (1898), 6 B.C. 125; *Walt* v. *Barber* (1899), *ib.* 461; *Lenz & Leiser* v. *Kirschberg* (1899), *ib.* 533; *Tanaka* v. *Russell* (1902), 9 B.C. 24; *Wehrfritz* v. *Russell* (1902), *ib.* 50; and *McKay* v. *McKay* (1933), 47 B.C. 241.

It is to be noted that in *Macaulay* v. *O'Brien* (1897), 5 B.C. 511, Chief Justice DAVIE entertained (presumably by request) a motion to set aside an order for *capias* made by DRAKE, J., and the writ and proceedings thereunder, on the ground principally that the affidavit was defective, after the defendant had been released from custody upon deposit with the sheriff, despite objection taken to his right to do so (p. 513), which entertainment was in accord with the practice in *Onderdonk's* case, *supra,* which was cited to him. In *Robertson* v. *Beers* (1899), 7 B.C. 76 Chief Justice MCCOLL also reviewed his own order for *capias* and the sufficiency of the affidavit therefor, but held that as to irregularities in the writ they had been "waived by the giving of bail" (*cf. Tanaka* v. *Russell, supra*) but, strangely enough, the radical distinction already pointed out, *supra,* between bail and the special deposit to the sheriff was overlooked, whatever may be the effect of the latter, a point not raised herein.

It follows that the course adopted by the learned judge in reconsidering his own *ex parte* order made under section 3 was a proper one under the circumstances, and as to the conclusion he arrived at to, in effect, rescind that order, it is sufficient to say that on the merits, apart from technicalities, he was justified in so doing upon the facts, new and old, then fully disclosed to him.

It is to be noted that so far as irregularties only are concerned we held during the argument that by County Court Order XXIII., r. 14, a general power is given to a judge to set aside proceedings on that ground.

Finally, it is to be understood that while we uphold the long-established practice in *Onderdonk's* case, which removed "the inconvenience and injustice" in the Ontario practice, as pointed out in *Parsons* v. *Hancock, supra,* p. 594, that practice should

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properly extend only to a judge reviewing his own *ex parte* order, or that of another judge upon request.

This appeal, therefore, should be dismissed, and since the application was, in a case of this kind, properly made in substance and in effect, to rescind the original order (upon which the writ would fall with it), the objection taken to the form of the notice of motion, as already cited, cannot prevail, though it would have been proper and, in strictness, better as a matter of form to have rescinded the order as well as setting aside the writ and ordering the return of the deposit.

Appeal dismissed.

Solicitor for appellant: *Charles J. S. Farrand.*
Solicitor for respondent: *W. M. Gilchrist.*

REX v. BROWN, ROY AND SWAN.

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Criminal law—Theft—Charge of retaining stolen goods—Goods stolen by accused—Charge dismissed—Appeal—Criminal Code, Sec. 399

As it is impossible in England and in Canada to convict a thief of being a receiver of goods he has actually stolen, so it is impossible under the addition of "receives or retains" in the Criminal Code, section 399, to convict him of being a retainer of them. No different principles can be applied where under the same circumstances it is sought to convict a principal offender of "retaining" the goods.

Rex v. *Carmichael* (1915), 22 B.C. 375, followed.

APPEAL by the Crown from the decision of ELLIS, Co. J. of the 25th of July, 1935, dismissing a charge against the accused that they had retained stolen property, knowing that it had been stolen, contrary to section 399 of the Criminal Code. The evidence disclosed the fact that the accused had committed the robbery themselves.

The appeal was argued at Vancouver on the 9th of October, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

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Owen, for the Crown: This is a charge under section 399 of the Criminal Code. The accused stole the property themselves, and the question is whether they can be convicted under this section: see *Rex* v. *Carmichael* (1915), 22 B.C. 375; *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22. The English statute does not contain the words "or retain" which are in section 399, so that the English cases do not apply.

Branca, for accused: *Rex* v. *Carmichael* is in our favour. The second count in that case was for receiving stolen goods, and on appeal it was dismissed. See also *Reg.* v. *Perkins* (1852), 5 Cox, C.C. 554; *Reg.* v. *Coggins* (1873), 12 Cox, C.C. 517.

Cur. adv. vult.

14th January, 1936.

MARTIN, J.A.: The appeal is dismissed. We are all of the opinion that on its particular facts this case comes within the principle of our decision in *Rex* v. *Carmichael* (1915), 22 B.C. 375, even though there may be some slight variation in the facts, and therefore, in our view, we should abide by that principle and apply it to this case, leaving it to a higher Court to point out any legal difference, if such there be.

To this I add my own view of what was the exact principle that I was a party to when we decided *Carmichael's* case, *supra*, and it is that just as it is impossible in England and in Canada to convict a thief of being a receiver of goods he has actually stolen so it is impossible under the addition of "receives or retains" in our Criminal Code, Sec. 399 (first appearing in 1892, Sec. 314 of Cap. 29) to convict him of being a retainer of them (*cf.* Taschereau's Criminal Law (1888), 2nd Ed., 448; *Rex* v. *Owen* (1825), 1 M.C.C. 96; *Reg.* v. *Perkins* (1852) 2 Den. C.C. 460; 5 Cox, C.C. 554; *Reg.* v. *Huntley* (1860), 8 Cox, C.C. 260; Bell, C.C. 238; *Reg.* v. *Evans* (1856), 7 Cox, C.C. 151; *Reg.* v. *Coggins* (1873), 12 Cox, C.C. 517; *Reg.* v. *Hughes* (1860), 8 Cox, C.C. 278; Bell, C.C. 242; *Reg.* v. *Hodge* (1898), 12 Man. L.R. 319; 2 Can. C.C. 350; *Reg.* v. *Lamoureux* (1900), 4 Can. C.C. 101; *Kelly* v. *Regem* (1916), 54 S.C.R. 221, and *Rex* v. *Cross*, [1927] 3 W.W.R. 432.

The reason why a thief cannot be convicted as a receiver is clearly put by Lord Campbell, C.J., in *Perkins's* case, *viz.*, that "he could not take the stolen property from himself," and hence it follows that if he cannot commit an additional and distinct offence by "receiving" from himself, neither can he commit the further and distinct offence of "retaining" the goods he stole because before he can "retain" them from himself he must first have so "taken" them from himself, which is a legal impossibility.

There is no difficulty in practice in overcoming this "technical principle," as Blackburn, J., styles it in *Coggin's* case, *supra* (521), because the two distinct offences should be averred in separate counts to meet the circumstances that the evidence may disclose, and thus the requirement that the accused "should be indicted for the offence which he really committed" will be satisfied—*cf.* also Roscoe's Criminal Evidence, 15th Ed., 270; Archbold's Criminal Pleading, 29th Ed., 514, 736; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 553; *Reg.* v. *Craddock* (1850), 4 Cox, C.C. 409; *Reg.* v. *Hilton* (1858), Bell, C.C. 20, 26; and *Reg.* v. *Hughes* and other cases cited *supra.*

In this appeal it is to be understood that we are dealing with a case where all three appellants were proved to have jointly and actually participated in stealing the goods in question, as the learned judge below finds in his reasons for judgment:

> They were in the store and took them and that is the only way they got them . . . they took them themselves, they stole them . . .

This is to be borne in mind because the thief might part with the stolen property and later receive—retake—it and retain it, and also under certain circumstances there might be participation in the theft to an extent, even including counselling and procuring, that would justify a conviction for receiving, as well as stealing, as was held, *e.g.*, on a case reserved, *Reg.* v. *Hodge, supra,* wherein the matter is clearly defined and the line drawn by Killam and Bain, JJ., on cases cited, which are unnecessary to consider in the different facts before us. But the true test is, as Killam, J., puts it: did the accused "actually participate in the theft?" because as Bain, J. added (p. 323):

> It is not possible . . . that one can be an active participant in the theft of property and also a receiver of the property in the same transaction.

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That test is confirmed by *Reg.* v. *Hilton, supra,* p. 26, which approves the direction to the jury that

> if they did not think from the evidence that M'Evin was participating in the actual theft, it was open to them on the facts to find a verdict of guilty on the count for receiving. That direction substantially is that, if the jury should think the taking the purse was the common act of the two prisoners, they might convict M'Evin of stealing; but if they did not think that he was participating in the actual theft they might find him guilty of receiving. If the jury had found a common purpose, no doubt the stealing would have been the act of both; but they did not so find; and I think the direction of the learned recorder was quite right.

This direction was adopted in *Coggin's* case, *supra,* p. 521, but in that case, as in this, there was only one count, there for receiving, and here for retaining, and to which the same principle should be applied on the facts before us.

It is the more necessary to give this view of the extent of our decision in *Carmichael's* case because, as Mr. *Owen* pointed out, and relied upon, there is a statement in the judgment of the learned Chief Justice therein, at p. 379, which is in conflict with that in his prior judgment in *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22, at p. 24, that the intention and effect of the said amendment were to include retaining by the thief as well as "actual stealing," and hence further misunderstanding of the scope of our said decision should be removed.

MCPHILLIPS, J.A.: I agree in dismissing the appeal.

MACDONALD, J.A.: The point is—may the respondent, having stolen certain goods, be convicted of retaining them, knowing them to be stolen under section 399 of the Code? One who assists another in stealing an article is a principal offender in the theft and cannot, because he becomes the custodian of the loot, be treated as the receiver of the thing stolen. He can only be convicted of the real offence committed by him, *viz.,* theft: *Reg.* v. *Coggins* (1873), 12 Cox, C.C. 517; *Reg.* v. *Perkins* (1852), 5 Cox, C.C. 554.

No different principles can be applied where under the same circumstances it is sought to convict a principal offender of "retaining" the goods. In *Rex* v. *Carmichael* (1915), 22 B.C. 375 the Chief Justice states, at p. 379:

> It is impossible to say that one person can be both the thief and the receiver or the retainer of the thing stolen. If it were so, then every thief

is guilty of the double offence of stealing and retaining, or stealing and receiving. I do not think Parliament ever intended any such thing.

IRVING, J.A., by saying, at p. 379, "I have nothing to add," inferentially supports the views of the Chief Justice and as GALLIHER, J.A. expressly agrees with him it must be taken as the judgment of the Court.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. S. Owen.*
Solicitor for respondents Brown and Swan: *A. E. Branca.*
Solicitor for respondent Roy: *T. F. Hurley.*

BENTLEY v. VANCOUVER EXHIBITION ASSOCIATION.

Lessor and lessee—Invitee—Injury to—Liability of lessor—Negligence—Trap.

The Horse Show Building in the Vancouver Exhibition Grounds, held under a lease from the city by the defendant association, was sublet for one day to the Boy Scouts and Girl Guides who were giving a Scout rally in honour of Lord Baden-Powell. The Scouts paid $100 rental for the building and the association was to provide lighting for the evening's entertainment. The plaintiff with her daughter paid the admission fee, entered the west door of the building and went up the stairs to the top balcony, when they turned south on the outside passageway and went half way around the building to the centre of the east side, where the plaintiff, who was slightly ahead of her daughter, fell down a flight of stairs that was immediately in front of her on the passageway. In addition to the flood-lights in the building there was a white bulb light 24 feet beyond the first step on a wall at about the same height as the top step, and a red bulb light about fifteen feet directly over the top step. The plaintiff declares she did not see the steps and she was continuing along the passageway when she stepped into space There was no one in front of her for several paces before she reached the steps. The plaintiff who was injured by the fall recovered judgment in an action for damages for negligence.

Held, on appeal, reversing the decision of FISHER, J., that the defendant association cannot be held to be liable because it had given up possession and control of the building for the day in question to the joint societies of Girl Guides and Boy Scouts, and therefore was exonerated

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from liability while it was in the occupation and control of those societies who were in the position of lessees.

Held, further, that the learned judge below took the wrong view in finding that there was a trap, because there is no evidence to justify such a finding.

APPEAL by defendant from the decision of FISHER, J. of the 20th of August, 1935, in an action for damages for injury to the plaintiff in falling down a stairway in the defendant's Horse Show Building in the Exhibition Grounds in Vancouver on the 15th of April, 1935, owing to the alleged defective lighting of the building. The defendant had leased the building for one day, namely, the 15th of April, 1935, to the Girl Guides and Boy Scouts, who were giving a Scout rally in honour of Lord Baden-Powell, to commence at eight o'clock in the evening, and a charge of 50 cents was made to any person desiring to view the rally. The plaintiff, who is 68 years old, paid the admission fee for herself and daughter, and they went up the stairs to the top where there was a passageway around the outside edge of the building that circled substantially the whole building. The plaintiff and her daughter walked around this passageway from one side of the building to the other, and at about the centre of the other side there was a stairway going down six steps. The plaintiff did not see the stairway and as she continued walking she stepped into space and fell down these steps, injuring herself. In addition to the flood-lights in the building there was a white globe light on the wall about 24 feet beyond the first step and about the same height as the first step. There was also a red light on a beam about fifteen feet immediately above the first step. The plaintiff says she did not see these lights, and evidence is put in by the defence that both lights could be seen plainly when approaching 30 feet away from the upper step, and the steps were plainly to be seen.

The appeal was argued at Vancouver on the 25th to the 30th of October, 1935, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Locke (*Yule*, with him), for appellant: The City owns the building and the Exhibition Association are the lessees. The defendant rented the building to the Girl Guides and Boy Scouts

for one day for $100. The rally took place in the evening and the plaintiff attended with her daughter. The defendant as tenant owed no duty to the plaintiff as it sub-leased to the Boy Scouts. It was only with the Boy Scouts that the plaintiff had any contract. The arrangement was that the defendant should supply light: see Salmond on Torts, 8th Ed., 534; *Lane* v. *Cox,* [1897] 1 Q.B. 415; *Bromley* v. *Mercer,* [1922] 2 K.B. 126; Findlay on Property Owners' Liability, 305; Williams on Landlord & Tenant, 2nd Ed., 352; Clerk & Lindsell on Torts, 8th Ed., 435. The duty rests on the occupier and not the owner: see Halsbury's Laws of England, Vol. 21, p. 382, sec. 651; *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221; *Cavalier* v. *Pope,* [1906] A.C. 428. We have not control because we look after the light: *Terainshi* v. *Canadian Pacific Ry. Co.* (1918), 25 B.C. 497; *Humphreys* (*Pauper*) v. *Dreamland* (*Margate*), *Ltd.* (1930), 100 L.J.K.B. 137. She has no action in contract or tort: see *Miller* v. *Hancock,* [1893] 2 Q.B. 177; *Cunard* v. *Antifyre, Limited* (1932), 49 T.L.R. 184 at 186; *Fraser* v. *Pearce* (1928), 39 B.C. 338; *Payne* v. *Rogers* (1794), 2 H.Bl. 349; *Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; *Nelson* v. *Liverpool Brewery Co.* (1877), 46 L.J.C.P. 675; *Russell* v. *Shenton* (1842), 11 L.J.Q.B. 289. The cases of public nuisances are *Miller* v. *Hancock,* [1893] 2 Q.B. 177; *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50; *Lucy* v. *Bawden* (1914), 83 L.J.K.B. 523; *Dobson* v. *Horsley* (1914), 84 L.J.K.B. 399. As to obligation of landlord to keep the premises in safe condition see *Cunard* v. *Antifyre, Limited* (1932), 49 T.L.R. 184. We were in neither possession nor control of any part of the building: see *Cox* v. *Coulson* (1916), 85 L.J.K.B. 1081. In any case the condition here did not constitute a trap: see *Latham* v. *Johnson & Nephew, Lim.* (1912), 82 L.J.K.B. 258 at p. 267. There were 38 flood-lights, there was a light just beyond the stairs and one just above the stairs: see *Wilchick* v. *Marks* (1934), 103 L.J.K.B. 372. The stairs with sufficient lights do not constitute a trap and there should be a reversal on the facts. The lights were on at the time of the accident: see *Voight* v. *Groves* (1906), 12 B.C. 170; *Coghlan*

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v. *Cumberland,* [1898] 1 Ch. 704; *Raymond* v. *Township of Bosanquet* (1919), 59 S.C.R. 452; *The Komnick System Sandstone Brick Machinery Co.* v. *Morrison* (1920), 28 B.C. 207.

A. B. Macdonald, K.C. (*Marsden,* with him), for respondent: The defendant always remained in complete control of this building. The landlord and tenant position did not exist. The case does not come within *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311. The use of the words "rental" or "lease" is not a tenancy: see *Greisman* v. *Gillingham,* [1934] S.C.R. 375. There was not an exclusive occupation by the Boy Scouts: see *Kelly* v. *Woolworth & Co.,* [1922] 2 I.R. 5; *Taylor* v. *Caldwell* (1863), 3 B. & S. 826. The question is who is in legal control and occupation of the premises: see *Coman* v. *Governors of the Rotunda Hospital, Dublin,* [1921] 1 A.C. 1; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213. On the effect of the learned judge below hearing the evidence see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243 at pp. 250 and 257; *Howard* v. *Henderson* (1929), 41 B.C. 441. The case of *Humphreys (Pauper)* v. *Dreamland (Margate), Ltd.* (1930), 100 L.J.K.B. 137, does not apply.

Locke, in reply, referred to *Gregson* v. *Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584; *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430; *Admiralty Commissioners* v. *Owners of S.S. Volute* (1921), 91 L.J.P. 38.

Cur. adv. vult.

On the 14th of January, 1936, the judgment of the Court was delivered by

MARTIN, J.A.: We are all of the opinion that the appeal should be allowed. We think, in brief, that the defendant association cannot be held to be liable, because it had given up possession and control of the building in question for the time in question to the joint Societies of Girl Guides and Boy Scouts, and therefore was exonerated from liability while it was in the occupation and control of those societies, who were in the posi-

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tion of lessees, or something in legal effect equivalent thereto, of the owner (the defendant).

We add to that only that we think the learned judge took the wrong view, with all respect, in finding that there was a trap, because there is no evidence to justify such a finding.

Appeal allowed.

Solicitors for appellant: *Locke, Lane & Nicholson.*
Solicitor for respondent: *P. S. Marsden.*

REX v. CHOW WAI YAM, JAY SONG AND GEE DUCK LIM.

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Jan. 22, 27, 31.

Criminal law—Practice—Charge dismissed—Appeal by Crown—Notice of appeal—Service of—Accused avoiding service—Extension of time for service—Ex parte application—Substitutional service—Criminal Code, Sec. 1013 (4) and (5)—Criminal Appeal Rules, 1923, rr. 1, 6 and 18.

The accused were acquitted on a charge of having in their possession a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929. Notice of appeal was filed but Crown officers were unable to locate any of the accused in order to serve them with notice of appeal. Information obtained disclosed that they were still in Vancouver but in hiding to avoid service. On an application by the Crown for an order extending the time for giving notice of appeal and for an order that the appellant be at liberty to effect substituted service of the notice of appeal, and for directions as to the mode of such service:—

Held, that leave to extend the time for giving notice of appeal be granted and that argument on the motion for substitutional service be adjourned until after the extended time for personal service, as it may not be necessary to go further into that question.

Held, further, that although it is the practice that applications for leave to extend the time to serve notice of appeal are not ordinarily made *ex parte*, where the material before the Court supports the submission of counsel that the persons concerned have been and are evading service of the notice of appeal, the Court will properly depart from that practice and hear the application *ex parte*.

MOTION by the Crown to the Court of Appeal for an order

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extending the time for giving notice of appeal from the order of ELLIS, Co. J. of the 11th of December, 1935, acquitting the above named respondents of the charge that the said respondents, at the City of Vancouver on the 27th of September, 1935, did unlawfully have in their possession a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929, and for an order that the appellant be at liberty to effect substituted service of notice of appeal herein, and for directions as to the mode of such substituted service. The evidence of the Crown on the trial disclosed that Chow Wai Yam and Gee Duck Lim were found on the 27th of September, 1935, in a room in the Balmoral Hotel in Vancouver in which were found two decks of opium, a package of brown powder and some opium pills. Jay Song was apprehended a few feet from the room, and later it was found that he occupied the room, and a few minutes after his apprehension he went into the room, picked up a jacket and put it on. The charge was dismissed on the ground that there was no evidence that any of the accused was the tenant of the room, and that no assistance could be gained by the Crown from section 5 of the Criminal Code or section 17 of The Opium and Narcotic Drug Act, 1929. The Crown then employed detectives to locate the whereabouts of the accused for service of notice of appeal upon them, but they could not be found. There was evidence of their still being in the City of Vancouver but they were keeping in hiding in order to evade service.

The motion was argued at Victoria on the 22nd and 27th of January, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Maitland, K.C., for the Crown: The charge was dismissed, and as counsel who appeared in the Court below will not accept service of notice of appeal and the accused are hiding to avoid service, we ask for an extension of time for service: see *Archibald* v. *McDonald* (1899), 7 B.C. 125; *Rex* v. *Lee Park* (1923), 33 B.C. 158. Diligent search has been made by detectives for these men who, so far, cannot be found, but information has been obtained that they are still in Vancouver in hiding. We ask for an order for substitutional service: see *Rex* v. *Reader*

(1922), 31 B.C. 417; *Wills & Sons* v. *McSherry,* [1913] 1 K.B. 20; *Rex* v. *Sharpe and Inglis* (1921), 15 Sask. L.R. 35.

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Cur. adv. vult.

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Per curiam: That part of the motion which asks for leave to extend the time for giving the notice of appeal from the judgment of acquittal we grant (*cf.* Criminal Code, Sec. 1013 (4) and (5) and Criminal Appeal Rules, 1923, rr. 1, 6 and 18) until the first day of next term, *i.e.,* March the 3rd.

The second part of the motion asks us to grant an order for substitutional service of the said notice of appeal, and the argument on that is further adjourned until after the said extended time for personal service, because it may not be necessary to go further into that question, and therefore we reserve it.

The only thing that need be mentioned about the said first part of the motion is that it is made *ex parte,* and while it is our practice that applications for leave to extend the time to serve notice of appeal are not ordinarily made *ex parte,* but upon notice to the other side, yet where the circumstances justify or require it we can properly depart from that practice and hear the application *ex parte,* as we do now, because the material before us amply supports the submission of counsel that these persons concerned have been and are evading service of the notice of appeal.

Motion granted.

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REX v. WONG YIP LAN AND LEE LUNG.

Criminal law—Opium—Possession—Offence of smoking opium—Charge—Can. Stats. 1929, Cap. 49, Sec. 4 (d)—Criminal Code, Secs. 5 and 1013 (4).

Four detectives went to a room in the Pennsylvania Hotel in Vancouver. One of them knocked at the door. It was not opened so he tried the door and found it locked. He then broke it open. Lee Lung was standing at the window and Wong Yip Lan was sitting on the bed. Before breaking in one of the detectives heard the sound of a window opening and then heard a sound resembling the bounce of a tin in the alley below. The room was full of opium smoke and the crevices around the door were filled with paper, evidently to keep the smoke from escaping into the hall. In the top drawer of the dresser a complete opium-smoking outfit was found, including a pipe which was warm, and in another drawer was a cup containing opium dross. Eleven decks of opium were found in a paper bag in the lane outside the window. Neither of accused was tenant of this room. One of them lived in another room in the hotel and the other lived outside. A charge of having opium in their possession was dismissed, the Court expressing the view that the proper charge against the accused was either smoking opium or being an inmate of an opium-joint.

Held, on appeal, reversing the decision of HARPER, Co. J., that the element of "possession" was the foundation of the whole charge, that the learned judge erroneously regarded the case as being founded and governed by the "tenancy" of the room in question in the hotel and "ownership" of the opium, and consequently restricted his main consideration of it to the previous smoking instead of to its "possession." It was for the learned judge to consider and decide the question of possession from all the particular facts before him, while approaching it from the above point of view, but that course was not adopted and a new trial should be ordered.

APPEAL by the Crown from the decision of HARPER, Co. J. of the 18th of November, 1935, dismissing a charge against Wong Yip Lan and Lee Lung of unlawfully having opium in their possession. The facts are sufficiently set out in the headnote and reasons for judgment.

The appeal was argued at Victoria on the 17th of January, 1936, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Maitland, K.C. (*Owen,* with him), for appellant: The charge of having drugs in their possession was dismissed, and this

appeal is under section 1013 (4) of the Code. The learned judge took the wrong view that if the Chinamen are smoking opium the charge must be for "smoking" alone, and not for "having opium in their possession." We submit the law officers can make any charge they please so long as they can prove the charge. Once the charge of "possession" is made the Court must deal with it: see *Rex* v. *Lee Po* (1932), 45 B.C. 503 at p. 507.

W. M. McKay, for respondent: This room was occupied by Charlie Ying. The two accused were casual visitors in room 419 when it was broken open. These two men were not smoking when the parties entered, and they did not have opium in their possession. Opium smoke was in the room and the smoking outfit was in one of the bureau drawers, but as the accused were casual visitors there is no proof that they knew anything about the opium outfit, and the occupier of the room or someone else may have been smoking there and then disappeared before the detectives broke in.

The judgment of the Court was delivered by

MARTIN, J.A.: We think the learned judge has not really tried the charge before him, as is shown by his report and by what he says on page 60 of the appeal book in giving judgment, *viz.*:

> It is an unfair construction of the criminal law to stretch the facts in this case in order to introduce here a charge of possession, which is a very serious offence, and which means the penitentiary and leads to deportation of these men.

With respect, I do not quite understand that observation because the element of possession was not "introduced" into the case but was the foundation of the whole charge, and as to the consequences of it, if proved, we have nothing to do.

He proceeds:

> The two Chinamen no doubt were [*i.e.*, had been] smoking in the room, and that is the real offence, and I think it is stretching the criminal law, when on the facts here you are trying to make this a charge of possession. Neither one of them were tenants of the room. They were in there for the purpose of smoking, and I am not going to find them guilty of possession on this evidence.

These reasons read with the said report show that he erro-

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neously regarded the case as being founded and governed by the "tenancy" of the room in question in the hotel, and "ownership" of the opium, and consequently restricted his main consideration of it to the previous smoking instead of to its "possession" (at the time the constables entered) as defined by section 5 of the Code, which may, according to the circumstances, be constructive, or actual, and supported by direct, or apt circumstantial evidence, ranging from the ordinary kind to the clearest kind, *i.e.*, actual manual, which was the unusual case in *Rex* v. *Lee Po* (1932), 45 B.C. 503. It was for the learned judge to consider and decide the question of possession upon all the particular facts before him while approaching it from the above point of view, but that course was not adopted.

As to the case of *Rex* v. *Gun Ying* (1930), 53 Can. C.C. 378, relied on by the learned judge, whatever may be said of it, its facts are so different from these that it is not of assistance, and as we think that on the said facts before him the error in law above set out occurred, therefore the appeal should be allowed and a new trial ordered.

Appeal allowed and new trial ordered.

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

Solicitors for respondent Wong Yip Lan: *Locke, Lane & Nicholson.*

Solicitor for respondent: *W. M. McKay.*

GARD v. YATES AND McLENNAN, McFEELY & PRIOR, LIMITED.

S. C. 1936 *Jan.* 14, 30.

Bankruptcy—Fraudulent preferences—Transfer of property by debtor—Whether Fraudulent Preference Act operative since passing of Bankruptcy Act—R.S.B.C. 1924, Cap. 97, Sec. 3—R.S.C. 1927, Cap. 11, Sec. 64.

The plaintiffs obtained judgment against the defendant Yates on the 16th of April, 1935, for $2,294.20, said judgment remaining unsatisfied. For some years prior to this Yates carried on a retail ship chandler's business in Vancouver, during which he was a regular customer of his co-defendant, McLennan, McFeely & Prior, Ltd. On the 9th of April, 1935, the defendant company wrote Yates with respect to his account and a further letter was written to him by the company's solicitor on the 23rd of April. Yates and the company's solicitor then had a conference when it was agreed that Yates should return his stock on hand to the defendant company, and it was handed over on the 25th of April. At the close of the defendant's case in an action to set aside the transfer to the defendant company as void under the Fraudulent Preferences Act, counsel agreed that they should first argue the point as to whether the Fraudulent Preferences Act, upon which the plaintiffs rely, had not ceased to be operative since the passing of the Bankruptcy Act.

Held, that the provisions of the Fraudulent Preferences Act may be invoked by the plaintiffs.

ACTION to set aside the transfer by the defendant Yates to the defendant McLennan, McFeely & Prior, Ltd. of certain goods and chattels on the 25th of April, 1935. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 14th of January, 1936.

J. A. MacInnes, and *C. F. MacLean,* for plaintiffs.
Griffin, K.C., and *J. S. Shakespeare,* for defendant company.
No one, for defendant Yates.

Cur. adv. vult.

30th January, 1936.

MANSON, J.: The plaintiffs are the holders of an unsatisfied judgment against the defendant Yates in the sum of $2,294.20 which judgment was pronounced in this Court on the 16th of April, 1935. The defendant Yates was a retail ship's chandler

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carrying on business in the City of Vancouver for some years prior to the end of April, 1935. He had during the years been a customer of his co-defendant McLennan, McFeely & Prior, Ltd. On the 9th of April, 1935, the defendant company wrote Yates with respect to his account and on the 23rd of April, 1935, the solicitors for the defendant company wrote him in the same connection. A substantial portion of the account was considerably past due. The letter was received by Yates apparently on the 24th of April. A conference as between the solicitor for the defendant company and Yates resulted in Yates agreeing, upon the solicitor's suggestion, that his stock on hand should be returned to the defendant company. On the 25th of April, 1935, the stock was returned. Yates has not been adjudged a bankrupt nor has he made an authorized assignment. The plaintiffs seek to set aside the transfer to the defendant company as void under the Fraudulent Preferences Act.

At the close of the defendant's case Mr. *Griffin, K.C.,* of counsel for the defendant, suggested that he be permitted to sever his argument and argue only the point, for the time being, as to whether the Fraudulent Preferences Act, being R.S.B.C. 1924, Cap. 97, upon which the plaintiffs rely, had not ceased to be operative since the passing of the Bankruptcy Act, R.S.C. 1927, Cap. 11. To this suggestion Mr. *MacInnes,* of counsel for the plaintiffs, agreed.

Mr. *Griffin* relied upon a decision in the Court of Appeal of this Province—*Hoffar Ltd.* v. *Canadian Credit Men's Trust Association* (1929), 40 B.C. 454 and upon the more recent decision in the Court of Appeal for Ontario: *Re Trenwith,* [1934] O.R. 326.

Mr. *MacInnes* submitted that the two cases referred to were readily distinguishable from the case at Bar, that the Bankruptcy Act was not applicable and that the Fraudulent Preferences Act was *intra vires* and applicable. He referred to an article in 5 F.L.J. 136-8, 151-3, 168-9.

It is assumed for the purpose of the argument on this point (a) that the defendant Yates was in insolvent circumstances at the time of making the transfer of goods complained of, (b) that the transfer was "with a view of giving" the defendant company

a preference over other creditors. I make no finding of fact upon either (a) or (b) pending further argument.

The *Hoffar* case. There an insolvent debtor on the 18th of February, 1928, gave a transfer of the bulk of his assets to his creditor Hoffar which transfer gave Hoffar a preference over the debtor's other creditors. The transfer was not given "with a view of giving" Hoffar a preference. On the 13th of April, 1928, the debtor made an assignment for the general benefit of his creditors in pursuance of the Bankruptcy Act and a trustee was appointed. He attacked the Hoffar transfer. The Court of Appeal, reversing the trial judge, held that the transfer not having been made "with a view of giving" a preference (the trial judge having found as a fact that the *prima facie* presumption of intention to prefer had been rebutted) the transfer was a valid transfer. The Court laid it down that, section 64 of the Bankruptcy Act being applicable to the facts, section 3 of the Fraudulent Preferences Act might not be invoked.

The *Re Trenwith* case. A judgment having been obtained against the debtor on the 27th of November, 1932, which was not paid, a receiving order was made against him on the 20th of June, 1933, pursuant to a petition in bankruptcy filed on the 15th of May, 1933. The debtor on the 4th of January, 1933, had executed and registered a mortgage of his substantial asset to his wife purporting to secure the sum of $7,000. Two leases from the debtor, one to each of his two sons and both bearing date the 1st of April, 1927, were discovered by the trustee on the 3rd of July, 1933. The trustee attacked the mortgage and the leases. The trial judge avoided the mortgage under the provisions of The Assignments and Preferences Act, R.S.O. 1927, Cap. 162. The Court of Appeal held that The Assignments and Preferences Act had been superseded by the Dominion Bankruptcy Act and that the provisions of the former Act could not now be invoked and directed a new trial. It was the preference sections of the Ontario Act, Secs. 3 and 4, that were under consideration. *Re Pommier* (1930), 65 O.L.R. 415 was overruled. *Canadian National Railway Co. et al.* v. *Labutte et al.*, [1933] O.W.N. 353, a decision of the same Court (differently constituted), does not appear to have been considered.

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The case at Bar. The debtor is not an "adjudged bankrupt" under the Bankruptcy Act nor has he made an "authorized assignment" under the Act. It is assumed that the debtor is an "insolvent" within the definition of the Act, Sec. 2 (*u*), and that he has committed an "act of bankruptcy" within the meaning of section 3 (*j*) of the Act. The bankruptcy of a debtor relates back to and commences at the time of the presentation of the petition on which a receiving order is made against him—*vide* section 4 (*e*). An assignment for the general benefit of creditors by an insolvent debtor whose liabilities exceed $500 does not become operative until accepted and filed by the official receiver—*vide* section 9 (3). This debtor's bankruptcy has not commenced. Conceivably, as others have done, he may recover from his insolvency and never become a bankrupt.

The Bankruptcy Act does not extend to insolvent wage-earners or farmers—*vide* section 7, nor to all insolvent corporations—*vide* section 2 (*k*) nor can the machinery of the Act be invoked in the case of an insolvent debtor where his liabilities do not exceed $500—*vide* section 4 (3) and section 9.

Section 64 of the Act enacts that a transfer by an insolvent person made with a view of giving one creditor preference over other creditors shall be deemed fraudulent and void against a trustee in bankruptcy, if the debtor becomes an adjudged bankrupt within three months of the making of the transfer or if he makes an authorized assignment within three months of the making of the transfer. Under section 64 (2), if any such transfer has the effect of giving any creditor a preference over other creditors, it shall be presumed *prima facie* to have been made with intent to prefer.

Section 3 of the Fraudulent Preferences Act enacts:

> 3. (1.) . . . . every . . . , transfer, . . . of goods, chattels, or effects, or of bills, bonds, . . . , made by a person at a time when he is in insolvent circumstances, . . . , shall:—
>
> (*a.*) If made with intent to defeat, hinder, delay, or prejudice his creditors . . . , be, as against the creditor . . . injured, delayed, or prejudiced, . . . void; and
>
> (*b.*) If made to or for a creditor with intent to give such creditor preference over his other creditors . . . , be, as against the . . . creditors injured, delayed, prejudiced, or postponed, utterly void.
>
> (2.) . . . every such . . . transfer, . . . , made to or for a creditor by a person at any time when he is in insolvent circumstances,

or is unable to pay his debts in full, or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor . . . , shall:—

(*a.*) . . . with respect to any . . . proceeding which, within sixty days thereafter, is . . . taken to . . . set aside such transaction, be utterly void as against the . . . creditors injured, delayed, prejudiced, . . . ; and

(*b.*) If the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be utterly void as against the assignee or any creditor authorized to take proceedings to avoid the same.

Then subsection (3) after setting out what transactions are deemed to be preferential, provides:

And such effect shall not be deemed dependent upon the intent or motive of the debtor.

The debtor in this case, not being an "adjudged bankrupt," and not having made an "authorized assignment," obviously the transfer complained of cannot be attacked under section 64. Can it be attacked under section 3 of the Provincial Act? The answer to that question depends first, upon whether the section is now *intra vires* the Provincial Legislature and secondly, upon whether, if it is *intra vires,* it is operative since the passing of the Bankruptcy Act.

The validity of section 3 was not questioned in this action, nor was it in the *Hoffar* case, *supra.* Had it been, the Attorney-General of Canada and the Attorney-General of this Province must have been notified under the Constitutional Questions Determination Act, R.S.B.C. 1924, Cap. 46, Sec. 9. So far as I have been able to gather no Court, since the passing of the Bankruptcy Act, has been called upon to definitely pass upon the validity of the section nor upon the validity of the parallel sections in the statutes of other Provinces. If the legislation was *intra vires* prior to that time it is still *intra vires,* there having been in the *interim* no amendment to the B.N.A. Act with regard to the distribution of legislative powers. The assumption is that the section is an exercise by the Province of its exclusive power to legislate upon the subject of property and civil rights—*vide* B.N.A. Act, Sec. 92 (13).

But, while the section has not been declared *ultra vires,* language has been used by the Courts declaring that it has been "superseded" and "can no longer be invoked." With respect, I

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am of the opinion that such a declaration is not a true statement of the law.

The *Hoffar* case, *supra,* in our own Court of Appeal has been much cited but on occasions, I think, as an authority for an interpretation of the law which it did not lay down. In that case the learned Chief Justice at p. 462 observed:

> Assuming then that the Provincial Act [the Fraudulent Preferences Act] is *intra vires*, section 3 has, in my opinion, been rendered inoperative by the overriding enactment of section 64 [*supra*]. It would, I think, be difficult to find a clearer case of repugnancy.

I do not take this to mean more than that in the opinion of the learned Chief Justice section 3 was inoperative in the particular circumstances. MARTIN, J.A. agreed with MACDONALD, J.A. GALLIHER, J.A. says no more than that the two Acts being in conflict "in respect of the matter to be decided upon in this appeal" the enactment of the Dominion Parliament must prevail. MCPHILLIPS, J.A. agreed in allowing the appeal but gave no reasons. MACDONALD, J.A. gives quite full reasons. The learned justice does at one point use the phrase *"ultra vires."* Speaking of the right to rebut intent to prefer given by section 64 (2) of the Bankruptcy Act, he says, at p. 465:

> If this right is given by Dominion legislation a Provincial Act destroying it is *ultra vires* to the extent of the conflict.

I think the use of the phrase a mere inadvertence. Counsel had not argued the point of constitutionality. The Attorneys-General had not been notified under the Constitutional Questions Determination Act, *supra.* The learned justice in the earlier part of his judgment speaks of "conflict" and in the sentence just quoted speaks of the "extent of the conflict." The phrase is not reconcilable with the unequivocal pronouncement made at p. 465:

> This is not to say that the trustee cannot resort to a Provincial Act to impeach a transaction. Provincial legislation respecting fraudulent conveyances may be resorted to. The Bankruptcy Act does not abrogate Provincial Acts simply because they deal with preferential transactions.

The decision then, as I read it, is not an authority supporting the proposition that since the passing of the Bankruptcy Act section 3 of the Fraudulent Preferences Act has become wholly inoperative. On the contrary the view of the Court so far as expressed is that section 3 is operative except to the extent of conflict in a specific case. In the *Re Trenwith* case, *supra,*

without suggesting that the decision in its result was incorrect, with respect, I cannot agree that the cases cited support the propositions laid down. At p. 332 Masten, J.A. says:

> The common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion Bankruptcy Act, the provisions of The Assignments and Preferences Act respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation.

Davis, J.A. (as he then was) in the same case says, at p. 343:

> The trial judge avoided the mortgage under the provisions of The Assignments and Preferences Act, R.S.O. 1927, ch. 162, but, in my view, since the enactment of bankruptcy legislation by the Dominion Parliament, this Provincial statute cannot be invoked.

The learned justice cites *Royal Bank of Canada* v. *Larue*, [1928] A.C. 187 and the *Hoffar* case. Masten, J.A. cites additionally the "Voluntary Assignments" case, *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*, [1894] A.C. 189 at p. 200. Sections 3 and 4 of the Provincial Act were the actual sections under consideration—they are in *pari materia* with our Fraudulent Preferences Act. The *Hoffar* case is not authority for such broad *dicta* as those pronounced by the learned justices and their language is in direct conflict with that of MACDONALD, J.A. as quoted above and agreed to by MARTIN, J.A. Nor can their language be reconciled with the decision in *Canadian National Railway Co. et al.* v. *Labutte et al.*, [1933] O.W.N. 353, a decision of the same Court (differently constituted). In the latter case there was, as here, an insolvent debtor who had apparently committed an act of bankruptcy but who had not become an adjudged bankrupt and had not made an authorized assignment. The transfer of a promissory note by the insolvent debtor to a creditor was set aside as a fraudulent preference under the preference sections of the Ontario Assignments and Preferences Act. In the Voluntary Assignments case, section 9 of the Ontario Act was in issue. That section dealt only with voluntary assignments for the general benefit of creditors and was held *intra vires*. The Lord Chancellor does, at p. 197, direct attention to the fact that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act being defeated and that for that purpose it may be

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necessary to deal with the effect of executions and other matters which would be otherwise within the legislative competence of the Provincial Legislature. In that event, the Lord Chancellor intimates, at p. 201, the Provincial Legislature would be precluded from interfering but he goes further and points out that when there is no Dominion bankruptcy or insolvency legislation the Province is not precluded from legislating. By parity of reasoning and in the light of the law as laid down by the Judicial Committee, it seems to me, that existing Provincial legislation operates where the provisions of the Bankruptcy Act do not apply, as well as where there is no Dominion Bankruptcy legislation. Provincial legislation respecting property and civil rights *qua* property and civil rights, which is always *intra vires*, where in conflict with *intra vires* Dominion legislation including its reasonably necessary ancillary provisions, becomes inoperative to the necessary extent but no more. In considering *Royal Bank of Canada* v. *Larue, supra,* the learned justice of the Ontario Court of Appeal doubtless had in mind the language of Viscount Cave, L.C., at p. 198, where he states that:

> The thesis that a postponement or annulment of the rights of creditors who under a Provincial law have obtained preferential rights is within the domain of bankruptcy legislation receives support by reference to a series of Provincial statutes.

The Lord Chancellor is not dealing with the preference sections involved in this case but rather with those sections in the Provincial statutes that gave assignments for the general benefit of creditors precedence over attachments, garnishee orders, etc. The subsequent language of the Lord Chancellor:

> It would be difficult to reconcile the course so taken by those Legislatures (in the matter of the provisions mentioned) with the contention that such a postponement

(that is of attachments, garnishing orders, etc., to assignments for the general benefit of creditors)

> is not within the domain of bankruptcy law,

has therefore no bearing on the question of whether the preference sections under consideration are today *intra vires* nor upon the question of whether they still have an operative effect in some circumstances.

Lord Dunedin in *Grand Trunk Railway of Canada* v. *Attor-*

ney-General of Canada, [1907] A.C. 65, at p. 68, lays down these two propositions:

> First, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such domain the two legislations meet, then the Dominion legislation must prevail.

A review of the cases on "conflict" will be found in the judgment of Newcombe, J. of the Supreme Court in *Larue* v. *Royal Bank of Canada,* [1926] S.C.R. 218 at pp. 225-8.

The Judicial Committee has refrained from comprehensively defining "bankruptcy and insolvency" but its observations in *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6 P.C. 31 at p. 36 and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada, supra,* at p. 200 at least do not suggest that provisions with regard to fraudulent conveyances and preferences are an essential part of "bankruptcy and insolvency" legislation. The cases go no further I think than to indicate that such provisions are reasonably ancillary to "bankruptcy and insolvency" legislation. That view is consistent with the view that the Fraudulent Preferences Act is *intra vires* legislation, and also consistent with the view that the Fraudulent Preferences Act is operative legislation—legislation which can be invoked, except in so far as it may be necessary in a particular case that its provisions should lie dormant by reason of the fact that the provisions of section 64 of the Bankruptcy Act are applicable. A similar view of the law was taken by Mitchell, J.A. of the Alberta Court of Appeal in *Crown Coal Co. Ltd.* v. *Swanson Lumber Co. Ltd.*, [1935] 3 W.W.R. 244 at pp. 252, 253.

As pointed out in the earlier part of my observations, the Bankruptcy Act specifically eliminates from its field of operation a substantial portion of the field it might have occupied. *Similiter* there are individual sections within the Act which do not occupy the complete field of the subject-matter dealt with. Section 64 specifically excludes the operation of the section except in cases where the insolvent debtor has become an "adjudged bankrupt" or has made an "authorized assignment." Section 64 has not occupied the whole field which it might have

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occupied. The provisions of the Fraudulent Preferences Act may be invoked by the plaintiffs. What then is the effect of section 3 of the latter Act upon the transfer of goods by the defendant Yates to the defendant company? That depends upon findings of fact which I shall make after argument upon the remaining issues.

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Jan. 29, 30;
Feb. 7.

ROMANO v. MAGGIORA (No. 3).

Practice—Notice of appeal—Style of cause—Stay of proceedings—Step in the action—Evidence abroad—Commission—Grounds in support—Sufficiency—Discretion.

Notice of appeal to the Court of Appeal should be entituled in the Court appealed from, the notice should be filed in that Court and a copy thereof in the Court of Appeal.

Giving notice of appeal is not a breach of a clause in an order for security for costs directing that "all further proceedings be stayed until such security is given."

On an application for an order to examine a witness on commission in the State of Michigan, the relevant material submitted to justify the order was a clause in the affidavit of the plaintiff's solicitor which, after stating that the proposed witness was necessary and material to prove the service by him in Seattle upon the defendant of the necessary process to found the foreign judgment sued on, and that the witness had "left Seattle," goes on to say: "He has since been located at Kalamazoo, Michigan, but it is not possible to compel him to attend here at the trial, and, in any event, the expense of such an attendance would be prohibitive." There was no statement that there was any attempt to get him to come to Victoria. The order was granted.

Held, on appeal, reversing the decision of FISHER, J., that upon the present facts the material submitted to the learned judge was so meagre that it did not afford a reasonable ground for the exercise of his discretion in granting the order, and the appeal is allowed.

APPEAL by defendant from the order of FISHER, J. of the 21st of October, 1935 (reported *ante*, p. 273), whereby it was ordered that a special examiner be appointed at Kalamazoo in the State of Michigan, U.S.A., for the purpose of taking the examination, cross-examination and re-examination *viva voce* on oath or affirmation of one Kenneth Hanna, a witness, on the

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part of the plaintiff at Kalamazoo. The plaintiff brought action on a judgment for $3,312.49 obtained by her against the defendant in the State of Washington. On an application for judgment under Order XIV., it was set up in defence that the defendant was not served with any process in the Washington action and took no part in the alleged proceedings therein, as the proceedings did not come to his knowledge or notice until apprised thereof in the course of the proceedings in this action. The Washington judgment recited that it appeared that the plaintiff was duly served with a summons and copy of the complaint which was based on an affidavit of Kenneth Hanna, who swore he served the defendant with these papers "by personally delivering to and leaving with the said John Maggiora at Seattle on the 28th of September, 1934, the summons and copy of the complaint." The application was dismissed and the defendant was allowed to defend the action on the merits. On the 21st of October, 1935, the plaintiff applied for an order appointing one Reint Schuur as special examiner to take the evidence of one Kenneth Hanna of Kalamazoo, Michigan, for use on the trial of the action. The order was made and this is the order from which this appeal is taken. Immediately after said order was made the defendant applied for an order requiring the plaintiff to furnish security for costs, and that pending the furnishing of security all further proceedings be stayed. This order was granted. Security for costs was not furnished by the plaintiff until the 19th of December, 1935. Notice of appeal was served on the plaintiff's solicitor in the matter now before the Court on the 2nd of November, 1935.

The appeal was argued at Victoria on the 29th and 30th of January, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Maitland, K.C., for appellant.

H. W. R. Moore, for respondent, took the preliminary objection that the appeal should be dismissed, as it was taken in contravention of the second order of the 21st of October, 1935, staying proceedings until security was put up and the security was not furnished until the 19th of December, 1935, and the

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notice of appeal was served on the 2nd of November, 1935: see *Belcher* v. *McDonald* (1902), 9 B.C. 377 at p. 392; *Spincer* v. *Watts* (1889), 23 Q.B.D. 350.

Maitland, contra: Section 6 of the Court of Appeal Act gives jurisdiction and a judgment of the Supreme Court cannot stay its hand: see *Sunder Singh* v. *McRae* (1922), 31 B.C. 67; *Harrington* v. *Ramage* (1907), 51 Sol. Jo. 514; *La Grange* v. *McAndrew* (1879), 4 Q.B.D. 210; *The London-road Car Co.* v. *Kelly* (1886), 18 L.R. Ir. 43; *Thomas Coal Co. Ltd.* v. *Red Deer Valley Coal Co., Ltd.*, [1935] 2 W.W.R. 638. Later we were asked to put up costs and we did so: see *Hepburn* v. *Beattie* (1911), 16 B.C. 209 at p. 213.

Moore, replied.

The judgment of the Court was delivered by

MARTIN, J.A.: We are all of opinion that the motion to quash this appeal should be refused. From the first sitting of this Court, 26 years ago this month, it has been the practice to intitule the notice of appeal as in the Court appealed from, and in *Hepburn* v. *Beattie* (1911), 16 B.C. 209, it was said, p. 214:

> . . . the correct practice according to our rules and statutes [is that] the notice should be given in the Court appealed from, and to the Court invoked. . . in order to take the matter out of the Court below, notice must first be given in that Court.

At that time the original notice was filed in the Court below "in the proper registry" (*i.e.*, of origin) and a copy of it here under the rules then in force (*i.e.*, of 1906 and 1912, pursuant to sections 31 and 34 of the Court of Appeal Act), and this practice is continued by our present Court of Appeal Rule 11 of 1924, and said sections 17 and 18. By section 14 (5) of said Act it is declared that "the giving of notice of appeal shall be deemed to be the bringing of the appeal within the meaning of this Act," and section 9 directs that

> 9. Subject to the Rules of Court and save as hereinafter provided, after notice of appeal has been given all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal.

By section 26 after this Court has delivered judgment and a certified copy thereof has been "deposited" in the Court below, all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in [that] Court.

The facts that by Court of Appeal Rule 19 it is declared that an appeal shall not, as of course, operate as a stay of execution, etc., below; and that no intermediate act or proceeding below shall, as of course, be invalidated; and also that the jurisdiction over security for costs of the appeal is specially conferred upon the Court below—*Prudential Savings & Loan Association* v. *Wheatley* (1932), 48 B.C. 401, 404—and, still further, that a special stay of execution is provided by the Court of Appeal Act Amendment Act, 1930, Cap. 10, Sec. 2 (3), only show that it was necessary to make these special provisions in order to retain below that jurisdiction over their subject-matters which would otherwise have been taken away and conferred upon this Court by said section 9.

The only appropriate and practical way of working out the change brought about by the said Court of Appeal Act and relevant rules, in the absence of specific direction, was, in 1910, and still is, that as the original notice had to be "filed in the proper registry" of the Court of origin, it should be intituled in that Court so that it should immediately take cognizance of the transfer of the "subject-matter of the appeal" (rule 13) and "proceedings in relation" thereto (section 9, save as aforesaid) from its jurisdiction to ours, and therefore *ex mero motu* stay its hand pending the result of the appeal. Such being the object of filing the original notice below it is not in its nature one to continue any proceedings there but to arrest them, and as regards that Court it is only one of notification, but to this it is one of invocation. The notice is dual in its nature and is aimed to start proceedings here and to stay them below, and it is because the said old rules directed that the original notice should be filed below and a copy here that, as a matter of convenient choice, we decided the better practice to adopt was that the notice should be intituled in the Court wherein it was orginally filed: if the original had been filed here we, doubtless, would have directed that the notice should be intituled herein.

Later, in *Wilson* v. *Henderson* (1914), 19 B.C. 45, we held that even if wrongly intituled the notice is nevertheless, if addressed to us, the foundation of our jurisdiction, and therefore

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in *Langan* v. *Simpson* (1919), 27 B.C. 504, the Chief Justice well described it as "the initial step in the appeal."

It follows that since the giving of the notice "proceeds" to nothing in the Court below, it cannot, in the true and appropriate meaning of the expression, be a breach of that clause in the order made below for security for the costs of the action directing that "all further proceedings be stayed until such security be given," or of the expression "further proceedings" in said section 9, and hence no real obstacle presents itself to our entertaining this appeal.

Motion to quash refused.

Maitland, on the merits: This order was given under rule 487. We submit that discretion must be exercised on proper material and there was not proper material before the Court. There was only the affidavit of Mr. *Moore* and that was not sufficient. Statements were made on information and belief and there is nothing showing the source of the information. The whole action turns on the evidence that this man gives as he is the man who is alleged to have served process on the defendant in Seattle. The affidavit in support must show they tried to get him and he will not come. That the expense of bringing him is prohibitive and it is in the furtherance of justice to allow his examination abroad and the affidavit should include where he gets his information and belief see *Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515 at p. 519; *Williams* v. *Fraser* (1925), 35 B.C. 481.

Moore: An application of this kind depends on the circumstances of the case. There is more strictness in the case of the plaintiff wanting the evidence, but in this case the cost of bringing the witness here is alone a sufficient ground for granting the order: see *Coch* v. *Allcock & Co.* (1888), 21 Q.B.D. 178; *Macaulay* v. *Glass* (1902), 47 Sol. Jo. 71. The discretion exercised below should not be interfered with: see *Giberson* v. *E. C. Atkins & Co.* (1917), 24 B.C. 19; *Butterfield* v. *The Financial News* (1889), 5 T.L.R. 279.

Cur. adv. vult.

7th February, 1936. C. A. 1936

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Per curiam: This is an appeal from an order of FISHER, J. granting the application of the plaintiff to have the evidence taken of one witness on her behalf at Kalamazoo in the State of Michigan.

Our practice is established by repeated decisions that if the plaintiff has chosen to bring his action in this Province then it is his duty *prima facie* to bring his witnesses here or to show that it is not in the interests of justice to compel him to do so, and if he discharges that latter *onus* then their evidence may, as "necessary for the purposes of justice" (rule 487), be taken on commission; and what is necessary for said purposes depends upon the particular circumstances of each case—*Stewart Iron Works Co.* v. *B.C. Iron, Wire and Fence Co.* (1914), 20 B.C. 515; *Giberson* v. *E. C. Atkins & Co.* (1917), 24 B.C. 19; and *Williams* v. *Fraser* (1925), 35 B.C. 481.

In his reasons for judgment the learned judge below says that on the material before him he thought that for said purposes "the ordinary mode in which evidence is to be taken should be departed from," and therefore made the order objected to. The only relevant material before him to justify that "departure" is a clause in the affidavit of the plaintiff's solicitor which after stating that the proposed witness, K. Hanna, was necessary and material (which is conceded) to prove the service by him in Seattle upon the defendant of the necessary process to found the foreign judgment sued on, and that Hanna had "left Seattle," goes on to say:

> 7. He has since been located at Kalamazoo, Michigan, but it is not possible to compel him to attend here at the trial, and, in any event, the expense of such an attendance would be prohibitive.

There is no statement that any attempt has been made to get him to come here, but, as was said in *Giberson's* case, *supra*, p. 21,

> It is not the practice that a witness in a foreign country must definitely state that he refuses to come before he can be examined on commission. It is quite sufficient if it reasonably appears from the facts that that is a fair inference that can be drawn from what is before the Court.

A refusal might "reasonably appear" where, *e.g.*, the material showed that the witness lived at so great a distance, say in Japan, that the expense and loss of time involved in bringing him here,

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in an action for a small amount, would be so disproportionate that *ex facie* a commission would be "necessary for the purposes of justice," but on the other hand it would not, *ex facie*, be necessary where the witness lived in San Francisco, and the action was for a large amount. In any event it is always a wise precaution to make due inquiry respecting the ability of witnesses to attend the trial because even though they live at a great distance yet they might well be able to attend the trial at a convenient time if their travels upon other affairs should happen to bring them within reasonable distance of the place of trial; and the earlier cases must be read in the present light of greater and time-saving facilities in travel by air, land and water.

To reach a correct decision the Court should be afforded all necessary information, having regard to the circumstances, and such a case as this requires the same sort of information as was furnished, *e.g.*, in *Coch* v. *Allcock* (1888), 21 Q.B.D. 178 (relied upon by the plaintiff-respondent) wherein the comparative cost of a commission (about £25) and of bringing several witnesses from Norway (about £100) in a suit for £24 was duly set out and the Court of Appeal affirmed the judgment of the Queen's Bench Division (which had reversed an order of Denman, J., refusing a commission) saying that, p. 181:

> The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration.

In the case at Bar (which is for $3,312.49) all that we have is the bare statement that "the expense of such an attendance would be prohibitive" without condescending to the usual particulars that would furnish the means for the obviously necessary comparison between the cost of bringing one witness here and that of issuing and executing a commission, which cost would undoubtedly be quite substantial for it would include the costs of both parties who would need to be represented thereat because the proposed witness is one of the first importance for the plaintiff.

The other statement in said paragraph 7 that "it is not possible

to compel him to attend here at the trial," simply states, unnecessarily, the law in regard to a foreign witness, and carries no weight, and in no way, under present circumstances, is it an excuse for not having asked him to do so: in *Emanuel* v. *Soltykoff* (1892), 8 T.L.R. 331 (C.A.) the defendant Prince Alexis Soltykoff was "not able to come to England as the Russian authorities would not allow him."

Now, as was said in *Williams's* case, *supra,* p. 484, while we are "always chary" in interfering with the discretion exercised by a learned judge below, yet it must be a judicial discretion, founded, as was said in the *Stewart Iron Works* case, *supra,* p. 519, on

> such facts as would have enabled the learned judge below, and also ourselves, to have drawn the inference that there was reasonable ground why the witness could not attend before the Court and be examined in the usual way. . . . While there is a disinclination to interfere with the discretion of the learned judge below in cases of this kind, yet it is clear this Court will do so where there has been a misapprehension in an important part of the case [*cf. Soltykoff's* case, *supra*].

Upon the present facts we are of opinion that the materials submitted to the learned judge were so meagre that they did not, with respect, afford a reasonable ground for the exercise of his discretion in granting the order and therefore the appeal from it is allowed.

Appeal allowed.

Solicitor for appellant: *E. V. Finland.*
Solicitor for respondent: *H. W. R. Moore.*

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June 14, 17, 18, 19; Nov. 2.

LLOYD-OWEN v. BULL *ET AL.*

Company law—Petition by shareholder and liquidator—Directions to bring action for recovery of assets of company—Previous action abortive——B.C. Stats. 1929, Cap. 11, Sec. 218.

A shareholder and the liquidator of the Pioneer Gold Mines Limited (in liquidation) petitioned for an order that the liquidator be directed to take action against the officers and shareholders of the company to recover property and assets of the company wrongfully acquired by them and unaccounted for to the company. The petition was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, J.A.: The question is whether or not under section 218 of the Companies Act we should in the interests of justice make the order sought for by the appellants. A similar action previously instituted by another petitioner proved unsuccessful, and we should only allow this appeal if in our opinion a new plaintiff on legal grounds, apart from fraud, would have a reasonable chance of success. In view of all that occurred and in the light of the argument presented to us, the proposed action could not in my judgment possibly succeed, and that being so it is not just that the respondents should be subjected to the cost and inconvenience involved in contesting it.

APPEAL by the petitioner Vernon Lloyd-Owen from the order of MURPHY, J. of the 28th of March, 1935. The petitioner John S. Salter is liquidator of Pioneer Gold Mines Limited (in liquidation) and Vernon Lloyd-Owen is the registered holder of 10,580 shares in the capital stock of said company. By order of the Court made upon petition on the 11th of July, 1933, dissolution of Pioneer Gold Mines Limited (in liquidation) was declared void and the time for final dissolution of the company was extended until the 20th of May, 1936. One Andrew Ferguson sued *Alfred E. Bull,* J. Duff-Stuart, R. B. Boucher, Francis J. Nicholson and the executors of the estate of Adam H. Wallbridge (all known as the Wallbridge Syndicate) together with John S. Salter as liquidator of said company. Judgment in said action was appealed to the Court of Appeal and thence to the Judicial Committee of the Privy Council. It appears from the reasons for judgment of the Privy Council that neither Ferguson nor any of the minority shareholders in said company

were competent to bring a minority shareholders' action to recover from the majority shareholders or directors assets allegedly belonging to the company, and that such an action can only be brought by the company. As the Wallbridge syndicate own a majority of the stock, the petitioner Lloyd-Owen believing an appeal to a general meeting of the company to authorize the liquidator to commence an action in the name of the company against the syndicate would be futile, and the liquidator refusing to bring action unless ordered by the Court to do so, the said petitioner prayed:

(a) For an order that the liquidator be directed to take action in the name of the company against [the Wallbridge syndicate] for the recovery of all property and assets of the company . . . wrongfully acquired by the proposed defendants, . . . and . . . , for the following relief:

1. For a declaration that the profit on an agreement dated January 21st, 1925, and allegedly made between the company and the . . . syndicate, was and is the property of the company.

2. For a declaration that 800,000 shares in Pioneer Gold Mines of B.C. Limited and all dividends thereon acquired . . . by the members of the . . . syndicate, were and are the property of the company.

3. For all necessary and incidental orders to compel the proposed defendants to restore to the company all such moneys and properties, with interest, or

4. In the alternative, to compel the proposed defendants to contribute such sum or sums to the assets of the company by way of compensation in respect of the matters complained of. . . .

5. For orders for the *interim* preservation of the subject-matter of the litigation, and . . .

(b) In the alternative . . . Lloyd-Owen, prays that he be granted leave to bring action in the company's name to obtain relief as aforesaid. . . .

The petition was refused.

The appeal was argued at Victoria on the 14th to the 19th of June, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

J. A. MacInnes (*Ian A. Shaw,* with him), for appellant: It was held by Mr. Justice MURPHY that an action could be maintained by the company only on an allegation of fraud and as the question of fraud was already decided in the former action the petition should be dismissed. The Privy Council decided that a shareholder had no *status* to bring the action and the appeal was dismissed on that ground. The balance of the judgment is

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merely *obiter*. There was in fact no moral turpitude found, but the transaction of the 16th of July, 1924, was void unless ratified by the transaction of the 15th of December, 1924. The question here is whether there is a reasonable ground to support or warrant the litigating of this case. The case of *Cook* v. *Deeks*, [1916] 1 A.C. 554 applies here. This petition is submitted under sections 218 and 220 (*j*) of the Companies Act, 1929, Cap. 11. There is a maintainable action in the company's name. The next question is as to what extent the Court should go considering the findings of the Privy Council as *obiter* or as to what weight should be given to *dicta:* see *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Limited,* [1907] 2 K.B. 814 at 820; *Slack* v. *Leeds Industrial Co-Operative Society, Ld.,* [1923] 1 Ch. 431 at p. 451, and on appeal [1924] A.C. 851 at p. 858. As to what weight should be attached to remarks of judges in course of argument see *Attorney-General* v. *Pearson* (1846), 2 Coll. C.C. 581 at p. 615; *In re Warwick, Etc., Railway Co.—Prichard's Case* (1854), 5 De G. M. & G. 495 at p. 500. The Privy Council refer to the 800,000 shares in the new company that fell to the syndicate as their share on the sale by Sloan of the mine to the new company, and the $30,000 profit that the syndicate received on the agreement of the 21st of January, 1925. Both were the property of the company as against the syndicate and the judgment of the Privy Council indicates an open question proper to be tried and should be tried.

J. W. deB. Farris, K.C., for respondent: The appellant is not competent to bring this appeal. Under section 218 of the Companies Act, 1929, the appeal must be taken by "the liquidator and any member of the company." This appeal has been taken by the member alone. Section 220 (*g*) does not apply because he (the liquidator) has not agreed to be joined in the petition. The liquidator does not appeal; having the order of Mr. Justice MURPHY he is satisfied. There is a basic misconception of the judgment of the Privy Council. We challenge the contention that the judgment indicates there was an open question and an action should be brought. It expressly states they would not give any pronouncement against the respondents when they were not heard. Lord Blanesburgh said an action could be

maintained but he did not say it would be successful. They were discussing a pure question of procedure and *Cook* v. *Deeks*, [1916] 1 A.C. 554 is an authority on procedure. On the question of constructive fraud (a) this case is real fraud or nothing; (b) by the judgment of the Privy Council fraud is swept away; (c) as far as fraud can be set up it is answered by the facts. The disposition of costs by the Privy Council could only be done on the basis of sweeping the board clear of fraud. When the minority shareholders ask for a share in a transaction they are thereby ratifying that transaction. As to the shareholders' meeting of the 5th of December, 1924, the directors after liquidation are not in a fiduciary position: see *The Chatham National Bank* v. *McKeen* (1895), 24 S.C.R. 348. On the dismissal of the petition the word "just" involves a judicial discretion: see *In re The Metropolitan Bank* (1880), 49 L.J. Ch. 651; *American Securities Corporation* v. *Woldson* (1927), 39 B.C. 145; *Royal Bank of Canada* v. *Whieldon* (1916), 23 B.C. 436 at p. 439. What they did at the July, 1924, meeting was not a fraud. They did not have a quorum and this was a technical defect that can be cured at a subsequent meeting.

MacInnes, in reply: On the interpretation of section 218 the word "and" is disjunctive: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 365. On appeal from the learned judge's discretion it depends on whether proper principles are observed. He decided on an improper view of the facts. He purported to decide the merits of the case when he should only decide whether there was a case to go to the Courts. He wrongly concluded that the judgment of the Privy Council barred fraud.

Cur. adv. vult.

2nd November, 1935.

MARTIN, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal is one from the judgment and order of MURPHY, J. upon the petition of Vernon Lloyd-Owen and John S. Salter, liquidator of the Pioneer Gold Mines Limited (in liquidation). The order taken out reads as follows: [after setting out the order His Lordship continued].

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The liquidator did not appeal but through counsel it was stated that the liquidator would abide by any order that the Court would make—that is, submitted to any order that the Court might make in the appeal and, in my opinion, that gives jurisdiction to the Court to proceed and the liquidator will be bound by the ultimate decision in the matter upon appeal to this Court on any further appeal had or taken. I have arrived at the conclusion that the learned judge in the Court below was wholly wrong in making the order he did. I dissented in the *Ferguson* v. *Wallbridge* case ((1933), 47 B.C. 518 at p. 539) which later went on appeal to the Privy Council and the judgment of their Lordships of the Privy Council was delivered by Lord Blanesburgh. In that judgment the appeal was dismissed, but it went off on the ground of the want of proper parties being before the Court and because of the allegation of fraud and conspiracy not being withdrawn. The company was in liquidation and the liquidator was not before the Court. There was no disposition of the appeal upon the merits at all. The judgment as delivered by Lord Blanesburgh is in its nature, if I may be permitted to so state, a classic as defining the rights of the shareholders of a company where there has been a failure to directors to properly discharge their fiduciary duty and the right to order that any moneys derived from any disposition of the properties of the company must be accounted for and brought into the treasury of the company. It is unthinkable to my mind to construe that judgment as being a holding that the final Court of Appeal has finally determined that the shareholders are without any possibility of relief. Here we have a large shareholder, who is desirous of having the question determined within the provisions of the Companies Act (of British Columbia) practically in the same terms as the Companies Act (Imperial). If that was the intended judgment of their Lordships of the Privy Council why was the elaborate judgment given by their Lordships of the Privy Council indicating the legal rights of shareholders where the properties of a company are sold and other disposition made of them and the moneys obtained therefor not accounted for but appropriated by the directors and retained by them as well as by certain shareholders of the company? Lord Blanesburgh took

great pains and in a most illuminative way pointed out what were the needed steps. It is only necessary to read the judgment of their Lordships of the Privy Council (reported in [1935] 1 W.W.R. 673) and see there pointedly indicated that the proceedings may be rightly taken under section 234 of the British Columbia Companies Act, R.S.B.C. 1924, Cap. 38.

The petitioner herein was, in my opinion, rightly entitled to proceed as he did and the liquidator joined in the petition. Therefore everything was done in form yet the learned judge refused to make the order which, in my opinion, and with great respect to the learned judge, it was incumbent upon him to make, so that no injustice would be done, that is, the petitioner should be entitled to have the matter adjudicated upon and that no miscarriage of justice should take place. It was stated upon the appeal before this Court that an offer was made to the liquidator and the assurance given that the liquidator would be indemnified against all costs that he would incur or be liable for. In view of this what possible obstacle was in the way of the learned judge making the desired order? It would seem to have been advanced by counsel opposed to any such order as desired being made that the decision in the Privy Council in the *Ferguson* v. *Wallbridge* case was conclusive and decisive of the petitioner's claim and counsel at this Bar in this appeal made the same submission—a most untenable contention. As I read the judgment of the Privy Council all that was dealt with, besides the want of proper parties, were the charges of conspiracy and fraud—charges wholly unessential for success in a properly constituted action. It will be observed that in the Privy Council in the judgment as delivered by Lord Blanesburgh it was stated that the case advanced in *Ferguson* v. *Wallbridge* was of the class so well defined in the case of *Cook* v. *Deeks,* [1916] 1 A.C. 554. There it was a case of breach of trust by the directors and constituted them trustees of all the benefits derived on behalf of the company; that the benefit of the contract belonged in equity to the company and the directors could not validly use their voting powers to vest it in themselves and the present case is of a similar nature. I was a dissenting member of the Court of Appeal in the *Ferguson* v. *Wallbridge* case and I was greatly

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surprised to note that counsel before their Lordships of the Privy Council advanced the contention of charges of conspiracy and fraud, as I distinctly remember that those charges were abandoned before the Court of Appeal and I came to my conclusion and wrote my judgment in the full belief that they were abandoned. It will be seen upon reference to my judgment (47 B.C. 542) that I dealt with the matter as being one of a breach of a fiduciary duty and cited a judgment of Lord Herschell (*Bray* v. *Ford*, [1896] A.C. 44) at p. 51 where he said:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

I traversed the questions of law so completely, as I think, in my judgment above referred to, I do not think that it is necessary to further deal with them. The judgment of their Lordships of the Privy Council, as delivered by Lord Blanesburgh), in the *Ferguson* v. *Wallbridge* case is in no way in conflict with my dissenting judgment in the case in this Court; in truth, it is in complete alliance with it upon the question of law.

With the most careful attention to all the considerations advanced in this appeal I unhesitatingly am of the opinion that the *Ferguson* v. *Wallbridge* case and the decision of the Privy Council therein in no way constitutes a bar but in fact supports and authorizes the relief asked here. It is plain that the interests of justice require that the relief as prayed for in the petition be granted and that the liquidator be ordered and directed and do proceed with all due diligence in taking the necessary proceedings for the recovery of or otherwise in respect of any property or assets of the company which may be shown to have been wrongfully acquired by the directors or shareholders and unaccounted for to the company, being the property of the company or derivable from shares received in the later company incorporated in similar name in payment for property and assets of the company alleged to be wrongfully appropriated by the

directors and leave be granted to bring action in the company's name against *Alfred E. Bull,* J. Duff Stuart, R. B. Boucher, F. J. Nicholson and Helen A. Wallbridge and *D. S. Wallbridge,* executors and trustees of the estate of Adam H. Wallbridge, deceased, or any of them to obtain relief as prayed for in the petition or otherwise on the company's account for vindication of the company's rights.

I would, therefore, allow the appeal.

MACDONALD, J.A.: The question is whether or not under section 218 of the Companies Act we should, in the interests of justice, make the order sought by the appellant. It is only if the Court thinks it just that such an order should be made. Mr. Justice MURPHY in his discretion refused to do so. We, in reviewing that decision, have the advantage of full knowledge of the case from earlier contact with it. While part of the judgment of the Judicial Committee may be *obiter,* I would, if I found therein, as Mr. *MacInnes* suggests, an intimation that leave to bring a new action should be given, be greatly influenced thereby and govern myself accordingly. I cannot, however, read the Board's decision in that way. We should only allow this appeal if in our opinion, with fraud in all its phases eliminated, a new plaintiff on legal grounds, apart from fraud, would have a reasonable chance of success. In view of all that occurred; my own opinion as expressed at the time; and the further study of the case in the light of the argument presented to us, the proposed new action could not, in my judgment, possibly succeed and that being so it is not just that the respondents should be subjected to the cost and inconvenience involved in contesting it.

I would dismiss the appeal.

MCQUARRIE, J.A. would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Ian A. Shaw.*
Solicitor for respondents: *T. Edgar Wilson.*
Solicitor for liquidator: *Charles W. St. John.*

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Jan. 16, 31.

JOHNSON *ET AL.* v. LINEKER *ET AL.*

Estate—Intestate—Distribution—Brother—Nephews and nieces of the half-blood—R.S.B.C. 1924, Cap. 5, Secs. 116 and 119—B.C. Stats. 1925, Cap. 2, Sec. 4.

An intestate's father and mother predeceased him. His mother by her first husband had three children, all of whom predeceased the intestate, and each of them left issue surviving the intestate. The mother by her second husband had four children, namely, the intestate and three others, two of whom predeceased him without issue, and the third a brother surviving him. On originating summons to determine what persons are entitled to the real and personal estate of the intestate:—

Held, that the brothers and sisters of the half-blood inherit equally with those of the whole blood, and the real and personal estate should be divided one-quarter to the brother and three-quarters to the nephews and nieces of the deceased.

ORIGINATING SUMMONS to determine what persons are entitled to (a) the real estate, (b) the personal estate of E. H. Lineker, deceased, intestate, and in what shares. Heard by ROBERTSON, J. at Victoria on the 16th of January, 1936.

A. D. Crease, for applicants.
Stuart Henderson, for F. V. Lineker.

Cur. adv. vult.

31st January, 1936.

ROBERTSON, J.: This is an originating summons to determine (1) what persons are entitled to the real estate and (2) to the personal estate of Edward Lineker, a bachelor, who died, intestate, on the 27th of February, 1935.

The intestate's father and mother predeceased him. His mother, by her first husband, had three children all of whom predeceased the intestate, and, each of whom left issue surviving the intestate. By her second husband she had the intestate, and three other children, two of whom predeceased the intestate and left no issue. The third child F. V. Lineker claims that as a brother of the whole blood, he is entitled to the intestate's estate as against the intestate's nephews and nieces who are of the half-blood. The questions fall to be determined under sections 116 and 119 of Part VII. of the Administration Act, R.S.B.C.

1924, Cap. 5, as enacted by section 4 of Cap. 2, B.C. Stats. 1925. This Act repealed Parts VII. and VIII. of Cap. 5, which, respectively, provided for the "course of descent of real estate," and the "distribution of personal estates of intestates," and enacted a new Part VII. under which an intestate's real estate is distributed exactly in the same manner as his personal estate. Section 126 of Part VII. of Cap. 5 expressly provided for relatives of the half-blood inheriting equally with those of the whole blood in the same degree, etc. Part VIII. of Cap. 5 is very much the same as the English Statute of Distributions, 22 & 23 Car. II., Cap. 10. Under this statute the half-blood shared equally with the whole blood—see Williams on Executors, 12th Ed., Vol. II., pp. 723 and 1031; *Jessopp* v. *Watson* (1833), 1 Myl. & K. 665 at p. 672. Sections 116 and 119 as enacted by section 4 of the 1925 Act are as follow:

116. If an intestate dies leaving no widow or issue or father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken, if living: Provided that where the only persons entitled are children of deceased brothers and sisters, they shall take *per capita*.

119. For the purposes of this Part, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative; and the kindred of the half-blood shall inherit equally with those of the whole blood in the same degree.

It was submitted by counsel for the surviving brother that the 1925 Act changed the existing law; that section 116 only applies to brothers and sisters of the whole blood, and that if this were not so, there would be no object in the statute providing by section 119 that kindred of the half-blood should inherit equally with the whole blood in the same degree. He argues that Part VII. is a code by itself and that section 119 refers only to sections 117 and 118, which provide that the intestate's estate shall go to his next-of-kin, if none of the next-of-kin mentioned in section 116, survives him.

I am of the opinion that the words "brothers and sisters" in section 116 include the half-blood for the following reasons—"Brother" is defined in Vol. I. of the Oxford Dictionary, p. 1132, as follows:

Properly. The son of the same parents. But often intended to include

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one who has either parent in common with another (more strictly called *half-brother*, or *brother of the half-blood.*

In determining the question whether a daughter of the half-blood was a niece of a testator within the meaning of a decree, Vice-Chancellor Turner said in *Grieves* v. *Rawley* (1852), 10 Hare 61 at pp. 63-4:

> In the description of nephews and nieces, there is not, I think, any distinction generally made between children of whole and of half-brothers and sisters. The relation of uncle and nephew or niece is of course founded on and derived from the relation between the uncle and the parent of the nephew or niece, but the first-mentioned relation is so generally recognized and understood that, in speaking of it, the nature and degree of the second-mentioned relation is not, I think, generally regarded. It would, for instance, as I conceive, be a great surprise in anyone to be told that the child of his half-brother or sister was not his nephew or niece.
>
> The argument on the part of the exceptant was, that the nephew or niece must be a child of the brother or sister, and that the relation of brother and sister subsists only where both the parties are descended from the same father and mother, and not where one of the parties has a different father or a different mother; and it is true, that the dictionaries so describe the relation of brother and sister; but this argument appears to me to be open to two objections: in the first place, it goes to the origin of the relation, for the purpose of defining a class which is generally recognized and defined independent of its origin; and, in the second place, it assumes that the meaning which is attributed to the term brother and sister in the dictionaries, is the meaning in which the term is ordinarily used; and I do not think this is the case. I think that, in general, when a man speaks of his brothers and sisters, he speaks of them, not with reference to the definition of the word in the dictionary, but as a class, standing in the same relation to one or both of his parents as he himself stands in. Though not descended from the same parents, the parties are, as is said in the "Termes de la Ley" (p. 123, *tit.* Half-Blood (Demy Sangue)), "after a sort brothers," "brothers by the father's side," "brothers by one mother;" and, however other parties might describe them, or they designate themselves, if required to give a precise description of the nature and degree of the relation subsisting between them, I think that, in ordinary parlance, they would be called, and would call themselves, brothers and sisters. Suppose, for instance, A., a member of a family consisting of sons and daughters of the father by different marriages, was asked the question as to the relation between him and B., another member of the same family, would not the question be—Is B. your whole brother or sister, or your half-brother or sister; and would not the answer be in similar terms? Both the party questioning and the party questioned would thus call B. a brother or sister, but each would distinguish the character and degree of the relation.

See also *In re Cozens. Miles* v. *Wilson,* [1903] 1 Ch. 138 at 141, following *Grieves* v. *Rawley, supra. In re Wagner* (1903), 6 O.L.R. 680 was a case in which Boyd, C. had to construe

section 6 of the Ontario Devolution of Estates Act which provided that the father of an intestate should not be entitled to any greater share in the intestacy than "any brother or sister." He held (p. 682) the proper construction was "to read 'brother' and 'sister' as including one who has either parent in common with another," . . .

In my opinion, then, under section 116, standing by itself, brothers and sisters of the half-blood are entitled to share in the intestate's estate.

If this is not so, then I think section 119 would apply to section 116 because of the words at the commencement of section 119, *viz.*, "for the purpose of this Part."

I think, therefore, the questions should be answered as follows: the real and personal estate should be divided one-quarter to F. V. Lineker and three-quarters to the nephews and nieces of the deceased, *per stirpes*.

Costs of all parties out of the estate.

Order accordingly.

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1936
Jan. 20;
Feb. 8.

HOME OIL DISTRIBUTORS LTD. v. BENNETT.

Real property—Land Registry Act—Conveyance—Application for certificate of indefeasible title—Covenant by the grantee—Whether registrable as a charge—Petition by grantor—R.S.B.C. 1924, Cap. 127, Sec. 148.

A conveyance of land, signed by the purchaser, contained a covenant "that the grantee doth hereby for himself and his assigns covenant with the grantor and its assigns that neither the grantee nor his assigns will manufacture or sell or permit or suffer to be manufactured or sold by any person, persons or corporation at any time hereafter any gasoline or other petroleum products upon the lands and hereditaments hereafter conveyed or any portion thereof."

On petition by the grantor praying that pursuant to section 148 of the Land Registry Act a direction be given to the registrar that the covenant be endorsed upon any certificate of title to be issued to the purchaser:—

Held, that said section 148 expressly includes a restrictive covenant and is mandatory. When a conveyance containing a restrictive covenant is put in for registration, the registrar must, under section 148 determine whether or not the covenant is restrictive, and if he finds it is, he must endorse it on the certificate. The section does not suggest he should decide whether or not the covenant is an interest in land or is enforceable.

PETITION by the grantor of certain lands in the City of Vancouver, praying that pursuant to section 148 of the Land Registry Act a direction be given to the registrar of titles that a certain covenant contained in the conveyance be endorsed upon the certificate of title to be issued to the defendant. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 20th of January, 1936.

Symes, for petitioner.
H. J. Crane, contra.

Cur. adv. vult.

8th February, 1936.

ROBERTSON, J.: The petitioner the Home Oil Distributors Ltd., carries on business throughout the Province of British Columbia as wholesale and retail merchants in the sale of petroleum products and owns, in the City of Vancouver and else-

where in the Province of British Columbia, numerous parcels of land on which these various products are sold. On the 18th of November, 1935, it conveyed in fee-simple to T. W. Bennett certain lands in Vancouver

subject to the restrictions and conditions hereinafter contained and imposed upon the grantee his heirs and assigns as obligations intending to be binding in perpetuity on the lands and hereditaments herein assured and all future owners hereof as far as the law will permit.

The conveyance (which was signed by Bennett) contained the following covenant:

That the grantee doth hereby for himself and his assigns covenant with the grantor and its assigns that neither the grantee nor his assigns will manufacture or sell or permit or suffer to be manufactured or sold by any person, persons or corporation at any time hereafter any gasoline or other petroleum products upon the lands and hereditaments hereafter conveyed or any portion thereof.

Section 148 of the Land Registry Act is as follows:

148. Upon any application to register a person as owner in fee-simple under an instrument whereunder any estate or interest in the land granted remains in the grantor, or whereunder or whereby any restrictive covenant is entered into by the grantee, or any condition, exception, or reservation, easement, right of way, or right of any kind soever in or upon the land covered by the application is imposed, reserved, or created, the existing certificate of title shall be cancelled or a memorandum made thereon in the manner provided by section 157, and the estate or interest remaining in and the rights reserved to the grantor or imposed or created shall be endorsed upon the new certificate as a charge, and such endorsement shall have the same effect as if the grantor had applied for and obtained registration of a charge in respect thereof.

Bennett applied for a certificate of indefeasible title. The registrar notified the petitioner that the covenant in the conveyance "is one of a personal character and accordingly not registrable as a charge" under the Act and that it was his intention to issue a certificate of title to the applicant "clear of the aforesaid restrictive covenant" unless in the meantime proceedings were taken by the petitioner to establish his claim. The petitioner then filed this petition, praying that pursuant to section 148 a direction be given to the registrar that the covenant be endorsed upon any certificate of title to be issued to Bennett.

The registrar submits the restrictive covenant is personal, and as it gives no interest in the land it cannot be registered as the Land Registry Act provides only for registration of "interests" in land; that in any event the covenant is not enforceable

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as the grantors do not own any land which would be benefited by the covenant; that the lands to be benefited must be clearly described in the conveyance, which was not done here; and that a covenant of this sort could not, pursuant to section 148, be endorsed "upon the new certificate of title as a charge," unless it came within the definition of "charge" in section 2. Finally he submitted he was a judicial officer—see *Esquimalt and Nanaimo Railway Company* v. *Granby Consolidated Mining, Smelting and Power Company, Ld.*, 88 L.J.P.C. 199; [1919] 3 W.W.R. 331 at 336; [1920] A.C. 172, and that it was his duty to examine into and ascertain whether the covenant created a charge and was therefore registrable and that "he should not register a charge for the asking."

The petitioner's counsel submits that the covenant is restrictive and therefore comes within the exact words of section 148; that the section is mandatory and the registrar has no discretion in the matter; and that his duty is to ascertain if this covenant is restrictive and if having ascertained it is, he must endorse it on the certificate. He argues he has no power to enquire as to whether or not the covenant is enforceable. Alternatively he submits that as the petitioner has other pieces of land in Vancouver upon which its products are sold although these are not contiguous to the lands conveyed to Bennett and these lands are affected by the restrictive covenant in question the covenant is valid and enforceable.

Lord Macmillan in delivering the judgment of the Privy Council in *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan*, [1933] A.C. 378 at p. 387; 102 L.J.P.C. 90 at p. 93; [1933] 2 W.W.R. 1 at p. 5, said:

> The answer to the question must be found from an examination of the ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the Legislature has itself said.

Section 148 expressly includes a restrictive covenant. It will be noticed that the section does not say in so many words that the restrictive covenant is to be endorsed but I think it would come within the words "and the rights reserved to the grantor or imposed or created."

Section 149 strengthens this view. It provides that if a restrictive covenant has been entered into for the purpose of

being annexed to land (*i.e.*, land other than that for which a new certificate of title is to issue) for which a certificate of indefeasible title has been issued the registrar shall make a memorandum of such covenant and of the instrument creating same upon the folio of the register which constitutes the existing certificate of title of the land to which such covenant is so annexed. There is no provision in the section that the covenant shall constitute an interest in the land or be enforceable. The section is mandatory.

It is submitted that if this construction of section 148 is adopted, then the grantor will be able to obtain registration of this covenant as a charge which if it had been contained in a separate deed, to which the petitioner and Bennett were the parties, it could not have obtained registration of the covenant as it does not fall within the definition of a charge which is registrable under section 163.

It is quite clear, that, assuming that the covenant was inserted in the conveyance for the purpose of benefiting adjoining lands it would give no interest to the grantor in the land conveyed, so that it is apparent that if the contention of the registrar is correct, even though the grantor had an enforceable covenant he would not be entitled to have it endorsed under section 148.

Now if only an estate or interest in land were to be registrable there would have been no necessity for expressly mentioning restrictive covenants and other rights in section 148. These rights must be something different from an estate or an interest in land.

I am of the opinion that when a conveyance containing a restrictive covenant is put in for registration, the registrar must, under section 148 determine whether or not the covenant is restrictive and if he finds it is he must endorse it on the certificate, for the section is mandatory. The section does not suggest he should decide whether or not the covenant is an interest in land or is enforceable. It gives him no discretion.

I am of the opinion that this petitioner is entitled to the direction it wishes.

Petition granted.

S. C.
In Chambers
1936
Dec. 13;
Jan. 30.

REX v. SOO KIT SANG.

Criminal law—Charge—Disorderly house to wit a common gaming-house—Conviction — Habeas corpus — Certiorari—No offence—Uncertainty—Criminal Code, Secs. 226, 227 and 229.

The accused was convicted on a charge that he "at a certain time and place did unlawfully keep a disorderly house, to wit, a common gaming-house." On the return of a summons for a writ of *habeas corpus* with *certiorari* in aid:—

Held, that the words "as hereinbefore defined" contained in section 229 of the Criminal Code cannot be ignored. Section 226 contains two subsections and section 227 contains four. Two separate and distinct offences are created by section 226 when read along with section 229, and four are created by section 227. The conviction in this case that the accused at a certain time and place did unlawfully keep a disorderly house, to wit, a common gaming-house, is bad either as disclosing no offence or as leaving it uncertain on which one of several separate and distinct offences the prisoner was convicted.

APPEAL by accused by way of *habeas corpus* with *certiorari* in aid from his conviction on a charge that he did unlawfully keep a disorderly house, to wit, a common gaming-house. Argued before FISHER, J. in Chambers at Vancouver on the 13th of December, 1935.

Mellish, for Soo Kit Sang.
Oliver, for the Crown.

Cur. adv. vult.

30th January, 1936.

FISHER, J.: In this matter upon the return of a summons for a writ of *habeas corpus* with *certiorari* in aid I ordered the applicant to be discharged from custody on December 13th last but, as the reasons I then gave were not recorded, I have been recently requested by Mr. *Joseph Oliver* of counsel for the Crown to state my reasons in writing. Shortly they may be stated as follows: I do not think, that the words "as hereinbefore defined" contained in section 229 of the Criminal Code can be ignored. A reference to the preceding sections defining

the expressions used in said section 229 shows that section 226 defining common gaming-house contains two subsections (*a*) and (*b*) and section 227 defining common betting-house contains four subsections (*a*), (*b*), (*c*) and (*d*). From the comments upon the latter section contained on p. 218 of Crankshaw's Criminal Code, 6th Ed., referring to *Bond* v. *Plumb* (1893), 17 Cox, C.C. 749; [1894] 1 Q.B. 169, I infer that the writer is of the opinion that four separate and distinct offences are created by said section 227. Similarly I would be of the opinion that two separate and distinct offences are created by said section 226 when read along with section 229. The charge should give the accused notice of the particular offence with which he is charged. This is obviously done by the forms set out in Crankshaw's Criminal Code, *supra,* p. 1443 under the heading of "Keeping a Common Gaming-house." Compare also the form on p. 1444 under the heading of "Keeping A Bucket Shop." I am therefore of the opinion that the conviction in the present case which, according to the return made, was simply that the accused at a certain time and place did unlawfully keep a disorderly house, to wit—"a common gaming-house" is bad either as disclosing no offence or as leaving it uncertain on which one of several separate and distinct offences the prisoner was convicted.

Conviction quashed.

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1936
Jan. 29;
Feb. 4.

WELCH AND DOWNIE v. GRANT.

Negligence—Motor-vehicles—Collision at intersection—Stop street—Right of way—Driver on right negligent—Sole cause of accident—Loss of consortium.

The plaintiff driving his car, on coming to a stop sign at an intersection stopped, looked to right and left, and concluding there was no danger, proceeded to cross the intersection. When he started across he saw the defendant's car about 250 feet to his right, coming at about 30 miles an hour, but was satisfied he had plenty of space and time to cross. The defendant approaching from the right of the plaintiff did not look to his left or see the plaintiff's car until he was within the intersection. In an action resulting from a collision between the two cars at the intersection:—

Held, that the accident was due solely to the negligence of the defendant, who was on the right of the plaintiff, in not keeping a proper look-out and in not giving the plaintiff the right of way which he had obtained. The plaintiff was justified in proceeding and had displaced the defendant's right of way.

ACTION for damages resulting from a collision between two automobiles at an intersection. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 29th of January, 1936.

Bull, K.C., and *Mayall*, for plaintiffs.
Nicholson, and *Yule*, for defendant.

Cur. adv. vult.

4th February, 1936.

FISHER, J.: In this matter I find that the defendant driver Grant, who was approaching from the right of the plaintiff driver Thomas Downie, did not look to the left at all or see the plaintiff's car until he was within the intersection as defined in the by-law (see Exhibit 14) and by MARTIN, J.A. in *Lloyd* v. *Hanafin*, 43 B.C. 401; [1931] 1 W.W.R. 415. His failure to look and see what was plainly visible cannot be justified and was negligence under the circumstances. On the other hand I find that the plaintiff driver, having come to a full stop at the stop sign for an appreciable time, looked both to the right and to the left, and, having concluded that there was no danger of inter-

ference or collision, then proceeded to cross. Downie says that at that time he observed the Grant car on his right on Hastings Street, where there is a steep grade, and that it was 500 feet away or in the hollow below when he started to cross. It may be argued that he did not make all the necessary observations before proceeding because he admits he did not form an estimate of the speed of the car which he saw approaching from his right. I agree that, speaking generally, one may say that the speed of the driver approaching from the right is one of the things that should be observed by a driver holding the servient position before he proceeds to cross in front of the other but in the present case it must be noted that Downie says specifically that he saw he had lots of space and time to cross in front. Though I think he over-estimated the distance, I am satisfied and find that when he started to cross, as he did, in low gear the other car was at least 250 feet away from the intersection and going only about 30 miles an hour. Under the circumstances it could not be said that Grant's car was going at an obviously high or dangerous rate of speed and that Downie was negligent in crossing ahead of a "speed maniac." See *Groh and Jeffrey* v. *Ritter,* 50 B.C. 129; [1935] 2 W.W.R. 472. It must be remembered that the Grant car must have been further away than 250 feet when Downie came to the intersection as I have found that he came to a full stop there for an appreciable time before proceeding to cross. I find that at that time, according to all appearances as well as according to the observations Downie then made, the way was clear and Downie, though the driver on the left, was justified in proceeding as the driver on the right could not reasonably be expected to continue on and enter the "danger zone" before the car on the left was out of it.

Counsel for the defendant relies especially upon *Swartz Bros. Ltd.* v. *Wills,* [1935] 3 D.L.R. 277, but I think that such case is readily distinguishable from the present one. In the *Wills* case the plaintiff did not stop at all upon reaching the intersection and reference might be made to what was said in such case by Cannon, J. at p. 280:

> The clear fact emerging from the evidence is that plaintiff, although he had seen the truck approaching, disregarded the law giving to the defendant the right of way, speeded up his automobile and took a chance.

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In the present case, as I have already intimated, the plaintiff Downie had come to a full stop at the intersection and it cannot be said that he speeded up his car and took a chance to cross ahead of the other car. The plaintiff had come to the intersection substantially ahead of the defendant and, the way appearing to be clear, as I have already found, he made a reasonable and substantial prior entry upon the crossing of the intersection. Under the circumstances therefore I find that Downie did not disregard the law giving to the defendant the right of way but had displaced the right of way of the defendant who was then obliged to wait upon the other car which was entitled to proceed as a matter of right. See *Hanley* v. *Hayes* (1924), 55 O.L.R. 361, at pp. 366-7, and *Lloyd* v. *Hanafin, supra,* at pp. 402-3. In this case Downie has satisfied the *onus* of explaining how he got into the position he was and of proving that he was acting with reasonable care in entering upon the crossing of the intersection: see *Haines* v. *Williams. Williams* v. *Haines,* 47 B.C. 69; [1933] 1 W.W.R. 478, 644, and cases there referred to at p. 479. The plaintiff, while crossing the intersection, was clearly visible to any driver keeping a proper look-out and the defendant was negligent in not seeing him long before he did.

I now come to deal with the submission of counsel on behalf of the defendant that in any event the plaintiff Downie was negligent while in the intersection and that negligence on his part contributed to the accident. In this connection reference is made to my own judgment in *Haines* v. *Williams, supra,* especially at p. 74. In my view, however, that case is also distinguishable from the present case. In the *Haines* case I note that I said:

> I think it is clear from the evidence of Haines himself that while crossing the intersection he paid no attention to the Williams car approaching from his right though he himself was crossing very slowly and the Williams car was going at 25 to 30 miles an hour when he had last seen it, which was, as I have pointed out, when he stopped.

In the case now before me I cannot find that Downie while crossing the intersection paid no attention to the defendant's car approaching from his right as he tells me that he looked again to the right and saw the Grant car about 175 feet away.

Although I think Downie here again overestimated the distance and failed to estimate the speed, I also think that the other car at the time was at such a distance and was going at such a speed that Downie reasonably concluded, as he did, that there was no danger and so continued his crossing. I accept the evidence of Downie that he looked to the right while crossing the intersection and I am satisfied and find that at the time he looked the other driver Grant was at some substantial distance from the intersection and not going at any obviously high or dangerous rate of speed so that under the circumstances Downie was entitled to expect that Grant would keep a proper look-out and allow him to complete safely the crossing of the intersection. After that time the plaintiff's attention was reasonably directed to the pedestrians he saw.

On the question of liability, therefore, my conclusion is that the accident was due to the sole negligence of the defendant in not keeping a proper look-out and in not giving the plaintiff the right of way. As to the damages for which the defendant is liable to the plaintiffs it is or must be admitted that the plaintiff, May Gladys Downie, wife of the said Thomas Downie, was severely injured. It is contended on her behalf that she has permanently and completely lost her senses of taste and smell. Apart from what her loss may be in connection with such senses it is quite apparent that she sustained a fracture of the skull and a fracture of the pelvis and has at present serious physical and mental disabilities. As to her senses of taste and smell my conclusion on the whole evidence is that she will ultimately recover them but that it will probably be quite a long time before she does. Basing my estimate of her damages upon such conclusion, I fix them at $6,000.

As to the general damages of the plaintiff Thomas Downie, reference might be made on the question of loss of the society and companionship of his wife to *McIntosh* v. *Peterson,* [1933] 1 W.W.R. 440 at p. 460, and *Corkill* v. *Vancouver Recreation Parks Ltd.,* 46 B.C. 532; [1933] 1 W.W.R. 413, and on the matter of special damages reference might be made to *Scoble* v. *Woodward,* [1924] 1 W.W.R 1040.

Having in mind the principles laid down in such cases I

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allow the plaintiff Thomas Downie (1) general damages of $600 made up as follows: Personal injuries, $100; loss of consortium, $500; and (2) special damages of $1,113.70, made up as follows: Car, $185; nurse or servant for five months, $250; hospital, $268.70; Dr. Brown, $200; Dr. Emmons, $100; Dr. Mason, $10; Dr. Boucher, $50; Dr. Leeson, $20; Miss Markham, $25; A. Lundberg Co., $5.

There will be judgment accordingly in favour of the plaintiffs against the defendant.

Judgment for plaintiffs.

S. C.
In Chambers
1936
Jan. 24.

HARDY v. HOPGOOD.

Customs—Excise division—Pacific daily racing form—California publication—Importation—Entry refused by customs department—Action for damages and injunction—Criminal Code, Sec. 235 (g).

The plaintiff had the exclusive right to sell and circulate in British Columbia a San Francisco publication known as the Pacific Daily Racing Form. He was refused the right to bring the publication into Canada, the Customs authorities holding that its importation was in contravention of section 235 (*g*) of the Criminal Code. The plaintiff applied for an *interim* injunction to restrain the defendant from interfering with the importation of the publication, and in support read affidavits from local race-horse owners and breeders that the publication was useful and beneficial for their racing-stables and for breeding purposes, and did not assist gambling or book-making.

Held, that the defendant, his servants and agents be restrained from preventing or in any way interfering with the importation into Canada by the plaintiff of the said publication.

APPLICATION for an *interim* injunction preventing the defendant from interfering with or preventing the importation of a publication known as the Pacific Daily Racing Form, published in San Francisco, which the plaintiff is desirous of selling and circulating in British Columbia. Heard by MURPHY, J. in Chambers at Vancouver on the 24th of January, 1936. The plaintiff was engaged for twelve years in the business of publishing news of interest to horse-breeders, and he had the exclusive right to sell and circulate the above-mentioned publication in British Columbia. The publication is substantially the same

form and contains the same matters as is published in the Cities of New York, Chicago, Miami, Houston and Toronto, and it has been published for the last 42 years for the purpose of supplying news and comment of value and interest to horse-breeders, owners, race-track officials and live-stock associations and others having a legitimate interest in matters pertaining to the turf generally, other than information intended or likely to promote, assist in, or be of use in gambling, book-making or wagering on the race-track. In November, 1935, the plaintiff notified the defendant that he was bringing into the Province divers copies of said publication and asked him to "clear" the same. The application was referred by the defendant to the chief of police in Vancouver who advised the defendant that importation of the publication into Canada was illegal and in contravention of section 235 (*g*) of the Criminal Code, and the defendant then advised the plaintiff that he would be allowed to return the shipment to the exporter at his own expense otherwise the shipment would be seized and reported to the department at Ottawa. The plaintiff applied for an *interim* injunction which was supported by affidavits from local race-horse owners and breeders that the publication was useful and beneficial for their racing-stables and for breeding purposes, and did not assist gambling and book-making.

G. L. Fraser, for the application: The plaintiff contends that Hopgood was acting outside the scope of his duties and thus was liable to be restrained: see *Literary Recreations Ltd.* v. *Sauve* (1932), 46 B.C. 116. It is clear on the material that the publication mainly contains information of interest to horse-breeders and race-horse owners, and the fact that incidental information might have been contained in the publication pertaining to gambling did not offend against section 235 (*g*) of the Criminal Code.

Donaghy, K.C., for the Crown.

MURPHY, J.: The injunction is granted and in accordance with the agreement between counsel the order may be treated as a final determination of the action.

Injunction granted.

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Feb. 13, 18.

STRACHAN v. McGINN.

Damages—Injuries sustained by infant bitten by dog—Evidence—Child of tender years—Knowledge of nature of oath—R.S.C. 1927, Cap. 59, Sec. 15.

In an action for damages for injuries sustained by a young girl from the bite of a dog owned by the defendant, the only eye-witness was the infant plaintiff's sister, who was five years old. On being examined as to her competency, and it being found that she was bright, intelligent, and knew the religious sanction of an oath, she was sworn as a witness.

Judgment was given for the plaintiff for $83.80 special damages and $500 general damages, to be paid into Court for the benefit of the infant plaintiff.

ACTION for damages for injuries sustained by the infant plaintiff when bitten by a dog owned by the defendant. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 13th of February, 1936.

Denis Murphy, for plaintiffs.
J. A. McInnes, for defendant.

18th February, 1936.

MANSON, J.: The plaintiff, Betty June Strachan, an infant, brings action by her father and co-plaintiff, Edward Alexander Strachan, for damages for a wounding by a dog allegedly owned or harboured by the defendant James McGinn. The father seeks to recover from the defendant $35, being the amount of the doctor's bill incurred as a result of the dog's bite.

The only eye-witness of the alleged biting (with the possible exception of the infant son of the defendant, Jimmy, who was not called) was the five-year-old sister of the plaintiff—Violet May. She will be six on the 8th of May, 1936. She was called as the first witness for the plaintiffs. Mr. *J. A. MacInnes,* counsel for the defendant, urged that she was of too tender years to be sworn. I examined her as to competency and had no hesitation upon the authorities in having her take the oath. She was bright, intelligent and certainly knew the religious sanction of an oath. While one has some doubt, as to whether the admin-

istering of an oath to a child of five adds a tittle to the likelihood of getting the truth, nevertheless the Court, as it seems to me, under the authorities, has a clear duty to administer the oath in such a case if satisfied that the child is competent. Mere years are not the test. Phipson on Evidence, 7th Ed., 438; *Reg.* v. *Holmes* (1861), 2 F. & F. 788. While the weaknesses in the evidence of a child of such tender years are well known, and can be guarded against in the weighing, it is not to be forgotten that want of guile in a child makes for truth in its story, even as the presence of guile, prejudice and self-interest in an adult makes for untruth. Be it said of this child that she told her story simply and innocently without the slightest indication of coaching.

I had no manner of doubt upon the evidence that the infant plaintiff was bitten by the dog Ranger owned or harboured by the defendant—and I may add that the defendant and his wife appear to have had no doubt about the matter immediately after the biting.

The biting occurred on the 26th of September, 1935. The dog was partially at least a police dog about two years old. The defendant had had him from the time he was five weeks old. The defendant had "heard rumours" that the dog had a short time previously bitten Freddie Ellison, a small neighbour boy. He "had heard through his wife that the dog had bitten Freddie Ellison." As a matter of fact he took the Ellison boy to the doctor in his car "to be on the safe side" as was said by the boy's father in evidence. The dog bit Bert Shaw, a neighbour lad of 12, shortly afterwards when the latter picked up a lacrosse ball that had fallen outside the McGinn fence and handed it back over the fence. Robert McGinn, a brother of the defendant, who was playing lacrosse with the defendant's little boy Jimmy in the McGinn yard, did not see the dog bite—so he says, but Robert was so obviously a friend of the dog that he was not seeing things at all accurately. The defendant admits he heard from his brother about Bert Shaw being bitten. He put a light superstructure on top of the fence about his house to prevent the dog from getting over and to prevent children getting into his yard and then he adds in his evidence "Children sometimes stopped

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and teased the dog" . . . and "I told Bert two or three times not to tease the dog." The dog was not one to be teased. There was no evidence that Bert was teasing the dog when he was bitten. He was doing an innocent and friendly act—handing the lacrosse ball back over the fence. I think I may take judicial notice of the fact that there are dogs and dogs—police dogs have a reputation for biting but I find against this dog not upon the general reputation of its breed but upon its record. The dog was probably supremely loyal to its young master Jimmy and jealous. Some dogs are that way but in any event it was a "biting" dog—it had had two bites to the knowledge of the defendant before it bit Betty. It was a dog not to be teased to the knowledge of the defendant. It was, in short, a mischievous and biting dog to the knowledge of the defendant. On his own admission the defendant says that when he was called home on the occasion of his dog biting Betty he told his wife "if the dog was going to be biting people she had better 'phone the pound." *"Scienter"* was proven.

And now for the more difficult aspects of the case. The children, Betty and Violet, were playing in a vacant lot adjacent to the defendant's fenced-in home on the morning of the 26th of September last. The evidence is, and I accept it, that the dog and Jimmy were inside the fence—Jimmy busy painting the inside of the fence with mud paint—and, according to Violet, making a good job. The painting was probably engaging the attention of Betty and Violet. There were mounds or hillocks outside the fence about 15 or 20 inches therefrom. Upon one of these the two little girls were standing, just prior to the biting. The fence was 51 inches high measuring on the inside and on top of the fence there was an open superstructure seven inches high with open spaces of eight inches between parts of the superstructure through which a dog or a child could easily project a head. The fence below the superstructure was a tight board one and, measuring from the level of the mounds, about 42 inches high. Betty was, at the time of the biting about 37 inches high. The dog was about 24 inches high. His longitude was not given in evidence. *Quære*: Did Betty grasp the fence and put her head through the space between two parts of the superstructure,

that is, over the fence into the defendant's yard, or did the dog spring up and put his head and neck beyond the precincts of his yard? Violet says:

> Ranger put his head through the fence and got hold of Betty's face. . . . Betty and I were looking over the fence. . . . Betty did not have her head over the fence and I did not. . . . Betty was not on the fence. She did not fall off the fence.

Violet was an innocent, convincing little witness. Nevertheless her evidence is to be scrutinized closely. There is no evidence to contradict her. I viewed the premises. Betty would have had to have taken a very long lean from the top of the hillock to get her head over the fence. If she stepped up to the fence she would have been in a hole and the fence would have been from her feet 40 to 51 inches high against her 37 inches. The dog 24 inches high must have taken a lunge—dogs do that kind of thing—and put his head and neck through the aperture. I am convinced that was possible. It is almost a case of *"res ipsa loquitur."* The dog was a jealous dog and at the moment with his master. Jealousy often leads to sad results. I accept Violet's story and hold that Betty was not a trespasser. Furthermore I find and hold that, having regard to the established reputation of the dog the defendant did not take the precaution he ought to have taken. The superstructure should, if the dog was going to be permitted off the chain, have been one which the dog could neither get through nor over. The defendant is deserving of sympathy, he intended well, he tried to safeguard things but knowing the dog as he did he should, if he intended to keep it, have gone much further.

The plaintiff, Edward Alexander Strachan, in his statement of claim made no claim for the hospital bill. The child was in the hospital eight days. Mr. *Denis Murphy,* counsel for the plaintiffs, states that no hospital bill was rendered. One is at a loss to understand the omission on the part of a public institution maintained by the taxpayers of the Province and the City. Mr. *Murphy* has now obtained the hospital bill. It amounts to $48.80 and it is agreed to as to amount only by counsel. There will be an amendment to the pleadings to include a claim in that respect.

Damages. The bite was a nasty one on the right cheek and over the right eye—a piece was taken out of the cheek. Skilful

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surgical attention filled the wound and very neatly sutured it. Some scar tissue is under the quite long star-shaped sutures but the marks are not even now very visible. The red colouring will gradually quite well disappear. The doctor's bill of $35 was most modest. He had regard to the circumstances of the family involved as medical men constantly have in a spirit of service highly commendable. The bill is allowed, as is also the hospital bill of $48.80. Having regard to the station in life of the child's family and the remarkably fine repair of the wound and to the fact that the marks over the eye and upon the cheek will be scarcely visible at the time in the young lady's life when unmarred beauty is of consequence, I fix the general damages at $500. The general damages will be paid into Court for the benefit of the infant, Betty June Strachan, to be paid out in such sums from time to time as to the Court may seem meet.

Judgment for plaintiffs.

MOHAN SINGH v. KIRPA AND KARM SHAND.

S. C.
1936
Jan. 22.

Judgment—Counterclaim for amount of dishonoured cheque—Interest—Power to allow—R.S.C. 1927, Cap. 16, Secs. 134, 135 and 165; Cap. 102, Sec. 3.

In an action for damages for malicious prosecution the plaintiff recovered judgment against the defendant Karm Shand for $500. The defendant counterclaimed against the plaintiff as drawer of a cheque for $800, payable to the defendant, which was dishonoured on presentation, and for interest at 5 per cent. from the date of presentment.

Held, that section 165 of the Bills of Exchange Act defines a cheque as a bill of exchange drawn on a bank, payable on demand, and provides that the provisions of the Act (except as provided in Part III., which does not apply) applicable to a bill of exchange payable on demand, apply to a cheque, and under sections 134 and 135 of said Act in case of the dishonour of a bill the holder may recover from the party liable the amount of the bill and interest thereon from the time of presentment.

Held, further, that under section 3 of the Interest Act, where interest is payable and the rate is not fixed, it shall be 5 per cent. per annum.

IN the action the defendant counterclaimed for a dishonoured cheque for $800 given by the plaintiff to him and interest thereon from the date of its dishonour. Liability on the cheque was not disputed, but the plaintiff submitted interest should not be allowed. Argued before ROBERTSON, J. at Victoria on the 22nd of January, 1936.

F. C. Elliott, for plaintiff.
Lowe, for defendant.

ROBERTSON, J.: Counsel for the plaintiff submits there is no power to allow interest on a dishonoured cheque. I am of opinion that there is. Section 165 of the Bills of Exchange Act defines a cheque as a bill of exchange drawn on a bank, payable on demand, and provides that the provisions of the Act except as otherwise provided in Part III. of the Act, applicable to a bill of exchange payable on demand, apply to a cheque. I see nothing in Part III. which in any way affects the question which I have now to decide. Section 134 provides that the measures of damages on a dishonoured bill shall, *inter alia*, be "interest

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thereon from the time of presentment for payment, if the bill is payable on demand" and section 135 entitles the holder of a bill to recover the damages mentioned in section 134. There is therefore a right by law to recover damages in respect of a dishonoured cheque.

Then section 3, Cap. 102, R.S.C. 1927, provides that where interest is payable by law and no rate is fixed by law the rate of interest shall be 5 per cent. per annum. I refer also to the form of endorsement for a dishonoured cheque, to be found in Bullen & Leake's Precedents of Pleadings, 9th Ed., 122, where it will be seen interest is claimed.

LEVI v. THE BRITISH COLUMBIA DISTILLERY COMPANY LIMITED AND BROWNRIDGE.

S. C.
In Chambers
1935
June 27;
Aug. 2.

Practice—Issue of writ—One defendant outside Province—Not stamped "Not for service outside"—Application to set aside—Entry of appearance not necessary before applying—Rule 100.

If a writ of summons, in which the address of one or more defendants is shown as outside the Province, is issued without leave first having been obtained it must have stamped or sealed thereon a notification that it is not for service outside the jurisdiction.

A defendant may move to set aside a writ of summons for irregularity, or for irregularity in the issue thereof, without first entering an appearance or conditional appearance.

APPLICATION by defendant (resident in New York) without entering an appearance or a conditional appearance for an order setting aside the original writ of summons, the order for the issue of the concurrent writ of summons, the concurrent writ, the service thereof and all subsequent proceedings in the action. The plaintiff issued the writ of summons without first obtaining leave, naming as defendants a corporation within the Province and an individual resident in New York State. The writ did not have stamped or sealed thereon a notification that it was not for service out of the jurisdiction without order. The plaintiff applied for and obtained an order giving him leave to issue a concurrent writ of summons directed to the defendant in New York and serve the same on him there. A concurrent writ was issued and served accordingly. Heard by McDONALD, J. in Chambers at Vancouver on the 27th of June, 1935.

A. Bruce Robertson, for the application.

Tufts, contra, took the preliminary objection that the defendant could not be heard in so far as his application related to setting aside the original writ of summons because he had not entered either an appearance or a conditional appearance and submitted that Order XII., r. 30, did not apply to this part of the application.

Cur. adv. vult.

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2nd August, 1935.

MCDONALD, J.: The writ in this action showed on its face that the address of the defendant Brownridge was "Larchmont, New York, U.S.A." It was not stamped as being "Not for service outside the jurisdiction." The writ is therefore irregular and the motion of defendant Brownridge to set aside the writ must succeed provided Brownridge has a *status* to make this motion. Plaintiff objects that defendant cannot move for the reason that he has not entered a conditional or any appearance. I have examined the careful arguments submitted by counsel, and the authorities cited, and I am satisfied that under the practice both in England and in this Province, it is not necessary that a defendant moving to set aside a writ or the service of a writ, is under the necessity of entering an appearance, conditional or otherwise. This seems perfectly clear from the examination of the following authorities: Annual Practice, 1935, p. 144; Daniell's Chancery Practice, 8th Ed., Vol. I., p. 297; *Fletcher* v. *McGillivray* (1893), 3 B.C. 40; *Carse* v. *Tallyard* (1896), 5 B.C. 142. These decisions are not in conflict with the decisions in *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White* (1920), 27 B.C. 559 and *McDonald* v. *Cocos Island Treasures Ltd.* (1932), 46 B.C. 360, in which cases motions were made after judgment, to set aside orders which had been made. They were not motions to set aside the writ itself for irregularity.

On the hearing of the motion I held with the defendant that upon several grounds the service of the writ must be set aside. I now hold that the writ itself must be set aside. Under these circumstances I think I have no choice but to give all the costs to the defendant Brownridge.

Application granted.

EDGLIE v. WOODWARD STORES LIMITED.

S. C.
1934
April 24;
May 8.

Negligence—Injury to person on premises by invitation—Slipping on orange peel in store—Damages.

The plaintiff, a customer in the defendant company's store, stepped on a piece of orange peel when going down a stairway, and slipping fell to the bottom of the stairway and was severely injured. There was a special sale on and a large crowd of people in the store on that day. In an action for damages it was held that the principle to be applied is that the defendant owed to the plaintiff the duty of taking reasonable care that the premises were safe. The plaintiff has proved that the cleaning system established by the defendant for the removal of orange peel and other refuse from the stairs was not properly carried out and had not been properly functioning for more than an hour prior to the accident, that the defendant was negligent under the circumstances in not taking reasonable care that the premises were safe, and the plaintiff has proved enough to shift the burden upon the defendant to prove that the particular piece of orange peel upon which the plaintiff slipped was not there by such negligence, that the defendant has not satisfied such *onus* and is liable for the damages sustained by the plaintiff.

ACTION for damages by a customer in the defendant company's store who stepped on a piece of orange peel while going down a stairway, and falling broke his arm in such a way as to cause some permanent disability. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 24th of April, 1934.

J. A. MacInnes, and *Eades,* for plaintiff.
Locke, and *Nicholson,* for defendant.

Cur. adv. vult.

8th May, 1934.

FISHER, J.: In this matter I accept the evidence of Mrs. Pruden and her sister Mrs. Brown, witnesses called on behalf of the plaintiff. They were in the store of the defendant some time before the accident which occurred about 1 o'clock on Wednesday, March 22nd, 1933, and it may be noted that neither of them knew the plaintiff before. They both say that they kicked orange peel out of the way or under the brass rail in the

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centre on the stairs. They also both say that after the plaintiff fell they observed orange peel near his feet at the bottom of the stairs. The plaintiff says that he slipped on orange peel on the stairs. I accept his evidence on this phase of the matter and find as a fact that, as the plaintiff was going down the stairs he turned aside to let a woman coming up pass and slipped on a piece of orange peel falling to the bottom of the stairs and suffering a fracture of his left arm in the fall. It is suggested that the plaintiff was hurrying down the stairs and was negligent but there is no direct evidence of negligence on his part and upon the evidence I cannot find that he did not use reasonable care on his part for his own safety. He admits that he had been in the defendant's store a great deal and was quite familiar with the said stairs but I think his attention would naturally be somewhat directed at the time to allowing the woman to pass him without any inconvenience to herself and I also think it is a fair inference from the evidence that orange peel on the stairs would not be easily noticeable to one going down the stairs in the circumstances aforesaid.

I now come to consider whether the defendant occupier was guilty of any negligence causing the accident to the plaintiff. During the argument Mr. *Nicholson,* of counsel for the defendant, cited many authorities and relied particularly upon *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 183 and *Hayward* v. *Drury Lane Theatre, Lim.* (1917), 87 L.J.K.B. 18. In the *Indermaur* case as reported in 35 L.J.C.P. Willes, J. said at p. 190:

> The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation, express or implied.
>
> And with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In *Norman* v. *Great Western Railway* (1914), 84 L.J.K.B. 598 at 604; [1915] 1 K.B. 584, Phillimore, L.J. suggests substituting "unexpected" for "unusual" in the above expression "unusual danger" but it might be noted with all deference that such substitution is criticized by W. H. Griffith in an article on Duty of Invitors in 32 L.Q.R. 255. It might also be noted that Salmond in his book on the Law of Torts, 7th Ed., after setting out at length the passage from the judgment of Willes, J. containing the excerpt as above, goes on to say at pp. 461-2:

The foregoing passage contains an unfortunate ambiguity which has not been resolved by the later authorities and as to which indeed those authorities are in direct conflict. Is the duty of an occupier to an invitee a duty to use care to make the premises reasonably safe, or is it merely a duty to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence? If the latter alternative is correct the fact that the danger is actually known to the invitee is an absolute bar to any action by him; for if the duty of the occupier is merely one of warning, he owes no duty at all in respect of dangers already known by the invitee. If, on the other hand, the duty of the occupier is the higher duty of taking care to make the premises safe, he commits a breach of this duty when he invites persons to enter premises which he knows or ought to know to be dangerous, even though those persons are themselves aware of the danger. In such a case the plaintiff's knowledge of the danger is not in itself an absolute bar, but operates, if at all, only as evidence of contributory negligence or of an agreement to waive fulfilment of the occupier's duty—save indeed in those cases in which the danger is of such a nature that it ceases to be a danger at all to those who know of its existence.

In *Hayward* v. *Drury Lane Theatre, Lim.* (1917), 87 L.J.K.B. 18 Scrutton, L.J. says at p. 30:

The rights of an invitee who does not pay for his presence are stated in *Indermaur* v. *Dames* (35 L.J.C.P. 184; L.R. 1 C.P. 274; affirmed, 36 L.J.C.P. 181; L.R. 2 C.P. 311), and are that the owner of premises must use reasonable care to protect him either by warning or precaution against traps, whether existing or new, dangers which the licensee, if ignorant of the premises, could not avoid by reasonable care and prudence.

Against dangers which are not traps in this sense the owner is under no liability—that is, he does not warrant the premises safe, or as safe as reasonable care could make them.

In *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213 at p. 223 MARTIN, J.A., discussing the rights of invitees, says in part as follows:

Recently the subject has again been considered by the House of Lords in *Robert Addie & Sons (Collieries)* v. *Dumbreck* [1929] A.C. 358; 98 L.J.P.C. 119, wherein Lord Chancellor Hailsham said, p. 121:

"The duty which rests upon the occupier of premises towards the persons

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who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards these 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. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

This declaration of the duty of the occupier to the invitee at last clears up the "unfortunate ambiguity" in *Indermaur* v. *Dames, supra,* pointed out by Salmond, *supra,* p. 461.

And at pp. 224-5:

Upon the facts of the case before us it must be taken on the footing that the plaintiff was an invitee and so "the highest duty exists towards" him which is that "of taking reasonable care that the premises are safe." What is "reasonable care" varies, of course, with the circumstances. . . .

And at p. 229:

Lord Justice Bankes, in *Rex* v. *Electricity Commissioners,* [1924] 1 K.B. 171 at 192, said:

"It has, however, always been the boast of our common law that it will, whenever possible, . . . apply existing principles to new sets of circumstances."

My conclusion on the authorities referred to is that upon the facts of the present case the principle to be applied is that the defendant owed to the plaintiff the duty of taking reasonable care that the premises were safe. The only difficulty would appear to be in applying such principle to the set of circumstances existing at the time and place of the accident to the plaintiff herein. In this connection reference might be made to what was said by MACDONALD, J.A. in *Willis* v. *The Coca Cola Company of Canada Ltd.* (1933), 47 B.C. 481 at 514:

Knowledge of dangerous possibilities creates a duty to avoid it.

That the defendant in the present case had such knowledge of dangerous possibilities is quite apparent. In his examination for discovery Mr. Hadfield, building superintendent of the defendant company, says in part as follows:

What have you to do with the janitor work and cleaning of the floors? I am responsible for them.

. . . .

This Wednesday, the 22nd day of March, was an extremely busy day in the store, was it not? Well, yes.

It was one of the big sales days? That is right.

And in addition to its being an extraordinary big sale day, there was a special sale of sugar? Yes.

And there was some considerable excitement about that sugar sale on account of the duty being imposed shortly afterwards, wasn't there? Yes.

And there was a very large crowd of people—an especially large crowd of people there that day? Yes.

The sugar was sold in the basement, was it not? Yes.

And to get to that basement the public had to go down to the basement—either down those stairs—— Yes.

Locke: It isn't really the basement. They call it the lower main floor.

It is the street entrance from Cordova Street, isn't it? Yes. It is a little lower than the street entrance on Cordova.

MacInnes: Yes, you go in on Cordova Street, and then you go down a partial flight of stairs of four or five steps, and then you are on that main floor? Yes.

But the stairs in question, on which the accident happened, were the stairs that led from the main floor into the lower main floor? Yes.

. . . .

What condition were they in, do you remember, with regard to debris and foreign material strewed about? I don't remember.

You don't remember. Is that part of your duty, to look out for that sort of thing? Yes.

So you don't remember whether they were covered with debris or not? No.

And in Woodward's Store they have a department where they sell fruit? I beg your pardon?

They have a department where they sell fruit? Yes.

Oranges, bananas and all sorts of fruit? Yes.

Where is that department located? On the lower main floor.

On the lower main floor. And in this crowd that was there on the Wednesday, the 22nd day of March, there were a great many children, I take it? Well, I don't know that there were particularly.

Well, isn't that a common thing in a crowd? Yes, it is a common thing.

Mothers take their children to the store with them, and it is a common thing for them to buy an orange, or a banana, or some sort of fruit or sweets for the children, to keep them in good humor while they are there in the store, isn't it? I presume so.

. . . .

Well, then, what are your directions to the man with regard to these steps? There are two men on the lower floor picking up the debris on the lower floor, and every time they come around the staircase they go up the stairs—both men.

That is, the lower floor men are supposed to go up to the level of the upper floor and take the stairs in there? Yes.

And I take it the men on the main floor don't go downstairs? They look down. They can see down.

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But it is the duty of the lower floor men to do the cleaning? Yes. And the men on the upper floor, if they see anything, they do the same.

And those are the regulations that are promulgated to the men? Yes.

What space would there be between the times in which they cleaned the stairs? Each man would be probably there five times an hour.

Eh? Each man would probably be there five times an hour.

You think that is what he should have been. Do you know whether he was or not, or whether they were or not? Well, if they weren't there is going to be trouble.

. . . .

Now, an orange peel or a banana peel on these steps would make it very treacherous for anyone to step on, wouldn't it? Yes.

And an orange peeling is quite conspicuous? Yes.

Easily seen? Yes.

Do you think it would be possible, under your system of inspection, for a considerable sized piece of orange peel to lie on those steps for fifteen minutes, or for ten minutes? No.

Now, it would certainly be the duty of anyone, seeing an orange peel there (that is, any of those attendants seeing an orange peel there) to remove it at once? Yes, sir.

. . . .

What is the width of the stairs from side to side, do you know? I can give you the approximate measurements—approximately six feet on each side.

It is a twelve-foot stairs divided by a railing in the middle? Yes, approximately.

And one side was for going up and the other side was for going down? It should be, yes.

It should be. That is the intention? Yes.

And how do people use it? They mix it up pretty badly, don't they? Yes.

People come up the wrong side and go down the wrong side? Yes.

And that always causes confusion of traffic on the stairs on a busy day? Yes.

. . . .

And on your way up and down those stairs, when there is no traffic, you can readily see whether there is dirt or debris on those steps? Yes.

And as the traffic increases, it becomes more difficult to get a view of the steps? Yes.

It is interesting to note that reference to the question of liability, for an accident arising from slipping on an orange peel, has been made in at least two cases. In *O'Keefe* v. *Edinburgh Corporation*, [1911] S.C. 18 at pp. 20-1, the Lord President, referring to the case of *Shepherd* v. *The Midland Railway Company* (1872), 25 L.T. 879 said:

It was suggested in the course of the argument in that case that if a passenger had thrown a piece of orange peel from a train on to the platform, and a person had slipped on it, the company would not be liable on the ground of negligence, and Baron Pigott remarked: "They might be, if the orange peel had been allowed to remain a long time upon the platform without being swept up." I agree with that statement of the law.

I come now therefore to consider the question as to how long the orange peel had been allowed to remain upon the stairs in question in this action.

In her evidence Mrs. Brown says that on the said 22nd day of March, 1933, she was three times up and down the stairs looking for her boy between a quarter to 12 and ten minutes after 12 and then she goes on to say, in answer to questions, as follows:

What did you see on the stairs? About three or four steps from the top of the west side, and about three steps or four steps from the top of the west stairway there was pieces of orange peel on the stairs, and I kicked two or three little pieces under the brass rail as I went on up.

MacInnes: That is the brass rail—— In the centre.

It is a ten or twelve-foot stairway with a rail in the middle? Yes.

You say you travelled those stairs up and down three times? Three times before I left word for them to send my boy over to the stairs.

Did the peel remain there throughout this time? Well, as I went up the stairs you could see the peel each time under the brass rail, but it isn't noticeable as you go down the stairs, as I was over on the outside on the east stairs when I came down each time.

Did you meet anybody at the stairs that morning? Well, when I had stopped there, left word, told the man in the department I was going to stand on the stairs until he came, I stood there then and my sister came down, I should judge between 20 minutes to 1 and 1 o'clock.

Your sister, Mrs. Pruden, who gave evidence this morning? Yes.

. . . .

You told me, I think it was, a quarter to 12 you first went up the stairs? Yes.

And from then till 1 o'clock you said you were up and down those stairs three separate times? Yes.

And you were standing at the foot of the stairs talking to your sister—— From between twenty or quarter to 1 to the time that we went out. I was there until after the accident happened.

Now during this period of time what steps were taken by anybody to clean those stairs? There was none whatever.

Are you a frequenter of Woodward's store? Yes.

Do you know the cleaning staff, the janitor staff? I don't know the staff, but I have seen them several times in the grocery and the main department, and tney have a little bag on the end of a stick business that they draw the rubbish into, but they were not on the steps that day at all. There was too big a crowd I think.

Now during that period of time, upwards of an hour, did those orange peels remain on the steps? Yes, they did.

Having in mind what was said by Baron Pigott in the *Shepherd* v. *The Midland Railway Company* case, *supra*, I have to say that I have no doubt that in the present case the defendant

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would be liable if the orange peel was allowed to remain a long time upon the stairs without being removed. Having in mind also the evidence before me, especially that of Mr. Hadfield and Mrs. Brown as hereinbefore set out I have also to say that I have no doubt and find as a fact that the defendant was negligent in allowing pieces of orange peel to remain upon the stairs too long a time immediately before the accident. It is argued however by counsel on behalf of the defendant that the plaintiff, even if he has proved that he slipped and fell on a piece of orange peel must fail in any event on the ground that he has not proved that such particular piece of orange peel was allowed to remain upon the stairs any length of time. I think the answer to the argument, however, is this: When the plaintiff has proved, as I find he has, that the cleaning system established by the defendant for the removal of orange peel and other refuse from the stairs was not properly carried out and had not been properly functioning for more than an hour prior to the accident and that pieces of orange peel had been allowed to be during the whole of that time upon the stairs on which the plaintiff slipped and fell upon an orange peel, then the plaintiff has established that the defendant was negligent under the circumstances existing in its store at the time in not taking reasonable care that the premises were safe (see *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633 at p. 634) and has proved enough to shift the burden upon the defendant to prove that the particular piece of orange peel upon which the plaintiff slipped was not there by such negligence and that it was blameless in respect of the cause of the accident. I find that the defendant company has not satisfied such *onus* and I therefore hold that it is liable for the damages sustained by the plaintiff through its negligence as aforesaid.

The special damages of $599, as claimed by the plaintiff, should be allowed. The evidence shows some permanent disability and I assess his general damages at $2,500. Judgment accordingly in favour of the plaintiff against the defendant.

Judgment for plaintiff.

SQUIRE v. WRIGHT.

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March 3.

Practice—Arrest and Imprisonment for Debt Act—Ex parte order to hold to bail—Motion to set aside—Writ of capias—Endorsement thereon under section 13 of Act not sufficient—R.S.B.C. 1924, Cap. 15, Secs. 3 and 13.

Section 13 of the Arrest and Imprisonment for Debt Act provides that "No sheriff, deputy sheriff, or other officer having the execution of process shall arrest the person of any defendant, upon any writ or process issued by any plaintiff in his own person, unless the same writ or process shall, at or before the time of making such arrest, be delivered to such sheriff, deputy sheriff, or other officer having the execution of process, by some solicitor, or by the clerk of such solicitor, or an agent authorized by such solicitor in writing, and unless the said writ shall be endorsed by such solicitor, clerk, or agent, in the presence of such sheriff, deputy sheriff, or officer, with the name and place of abode of such solicitor."

The only endorsement on the writ in question was in typewriting as follows: "This writ was issued by *J. Edwin Eades*, solicitor for the plaintiff, whose place of business and address for service is 404 Rogers Building, 470 Granville Street, Vancouver, B.C."

On motion to set aside an order made *ex parte* under section 3 of the Arrest and Imprisonment for Debt Act, that the defendant be held to bail and that the plaintiff be at liberty to issue a writ of *capias ad respondendum*:—

Held, that the endorsement herein is not sufficient to comply with the strict interpretation which this statute requires, and the writ is set aside.

MOTION to set aside an order made *ex parte* under section 3 of the Arrest and Imprisonment for Debt Act, that the defendant be held to bail and that the plaintiff be at liberty to issue a writ of *capias ad respondendum*.

This motion was based upon the ground, *inter alia*, that the said writ did not contain the endorsement required by the Arrest and Imprisonment for Debt Act and the Rules of Court in that behalf.

Heard by HARPER, Co. J. at Vancouver on the 3rd of March, 1936.

Dickie, for the motion.
Eades, contra.

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HARPER, Co. J.: While it is true as argued by the plaintiff's solicitor that *"omnia præsumuntur rita esse facta"* yet this endorsement is typewritten in the same type as the body of the writ and there is nothing to show that it is a signature or intended to be a signature of the plaintiff's solicitor or that it was endorsed in the presence of the sheriff. In a matter affecting the liberty of the person the requirement of section 13 is imperative as an authentication of the process, otherwise the Legislature would not have enacted that the signature of the solicitor issuing the writ be endorsed in the presence of the sheriff, deputy sheriff, or other officer having the execution of the process.

The endorsement herein is not sufficient to comply with the strict interpretation which this statute requires. The writ therefore will be set aside.

Motion granted.

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Feb. 27, 28;
Mar. 13.

HARRIS *ET AL.* v. BANKERS AND TRADERS INSURANCE COMPANY.

Insurance, automobile — Proposal — Incorrect statement — Materiality— Knowledge of agent imputed to principal—Coverage against passenger hazard.

H., an infant, purchased a car, and on applying for a permit as a minor to operate the car his mother, K., joined by taking the statutory declaration with respect to her liability for negligence of the son in driving the car. On March 7th, 1935, one P., an insurance salesman, obtained from K. an application for coverage on a printed form of the British Colonial Fire Insurance Company, a company that had previously been taken over by the defendant company, and the words "British Colonial Fire" on the form were scratched out and the words "Bankers & Traders" were written above. K. could not read English and spoke it with difficulty. K. and her son were present at the time of the taking of the application. P. did not read the application to K. and did not bring to her attention that in small print at the end of the application was a clause "I declare that I am the registered owner of the automobile herein described." The application called for public liability, property

damage and passenger hazard coverage. The premium of $38 was set out covering the three risks, and K. paid $5 on account of the premium. P. put his name at the bottom of the application over the word "agent" and then handed it over to E. P. Mardon & Company, insurance agents, who stamped their name over that of P. on the application and forwarded it to Hobson Christie & Company, Ltd., general agents of the defendant company in British Columbia. The Hobson Company had been receiving applications from Mardon for over two years and had been supplying Mardon with forms and had a running account with him, and Mardon had been supplying P. with forms and had a running account with him. Hobson received the application on the 8th of March and after telephoning Mardon wrote on the application "Cover to inspect." Hobson declared "passenger hazard" was struck out by him but this was not accepted by the Court as K. was never notified of any such change in the application. On the 10th of March Hobson telephoned Mardon he would send a cover note and Mardon so notified P., but Hobson forgot about it and did not issue the cover note until the 15th of March. There was no evidence that Hobson had notified K. that he was declining the passenger hazard risk. On the 14th of March there was an accident and a passenger, one Fraser, was badly injured. Fraser recovered judgment in an action for damages against the present plaintiffs. In an action to recover from the defendant company on the insurance coverage against passenger hazard on the car:—

Held, that Mardon was the *de facto* agent of Hobson Christie & Company Ltd. and P. was the *de facto* agent of Mardon. Hobson Christie & Company Ltd. had adopted P. as their agent for the purposes of soliciting insurance and collecting premiums, and temporary coverage was granted on the 8th of March for property damage, public liability and passenger hazard. Notice of intention to claim under the coverage was sufficient and the defendant had full opportunity to take charge of the defence in the Fraser case and H. and K. put up an honest defence in that action. The applicant did not knowingly misrepresent the facts in the application as to ownership of the car. P., knowing K. could not read, should have drawn her attention to the clause at the end of the application, and the misrepresentation not being of a material character there is no ground for rescinding the contract. The company could not alter the application by striking out the passenger hazard; they must accept it or decline it. There will be judgment for the plaintiff K.

ACTION on an automobile-insurance policy alleged to include coverage against passenger hazard on a car. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 27th and 28th of February, 1936.

Denis Murphy, for plaintiffs.

Bull, K.C. (*Ray*, with him), for defendant.

Cur. adv. vult.

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HARRIS v. BANKERS AND TRADERS INS. CO.

Manson, J.

13th March, 1936.

MANSON, J.: The plaintiffs seek to recover from the defendant on an alleged insurance coverage against passenger hazard (*inter alia*) on a car. The infant plaintiff bought a car and registered it in his own name under the Motor-vehicle Act on the 14th of November, 1934. On the 28th of February, 1935, he made application for a permit as a minor to operate a motor-vehicle. In this application his mother and co-plaintiff joined to the extent of taking the statutory declaration with respect to her own liability for negligence in the driving of a car by her son. Shortly afterwards, in discussing the matter with a friend, the mother concluded that it was desirable that she should insure. A friend got in touch with an insurance salesman, one Peters, who, on the 7th of March, 1935, took from Mrs. Kauffman an application for coverage (Exhibit 3). Peters was not called as a witness by either side. Why does not appear. The application was taken on what was originally a printed form of the British Colonial Fire Insurance Company. The British Colonial Fire Insurance Company had been taken over on the 1st of January, 1935, by the defendant company. Hobson Christie & Company Ltd. were the general agents in British Columbia of the British Colonial until it ceased to do business in this Province and subsequently of the defendant company. Mrs. Kauffman does not read English and only speaks English with difficulty. Peters was able to talk with Mrs. Kauffman in Yiddish. At the time of the taking of the application Mrs. Kauffman and her son were both present as was a Mrs. Fraser, the wife of the passenger in the insured car, who was subsequently injured while riding in the car. Peters was shown the transfer of the car to the infant plaintiff and the permit to the infant plaintiff to drive a car. No one suggested to him that the car belonged to the mother and, so far as it appears from the evidence, he had no reason for believing that the car did belong to the mother. He must have been perfectly well aware that Mrs. Kauffman could not read English. He was not an amateur as an insurance salesman. He had been associated with one Mardon whose part in this picture will be dealt with below, at least six years. There was the clearest kind of a duty upon Peters to see that Mrs. Kauffman

understood what she was signing. *Wilkinson* v. *Coverdale* (1793), 1 Esp. 75, 76. He did not read over the application to her and he did not draw her attention to the fact that in quite small print there was a clause at the end of the application "I declare that I am the registered owner of the automobile described herein." Nor did he call to her attention the representation as part of item 2 of the application that she had purchased the car. Mrs. Kauffman did not wittingly misrepresent the facts nor can it be said that she did so at all unless it be true that Peters in filling out Exhibit 3 was her *amanuensis*. The effect of the misstatement of facts in the circumstances will be considered below.

The application called for public liability, property damage and passenger hazard coverage. The premium was set out at $18 for each of the first two risks and at $2 for the passenger hazard risk, making a total premium of $38. Peters was paid $5 at the time of taking the application, and he promised to bring the policy in on Saturday following when Mrs. Kauffman said she would pay him some further money. Peters put his name at the bottom of the application over the printed word "agent." He, on March 7th, took the application to E. P. Mardon & Company who stamped their name over the top of Peters's signature. E. P. Mardon & Company were general insurance agents and brokers, but not "appointed" agents of Hobson Christie & Company Ltd. general agents of the defendant company. E. P. Mardon & Company put the application in an envelope without covering letter and sent it through the mail to Hobson Christie. Mardon says that Peters was not an agent of his and Mr. C. G. Hobson of Hobson Christie says that Mardon was not an agent of theirs. Mr. Hobson says that he had been receiving applications from Mardon for some two years but that he did not know Peters. Hobson also stated that he had been supplying application forms to Mardon right along and that he had a running monthly account with Mardon and that Mardon had authority to accept premiums and issue receipts for risks that came in through his office and which Hobson Christie accepted. Mardon confirms this and tells us that it was he that wrote the words "Bankers & Traders" over

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the words "British Colonial Fire" on Exhibit 3. He tells us further that he supplied forms to Peters and that he had a running monthly account with Peters. The relationship between Mardon and Peters seems to have been identical with that between Mardon and Hobson Christie. I hold that Mardon was the *de facto* agent of Hobson Christie and that Peters in turn was the *de facto* agent of Mardon. Further, the ordinary course of business having been as set out above, I hold that Hobson Christie had adopted Peters as their agent for the purposes of (1) soliciting insurance and (2) collecting premiums and giving receipts, upon their acceptance of applications sent in. Peters, in so far as they were concerned, was Mardon & Co. *Vide Rossiter* v. *The Trafalgar Life Assurance Association* (1859), 27 Beav. 377.

The application reached Hobson Christie's office on the morning of Friday, the 8th of March. C. G. Hobson dealt with it and states that he made certain pencilled notations thereon and he probably put some at least of the notations on at the time. I have no reason for believing that he did not do so. The pencilled notations are as follow: The word "decline" with a circle around it and two lines through the length of the word "decline," a long cross through the words "passenger hazard," another cross through the figures "$2.00," a single line through the figures "$38.00," the pencilled figures "$36.00" written beneath the figures "$38.00" and to the left of the phrase "passenger hazard" the words "Cut out." At the left hand corner of the top of the application the further notation "Cover to inspect." The car in question was a 1927 4-cylinder Chevrolet light delivery truck. I conclude from the evidence with respect to the application that Hobson, upon looking over the application, thought the risk on a car of 1927 vintage was not a good one and his first inclination was to decline the risk entirely. He thereupon wrote the word "decline." He, however, 'phoned Mardon and Mardon told him that while he had not seen the car he understood it was in fair condition. Hobson then struck out the word "decline" which he had written on the application and wrote the words "Cover to inspect." So far the history is clear. Mardon and Hobson differ however as to whether or not there was coverage agreed to on the 8th. Hobson says Yes or rather leaves that impres-

sion; Mardon says No. I think Hobson is correct. I cannot believe, however, that the phrase "passenger hazard" was struck out on the 8th. If it was Mrs. Kauffman should have been promptly informed. An insurer cannot upon the receipt of an application be casual in the matter of informing the applicant that coverage as asked for has been in part granted and in part refused. Mardon says on cross-examination that he understood on the morning of the 8th that coverage was not being granted at all. He certainly did not communicate that to the applicant nor to Peters and in cross-examination Mardon goes no further than to say that he thinks Hobson discussed with him on the 8th the declining of the passenger hazard risk. He says that two or three days later, that would be on Sunday the 10th or Monday the 11th, Peters came in and he told him that Hobson Christie would only be interested in public liability and property damage and that only on inspection. On Peters's suggestion he said he would try and get a cover note. He says he 'phoned Hobson and Hobson said the car had not been inspected but that he would send the cover note and Mardon says he advised Peters to that effect. Hobson forgot all about issuing the cover note until March 15th, the day after the accident and he does not know what became of the original copy of the cover note which he admits should have gone to the insured. Hobson went to inspect the car on the afternoon of Saturday the 9th and Mrs. MacDevitt was present and recalls Hobson's visit. Hobson saw Mrs. Kauffman, showed her the application and asked her if the signature to the same was hers. She said, Yes, and told him the car was in New Westminster. Hobson did not trouble to tell Mrs. Kauffman that he was declining the passenger hazard risk. Had the phrase "passenger hazard" been struck out at the time, even Mrs. Kauffman with her handicap would probably have noticed it. Mrs. MacDevitt glanced at the application and she also would probably have noticed the deletion. Hobson was in direct touch with the applicant and there was a clear duty upon him, if the deletion had been made at the time, to draw to the applicant's attention that a material alteration in the application had been made. In so far as Hobson is concerned there is nothing in the evidence to suggest that he communicated directly

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to Mrs. Kauffman the fact that he was declining the passenger hazard risk. Hobson stated that Mardon 'phoned him on the 15th that he heard that the car was in a slight bump but that there was no serious damage. One wonders where Mardon got any such idea. The passenger Fraser had been very seriously injured and had been taken to the hospital immediately following the accident on the afternoon of the 14th. Peters was 'phoned the same evening and the evidence is that he was told immediately following the accident that Fraser was in hospital. Incidentally too he was asked if there was a coverage and he replied that there was. Although it is not specifically stated in the evidence that Peters was at that time asked if there was passenger hazard coverage nevertheless he was apparently asked about the coverage after he was told about the accident and I cannot conclude that Peters or anybody else understood that the conversation as to coverage had to do with property damage in the face of the serious passenger injury which had occurred. We have not Peters's assistance as to the details of the conversation. On the morning of the 15th Peters called at Kauffman's and was told by Mrs. Fraser, when he asked if her husband was badly hurt, that the doctors thought he had a fractured spine. Peters apparently did not deny liability at that time. I cannot help attaching significance to the fact that Hobson, after he had heard about the accident, took the precaution to make out a cover note with the passenger hazard eliminated—the cover note which he had forgotten to make out although requested to do so almost a week before. One is impressed that an endeavour was being made to create evidence. Hobson says that Mardon 'phoned him that he heard a passenger had been injured in the Kauffman car and he understood he was an employee. If he was an employee he presumably would not be covered. One can only conclude that Mardon thought that the fact that Fraser was an employee was the way out. He apparently was not relying at that time upon the fact that there was no coverage for passenger hazard at all. Hobson and Mardon had luncheon together a few days after the accident. The subject of the accident came up again and Hobson says "he reminded him that we were not interested because we had not accepted passenger hazard." Why

was it necessary to remind him? On Wednesday, the 20th of March, Hobson inspected the car and on his return to the office wrote Mardon (Exhibit 15) that "the temporary coverage of public liability and property damage only, as arranged with you by telephone, is therefore cancelled as from this date." It is conspicuous that care was taken to be so specific. The letter has the ear-marks of a further endeavour to make evidence. On March 27th Hobson Christie wrote Mrs. Kauffman (Exhibit 4), after consultation between Mr. C. G. Hobson and his father, senior member of the company. In the letter it was stated that the temporary coverage did not cover passenger hazard. The letter is significant as an effort on the part of Hobson and Christie to get themselves on record and also of the fact that they were anticipating a claim. Hobson Christie were so far impressed with their possible liability, as a result of the injury to Fraser, that they appointed an adjuster to go into the matter. Peters upon the evidence throughout gave the plaintiffs to understand that a three-way coverage had been granted. I cannot find upon the evidence that Peters deliberately misled the applicant by withholding from her information allegedly communicated to him that the passenger hazard risk had been declined. I hold that temporary coverage was granted on the 8th of March for property damage, public liability and passenger hazard as applied for by Mrs. Kauffman and that at the time of the accident on the 14th was intended by Hobson Christie to be effective and was believed by Mrs. Kauffman to be in effect.

No difficulty arises as to notice by Mrs. Kauffman of her intention to make a claim on the coverage. Hobson says on cross-examination that he had been advised by Mardon on the 20th of March that Mrs. Kauffman intended to make a claim and on the 20th of March Hobson Christie had put Mr. Broderick, an adjuster, in charge of the case with instructions to report to Mr. C. G. Hobson. The solicitors for Mrs. Kauffman, under date of the 11th of May, wrote Hobson Christie enclosing a copy of the Fraser writ issued against the present plaintiffs and intimating that it was intended to hold them under the coverage granted (Exhibit 11). On the 15th of May the same solicitors forwarded to Hobson Christie a copy of the statement

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of claim in the Fraser action (Exhibit 12). I find that the notice of intention to claim under the coverage was sufficient.

Counsel for the defendant submitted that the action of Fraser against the present plaintiff had not been properly defended and that a violation of the statutory conditions in that respect had taken place. I cannot so find. This defendant had full opportunity to take charge of the defence in the Fraser case—*vide* Exhibits 11 and 12. It did not do so. I am satisfied that Harris and Mrs. Kauffman put forth an honest defence in the Fraser action.

It was further submitted by counsel for the defendant that Peters in filling out the proposal was not an agent of the defendant but the agent of the applicant—the *amanuensis* of the applicant—as in *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356 at 364. A substantial portion of the judgment in the *Newsholme* case is devoted to distinguishing the case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company*, [1892] 2 Q.B. 534. Scrutton, L.J. refers to the latter case as a "very distinguished" case. Peters was not, as the agent was in *St. Regis Pastry Shop and Baumgartner* v. *Continental Casualty Co.* (1928), 63 O.L.R. 337, an agent looking after all the insurances of the applicant. He was a stranger to Mrs. Kauffman. She knew him only as an insurance agent who had come to her on this particular occasion to negotiate a policy on the car. I think it might be said of Peters, as was said of the agent in the *Bawden* case by Lord Esher, M.R. at p. 539:

> His authority is to be gathered from what he did. He was an agent of the company. He was not like a man who goes to a company and says, I have obtained a proposal for an insurance; will you pay me commission for it? He was the agent of the company before he addressed Bawden. For what purpose was he agent? To negotiate the terms of a proposal for an insurance, and to induce the person who wished to insure to make the proposal. The agent could not make a contract of insurance. He was the agent of the company to obtain a proposal which the company would accept. He was not merely their agent to take the piece of paper containing the proposal to the company. The company could not alter the proposal; they must accept it or decline it.

It was admitted in the *Newsholme* case that the *Bawden* case is still an authority where the facts are as they were in that particular case and the *Bawden* case has been accepted as an authority in the Supreme Court of Canada on more than one

occasion. In that case the application was for accident insurance. The agent (a local agent or canvasser, as was Peters), knowing that the applicant had but one eye, omitted to disclose that fact in the application although a note on the face of the application made it clear that he ought to have done so. As in this case, the applicant was an illiterate person, "almost unable to read or write but he could write his name." The Court imputed the agent's knowledge of the material fact that Bawden had lost an eye to the company and held the company liable. In this case there was no concealment on the part of the applicant, quite the contrary. If an application was to be made out it could not have been made out by the applicant herself. In the *Newsholme* case Scrutton, L.J. says at p. 371 that as a general rule it is not the duty of an agent to fill up answers to questions on an application form. There is no evidence here to indicate that the general rule is the same in this Province. There is no evidence at all as to the general rule. If there were it would doubtless indicate that it is a very common practice indeed for agents to fill up proposals. Having found that the agent had authority to negotiate proposals I cannot, in the absence of evidence, draw the conclusion that it was a bare authority to negotiate. It is reasonable and logical to assume that the authority was wide enough to enable the completion of the job in hand, namely, the getting of the completed proposal and the submitting of it to the company. I so hold.

The difficulty arose not in the filling in of the proposal but out of the fact that an inappropriate form was used. In the *Newsholme* case the agent was told the true facts by the applicant but for an unexplained reason he did not write down the true facts. Newsholme was a literate man who could and doubtless should have read the filled-in proposal. To the knowledge of Peters Mrs. Kauffman was illiterate. The defendant company pleads section 158 (1) of the Insurance Act as enacted by B.C. Stats. 1932, Cap. 20, Sec. 5:

158. (1.) Where an applicant for a contract falsely describes the automobile to be insured, to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein, . . . , any claim by the insured shall be rendered invalid and the right of the insured to recover indemnity shall be forfeited.

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The applicant did not falsely describe the automobile to the prejudice of the insurer and she did not knowingly misrepresent or fail to disclose in the application any facts required to be stated therein. The defendant's agent was negligent. The plaintiff Kauffman changed her position and the defendant cannot take advantage of its own negligence.

Furthermore the misinformation that came to the defendant was not of a material character. In the *Newsholme* case it was. Had Mrs. Kauffman been the owner of the car the company would have been liable for the driving of the car by a wide variety of drivers. Mrs. Kauffman, not being the owner, the company's liability was confined to those occasions when the car was being driven by Mrs. Kauffman or by some one to whom she entrusted it within section 18 (*a*) of the Motor-vehicle Act as it stood prior to the re-enactment of that section by the new Motor-vehicle Act, B.C. Stats. 1935, Cap. 50. The misinformation not being of a material character there is no ground for rescinding the contract and, even if there were, rescinding would not be the proper remedy if the parties could not be placed in their original position. Again, even if I accepted the evidence adduced on the part of the defendant, which I do not in the respects set out above, I would still have to find that they attempted to do the impossible, namely, to accept part of the proposal while declining the other part. The company could not alter the proposal; they must accept it or decline it—*vide Bawden* case (*supra*) at p. 539. Harris should not have been joined as party plaintiff. His action will be dismissed with such costs to the defendant as have been additionally incurred by reason of his improper joinder. There will be judgment for the plaintiff Kauffman with costs in the sum of $1,992.05 and for her costs in the Fraser action to be taxed and for the costs of this action to be taxed.

Judgment accordingly.

REX v. CHIN HONG.

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In Chambers
1936
April 2, 9.

Criminal law—Dismissal of charge by magistrate—Appeal—Application for case stated—Non-compliance with section 89 of the Summary Convictions Act, R.S.B.C. 1924, Cap. 245, Secs. 30 and 89.

An information preferred against Chin Hong for that he failed to comply with an order of the corporate bodies acting conjointly under the Natural Products Marketing (British Columbia) Act (B.C. Stats. 1934, Cap. 38) and The Natural Products Marketing Act, 1934, Can. Stats. 1934, Cap. 57, was dismissed by a magistrate in Vancouver. On appeal, counsel for the Crown wrote the magistrate, and after setting out the ground upon which the charge was dismissed, stated "We have now received instructions from the Attorney-General's department to appeal from this decision by way of case stated, and we shall be glad if you will accept this as notice to that effect." The magistrate replied by letter that he was pleased to hear that counsel was taking a case stated in the matter and would assist in every possible way, concluding with the words "I accept your letter as notice." A case stated was prepared and settled as between counsel and signed by the magistrate. On the hearing counsel for the respondent took the preliminary objection that the letter of appellant's counsel to the magistrate was not a strict compliance with section 89 of the Summary Convictions Act.

Held, that there was the omission in counsel's letter to the magistrate to apply to the magistrate to state a case, setting forth the facts of the case. There must be a very substantial compliance in the matter of notice to give the Court jurisdiction. There has not been a substantial compliance with the statute and the appeal is dismissed for want of jurisdiction.

APPEAL by way of case stated from the decision of *C. L. Fillmore,* Esquire, stipendiary magistrate for the County of Vancouver, on an information that the accused failed to comply with an order of the corporate bodies acting conjointly under the Natural Products Marketing (British Columbia) Act and The Natural Products Marketing Act, 1934 (Dominion). Argued before MANSON, J. in Chambers at Vancouver on the 2nd of April, 1936.

George A. Grant, for the Crown.
Pratt, for accused.

Cur. adv. vult.

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9th April, 1936.

MANSON, J.: An Information was preferred against the respondent, Chin Hong, for that he, on the 12th of December, 1935, failed to comply with an order of the corporate bodies acting conjointly under the Natural Products Marketing (British Columbia) Act and The Natural Products Marketing Act, 1934 (Dominion). Mr. *C. L. Fillmore,* the learned stipendiary magistrate in and for the County of Vancouver, after hearing argument dismissed on the 14th day of February, 1936, the information and complaint against respondent.

The Crown seeks to appeal by way of a case stated. Under date of the 18th of February, Mr. *G. A. Grant,* of counsel for the Crown, wrote the magistrate as follows:

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In this matter in which you will remember we filed written argument on the question whether it was necessary for the prosecution to prove that the potatoes in question were grown within the regulated area or whether it was for the accused to prove as an exception that they were grown outside the area, you dismissed the charge holding that the amended definition of regulated area did not have the effect of creating an exception, exemption, proviso, excuse or qualification under section 30 of the Summary Convictions Act.

We have now received instructions from the Attorney-General's department to appeal from this decision by way of case stated and we shall be glad if you will accept this as notice to that effect.

And under date of the 19th of February the magistrate replied as follows:

In re Rex v. Chin Hong

Your letter of February 18th reached me this morning. I was pleased to learn that you are taking a case stated in this matter. I shall be glad to assist in every way possible. I accept your letter as notice.

A case stated was prepared and settled as between counsel representing the appellant and the respondent and signed by the magistrate on the 20th day of March, 1936. Upon the matter coming on for hearing on the 2nd of April, counsel for the respondent took the preliminary objection that appellant had not strictly complied with section 89 of the Summary Convictions Act in the matter of the application to the magistrate for a case stated. The appeal by way of a case stated is a purely statutory appeal. The authorities are abundantly clear that the provisions of the statute must be strictly complied with in taking the appeal. The notice is a condition precedent to the establish-

ment of jurisdiction in this Court. Our statute is not supplemented by rules and section 89 is somewhat lame in its wording. The relative words of the section are:

> 89. (1.) Any person aggrieved, . . . , may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, ...
>
> (2.) The application shall be made in writing to the justice, ...

The statute does not require the applicant to set forth the grounds upon which the decision is questioned—one would have thought it logical that the applicant should do so. If several submissions in law were made at the trial and adversely decided by the magistrate the appellant might only desire to question the correctness of the magistrate's finding upon one of the submissions. How is the magistrate to know upon what grounds his decision is questioned?

Referring now to the letter of counsel to the magistrate, quoted above, the magistrate is requested to accept the letter as notice of the intention of the Attorney-General's department to appeal from the decision by way of a case stated. Is this a sufficient application under section 89?

It might be inferred that the notice given was intended as an application and it might be presumed, as was done in *Rex* v. *Canmore Coal Co.* (1920), 34 Can. C.C. 48 at p. 51, that the omission to apply to the justice to state a case "setting forth the facts of the case" was not a serious matter—that the magistrate, having his statute beside him, by reference was requested to state the facts. But why should the Court labour to find that done which ought to have been done and which has not been done?

The language of the learned Chief Justice of the Common Pleas of Ontario cited by Middleton, J.A. in *Rex* v. *Klig* (1929), 65 O.L.R. 8 at p. 10, " 'formal obstacles should not be placed in the way of any one who has the right of appeal and that no right of appeal should be killed or hampered by technical objection' " undoubtedly correctly states the view of our Courts today, but I do not take that language to excuse omission to do essential things nor to justify the Court in supplying by presumptions and inferences clear omissions. To do so would be to establish looseness and innovations in the administration of justice—something that ought to be firmly discouraged. *Vide*

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the remarks of MARTIN, J.A. in this connection in *Rex* v. *Evans* (1934), 48 B.C. 223 at p. 226 *et seq.* It ought not to be that a condition precedent to a statutory appeal should be an uncertain thing depending upon the liberality in interpretation of this Court or that. It was said in the Table Talk of John Seldon:

> Tis all one as if they should make the Standard for the measure, we call a Foot, a Chancellor's Foot; what an uncertain Measure would this be! One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. Tis the same thing in the Chancellor's Conscience.

It has been said that there must be strict compliance in the matter of the notice to give the Court jurisdiction. I take this to mean at least a very substantial compliance though not a compliance to the letter. I cannot find that there has been a substantial compliance with the statute in the case at Bar.

If I were called upon to determine the point of law which it was intended to raise in the case stated I would determine it in favour of the appellant. With respect I think the learned magistrate erred. The *onus* was upon the accused to prove that he was within the exception. In the circumstances the appeal is dismissed for want of jurisdiction.

Appeal dismissed.

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1936
Jan. 6, 8.

Divorce—Petitioner's expenses—Order that respondent pay sum into Court to cover—Non-compliance—Motion for writ of attachment—R.S.B.C. 1924, Cap. 15, Secs. 2 and 19; Cap. 51, Sec. 58.

In a divorce cause the deputy district registrar made an order directing the husband to pay $225 into Court to cover petitioner's costs of and incidental to the hearing of the petition or give the usual bond to cover said expenses. The husband having failed to comply with the order, the petitioner moved for a writ of attachment.

Held, that the deputy district registrar's order is an order to pay money and as to the alternative of putting up a bond, a bond is an obligation to pay money in certain eventualities and the order to give a bond is an order to pay money. There can be no imprisonment for contempt for non-payment of money unless the applicant brings herself within section 19 of the Arrest and Imprisonment for Debt Act or section 58 of the Supreme Court Act. She has failed to bring herself within either of said sections and the application fails.

MOTION in a divorce cause against the husband for a writ of attachment, the husband having failed to comply with an order of the deputy district registrar directing that the husband lodge in Court $225, being the estimated costs fixed by the deputy district registrar as sufficient to cover the costs and expenses of the petitioner of and incidental to the hearing of the petition herein, and to give the usual bond as therein directed, conditioned for the payment of such expenses of the petitioner as should be certified to be due and payable by the respondent, not exceeding the sum of $225. Heard by ROBERTSON, J. at Victoria on the 6th of January, 1936.

C. H. Tait, for petitioner.
Lowe, for respondent.

Cur. adv. vult.

8th January, 1936.

ROBERTSON, J.: The petitioner applies for a writ of attachment against the respondent for non-compliance with an order dated the 16th day of November, 1935, whereby the respondent was ordered to lodge in Court $225 to cover the costs and

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expenses "of the hearing of the cause" or to give a bond under his hand and seal, with two sureties, conditioned for the payment of such expenses as should be certified to be due and payable by the respondent not exceeding the sum of $225.

The respondent's counsel raised no question as to the power of the registrar to make this order. He submits that in any event the order is one for the payment of money within section 2 of Cap. 15, R.S.B.C. 1924, being the Arrest and Imprisonment for Debt Act, and therefore no writ of attachment can issue. In my opinion the order is one for the payment of money. There is no question about that part of the order which orders the money to be lodged in Court. To comply with this the respondent must pay money into Court; therefore it is an order to pay money. As to the alternative, namely, putting up of the bond, a bond is an obligation to pay money in certain eventualities and therefore in my opinion the order to give a bond is an order to pay money.

In *Royal Bank of Canada* v. *McLennan* (1918), 25 B.C. 183, the Court of Appeal held that there could be no imprisonment for contempt, for mere non-payment of money, except the applicant brought himself within the provisions of section 19 of the above-mentioned Act. At the time of the *McLennan* decision while there was power under the Supreme Court Act where a judgment or order was for the recovery or payment of money to make an order for the examination of a judgment debtor there was no power to commit—see section 3, B.C. Stats. 1915, Cap. 17. This additional power was conferred by section 2, Cap. 16, B.C. Stats. 1922. The section now applicable is section 58 which provides for committal under certain circumstances. The applicant has failed to bring herself within either of said sections 19 or 58 and I therefore am of the opinion that the application fails and must be dismissed with costs.

Motion dismissed.

HUMBER v. HUMBER. (No. 2).

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In Chambers
1936
April 20.

Practice—Summons—No time mentioned for hearing the application—Defect.

On an application by the petitioner in a divorce cause to amend the decree made by ROBERTSON, J. on the 5th of March, 1936, the summons was in the form set forth at page 186 of the Rules of the Supreme Court, 1925, No. 1(i), save and except that the words "at o'clock in the noon," were omitted and no time was mentioned in the summons for hearing the application. On preliminary objection by respondent that the summons was defective and a nullity:—

Held, that the preliminary objection should be given effect to and the application is dismissed.

APPLICATION by petitioner by way of summons for leave to amend the decree of ROBERTSON, J. made herein on the 5th of March, 1936. The summons was in the form set forth at page 186 of the Rules of the Supreme Court, 1925, No. 1 (i), save and except that the words "at o 'clock in the noon," were omitted in the summons and consequently no time was mentioned in said summons for hearing the application. Heard by ROBERTSON, J. in Chambers at Victoria on the 20th of April, 1936.

C. H. Tait, for petitioner.

Lowe, for respondent, took the preliminary objection that the summons was defective in that no time is mentioned for hearing the application and therefore is a nullity.

Finland, for intervener.

ROBERTSON, J.: The preliminary objection as to the defect in the summons should be given effect to and the application is dismissed with costs.

Application dismissed.

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Jan. 14.

FOXALL v. SHOBROOK *ET AL.*

Trespass—General insurance agent—Illness of agent—Agent's business premises entered and taken possession of by manager of two companies of which he had the agency—Books and effects removed from offices and agencies cancelled—Liable in damages.

The plaintiff was local agent in Victoria for the defendant Massie & Renwick Limited of Vancouver, and the defendants The Dominion Fire Insurance Company and Firemen's Insurance Company of Newark, New Jersey. Massie & Renwick Limited were the British Columbia agents of said companies, and the defendant Shobrook was manager of Massie & Renwick Limited. The plaintiff was also agent of four other insurance companies and carried on a brokerage business for other concerns. On the 15th of January, 1932, the plaintiff fell ill and was taken to a hospital. The defendant Shobrook came to Victoria on the 20th of January, 1932, when he entered and took possession of the plaintiff's business premises, cancelled the agencies of the two defendant companies, put another agent in control and carried away the goods and effects used by the plaintiff in connection with his general insurance business. In an action for trespass and damages the plaintiff recovered judgment for $3,000 less $946.94 on the counterclaim.

Held, on appeal, that the damages should be reduced from $3,000 to $2,250, but in other espects the judgment should stand.

APPEAL by defendants from the decision of LUCAS, J. of the 29th of May, 1935, in an action for damages for wrongfully entering the plaintiff's land and place of business and taking possession thereof, and for seizing and carrying away therefrom the books and effects of the plaintiff. For a number of years prior to 1932 the plaintiff conducted a general insurance business in the Pemberton Building, Victoria, being the agent of a number of insurance companies, including the Victoria agency for the defendant companies. The defendant Shobrook lived in Vancouver and was agent for the defendant companies Massie & Renwick Limited, The Dominion Fire Insurance Company and Firemen's Insurance Company of Newark, New Jersey. In the middle of January, 1932, the plaintiff became ill from nervous breakdown and was taken to the hospital. While the plaintiff was in the hospital the defendant Shobrook came over from Vancouver and entered the plaintiff's place of business and took possession, took away what books and papers he wanted, and proceeded to manage the business as his own.

The appeal was argued at Vancouver on the 7th of October, 1935, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Bull, K.C., for appellants: The plaintiff left his office for the hospital in the middle of January, 1932, and was in a very bad condition, the general impression being that he would not be able to go on with his business again. One Straker worked for him, and when Shobrook came over they concluded they would have to take over the business if it was to be run at all.

C. L. Harrison, for respondent: The plaintiff worked hard to keep his business going and broke down on January 15th, 1932. Straker saw Shobrook and induced him to cancel the agencies that Foxall had. This resulted in irreparable damage to Foxall.

Cur. adv. vult.

14th January, 1936.

MARTIN, J.A.: We are all of the opinion that the appeal should be allowed as to damages only, and they shall be reduced from $3,000 to $2,250; in other respects the judgment will stand. The plaintiff (respondent) will have the costs below and the defendants (appellants) those here.

MCPHILLIPS, J.A.: I concur with Mr. Justice M. A. MACDONALD. The learned trial judge has not been shown to be wholly wrong and the evidence discloses high-handed and unwarranted procedure constituting actionable wrongs which well entitled the learned trial judge making the findings he did and established the right for the imposition of substantial damages. The amount of damages as assessed by the learned trial judge though would seem to be excessive: the reduction by $750 would appear to me to be but right and proper. The appeal therefore should be allowed as to the *quantum* of damages, the damages to be reduced by $750 and the appeal in respect to the counterclaim should be dismissed. The costs of appeal should be costs to the appellants; the costs of the trial should be costs to the respondent.

MACDONALD, J.A.: This appeal is not free from difficulty. I hesitate to accept much of respondent's evidence in view of letters written by him and one letter written by Shobrook placed in evidence by the respondent. On the other hand, the evidence of Shobrook in many respects is not satisfactory. He leaves the impression that, whether or not any assent was secured, he

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Macdonald, J.A.

thought he had the right to make the change without reference to Foxall and that consulting him was a mere formality.

In these circumstances if we could find an explicit finding of fact by the trial judge, accepting the evidence of one or other of the parties and directed to the issues in the action, no difficulty would arise. It is submitted that no such finding was made. The learned trial judge merely found, it is urged, that the alleged cancellation of the old arrangement with Foxall and the substitution of the new was not concluded because of the mental incapacity of one of the parties, *viz.,* Foxall, something not an issue in the action and that the true inference from the reasons is that he believed that everything stated by Shobrook actually transpired although Foxall was not capable of appreciating its significance.

One may, however, in interpreting reasons for judgment, difficult to construe or possibly open to two or more constructions, obtain some assistance from the fact that the respondent succeeded in the action. Unless prevented by the reasons from doing so, we should assume that the trial judge concluded that respondent ought to succeed on the issues as framed in the pleadings and awarded damages accordingly. With that in view, notwithstanding the use of the word "therefore" following a discussion of mental incapacity on Foxall's part, I think he intended to find that no such agreement, as alleged, in respect to cancellation, assented to by respondent or ratified by him, was ever concluded. There is at least a finding of an "unwarranted and wrongful trespass." That finding could not be made if Shobrook's evidence was accepted, subject of course to the remote contingency that the trial judge, as suggested, called it a trespass because, although Shobrook secured assent, it was not by reason of incapacity so understood by the respondent. I am satisfied that if the trial judge intended to view it in this way he would have used different words.

However, in view of the difficulties referred to, I read the evidence again to ascertain if, viewing it *de novo* it reasonably supports the general conclusion arrived at by the trial judge and, having done so, I would not interfere. The letter written by appellants' solicitors, acting no doubt on detailed instructions

from Shobrook, discloses that if he correctly stated the facts to his legal adviser he did not do so at the trial. It clearly shows he believed that, without consulting Foxall at all, he might cancel his contract, close the office and turn the business over to another. It is inconsistent with appellants' case at the trial.

As to damages the amount awarded the respondent is excessive. Having regard however to the fact that punitive damages might be given I would reduce it by $750 only.

The appeal should to that extent be allowed and the appeal on the counterclaim dismissed. Costs of appeal to the appellants; of the trial to the respondent.

Appeal allowed in part.

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

Solicitor for respondent: *C. L. Harrison.*

REX v. YONG JONG.

S. C.
In Chambers
1936
April 15, 21.

Criminal law—Habeas corpus—Certiorari—Form of record—Consent to trial by one judge—Tried by another—Failure to show on record that trial judge is a judge—Jurisdiction.

On an application to quash a conviction in *habeas corpus* proceedings, the form of record disclosed that accused was brought before His Honour Judge ELLIS of the County Court of Vancouver on a charge of having opium in his possession, and was asked by His Honour if he consented to be tried before him without a jury, and accused consented to be so tried. The case was then adjourned and later he was brought before His Honour Judge LENNOX who presided on the trial and found accused guilty.

Held, that the accused only consented to be tried by His Honour Judge ELLIS, and on the record Judge LENNOX was without jurisdiction and the proceeding before him and the conviction was null and void.

Held, further, that as the record does not disclose that CHARLES JAMES LENNOX is a judge, there being only the initials "C.C.J." appended to his signature, the accused would also be entitled to his discharge on that ground. Furthermore it does not appear from the record in what County the City of Vancouver is.

APPLICATION to quash a conviction on *habeas corpus* with *certiorari* in aid. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 15th of April, 1936.

Mellish, for the application.

Owen, for the Crown.

Cur. adv. vult.

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YONG JONG

21st April, 1936.

MANSON, J.: The form of record in this matter is bad on its face on two counts. The record reads in part:

> And having been brought before me, JOSEPH NEALON ELLIS, Judge of the County Court of Vancouver, in the County Court Judge's Criminal Court of the said County holden at Vancouver on the 18th day of September, 1935, and asked by me if he consented to be tried before me without the intervention of a jury consented to be so tried and that upon the 10th day of October in the year of our Lord one thousand nine hundred and thirty-five, the said Yong Jong was brought before me, CHARLES JAMES LENNOX, for trial and the trial being adjourned to the 18th day of October, and again to the 28th day of October, A.D. 1935, and on the 28th day of October, A.D. 1935, Yong Jong being again brought before me for trial, and declaring himself ready was arraigned upon the charge for that he, the said Yong Jong, at the said City of Vancouver, on the 14th day of August, A.D. 1935, did unlawfully have in his possession a drug, to wit: opium, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence I find him guilty of the said charge as aforesaid, and I accordingly sentence him to a term of six (6) months' imprisonment at hard labour in Oakalla Prison Farm, and fine him $200 and in default of payment I sentence him to an additional two months' imprisonment. Sentence to date from September 5th, 1935.
>
> WITNESS my hand at Vancouver, B. C., in the said County of Vancouver this 28th day of October in the year A.D. 1935.
>
> CHAS. J. LENNOX,
> C.C.J.

On the face of the record the accused did no more upon his election than consent to be tried before His Honour Judge ELLIS. In those circumstances His Honour Judge LENNOX would have no jurisdiction to take the trial. *Vide Rex* v. *McDougall* (1904), 8 Can. C.C. 234. The County Court Judge's Criminal Court is a purely statutory Court. Its jurisdiction to try the accused depends upon the consent of the accused to be so tried. In so far then as the record is concerned Judge LENNOX was without jurisdiction and the proceeding before him and the conviction would be null and void. Secondly, it does not appear from the record that CHARLES JAMES LENNOX is a judge. He is not described in the body of the record as a Judge of the County Court Judge's Criminal Court of the County of Vancouver and he does not append to his signature anything more than the initials "C.C.J." If I am to look at the record alone the accused would also be entitled to his discharge upon that ground. Furthermore it does not appear from the record in what County the City of Vancouver is.

It was submitted by counsel for the Crown that *habeas corpus* proceedings would not lie, the County Court Judge's Criminal Court being a Court of Record and competent. That the County Court Judge's Criminal Court is a Court of Record and competent cannot be denied, but it seems to me Crown counsel must go further. It is not a "Superior Court of Criminal Jurisdiction" within section 2 (38) of the Criminal Code. The law is reviewed in the very elaborate judgment of the Supreme Court of Canada in the case of *In re Robert Evan Sproule* (1886), 12 S.C.R. 140. Strong, J. says at pp. 204-5:

> When there has been a conviction for a criminal offence by a superior court of record having general jurisdiction over that offence the objection that the court ought not in that particular case to have exercised its jurisdiction or that there was some fatal defect in its proceedings is one conclusively for a court of error, in other words the judgment of the court is *res judicata* as to questions of jurisdiction as well as to all other objections. If a court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding, being one beyond its general jurisdiction, is wholly void and the prisoner so illegally dealt with may be entitled to be discharged on a writ of *habeas corpus*.

The County Court Judge's Criminal Court is limited as to territorial jurisdiction by the statute and it acquires jurisdiction only upon the consent of the accused. It is in no sense therefore a competent Court of general jurisdiction. This was the view taken by FISHER, J. of this Court in *Rex* v. *Wong Cheun Ben* (1930), 42 B.C. 520 at 523. In *Rex* v. *Wong Cheun Ben* (1930), 43 B.C. 188, the learned Chief Justice, on the same point, after noting that the law of this Province is different from that of the Province of Ontario, observes at p. 191:

> It is difficult to believe that when a conviction is by a Court without any jurisdiction at all and the conviction is therefore a nullity that *habeas corpus* will not lie to release the prisoner.

In my opinion *habeas corpus* will lie, certainly at least where the question of jurisdiction is in issue.

The order in this matter was made by my brother FISHER on the 24th of March, 1936, and was returnable on the 27th of March, 1936. On the 27th of March the return to the order of FISHER, J. was before him but the matter was adjourned until the 31st of March and it was further adjourned on that day to the 1st of April. On that day Mr. *Owen* of counsel for the

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Crown applied for *certiorari* in aid and upon consent of Mr. *Mellish* of counsel for the accused *certiorari* was directed. The matter came on for further hearing on the 6th of April when it was fully argued.

The question arises as to whether, the *habeas corpus* return having been made, I should look at the proceedings brought up upon *certiorari*. In this connection in *Re Timson* (1870), L.R. 5 Ex. 257 is in point. There Kelly, C.B. observed at p. 261:

> Here the *habeas corpus* has been already granted and the prisoner is brought up under it, and is, with the return, before the Court; and we cannot deal with it as if it were merely an application for a writ made upon matters shewn by affidavits. On the contrary, in the case of *Reg.* v. *Chaney* [(1838)], 6 Dowl. 281, which was subsequent to the case I have just cited, and which resembled the present in the fact that a *habeas corpus* had been already granted and the prisoner was brought up upon it, the course described by Abbott, C.J., was not followed, but the matter was decided on the view of the commitment alone. On that authority, I think that all parties being now before the Court, and the magistrates, though served with notice and appearing by counsel, not having thought fit to bring before us the conviction, we ought not to allow the defendant to remain in custody under a commitment which is bad upon the face of it.

Channell, B. observes in the same case at pp. 261-2:

> Upon questions of *habeas corpus* it is a well known rule that each Court is accustomed, and indeed considers itself bound, to exercise its jurisdiction according to its own view of the law . . .; here a return has been made, and in *Reg.* v. *Chaney*, where also a return had been made, the course suggested in the earlier case [*Rex* v. *Taylor* (1826), 7 D. & R. 622] was not followed.

Cleasby, B. took the same view.

The return upon *certiorari* includes only the original of the form of record to which reference has been made and a certified transcript of the evidence taken before His Honour Judge LENNOX. In my view the transcript ought not to form part of the return. We have no rule or statute as in some Provinces, that it should. It is clear in any event that it may not be looked at to support the conviction. *Vide Rex* v. *Nat Bell Liquors Ld.*, [1922] 2 A.C. 128; 37 Can. C.C. 129 and *Rex* v. *Brandilini* (1926), 38 B.C. 87; 47 Can. C.C. 166. The original of the form of record corresponds in all respects with the copy exhibited to the affidavit of the accused. If it be that I should look at the transcript of evidence disregarding how it came before me, then I am of opinion that I cannot accept it in contradiction of the form of record which is, after all, a solemn

document under the seal of the Court. The evidence shews that a proper election was made but it may easily have been that the stenographer recorded that as having been done which ought to have been done. Official stenographers are familiar doubtless with that which ought to have been done and might easily and unwittingly record the usual form of election instead of that appearing in the form of record. If the latter, by a slip, does not truly record the facts, I have before me no affidavit to that effect by the person drawing the same. As between the transcript of evidence and the form of record I should give effect to the more solemn document. As Strong J. says in the *Sproule* case (*supra*) at p. 206, "we are bound to consider the record as importing absolute verity."

I have already held that the proceeding before His Honour Judge LENNOX and the conviction is null and void and I am unable to arrive at a different conclusion after looking at the transcript. It follows that the sentence and the order for deportation are without foundation.

The application of the accused to quash is granted and the prisoner discharged.

Application granted.

S. C.

1936

March 3, April 22.

FUHR v. FUHR AND LAPORTE.

Husband and wife—Separation deed—Action for alimony—Judgment—Payments in arrears—Transfer of land by husband to daughter—Consideration—Action to set aside under the Fraudulent Conveyances Act, R.S.B.C. 1924, Cap. 96, Sec. 2.

The plaintiff, the second wife of the defendant Fuhr, brought action for alimony against her husband on March 14th, 1935, and on the 19th of August, 1935, obtained judgment for alimony at $25 per month and $427.75 costs. The alimony is in arrears and the costs are unpaid. The husband conveyed certain property on Carolina Street in the City of Vancouver to his daughter on the 21st of March, 1935, for the purported consideration of $1,000, but this was never paid nor contemplated. It was sought to support the conveyance on the consideration of the promise of the daughter to support her father for the remainder of his life. In an action to set aside the conveyance of the Carolina Street property as fraudulent and void under the Fraudulent Conveyances Act:—

Held, that promise of daughter, while possibly meritorious consideration, was not valuable consideration. That the action was not one in tort within the meaning of section 13 of the Married Women's Property Act. That a judgment for alimony is not *res judicata* as between the parties but that the judgment for costs in the alimony action established *inter partes* a debt "conclusively, finally and forever." That the plaintiff having brought the action on behalf of herself and all other creditors, it was immaterial that there were in fact no other creditors. That the action is one on statutable tort and not of an inherently equitable character. That the plaintiff was at liberty to bring the action and not obliged to have recourse to the provisions of the Execution Act. That the conveyance was void as against the plaintiff and the other creditors of the defendant Fuhr.

ACTION to set aside a conveyance of a parcel of land in the City of Vancouver on the ground that it is fraudulent and void under the Fraudulent Conveyances Act, and alternatively that it constitutes a fraudulent preference under the Fraudulent Preferences Act. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 3rd of March, 1936.

C. F. MacLean, for plaintiff.

Ponsford, for defendant Laporte.

Conrad Fuhr, in person.

Cur. adv. vult.

April 22nd, 1936.

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MANSON, J.: The plaintiff seeks to set aside a conveyance of a parcel of land on Carolina Street in Vancouver, British Columbia, more particularly described in paragraph 7 of the statement of claim, from her husband to his daughter, the defendant Laporte. The allegation is that the conveyance is fraudulent and void under the Fraudulent Conveyances Act and alternatively that it constitutes a fraudulent preference under the Fraudulent Preferences Act.

Chronologically the relative documents are as follow: 11th September, 1934 (Exhibit 14) Separation deed; 5th January, 1935 (Exhibit 12) letter *Maitland & Co.* to C. Fuhr; 9th January, 1935 (Exhibit 13) Part letter C. H. Fuhr to *Maitland & Co.;* 1st March, 1935 (Exhibit 10) Letter Laporte to C. Fuhr; 11th March, 1935 (Exhibit 7) Letter *Fleishman & Co.* to C. Fuhr; 14th March, 1935 (Exhibit 6) Writ *Fuhr* v. *Fuhr* claiming alimony; 15th March, 1935 (Exhibit 16) Part letter C. Fuhr to *Fleishman & MacLean;* 21st March, 1935 (Exhibit 1) Deed Fuhr to Laporte; 26th March, 1935 (Exhibit 15) Statement of claim *Fuhr* v. *Fuhr;* 19th August, 1935 (Exhibit 4) Judgment *Fuhr* v. *Fuhr* for alimony as from 6th June, 1935, $25 monthly; 5th September, 1935 Writ *Fuhr* v. *Fuhr and Laporte;* 14th September, 1935 (Exhibit 5) *Fuhr* v. *Fuhr* allocatur $437.75; 21st September, 1935 (Exhibit 2) *Fuhr* v. *Fuhr* Writ *fi. fa.;* 2nd October, 1935 (Exhibit 3) *Fuhr* v. *Fuhr* Order to sheriff to sell.

It does not appear from the evidence that, at the time of the making of the conveyance which is attacked, the defendant Fuhr had any creditors and it further appears that at that time he was not in insolvent circumstances. The Fraudulent Preferences Act, therefore, is of no assistance to the plaintiff.

The conveyance was for a purported consideration of $1,000. No such consideration passed nor was contemplated. It is sought to support the conveyance on the ground that the true consideration was an undertaking by the daughter to support the father as set out in her letter to her father of 15th March, 1935 (Exhibit 16). It seems the plaintiff had acquired the habit of bringing actions against her husband. She had brought

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three or four in Saskatchewan and another one was in the offing as intimated by the letters from her solicitors of 5th January and 11th March, 1935 (Exhibits 12 and 7). The plaintiff was the second wife of the defendant Fuhr. Husband and wife were each approximately 60 years of age. The wrangling as between the wife and the husband is regrettable and results chiefly in the dissipation of assets. The husband made no attempt to conceal the fact that he was "fed up" with his wife's numerous lawsuits and the daughter was entirely in sympathy with her father and of the opinion that her stepmother was more solicitous about the financial welfare of her nine children by her first husband than she was about the financial welfare of her husband. The defendant Fuhr wrote his daughter in February, 1935, "hinting" to her that she might support him for the remainder of his life. The letter has not been produced. The daughter replied under date March 1st, Exhibit 10:

> Now my offer is this: Transfer this property [Carolina Street property] over to me and I promise to support you for the remainder of your life.

At that time the daughter was unmarried and had a modest employment at Timmins, Ont. She was about to be married to her present husband who was, as she said, "only a working man." A few days after the receipt of the letter from the daughter, to wit, on the 21st of March, 1935, the father deeded the Carolina Street property to the daughter. The affidavit of the witness to the document was sworn to on the 22nd of March and the deed was registered in the Land Registry office at Vancouver on the same day. The evidence of the daughter was taken on commission and she swore that the deed had been sent to her, that she had signed it and returned it to her father. She was obviously mistaken. The father bore the expense of the conveyance and its registration and has substantially managed the property from then until now although the daughter does swear that she paid some taxes. This is not verified by any documentary evidence. The promise to support the father made by the daughter is possibly a meritorious consideration but it is not a valuable consideration. The grantor endeavours to secure future maintenance—a benefit for himself, in consideration of the transfer. This was the interpretation put upon such a transfer in *Conrad* v. *Corkum* (1902), 35 N.S.R. 288, a

decision of the Full Court of Nova Scotia. The whole of the evidence leads but to one conclusion, namely, that the real intent of both parties was to put the Carolina Street property beyond the reach of the plaintiff and thereby to hinder and delay the plaintiff in the event of her obtaining a judgment against her husband for alimony.

It was submitted by counsel that the action was one of tort and that the wife was therefore prohibited from bringing it under section 13 of the Married Women's Property Act. It is an action upon the statute and not in tort within the meaning of section 13. *Vide Shephard* v. *Shephard* (1925), 56 O.L.R. 555 and *Hulton* v. *Hulton (No. 2)* (1917), 86 L.J.K.B. 633 at pp. 637 and 639.

The alimony action was launched 14th March, 1935, and judgment was had for alimony at $25 per month as from 6th June, 1935, on 19th August, 1935, and for costs subsequently taxed at $427.75. The alimony is in arrears and the costs are unpaid. If the alimony alone were unpaid I think the action would have to be dismissed, the judgment for alimony not being a final or conclusive judgment. *Vide Robins* v. *Robins,* [1907] 2 K.B. 13. The judgment as to alimony is not *res judicata* as between the parties. With respect to the judgment for alimony it may be said, as was said by Lord Herschell in *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1 at p. 9, a debt as between the parties was not established "conclusively, finally and forever" but the judgment for costs in the action was final and the costs remaining unpaid a debt does exist on the part of the husband in favour of the wife.

The plaintiff brought this action on behalf of herself and all other creditors. At the date of the commencement of this action, namely, 5th September, 1935, she was a judgment creditor as set out above but there were, it seems, no other creditors. A writ of *fi. fa.* in the alimony action was placed in the hands of the sheriff of the County of Vancouver 23rd September, 1935, and the sheriff seized certain goods of the defendant Fuhr on the 24th of September. By order of McDONALD, J. on 2nd October, 1935, the sheriff sold. He did not, however, realize sufficient to liquidate the judgment. No return of *nulla bona* was made.

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Counsel submits that the plaintiff in actuality brings this action on behalf of herself alone (there being no other creditors) and he refers to the pleadings wherein the plaintiff alleges that the transfer was made with intent to defeat "specifically the plaintiff." *Vide* paragraphs 5, 7 and 10 of the statement of claim and the prayer, clause (b). I think it is immaterial that it has not been shown that there were other creditors. The existence of other creditors at the time of the conveyance would have been a fact to be taken into consideration in determining whether or not the conveyance was made with intent to defeat, delay, etc., but where that intent is proven, apart from the fact of the existence of other creditors, the transaction comes within the purview of the statute as one which is void. *Vide In re Maddever* (1884), 27 Ch. D. 523 at 529 where North, J. says:

> The decree, therefore, will be a declaration that the conveyance is void against the plaintiffs and the other creditors of Maddever deceased. It must be as against the other creditors also as matter of form, although it does not appear there are any others.

And in *Edmunds* v. *Edmunds*, [1904] P. 362 at 376 Gorell Barnes, J. in referring to the case of *Freeman* v. *Pope* (1870), 5 Chy. App. 538 observes:

> Although in the case cited other creditors, if any, are formally taken note of in the judgment as reported, it appears, in fact, that there was only one particular creditor delayed or hindered.

May in his text-book on Fraudulent and Voluntary Dispositions of Property, 3rd Ed., p. 48, lays it down upon the authority of *Barling* v. *Bishopp* (1860), 29 Beav. 417 that where a fraudulent conveyance was made *pendente lite* the existence of any debts whatsoever at the time of conveyance is immaterial. In that case the defendant, after notice of trial in an action of trespass, executed a voluntary conveyance of real estate to his daughter. The verdict went against him and it was held that the conveyance was void under the Statute of Elizabeth it being intended to defeat the plaintiff in the action. *Stileman* v. *Ashdown* (1742), 2 Atk. 477 at p. 481 is to the same effect, and see also May, *supra*, at p. 311.

The defendant Fuhr not only did not allege that he had other assets within the jurisdiction available to satisfy the judgment of the plaintiff but on the contrary in his examination for discovery he took the position that he had no other assets. *Vide*

Questions 138 to 141 inclusive, also Exhibits 13 and 16. Counsel submitted that it must be shown that the plaintiff had exhausted her strictly legal remedies before relying upon an equitable remedy. Boyd, C. in *Clarkson* v. *Dupre* (1895), 16 Pr. 521 at 523 regards such an action as this as being one on statutable tort and not of an inherently equitable character. In *In re Maddever, supra,* at p. 532 it is clearly laid down by the Court on the appeal from North, J. that the right of a plaintiff under 13 Eliz. c. 5 is a legal right. Baggallay, L.J. at 531 says "but the plaintiffs had a legal right," and he makes it amply clear that in that case the relief sought was not merely on equitable grounds. Cotton, L.J. at p. 532 takes the same view and Lindley, L.J. agrees and it is not to be forgotten that after all 13 Eliz. c. 5 was merely declaratory of what was previously the Common Law of the land. *Vide Rickards* v. *The Attorney-General* (1845), 12 Cl. & F. 42 and this has been the view taken not alone in the Courts of the United Kingdom but in the Supreme Court of the United States—*vide Hamilton* v. *Russell* (1803), 1 Cranch 309.

Counsel for the defendant Laporte submitted that the plaintiff must have had a judgment or process of execution in respect of which she was entitled independently of other creditors of the debtor to equitable relief as against the property comprised in the settlement before launching this action and cites *Smith* v. *Hurst* (1852), 10 Hare 30 in support. *Smith* v. *Hurst* does not support that proposition. That was a case of a plaintiff suing on his own behalf alone and not of a plaintiff suing on behalf of himself and all other creditors.

Counsel for the defendant further submits that the plaintiff should have had recourse to the Execution Act, R.S.B.C. 1924, Cap. 83, Sec. 38 *et seq.* I am not of that opinion. Without expressing an opinion as to whether or not the plaintiff might have had her remedy under that Act it is obvious that had she relied upon it the very issue involved in this action would have come up for trial. In any event the course she took was a well-established course available to her, as it has been to persons in her position, since the passing of 13 Eliz. c. 5 and even prior to that time, as pointed out above, at Common Law.

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There will be a declaration, therefore, that the conveyance is void against the plaintiff and the other creditors of the defendant Fuhr. As to the form of the judgment reference might be had to *Bott* v. *Smith* (1856), 21 Beav. 511 at p. 517 and *In re Maddever, supra,* at 529 and May, *supra,* 316. Plaintiff will have her costs.

Order accordingly.

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1936
Feb. 5;
March 11.

REX v. BERU.

Criminal law—Conviction—Appeal—Surety for costs—Appeal dismissed—Payment of costs by surety—Assignment of judgment by minister of pensions to surety—Application by surety to enforce judgment—R.S.B.C. 1924, Cap. 83, Sec. 38—Criminal Code, Secs. 761 and 762.

B. appealed to the Supreme Court by way of a case stated from a summary conviction under The Opium and Narcotic Drug Act, 1929, and entered into a recognizance pursuant to section 762 of the Code with K. as a surety "to pay such costs as are awarded." The appeal was dismissed with costs, and after taxation of the costs formal judgment was entered and registered under the Execution Act. The King, represented by the Minister of Pensions and National Health of Canada then assigned the judgment to K., who had paid the costs to the minister. On the application of K. under section 38 of the Execution Act to enforce the judgment:—

Held, that the word "action" in section 38 of the Execution Act does not include a criminal proceeding, and this judgment is not one which can be enforced under said section.

APPLICATION to enforce a judgment under section 38 of the Execution Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 5th of February, 1936.

Whittaker, for Kabul Singh.
Stuart Henderson, for Beru.

Cur. adv. vult.

11th March, 1936.

ROBERTSON, J.: Beru appealed, unsuccessfully, by way of

case stated to the Supreme Court of British Columbia under section 761 of the Code, from a summary conviction under The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49. The accused entered into a recognizance, pursuant to section 762 of the Code, with one Kabul Singh, as his surety "to pay such costs as are awarded" by the Court. The order dated the 9th of February, 1934, dismissing the appeal provided "that the costs of and incidental to this appeal be taxed by the registrar and be paid forthwith after taxation by the appellant to the registrar." The costs of the appeal were taxed at $205 and on the 19th of May a formal judgment was entered for the sum of $245 which included the $205 and a further amount of $40 which is not now in question. This judgment was registered under the provisions of the Execution Act, Cap. 83, R.S.B.C. 1924, on the 19th of May, 1934. On the 13th of November, 1935, His Majesty the King represented by the Minister of Pensions and National Health of Canada, the Honourable Charles G. Power, purported to assign the judgment to Kabul Singh who had paid the costs to the minister.

Kabul now applies under section 38 of the Execution Act, to enforce this judgment. It is submitted on behalf of Beru (1) that as a matter of public policy Kabul cannot force Beru to pay; (2) that it is not shown that the minister had any power to assign the judgment and he could not do so unless first authorized either by statute or order in council; and (3) that the Execution Act does not apply to a judgment in a criminal proceeding.

I think the first point fails on the authority of *Jones* v. *Orchard* (1855), 16 C.B. 614.

Assuming the second point to be good I think, although it is not necessary to decide and I do not so decide, that Beru would be subrogated to the rights of the Crown and could enforce such rights in the name of the Crown. See *In re Pathe Freres Phonograph Co. of Canada Limited* (1921), 50 O.L.R. 644; *The Queen* v. *Fay* (1879), 4 L.R. Ir. 606; and Manning's Exchequer Practice, 2nd Ed., 70.

Now turning to the third point it is clear that the judgment was recovered in a criminal proceeding. Section 38 of the Execution Act gives certain rights where "any judgment

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creditor in an action has registered a judgment as aforesaid." "Action" is defined in section 2 of the Act to "include all actions at law and suits in equity, and all other proceedings, either at law or in equity." I do not think a criminal proceeding could be properly described as an action or proceeding at law or a proceeding or suit in equity.

Lord Watson speaking on behalf of the Privy Council in *Dilworth* v. *Commissioner of Stamps,* [1899] A.C. 99, said at pp. 105-6:

> The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

If the word "include" merely expands the meaning of the word "action" then because of section 46 of the Interpretation Act, section 2 of the Supreme Court Act applies and in that section it is provided that unless the context otherwise requires:

> "Action" means a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, but shall not include a criminal proceeding by the Crown.

There is nothing in the context which requires a different meaning to be applied to the word action and it is therefore clear that action does not include a criminal proceeding. If on the other hand the word "include" is equivalent to the words "mean and include" then as I have said above the judgment in this case was not given in an action as defined in section 2 of the Execution Act.

In my opinion therefore the judgment is not one which can be enforced under section 38.

The application must be dismissed.

Application dismissed.

RE RAY AND HELEN E. J. CHRISTIAN.

S. C.
In Chambers
1936
March 25, 26;
April 2.

Infant—Custody—Divorce—Access of guilty mother—Death of father—Welfare of child—R.S.B.C. 1924, Cap. 101.

In December, 1923, a girl was born to Harold and Olive Christian. In May, 1932, the wife left her husband and lived with one Ray. The husband then placed the child with Mr. and Mrs. Jacques where she has remained ever since. The husband brought divorce proceedings and a decree absolute was made in September, 1932, giving the sole guardianship and custody of the child to the husband. Mrs. Christian married Ray in October, 1932. In November, 1935, the child's father died, and by his will he appointed his father and mother to act in his place as guardian of the child under section 6 of the Equal Guardianship of Infants Act. The grandfather pays the Jacques $10 per month for the keep of the child. On an application by the mother for custody of the child:—

Held, that the custody of the child should remain for the present where it is, but the matrimonial offence which the mother committed is not a bar to access, and an *interim* order was made, subject to being varied or modified as occasion may require, allowing the applicant to see the child once a week, restricted by certain safeguards.

PETITION for the custody of a child by its mother under the Equal Guardianship of Infants Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 25th and 26th of March, 1936.

C. L. Harrison, for petitioner.
Clearihue, for respondent.

Cur. adv. vult.

2nd April, 1936.

ROBERTSON, J.: This is an application under the Equal Guardianship of Infants Act. Harold and Olive Christian had one child, Helen Elizabeth Jane Christian born on the 3rd of December, 1923. In May, 1932, trouble arose between the Christians over a man named Ray with the result that Mrs. Christian, saying she preferred Ray to her child, left their home. Her husband placed the child with Mr. and Mrs. Jacques on the 9th of May, 1932, where she has remained ever since. On

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the 16th of June, 1932, Christian filed a divorce petition naming Ray as co-respondent. On the 1st of September, 1932, a decree absolute was made; it gave the sole guardianship, custody and control of the child, during her minority to the husband, with liberty to apply. The decree did not, as it might have done, contain any declaration as to the unfitness of the wife to have the custody of the child (see section 12 of the Act under which this application is made). On the 19th of October, 1932, Mrs. Christian married Ray. On the 27th of November, 1935, Christian died and by his will appointed his father and mother William and Elizabeth Jane Christian to act in his place as guardian of the child. This appointment was made pursuant to section 6 of the Act. Mrs. Christian has resigned as guardian. Upon the death of either parent the survivor becomes the sole guardian unless (a) the deceased has under section 6 appointed a person to act in his place as guardian or (b) the survivor was not solely or jointly with the other parent a guardian, of his or her minor children, in which case he or she would not thereupon become such guardian except by order of the Court. By reason of the divorce decree the applicant can only become a guardian if she obtains an order of the Court appointing her. Mrs. Ray now petitions (the application should have been by notice of motion—*In re Befolchi* (1919), 27 B.C. 460, *per* MARTIN, J.A. at p. 465) that she be granted "the guardianship, possession and control of the said child during minority." The application to appoint the applicant as guardian is made under section 8 of the Act, and, under section 13 of the Act, as to the possession and control. No application is made for the removal of William Christian under section 14 of the Act and no case was made out for his removal. In accordance with the wishes of his son he has allowed the child to remain with the Jacques to whom he pays $10 a month for her keep.

The matter then resolves itself into this: first, should the mother be appointed a guardian in which case she and Christian would be the two guardians of the child; second should the custody of the child be given to the applicant, and third, in any event should she have any right of access.

Pursuant to section 13, when considering the questions of

custody and right of access I have to bear in mind the welfare of the infant and the conduct and wishes of the parents.

First, as to the welfare of the infant. The applicant and her husband are on relief. They and the applicant's mother live in a small apartment in which there are two bedrooms and the child in the event of the custody being given to the applicant would have to sleep in the same room as her grandmother. The Rays are not church-going people. They have no children. They have changed their place of residence several times since their marriage. The Jacques have been living in their present residence for about 20 years. They have an adopted daughter fifteen years of age who occupies a bedroom with the child. The child is attending the Quadra School and it is stated by Jacques that she is a bit backward owing to the fact that she had been shifted from one school to another owing to family troubles. If she were in the custody of the applicant there would be, necessarily, a change of school which would, probably, not be an advantage to her. Then the evidence shows that she has been receiving proper religious instruction. The Jacques are very kind to the child and she appears to be very happy with them and their adopted daughter. Jacques is a marine engineer and is able and willing to pay for her maintenance and education. William Christian is a rancher and is able and willing to support her. She is his only grandchild. I saw the child in my private room. She appears to be healthy and comfortably dressed and a very intelligent child. She repeated what she said in Chambers, *viz.*, that she did not want to see her mother again or to go with her or to have her come to see her. She says she does not like Ray.

Then as to the conduct of the parents. It must be borne in mind that the applicant left the child for her lover and although she has seen the child on a number of occasions since 1932, the child has been brought up by the Jacques since she was nine years of age and knows very little of her mother. Then it is evident the wish of the father was that the applicant should have nothing to do with the child. It would be useless to appoint the applicant a guardian unless she got the right to the custody of the infant. I can see no benefit to the child in appointing

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her mother as guardian and I refuse this part of the application.

In *In re Mathieson* (1918), 87 L.J. Ch. 445, in dealing with the question of welfare of a child Swinfen Eady, said at pp. 447-8:

> I think the law of the case is summed up in a very few words by Lord Justice Lindley in the case of *McGrath, In re* (1892), (62 L.J. Ch. 208, at p. 211; [1893] 1 Ch. 143, at p. 147), when he said: "The next point to consider is the duty of the Court towards a penniless child under the care of a legal guardian who is able and willing to maintain and educate the child at his own expense. The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken." This is the passage to which I draw particular attention. "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered, as well as its physical well-being. Nor can the ties of affection be disregarded."

In view of the conditions which I have mentioned and the child's feeling towards her mother and Ray and applying the law as summed up by the learned Lord Justice I think the custody of the child will have to remain for the present where it is. Then should the petitioner be entitled to access. The matrimonial offence which she committed is not a bar. In *Stark* v. *Stark and Hitchins,* [1910] P. 190 at pp. 193-4, the Court of Appeal said:

> We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen. The Court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the Court ought, in the language of Lopes, L.J., "to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked." [1894] P. at p. 307. And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change or new order for access.

This case was followed in *B.* v. *B.,* [1924] P. 176. I think the principle laid down in the above case should be applied to an application, such as this, under the Act.

The question is what is for the benefit of the child? Mr. Christian swears that he knew it was the wish of his son that

the child should be cared for by the Jacques and brought up by them as if she were one of their children. The Jacques say they are prepared to give Mrs. Ray reasonable access to Helen. William Christian does not wish the mother to have access to the child. She is living a decent married life at the present time and I should think has the interest of the child at heart. I feel that I should not entirely cut off Mrs. Ray from any association with her child; yet I realize that if she is given access she may make the child unhappy. From time to time since the child has been living with the Jacques she has written a number of affectionate letters to her mother, the last one being as late as the 13th of February, 1935. Under these circumstances I propose to do as was done in *B.* v. *B., supra,* at p. 183, *viz.,* "to make an *interim* order for access, not a final order, but one that can be varied or modified as occasion may require." The applicant is to be allowed to see the child once a week at the home of the Jacques in the presence of either one of the Jacques or William Christian or at such other place, and in the presence of such other person or persons as may be agreed upon for that purpose between the petitioner and William Christian or one of the Jacques. The interviews of the applicant with the child shall not exceed one hour in length or be repeated until the expiration of a week from the last previous interview. Ray is not to be present at any of these interviews. Mrs. Ray is to undertake not to attempt in any way to prejudice the child against the Jacques or Christian. In this way, as Atkin, L.J., said in the *B.* v. *B.* case, *supra,* the Court will be able to decide what effect this access will have on the interest of the child. If it is beneficial or at any rate if it does no harm it may very well be that an application may be made for further access. If it is not satisfactory the right of access may be taken away. The petition will be adjourned to permit of any further application being made.

Order accordingly.

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In Chambers
1936

March 30;
April 22.

RE MAX LEISER, DECEASED AND THE SUCCESSION DUTY ACT.

Taxation—Succession duties—Petition by executors of estate—Real property—Fair market value—Meaning of—R.S.B.C. 1924, Cap. 244, Sec. 40.

In order to fix the "fair market value" within the meaning of the Succession Duty Act of a number of lots partly vacant and partly occupied by buildings out of repair in areas outside the business section of the City of Victoria, real estate witnesses differing widely as to their value, and offers for sale at the prices fixed by the executors not being taken up, it was

Held, that the values given by the executors should be accepted as the "fair market value" at the time of deceased's death.

PETITION by the executors under section 40 of the Succession Duty Act to have determined the amount of duty payable in respect of certain lands belonging to the estate of the late Max Leiser, who died on the 5th of April, 1935. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 30th of March, 1936.

A. D. Crease, for executors.

Jackson, K.C., for the Minister of Finance.

Cur. adv. vult.

22nd April, 1936.

ROBERTSON, J.: The executors of the late Max Leiser, who died on the 5th of April, 1935, petition under section 40 of the Succession Duty Act to have determined the amount of duty payable in respect of certain lands belonging to the estate.

The executors, in the affidavit required by section 12 set out the "market value" of these lands. The Crown placed higher values on them. The lands with the respective valuations are as follow:

Lands	Executors' valuation	Crown valuation
Lot 107 Victoria City	$32,800	$33,800
Lot 816 Victoria City	1,500	3,600
Lot 819 Victoria City	2,500	6,300
Lots 1, 2, 3, 4, and 5 Oak Bay	1,000	2,230
½ interest lot 4, Hope, B.C.	nil	500
Lot 10 Victoria District, Langford, B.C.	1,000	1,800
	$38,800	$48,230

This petition was then filed. The petitioners said that in fixing their valuation of lot 107, they had based it on the assessed value, but found on enquiry they were mistaken in adopting this, for various reasons which they mention. They now place the fair market value at not more than $15,000. They further said they have made further enquiries into the increased valuations placed on the other lands by the Crown and that they are not warranted. Section 3 of the Act says that in determining the value "the fair market value shall be taken as at the date of the death of the deceased." Cases have been cited in which the meaning of the words "actual value" (*The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264); and "fair actual value" (*Pearce* v. *City of Calgary* (1915), 54 S.C.R. 1, and *Grierson* v. *Edmonton,* [1917] 2 W.W.R. 1139) have been considered.

Fullerton, J.A., referring to *Pearce* v. *City of Calgary, supra,* said in *Re Nairn Estate,* [1918] 2 W.W.R. 278, in which the Court was considering the meaning of the words "fair market value" in the Manitoba Succession Duty Act, at 292:

> The principles laid down in the last mentioned case cannot, however, apply here owing to the difference in the wording of the two statutes.

I think this is true of the other two decisions above cited.

In *Untermyer Estate* v. *Attorney-General for British Columbia,* [1929] S.C.R. 84, in which the Court had to decide the meaning of the words fair market value in the then British Columbia Succession Duty Act, Mignault, J. said at 91:

> It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market.

See also MACDONALD, J.A., in *The Bishop of Victoria* v. *The City of Victoria, supra,* at 280, where he said, in interpreting the words "fair actual value" the word "fair" adds little to the phrase. In *Untermyer Estate, supra,* Mignault, J. said at p. 91, that the dominant word was evidently "value" in determining which, the price that could be secured on the market, if there was one, was the best guide.

In *Lord Advocate* v. *Earl of Home* (1891), 28 Sc. L.R. 289, at 293 referred to by Sir Lyman Duff, C.J. in *Montreal Island*

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Power Co. v. *The Town of Laval des Rapides,* [1935] S.C.R. 304, Lord MacLaren said:

> Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there is something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.

In *The Bishop of Victoria, supra,* MACDONALD, J.A., with whom MARTIN and MCPHILLIPS, J.J.A., agreed, said at p. 280:

> There are two kinds of value known to economists, *viz.*, value in use and value in exchange. An article may have great value in use because of special properties or characteristics not susceptible to measurement by commercial standards and have comparatively little value in exchange. It is the latter measure of valuation properly understood however, that should be applied.

Sir Charles Fitzpatrick, speaking with the concurrence of all the members of the Court (see *Montreal Island Power Co.* v. *The Town of Laval des Rapides, supra,* at 306), said:

> Speaking generally the intrinsic value of a piece of property must necessarily be the price which it will command in the open market and . . . .

The Court of Appeal for Ontario had to consider the meaning of the words "fair market value" in the Succession Duty Act of that Province. That Act is very similar to our Act. The case was *Re Marshall* (1909), 20 O.L.R. 116. Osler, J.A. said at p. 121:

> The sworn market value must necessarily be an estimate of such value—what, in the best opinion of the executor, the property was worth; and the market value is the fair market value, that is to say, the price which, at the prescribed time, could probably have been obtained or made in the open market: *Belton* v. *London County Council* (1893), 68 L.T. 411.

Meredith, J.A. said at p. 126:

> Its actual value then—for the purpose of giving effect to the enactment in question—was the amount for which it could then have been sold, its value in the market at that time, or, as required to be sworn to by the executor, "the market value thereof;" . . . . .

The question then is what prices could probably have been obtained for these properties in the open market at the relevant date.

The evidence of W. H. Davies shows that Leiser was anxious to sell lot 107 at $15,000 but could not get an offer. In January, 1935, Davies was instructed to stop paying the taxes on, and to sell lot 816 for $2,000 and lot 819 for $2,500 (or any reasonable

price) and that he had not been able to obtain any offer. He was also at the same time instructed to sell the Oak Bay lands for $1,000 and prior to Leiser's death and shortly afterwards he managed to sell these lots for this figure. He was also instructed to sell the Langford lands "for $1,000 or any price" and he has not been successful in obtaining an offer. From this and the evidence of other witnesses it is clear to me there was no sale for these lands (except Oak Bay lands) for some time prior to Leiser's death and since. It is not possible to say these properties had a market value based upon actual sales in the market. Then, as I read the judgment of Mignault, J., in the *Untermyer* case, *supra,* other means must be resorted to to determine the market values.

I now deal with lot 107 which is situate at the corner of Blanshard and Johnson Streets. Bridgman's evidence shows that the owner of this property had lost money on it for 20 years. As an investment the property without, at least, considerable expenditure upon it could not be made to pay. Four witnesses for the Crown gave evidence as to its value. Okell the assessor for the City of Victoria said a "full fair value" was the "actual value" or $32,800. He was not aware of the requirements of the Succession Duty Act, *viz.,* "fair market value."

This value was based on sales of property, for the main part, made several years before Leiser's death, and, not in the immediate vicinity of lot 107; also, in part, on a letter written on the 31st of May, 1930, by Leiser to the City of Victoria offering to take $15,000 for part of this lot. Apart from the fact that this letter was written five years before his death it is at best only a statement of what he was willing to take and is not evidence of the market value either, then, or at the time of his death.

The second witness was Winslow who thought the "fair actual value" was $33,000, "if properly developed." He meant by this that a purchaser could afford to pay this amount for it and then with a further expenditure of $160 in alterations to the existing building and of $5,000 to $6,000 on the erection of a building on the vacant part of the lot the property would be a good investment. He did not think a purchaser could be found.

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In my opinion he really regarded the matter as a speculation.

The third witness for the Crown was Heath, who said he thought the "fair actual value" of lot 107 as it stands, is $33,000. He further thought that with the construction of a building at a cost of $5,000 on the vacant part of the lot and alteration of the existing building the revenue from the property would be such as to make lot 107 a good investment.

The fourth witness was McKay who thought the minimum actual cash value today was $33,000 "if properly rented and improved." He thought that the property with the construction of a new building on the unoccupied part at a cost of $4,500 would render the property a good investment. No one stated that the property could have been sold in open market at the figure he placed upon it at the time of Leiser's death. Against these views there are two witnesses. The first was Bridgman. His view was that the property was not in a good business area; that Blanshard Street was not a through street and the stores on it were small and unimportant and scattered; that the locality was not attractive to a purchaser. He did not know of any property that had been sold there for some years and he finally placed its value at $7,500 to $10,000. The other witness was Forman, one of the petitioners. His view was that the property was not a suitable one for building new stores; that "that part of Blanshard Street was not used for shopping"; that there were few stores on it and there was little demand for the existing stores, and that in his opinion the existing building was only suitable for a rooming-house. He had acted as Leiser's agent and was very familiar with the property. He further said that shortly after this petition was filed, *viz.*, the 21st of November, 1935, various enquiries were received by the executors for particulars of the Cecil Hotel and that the executors told "all agents and others" that the executors would sell for $15,000. One prospective purchaser obtained all details relating to the property and then declined to go on with the purchase, but nothing more has been heard of any enquiries.

This evidence is only of value because it is common ground that conditions have not changed materially since the date of Leiser's death.

Heath valued lot 816 at $3,500 saying the income was sufficient to pay taxes, repairs, insurance and management expenses. Forman who obtained the actual figures with regard to income and expenses shows that there was a loss of $62.48 on this property last year. Bridgman says the house is much decayed and will soon be unrentable; that there is no demand for sites "in this block." He mentioned a recent sale of a house and lot next to lot 816 for $1,250 but does not describe the kind of house which was included in this sale. McKay values the lot at $3,600. Bridgman's value was $1,250. Forman placed the value at $1,500. He says the improvement on lot 816 is a small cottage which is in such a bad shape of repair that it cannot be considered of any real value.

Lot 819 has a house on it. Heath and McKay value this lot, respectively, at $5,800 and $6,300; while Forman and Bridgman value it at $2,500 and $1,500 respectively. Forman says the house on the property is 40 years old and in a very bad state of repair; that in 1934 the net profit on the property was $17.39. Heath and McKay value the Langford lands at $1,870 and $1,875 respectively and Forman at $1,000. Davies tried to sell them at $1,000 or any other sum and failed to get a purchaser. No evidence was given with reference to lot 4, Hope, B.C. There are no sales to assist me with regard to any of the above-mentioned properties. The real estate witnesses differ widely as to their value. While the loss on lot 816 was small and the profit on lot 819 was also small neither of these properties could be regarded as investments.

In these circumstances I am unable to say the market value of these properties is greater than the amount fixed by the executors. Idington, J. in his judgment in *Pearce* v. *City of Calgary* (1915), 9 W.W.R. 668 said at 672-3:

> . . . there are generally some prudent persons possessed of means or credit who will attempt to measure the forces at work making for a present shrinkage in values for a time and again likely to arise making for an increase of value.
>
> Such men are few in number and of these only a very small percentage perhaps are able to make a rational estimate of these reversible currents, and a still smaller percentage willing to venture the chances of their investment on the strength of their best judgment. They know that the shrewdest and most far seeing may be mistaken.

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I do not think that any one of these persons if the property had been offered for sale at the time of Leiser's death would have paid more than the amount which I now fix as the then fair market value: Lot 107, $15,000; lot 816, $1,500; lot 819, $2,500; Oak Bay lots, $1,000; lot 4, Hope, B.C., nil; lot 10, Victoria District, Langford, B.C., $1,000.

Order accordingly.

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April 14, 15, 16, 25.

DYMOND v. WILSON.

Negligence — Damages — Bare licensee — Defective railing or stairway — Liability of owner.

A two-story building constructed in 1892 was purchased by the defendant in 1918. The upper story, containing a large number of rooms, was rented to the plaintiff's brother in 1930, who let out the rooms to the public. The plaintiff was his housekeeper. At the back of the upper story was a verandah, at one end of which was a stairway that went down the wall of the building to a platform, and the stairs then turned at right angles to the wall, going to the courtyard below. At one side of the platform was a railing extending at right angles from the wall to a post to which it was nailed, and at the wall end it was nailed to an upright that was held in place by a brace nailed to the floor of the platform. The plaintiff went down to the platform and when shaking a curtain over the railing she leaned against it and it gave way precipitating her to the floor of the courtyard sustaining injuries. The lease of the upper floor does not mention the verandah or the stairway but both were used for ingress and egress by the tenant who stored his garbage cans and firewood on the verandah, and had it swept from time to time. In an action for damages for negligence:—

Held, that the tenant had an easement over the verandah and stairway, but the possession and control remained in the defendant, and the plaintiff was a bare licensee. So far as a bare licensee is concerned the occupier has no duty to insure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the premises which is not apparent to the licensee, but is known to the occupier. There is no evidence here of the creation of a trap since the tenant obtained his lease, and assuming the railing in its condition was a concealed danger there is no evidence that the defendant knew of it. The action was dismissed.

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ACTION for damages for injuries sustained in falling from a stairway. The plaintiff leaned against a railing on the stairway that broke away from its fastening, and losing her balance she fell to the ground sustaining severe injuries. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria on the 14th to the 16th of April, 1936.

Whittaker, for plaintiff.
F. C. Elliott, for defendant.

Cur. adv. vult.

25th April, 1936.

ROBERTSON, J.: The plaintiff sues for damages for injuries sustained on the 7th of July, 1935, by a fall from a stairway at the rear of the London House, a two-story building, situate at the corner of Johnson and Broad Streets, Victoria, B.C. The building was constructed in 1892. There is no evidence as to when the stairway was constructed, so I assume that it was built at the same time. The defendant has been the owner of these premises since the 27th of August, 1918. The lower floor was let to various tenants. There were some 51 rooms on the upper floor, known as the Broadway Rooms, which the plaintiff's brother, Dymond, who had been the tenant of these rooms since the 3rd of April, 1930, let out to the public.

On the 31st of March, 1934, he obtained a renewal lease of "all the rooms on the upper floor of the London Building known as the Broadway Rooms" for one year. There was no covenant by the lessor to repair. There was a provision that Dymond might spend $150 on repairs to the roof in the event of repairs being necessary, the amount spent to be deducted from the rent. It was further agreed that in the event of his overholding, he was to continue to hold the premises as a monthly tenant on the same terms (except as to rent).

There was a stairway leading from Broad Street to the demised premises which would be used by the occupants of the Broadway Rooms, as well as the tenant, and his family and servants. From the head of this stairway a hall led to a door in the rear wall of the building which opened out on to a

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verandah, about 25 feet long and 6 feet wide. The building was "L" shaped. From the end of the verandah a stairway led down along a brick wall, to a platform and then at right angles to a courtyard, from which there was a passage-way to an alley and thence to Johnson Street. There was a railing on one side of the platform which extended at right angles from the brick wall to a post to which it was nailed. It was not fastened to the brick wall but nailed to a 2 x 4 (Exhibit 5) which was held in place by a brace nailed to the floor of the platform. The plaintiff had been housekeeper for her brother since 1930 and had used the platform in the same way as on the day of the accident at least a couple of dozen times.

I find that the plaintiff went down to the platform to shake some curtains which she put over the railing and leaned slightly against it with the result that it gave way and she fell to the floor of the courtyard, sustaining very serious injuries. The railing gave way because it was rotten at both ends as was also the brace, where nailed to the verandah. There was no negligence on the part of the plaintiff.

The defendant submits first that Dymond was the tenant of the verandah and stairway and if this is so, it is admitted by the plaintiff's counsel that she cannot recover. The lease does not mention the verandah or stairway nor does it demise the appurtenances. The defendant's counsel relies upon evidence which shows that the verandah and stairway were from time to time swept by someone on behalf of the tenant; that the tenant's garbage cans were kept on the verandah and taken down by way of the stairway; that the tenant's washing was sometimes hung on the verandah and that the tenant brought wood up the stairway to the verandah and stored it on the verandah. It further appears there are some 50 chimney flues some of which are used by tenants on the ground floor who have to keep these clean and for this purpose use a ladder which rises from the verandah to the roof. In my opinion there was no tenancy of the verandah and stairway. I viewed the premises and in my opinion "the situation and nature" of the verandah and stairway "show an intention" that they should be used by Dymond for the convenient use of the Broadway Rooms—see *Liddiard* v. *Waldron*,

[1933] 2 K.B. 319. I find that Dymond had an easement over the verandah and stairway; but the possession and control remained in the defendant, just as the balcony, in the case of *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746, remained in the possession and control of the defendant.

In this case it is clear that the plaintiff was a bare licensee. What then was the defendant's duty to her. In *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 the facts were that a lodger of the defendant's tenant sued for damages incurred by falling while going down a common stairway giving access to a flat of which her brother was tenant. It was held by the majority of the Court that she was a licensee and that the landlord was under no obligation to her to make the use of them safe for her; that she has to be content to take the premises as they were, subject to this, that the landlord was under obligation to give warning to her of any concealed danger existing on the premises, and known to him, and not to lay a trap for her. Lord Atkinson and Lord Wrenbury said that the duty extended to concealed dangers which "he ought to have known." No opinion on this point was expressed by the other learned Lords.

In *Sutcliffe* v. *Clients Investment Co., supra,* Bankes, L.J., speaking of the *Fairman* case, with reference to the words "ought to have known" said at pp. 754-5:

> I speak with respect of the opinions of the learned Lords in *Fairman's* case, [*supra*] but it was not necessary in that case to extend or enlarge the liability of an occupier towards a bare licensee, and it does not appear anywhere that any of their Lordships intended to make any alteration in the law. No alteration was in fact made if the plaintiff in that case was a licensee with an interest, because there is no material difference between a licensee with an interest and a person who is described as an "invitee," that is to say a person in the position of the plaintiff in *Indermaur* v. *Dames* [(1866)], L.R. 1 C.P. 274 [(1867)], L.R. 2 C.P. 311, and the position of both is better than that of a bare licensee. In my view this Court ought not to take those expressions as effecting an alteration in the law.

And Scrutton, L.J. said in the same case as reported in 94 L.J.Q.B. at 119:

> One word on *Fairman's* case in the House of Lords. I cannot think that the learned Lords intended to make any change in the law.

Atkin, L.J. agreed with them.

In Salmond on Torts, 8th Ed. 518, it is said that "the *dicta*"

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of Lord Atkinson and Lord Wrenbury were made *"per incuriam"* and reference is made to what was said by Bankes, L.J., and Scrutton, L.J., in the *Sutcliffe* case. It is further pointed out that if this were not so, "the duty towards a licensee would be exactly the same as the duty to an invitee in accordance with the restricted interpretation of *Indermaur* v. *Dames* adopted by Lord Atkinson himself in *Cavalier* v. *Pope.*" It further stated that Lord Hailsham who laid down the law, on this point, in *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 at 365, in the same way as Lord Atkinson and Lord Wrenbury, was also "speaking *(obiter) per incuriam.*" Lord Hailsham, L.C., said (pp. 364-5):

> 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.

The learned author also refers to a judgment of Greer, L.J., in *Liddle* v. *Yorkshire (North Riding) County Council,* [1934] 2 K.B. 101, at pp. 119-20, where he says the law, on the question of invitor and invitee, has been stated in unmistakable language by Lord Hailsham, L.C., and Lord Dunedin in *Addie's* case and by Lord Summer then Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew, Limited,* [1913] 1 K.B. 398. Crocket, J., who delivered the judgment of the Court (except Rinfret, J.) in *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430, speaking of the words "or ought to be known" appearing in Lord Hailsham's speech in *Addie's* case, said at p. 437:

> Whether the words "or ought to be known" in the last quoted *dictum* are to be taken as a recognition that the proprietor's duty in respect of concealed dangers or "traps" has been enlarged, is a question upon which there has been much argument. It is clearly *obiter*, as all the Law Lords taking part agreed that the boy in that case was a trespasser and not a licensee, either with or without an interest.

In *Liddle's* case the Court found that the plaintiff was a trespasser, so that it was not concerned with the liability of an

occupier to a bare licensee. In view of the foregoing it seems to me, therefore, with respect, that Lord Justice Greer's observation on this point was also *obiter*.

In a recent case of *Hauser* v. *McGuinness* (1934), 49 B.C. 289, FISHER, J., had to consider the liability of the owner of premises to a bare licensee. He held that the defendants were guilty of negligence in creating a trap or allowing a concealed danger to exist on the premises which was not apparent to the plaintiff but which was known—or ought to have been known —to the defendants, and applying the law as laid down by Lord Hailsham, L.C., in *Addie's* case he gave the plaintiff judgment.

The learned judge referred to *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213. In that case the learned Chief Justice of the Court of Appeal held that the plaintiff was a bare licensee. The other learned justices held, in the particular circumstances of that case that the plaintiff was an invitee. The Chief Justice said at p. 217:

> The duty of a licensor to a bare licensee is well settled by the highest authority and was canvassed in the recent case of *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, wherein it was said that the only duty owed by a licensor to a bare licensee was to warn him of any unusual danger which might be encountered on the premises. In *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746, the *dicta* of Lord Atkinson and Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 concerning the words "or ought to have known" were very much canvassed and those words were rejected from the definition by the Court as a factor in the duty of a licensor to a bare licensee. It was there pointed out that the inclusion of these words in the definition was putting the bare licensee in the same category as an invitee.

and said at p. 218, after referring to *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371:

> There seems, therefore, to be no doubt about the duty which a licensor is under to a bare licensee when going upon land and even when in a conveyance and it does not appear to me to make any difference what length of time the licensee has been enjoying the licence.

MARTIN, J.A., with whom GALLIHER and MCPHILLIPS, JJ.A. agreed, said at p. 222:

> In *Sutcliffe* v. *Clients Investment Co.*, [*supra*] the Court of Appeal pointed out (pp. 754-5) the difficulty which had arisen from certain *dicta* of Lord Atkinson and Lord Wrenbury in the *Fairman* case respecting a bare licensee, which expressions this Court "ought not to take as effecting an alteration in the law" (and *cf.* Salmond on Torts, *supra*, 457) . . . .

As I understand these judgments I think that the learned

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judges accepted the view laid down in *Sutcliffe's* case, that the *dicta* of Lord Atkinson and Lord Wrenbury "ought not to be taken as effecting an alteration in the law."

In the *Hambourg* case, *supra,* the plaintiff was to assist his brother, who was a pianist, in a recital in an auditorium rented by his brother and during a rehearsal while the plaintiff was playing the piano on the stage one of the light lenses of a spot light suspended above the piano burst and a piece of broken glass cut his hand. It was submitted that the plaintiff was an invitee. But the Court held that he was a mere licensee. Referring to Lord Hailsham's speech in *Addie's* case Crocket, J., said at pp. 438-9:

> Whether or not the *dicta* of Lords Atkinson, Wrenbury and Hailsham are accepted as recognizing any extension of the proprietor's obligation in respect to concealed dangers by making the liability of a proprietor of premises for a concealed danger depend not only upon his actual knowledge, but upon his means of knowledge as well—or what he ought to have known—it is quite apparent that the law still recognizes a distinct line of demarcation between the duty owed by a proprietor of premises to one who is an invitee and to another who is a mere licensee. Indeed the very *dicta* themselves, from which the debated alternative phrase has been extracted to support the extension of the principle contended for, afford conclusive evidence that it was never intended thereby to place invitees and mere licensees in the same category as regards the proprietor's responsibility towards them. Witness Lord Hailsham's statement that in the case of persons who go upon the premises by leave and licence, express or implied, the duty is much less stringent, than in the case of those who are present by the invitation of the occupier. If there were not still a material and very important distinction between the two degrees of duty, can it be supposed the Viscount Dunedin in the very same case would have emphasized as he did that in considering cases of that class the first duty of the trial tribunal was "to fix once and for all into which of the three classes the person in question falls" (trespassers, licensees or invitees) and apply the law governing that category without "looking to the law of the adjoining category?" Or that His Lordship should have used such a striking expression as: "There is no half-way house, no no-man's land between adjacent territories"?
>
> For my part I cannot think that it was intended, by the use of the debated alternative phrase in defining an owner's or occupier's liability for a concealed danger in the quoted passages relied upon, to lay down the principle that the owner or occupier owed the same duty to a licensee without an interest as to an invitee.
>
> The appellant being a mere licensee, the respondent's only duty to him was not to expose him to a hidden peril or trap, that is, as I understand it, a peril, which was not apparent to the licensee but the existence of which

was known to the licensor—(or, if one is disposed to add the alternative phrase above discussed) or which ought to have been known to the licensor.

I understand from the concluding words of the quotation that he was of the opinion that the only duty to a licensee was to not expose him to a hidden peril or trap which was not apparent to him but the existence of which was known to the owner but the matter is not clear.

The most recent case I have been able to find on the subject is a decision of the Court of Appeal—*Weigall* v. *Westminster Hospital (Governors)* (1936), 52 T.L.R. 301, in which case the facts were that the plaintiff went to visit her son who was a paying patient in the hospital, and having seen her son, went into another room to interview the surgeon about him. The floor was covered with highly polished linoleum and when she put her foot on a mat it slipped and she fell and sustained injuries. The Court held that she was an invitee. Slesser, L.J., with whom Scott, L.J., agreed, said that what primarily had to be determined was the measure of the liability of the defendants or the position which the plaintiff occupied in law with regard to the hospital at the time when she met with her accident and he then quotes that part of Lord Hailsham's speech in *Addie's* case already set out.

Again the Court was not dealing with a case of a bare licensee and, with respect, in view of what was said by Crocket, J., *supra,* I think Lord Justice Slesser's judgment on this point was *obiter.*

Atkin, L.J., said in *Coleshill* v. *Manchester Corporation,* [1928] 1 K.B. 776 at 792:

In *Hayward* v. *Drury Lane Theatre and Moss' Empires,* [1917] 2 K.B. 899, 913, Scrutton, L.J. says: "A bare or mere licensee, one who has no common interest with the owner of the premises but is there by the owner's permission, takes the premises as he finds them, with all their dangers and traps, a trap being a danger which a person who does not know the premises could not avoid by reasonable care and skill. The owner is under no liability as to existing traps unless he intentionally set them for the licensee, but must not create new traps without taking precautions to protect licensees against them; see the judgment of Willes, J. in *Gautret* v. *Egerton*" [*supra*]; and later on ([1917] 2 K.B. 914) he says: "The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former."

And Eve, J. said at p. 796:

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The grant of the licence creates no right, it merely affords an answer to a charge of trespass, it is a mere permission, and those who take it must take it with all chances of meeting with accidents; but the licensor, although not bound to make the premises safe for the use of the licensee, is bound to warn him of any concealed danger which he knows to be existing on the premises at the date of the licence, or subsequently created.

My conclusion then is that the law, so far as a bare licensee is concerned is that the occupier has no duty to insure that the premises are safe but he is bound not to create a trap or to allow a concealed danger to exist upon the premises which is not apparent to the licensee but is known to the occupier.

There is no evidence here of the creation of a trap since Dymond became a lessee. Assuming, as I think it was, that the railing in its condition was a concealed danger there is no evidence that the defendant knew about this.

In these circumstances the action must be dismissed.

Action dismissed.

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SCOTT v. SPEARIN.

Money had and received—Payment of rent by mistake—Lease of premises—Oral agreement varying—Evidence of refused.

In 1931 defendant leased certain lands to the Crown in the right of the Province of British Columbia. The lands described in the lease included a small parcel that for some years had been occupied by the plaintiff, who built a dwelling upon it in which he and his family lived. The plaintiff claimed that the land had been orally rented to him by the defendant, who informed him that he could live on it as long as he liked. In March, 1931, the defendant demanded of the plaintiff $5 per month as rental for said parcel of land, which he claimed he had a right to collect and keep for himself. The plaintiff paid this rent until July, 1935, when he learned that his land was included in the lease from the defendant to the Crown, and on the defendant refusing to refund the amount paid to him, the plaintiff brought action to recover the sum so paid. Evidence submitted by the defendant that by an oral agreement with the Crown representative he was allowed to collect this rent for himself, was refused.

Held, that the defendant collected and retained the sum of $255 from the plaintiff wrongfully, and that he must make restitution to the plaintiff.

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ACTION for money had and received by the defendant for the use of the plaintiff. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Kamloops on the 23rd of April, 1936.

Archibald, for plaintiff.
Borden McIntyre, for defendant.

Cur. adv. vult.

30th April, 1936.

SWANSON, Co. J.: The plaintiff is a labourer in the employ of the Provincial Government, at the Sanitarium at Tranquille, in the County of Yale, the property of the Crown in the right of the Province of British Columbia.

The defendant is a truck-driver resident in the City of Kamloops, and is the owner of lands leased by him to His Majesty the King in the right of the Province of British Columbia, the lease bearing date 20th March, 1931. The lands therein described were leased to the Crown for a term of one year at an annual rental of $150. The original lease (the property of the Crown) was produced at the trial from the custody of the plaintiff's solicitor, and by agreement between counsel a true copy thereof was produced and filed in Court as Exhibit No. 1.

It was also agreed that the lands described in this formal lease under seal signed by the defendant Spearin, and purporting to have been signed and executed by Spearin in the presence of the late *Ernest Clark,* Solicitor, of Kamloops, a former partner in the firm of *Fulton, Morley & Clark,* embrace the small parcel of land in question here. The lease also purports to have been executed and signed on behalf of the Government of British Columbia by the Honourable S. L. Howe, at that time Provincial Secretary, whose signature was witnessed by P. Walker, Deputy Provincial Secretary. The lease purports to have been made or prepared in the office of *Fulton, Morley & Clark.* It is admitted that the lands described in the above formal lease to the Crown embraced a small parcel of land which had been in the occupation of the plaintiff, an employee of the Sanitarium at Tranquille for some years, on which plaintiff had

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erected a small two-roomed building as a house for himself, wife and two young children.

Plaintiff stated that this small parcel of land had been orally rented to him by defendant, and that he informed him that he could live on it as long as he liked. Plaintiff states that for some time he had been paying a rental of $2 per month to a man named Vermilyea, up to March 20th, 1931. He states that about the latter date he met the defendant, who told plaintiff that he wanted $5 per month as rental for the parcel of land occupied by plaintiff. Plaintiff states that on that occasion the defendant informed him of this lease to the Crown of March 20th, 1931, and that the defendant informed the plaintiff that he would have to pay him $5 per month rental, and that the defendant had a right to collect that rental and keep it for himself.

Plaintiff states that the defendant represented to him that when he leased these lands to the Crown he was given the privilege of collecting this rental from him and keeping it for himself. To this the plaintiff states that he agreed, assuming that the defendant had such a right and privilege from the Crown.

It is admitted that the lease, Exhibit 1, although purporting to be for a term of only one year, has been orally renewed and that payment of rental by the Crown to defendant has continued from the original date of the lease to the present. Learning about July, 1935, that the defendant had no right to collect this rental of $5 per month from him the plaintiff states that he went to see defendant in July, 1935, and asked defendant if he had the right to collect this rent, to which defendant replied that he had. When requested by plaintiff to refund to him the money paid as rental to defendant the plaintiff states that he refused to do so, and still refuses.

The plaintiff now claims that the defendant, having leased all these lands to the Crown (including the portion occupied by plaintiff) and having no right to collect and keep such rental (as plaintiff now alleges), the defendant must now be responsible before this Court in this action for money had and received by him for the use of plaintiff.

Under the old system of pleading before the advent of the

Judicature Act such an action was styled one on the "Common Counts" or "Money Counts." The plaintiff bases his claim that the defendant should refund this sum of money paid to defendant (in all $255) on the ground that the moneys were paid by him to defendant under a "mistake of fact." Plaintiff's counsel submits that the principle of law is clearly shown in Halsbury's Laws of England, Vol. 21, p. 29, sec. 55:

> Where money is paid voluntarily under a mistake on the part of the payer, as to a material fact, it may, as a general rule, be recovered in an action for money had and received to the use of the plaintiff.

Halsbury quotes amongst many other legal authorities the case of *Barber* v. *Brown* (1856) 1 C.B. (N.S.) 121; 140 E.R. 50; 26 L.J.C.P. 41 *et seq.*

In the above case a "special case" was submitted by the trial judge, Sir John Jervis, Chief Justice of the Common Pleas, for determination by the Court of Common Pleas in which the eminent Victorian judges sat: Sir Cresswell Cresswell and Sir Richard Crowder. It was held that the money paid for rent was certainly paid under a mistake of facts, and that the defendants, after their title had expired, had no right to any such payments. It was held that the plaintiffs were entitled to recover the five half-years' rent in question. See authorities quoted in Leake on Contracts, 4th Ed., pp. 63 and 64. See *Newsome* v. *Graham* (1829), 10 B. & C. 234, where tenant of land had paid rent to his lessor as the supposed owner, and was subsequently ejected by the real owner and compelled to pay "*mesne* profits" for the period for which he had paid the rent. It was held that he might recover back the amount as "money received to his own use." The supposed landlord was held to be responsible and accountable to the real owner. *Hickman* v. *Upsall* (1876), 4 Ch.D. 144; 46 L.J.Ch. 245. See *Kelly* v. *Solari* (1841), 9 M. & W. 54 (decision of Parke, B., afterwards Lord Wensleydale). See cases collected in *Royal Bank* v. *The King*, [1931] 2 D.L.R. 685 at 688. This is not a case of "mistake of law." See judgment of this Court in *Fowler* v. *Spallumcheen*, 43 B.C. 47; [1930] 3 W.W.R. 12.

The defendant's counsel sought to submit evidence by the defendant and by William Jackson, who was the farm manager of the Provincial Sanitarium from 1928 to July, 1934, to the

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effect that by an oral agreement made between defendant and William Jackson (who was alleged by counsel to have been negotiating with defendant as to the terms of the lease from defendant to the Crown) it was expressly agreed that the defendant was to have the right and privilege of collecting the $5 per month rental from the plaintiff, and of retaining the same for his own use.

Counsel for the plaintiff strongly objected to this evidence as an attempt to seriously vary or change the express terms set forth in this very formal lease to the Crown executed by defendant. I refused to permit such evidence to be adduced.

Mr. *Archibald* for the plaintiff submitted that he could call Provincial officers of the Sanitarium to entirely contravert such a position, but submitted that it was not at all necessary to do so, as the proposed evidence on behalf of the defendant was clearly in violation of well-founded principles of evidence and so inadmissible. I entirely agree with the submission of the plaintiff's counsel. See Phipson on Evidence, 7th Ed., Cap. XLIV. on "Exclusion of Extrinsic Evidence on Substitution of Documents," p. 544:

> When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive memorial thereof, and no evidence may be given to prove the terms of the transaction except the document itself or secondary evidence of its contents as stated in chap. xliii.

The history of this well-settled rule of evidence is given *in extenso* thereunder. See the very explicit deliverance on this point by Duff J. (now Sir Lyman Duff, Chief Justice of Canada) in *Ship M. F. Whalen* v. *Pointe Anne Quarries Limited* (1921), 63 S.C.R. 109; 63 D.L.R. 545 at 567. Lord Bramwell said in *Wake* v. *Harrop* (1861), 6 H. & N. 768 at 775; 158 E.R. 317: "They put on paper what is to bind them and so make the written document conclusive evidence between them."

Mr. Justice Duff at pp. 125-6 (63 S.C.R.) said:

> The rule is obviously not a technical rule. It is founded upon the highest consideration of convenience and the value of it could hardly be better illustrated than by a case such as this where two men of affairs, thoroughly accustomed to transacting business, meeting after a negotiation with the object of making an agreement upon business which had been the subject of full discussion by each and after discussion of the matter deliberately

set down in writing in perfectly unambiguous language that upon which they have agreed. In commercial affairs it is of great importance that such documents should be regarded as final and on this principle the Courts have uniformly acted recognizing that the very purpose of expressing agreements in writing is to reduce the terms of them to permanent form and to preclude subsequent disputes as to such terms.

See also judgment of Anglin, J. (afterwards C.J.C.) in *Skene* v. *The Royal Bank* (1920), 59 D.L.R. 469 at 479:

The contract is in writing. It contains no stipulation as to the style of louvre. It seems reasonably clear to me that what the respondents seek to do is to vary the written contract by parol evidence of another term claimed by them to have been agreed upon as the basis upon which that contract was to be entered into. That, I think, cannot be done.

No more formal contract could be entered into than the lease in question, Exhibit 1, signed by the defendant. I fully believe that it was signed by him in the presence of the late *Ernest Clark,* well known to this Court as a most careful and conscientious solicitor, who would not I believe have put his name to this document as a witness specifically as to the execution by the defendant of this lease unless it were so in fact. The defendant has denied under oath that he executed this lease in the presence of *Clark.* I am clearly satisfied that he is mistaken. The lease has been signed on behalf of the Crown in the most formal manner. It was executed by the Honourable the Provincial Secretary of British Columbia in the presence of the Deputy Provincial Secretary.

It was attempted to be shown that the terms of this formal document were not a correct "memorial" of the bargain or arrangement arrived at by the parties. William Jackson, the farm manager of the Provincial Sanitarium Farm, was brought forward as a witness to endeavour to prove that it was a term of the lease to the Crown that in addition to the payment of $150 yearly as rental the defendant Spearin was to have the right and privilege of collecting from the plaintiff the rental of $5 per month and applying that to his own use. No authority was adduced to show that Jackson had any authority to bind the Crown in such an important matter, which apparently required the execution of the lease by the Provincial Secretary to bind the Crown. Indeed in some decided cases it has been held that even a Minister of the Crown lacks the authority to bind the Crown in certain circumstances without the formal *imprematur*

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of an order in council bearing the signature of His Honour the Lieutenant-Governor of the Province.

The evidence is clearly inadmissible. The plaintiff is just a labouring man in the employment of the Crown, living on a small parcel of land at the Sanitarium premises, and occupying a very humble dwelling thereon. The fact of his dwelling there all these years must be taken as a notorious fact, well known to the Provincial officers there, the superintendent and other officers of the Crown administering the affairs of the Sanitarium. It would seem that it would be very reasonable that the Crown officers were quite satisfied that this humble workman should occupy these living premises rent free as far as the Crown's interests were concerned.

By executing this lease to the Crown, Exhibit 1, the defendant Spearin parted with all his right, title or interest to rent or lease any part of those leased premises to any other tenant than the Crown. He had no residue of interest which would justify him in leasing any portion of that land to the plaintiff, and if he did so, or attempted to do so, he had no legal right to collect or receive any rent from the plaintiff.

He did so attempt to verbally lease the premises in question in this action to the plaintiff, and he did collect and retain the sum of $255 from the plaintiff, wrongfully as I hold, and he must now make restitution of that amount now legally owing by him to the plaintiff.

There will be judgment accordingly in favour of the plaintiff for the sum of $255 and costs.

Judgment for plaintiff.

REX v. CRUCIL.

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1936
May 20.

Criminal law—Summary conviction—Keeping licensed premises open in prohibited hours—View of locus in quo by magistrate without consent—Questioning of accused by magistrate at view before being sworn—Conviction quashed.

The accused was convicted on a charge that on Sunday, March 22nd, 1936, at Chemainus in the County of Nanaimo, she unlawfully did keep her licensed premises open for the sale of beer, contrary to the regulations pursuant to the Government Liquor Act of the Province of British Columbia, and amendments thereto. After the evidence for the prosecution was in, the magistrate without obtaining the consent of the parties, decided to take a view of the *locus in quo*, and at the view before the accused was sworn he asked her "And this is your kitchen?" to which the accused answered "Yes." "And this is the beer-parlour right here? Yes." On appeal by way of trial *de novo*:—

Held, allowing the appeal, that there is no authority for the magistrate to take a view unless by consent, and he has no authority at that stage of the proceedings, when the accused is not under oath, to question her.

APPEAL by way of trial *de novo* from the conviction of the accused by stipendiary magistrate Tisdall on the 2nd of April, 1936, at Chemainus, on the charge that on Sunday, the 22nd of March, 1936, at Chemainus in the County of Nanaimo, she unlawfully did keep her licensed premises open for the sale of beer at Chemainus in the County and Province aforesaid, contrary to the regulations pursuant to the Government Liquor Act of the Province of British Columbia and amendments thereto. The evidence disclosed that a constable saw a man on the night of March 22nd come out of the back door of the hotel in which the licensed premises are situate, with a carton under his arm. The constable took the carton away from him and found that it contained half a dozen bottles of beer. The man from whom the carton was taken was called for the prosecution and stated he had bought a dozen bottles of beer on the previous evening and had left the carton with half a dozen of the beer under some rubbish at the back of the hotel and had taken it from under the rubbish just previous to its being seized by the constable. Upon counsel for the accused moving for dismissal of the charge the magistrate

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decided to take a view of the *locus in quo,* and at the view the learned magistrate asked the accused: "This is your kitchen? Yes. And this is the beer-parlour right here? Yes." The Court then resumed its sitting and held there was a case for the defendant to meet. After evidence for the defence was submitted the accused was convicted and fined $50 and costs. Argued before HARPER, Co. J. at Duncan, on the 20th of May, 1936.

Castillou, for accused.
Davie, K.C., for the Crown.

HARPER, Co. J.: There is no authority to take a view unless by consent; and secondly I do not think the magistrate had authority to question the accused person. I do not think any judge has at that stage of the proceedings and under these circumstances. Further, the accused was not under oath. I never heard of its being done before. If those are the facts I will dispose of the appeal. The appeal will be allowed.

Appeal allowed.

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Jan. 16;
Feb. 5;
March 3.

Criminal law—Charge—Unlawfully keep a disorderly house, to wit, a common gaming-house—Sufficient in law—Criminal Code, Secs. 226, 227 and 229.

An information charging the accused that he "at a certain time and place did unlawfully keep a disorderly house, to wit, a common gaming-house" is sufficient in law.

Regina v. *France* (1898), 7 Que. Q.B. 83, followed.

Rex v. *Soo Kit Sang* (1936), *ante*, p. 386, overruled.

APPEAL by the Attorney-General from the acquittal of the accused by police magistrate *H. S. Wood,* Vancouver, on the 18th of December, 1935, whereby the charge against him that he, at the City of Vancouver between the 15th and 25th of November, 1935, did unlawfully keep a disorderly house, to wit, a common gaming-house at 115 East Pender Street, was dismissed. The premises in question were entered by virtue of a search warrant and gambling paraphernalia and money, sufficient to make out a *prima facie* case under section 226 of the Criminal Code, were brought before the Court. This and other evidence disclosed that a common gaming-house where Chinese gambling games, falling under three subsections of section 226, namely, (*a*), (*b*) (i) and (ii), were played, was being carried on on the premises in question, and the accused acted as keeper. The charge was dismissed on the ground that the information was void for uncertainty in that the charge did not state the particular means by which the gaming-house was kept or the particular kind of gaming-house, for under section 226 of the Code there are at least four different kinds of gaming-houses.

The appeal was argued at Victoria on the 16th of January and the 5th of February, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Oliver, for the Crown: The police magistrate followed the decision of FISHER, J. in *Rex* v. *Soo Kit Sang* (1936), 50 B.C. 386, and held the charge was void for uncertainty. In that case

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it was held that the words "as hereinbefore defined" should be given effect to. We submit that the charge "common gaming-house" is sufficient to bring it under section 226, and it is not necessary that it should include the particular means by which the gaming-house is kept or the particular kind of gaming-house as set out in any of the subsections of sections 226 or 227.

No one, for respondent.

Cur. adv. vult.

3rd March, 1936.

MARTIN, J.A.: We are all of opinion that this appeal should be allowed for the following reasons. It is one by the Crown from the judgment of acquittal, by His Worship Police Magistrate *Wood*, of the respondent "for that at the City of Vancouver between the 15th and 25th days of November, 1935, he did unlawfully keep a disorderly house, to wit, a common gaming-house, situate and being at 115 East Pender Street, contrary," etc.

The learned magistrate was of opinion that the charge was well laid and would have convicted thereupon, but he properly did not do so because he felt it was his duty to follow a recent decision of Mr. Justice FISHER in the case of *Rex* v. *Soo Kit Sang* (1936), [*ante* p. 386] wherein the learned judge had liberated, upon *habeas corpus*, a person who had been convicted by the same magistrate and upon a like information, and, therefore, he felt that being placed in such a position he should refuse, against his own opinion, to convict the accused herein, and so the Crown has brought this appeal to settle the question.

We have gone into it very carefully and at the conclusion of the argument we reserved judgment, not that we had very much doubt about it, in fact very little, but as the Crown alone was represented, and not the respondent, we felt that special precautions should be taken to see that no relevant decision was overlooked, and we had the belief that other cases which were relevant had not been cited to us, nor to FISHER, J., whose said decision is complained of. It was fortunate we took this course because we find that the identical question had long ago been decided by the Court of King's Bench, being the Court of

Criminal Appeal of Quebec, in the case of *Reg.* v. *France* (1898), 7 Que. Q.B. 83, the formal judgment being at p. 99. In it their Lordships decided that a conviction for the same offence as here, recorded in the same terms essentially, that the magistrate had convicted on in *Soo Kit's* case, was a proper one. That judgment has been followed by the Court of Criminal Appeal of Ontario in *Rex* v. *Lee Guey* (1907), 13 Can. C.C. 80, Osler, J.A. saying at p. 84:

> The reasoning of Wurtele, J., who delivered the judgment of the Court, based upon the authorities and the history of the legislation on the subject, seems to me entirely satisfactory. I cannot follow the Chambers decisions in British Columbia and the Yukon.

And Meredith, J.A., at p. 85:

> Precisely the same question which is asked in this case was asked, and considered, and answered, by a Court of Appeal in the Province of Quebec, nearly ten years ago, and presumably has been acted upon in that Province, if not elsewhere throughout the Dominion, ever since; though there are a few exceptions in cases before a single judge in other Provinces, probably without a knowledge of this case.
>
> For more than one reason, I am very firmly of opinion that this Court ought to follow that decision.

Now while the Ontario Court was primarily dealing with the question of the magistrate's jurisdiction under then existing sections 238, 773-4 and 777 of the Code relating to certain kinds of disorderly houses, and adopted the Quebec Court's decision on that point, yet there is much in the reasoning on those sections and section 228 (now 229), especially in the valuable historical judgment of Meredith, J.A., which supports the Quebec Court's judgment on the other point, *i.e.*, on the sufficiency of the form of the information respecting "the three kinds of disorderly houses mentioned in section 228" as Meredith, J.A. puts it at p. 89, where also he pays a deserved compliment to "the very comprehensive manner in which the subject has been dealt with by Mr. Justice Wurtele in the Quebec case": and he had already said, p. 85, that:

> The question arises under federal legislation applicable alike to all the Provinces of Canada: it obviously follows that the interpretation of such legislation should be the same in all parts of the Dominion. It would be unseemly, if not intolerable, that one view of it should be adopted in one Province, and the opposite view in another; that the same person, for the same offence, should, under the same law, be deprived of his right of trial by jury on one side of an imaginary inter-provincial line, and yet, on the

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other side of it, be accorded that right—not through any fault in legislation, but solely by reason of a false interpretation of the enactment in one or other of the Provinces.

It is to be regretted that it did not come to the attention of FISHER, J., because if it had he would undoubtedly have followed it, and the unfortunate consequences of the liberation of a properly convicted criminal would have been avoided.

The following statement by Mr. Justice Strong, concurred in by Chief Justice Ritchie, in the leading case of *Downie* v. *The Queen* (1888), 15 S.C.R. 358, at pp. 374-5 merits reproduction in this connexion:

> Further, the objection that this mode of pleading is vicious as being too vague and general whether regarded as one of a substantial or a technical character is, I think, met by the following language of Mr. Justice Willes in delivering the opinion of the judges in *Mulcahy* v. *The Queen* [(1868), L.R. 3 H.L. 306] already alluded to. That very learned judge there said:
>
> "Moreover, and this is the substantial answer to these objections, an indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions which it may be intended to produce at the trial. To make the indictment more particular would only encourage formal objections upon the ground of variance which have of late been justly discouraged by the Legislature."

We note that the said decision in *France's* case is in essentials entirely in accord (having regard to one difference in proof required by English law, *i.e.*, "for gain") with the form of indictment to be found in Archbold's Criminal Pleading, 29th Ed., 1351, and so even if the question were to be concluded by the English practice that the learned judge relied on, if reference had been made to the forms of indictment given by Archbold, this charge must have been found to be properly laid: the case he relied upon, *Bond* v. *Plumb* (1893), 17 Cox, C.C. 749, has, having regard to the difference in the statutes, no application.

The error herein seems to have arisen from the failure to regard correctly this offence as being one for keeping a disorderly house in one of the three ways "hereinbefore defined" by section 229 of the Code. A contrasting example of a case where Parliament does make a distinct offence to "occupy, use, manage or maintain" that kind of a stock-broking office (popularly called a bucket-shop) as "a common gaming-house," is to be found in section 232 of the Code.

It is to be noted that by a strange oversight the authors of Crankshaw's Criminal Code have failed to alter in the forms given since the decision in *France's* case to correspond with its effect upon them (1935—6th Ed., p. 1443) and continue to give substantially the same form as appeared in the first edition of that valuable work in 1892 at p. 132, six years before *France's* case.

It follows that the appeal is allowed, the judgment set aside and a new trial ordered on the original and proper charge.

MACDONALD, J.A.: The Crown appeals from an acquittal of respondent by the police magistrate of the City of Vancouver. He was governed by a decision of FISHER, J. in *Rex* v. *Soo Kit Sang,* unreported*, wherein the learned judge, on a similar charge, quashed a conviction. Mr. Justice FISHER held that where the accused was charged that he, at a certain time and place, "did unlawfully keep a disorderly house to wit: a common gaming-house" a conviction based thereon was bad inasmuch as it disclosed no offence and was void for uncertainty. It should have specified, in his view, the appropriate kind of gaming-house alleged to have been conducted as defined by section 226 of the Code, subsections (*a*) (*b*) with the classifications thereunder numbered (i), (ii) and (iii).

We are concerned with section 229 under which the charge herein was laid and section 226 where a gaming-house is defined. The material part of section 229 reads:

> Everyone is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

i.e., as defined in section 226 if the charge is keeping a gaming-house. The charge based on this section is quite complete in itself as it contains all the ingredients of a criminal offence, *viz.,* that of keeping a disorderly house of one of the three kinds mentioned therein, a common bawdy-house, gaming-house or betting-house. The words "as hereinbefore defined" do not imply that unless the definitions (or part of them) found in section 226 are included in the charge no offence is disclosed.

* Since reported (1936), *ante,* p. 386.

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The provisions of section 226 merely show the nature of the evidence that must be adduced to prove that it is in fact a common gaming-house.

Rex v. *Jordon* (1925), 35 B.C. 1 is distinguishable. In that case there was no violation of the Act at all unless one practised optometry without a certificate in a certain specified way, *viz.*, by following one or more of the methods outlined in section 2 of the 1921 Optometry Act, Cap. 48. If other methods were followed a certificate was not required. It is true, as stated by FISHER, J., that the forms found at p. 1443 of the 6th Ed. of Crankshaw's Criminal Code suggests that the appropriate parts of section 226 should be included in the charge. That appears to be misleading. Where, therefore, the offender is charged that between certain dates, at a certain place, he did unlawfully keep a disorderly house, to wit: a common gaming-house, contrary to the form of the statute, etc., it is a good charge giving full information with reasonable particularity to the accused as to the act to be proved against him and identifying the transaction as required by section 853. If the accused requires further information particulars may be obtained.

My brother MARTIN, the acting Chief Justice referred to *Reg.* v. *France* (1898), 7 Que. Q.B. 83. It is conclusive on the point.

I would allow the appeal and direct a new trial.

MCQUARRIE, J.A.: I would allow the appeal and order a new trial.

Appeal allowed; new trial ordered.

Solicitor for appellant: *Joseph Oliver.*

LEVI v. THE BRITISH COLUMBIA DISTILLERY COMPANY LIMITED AND BROWNRIDGE.

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May 14, 26.

Practice — Examination for discovery — Officer of company — Refusal to answer question—Relevancy to issue.

In an action for a declaration that an agreement was concluded between the plaintiff and one Brownridge of the one part and the defendant company of the other part, whereby the defendant company agreed to sell and deliver to the plaintiff its stock of whisky, the terms and conditions thereof being set forth in a formal contract referred to and accompanying a letter of the 12th of November, 1934, signed by the defendant company and addressed to and delivered to said Brownridge. One Wills, assistant manager of the defendant company, on his examination for discovery, admitted that he sent a telegram to one Knight, the agent of the defendant company in Ontario, who at the time was in New York, which reads as follows: "Terms of option not complied with. Go ahead with your prospect." Witness was then asked "Who was the prospect referred to in the telegram?" Witness refused to answer. An application for an order directing him to answer the question was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that the appellant has failed to show that the answer to the question would in any way assist him in proving his case or in meeting the defence set up; the question is irrelevant to the issue and the witness need not answer.

APPEAL by plaintiff from the order of MURPHY, J. of the 11th of March, 1936, dismissing the plaintiff's application for an order directing one Wills, an officer of the defendant company, to answer questions which, upon the advice of counsel, he refused to answer on his examination for discovery. The action was for a declaration that an agreement concluded on the 12th of November, 1934, whereby the defendant company agreed to sell to the plaintiff and the defendant Brownridge for export purposes their stock of rye whisky and Bourbon whisky on the terms and conditions of an agreement accompanying a letter of the 12th of November, 1934, signed by the defendant and addressed to Brownridge, is a valid and subsisting agreement. On the examination a telegram was produced from Wills to one Knight, an officer of the defendant company in New York, as follows: "Terms of option not complied with. Go ahead with your prospect." The question asked Wills was "Who was the

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prospect referred to in the telegram addressed by you to Knight?" On the advice of counsel he refused to answer the question.

The appeal was argued at Victoria on the 14th of May, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Lowe, for appellant: There was a contract that the defendant company sell all their stock of liquor to the plaintiff and Brownridge. Wills, an officer of the company, was examined for discovery. He admitted he sent a telegram to one Knight, the company's agent in Ontario, who was in New York at the time, saying "Terms of option not complied with. Go ahead with your prospect." When asked who the "prospect" was he refused to answer. We say this is a relevant question: see *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55; *Peterson* v. *Vancouver Gas Co.* (1920), 28 B.C. 107; *Anderson* v. *Imperial Development Co.* (1910), 20 Man. L.R. 275; *Giddings* v. *Canadian Northern Railway Co.,* [1919] 3 W.W.R. 15; *The Canada Atlantic Ry. Co.* v. *Moxley* (1888), 15 S.C.R. 145; *Johnson* v. *Walch Land Co.,* [1919] 2 W.W.R. 713.

E. B. Bull, for respondent: In the first place there never was a contract. Secondly, admitting there was a form of contract, it was conditional, one of the conditions being that the plaintiff must show he could pay for the liquor as he received it. Thirdly, we could only sell through a Canadian company, one of the conditions being that they should form a company and no company was ever established. They had an option up to December 15th, and on the 10th of December they asked for an extension. The statement of claim does not allege a sale to another, so the question of a sale to any one else has no relation to a breach of the contract assuming there was a breach: see *Morrison* v. *Rutledge* (1912), 8 D.L.R. 325; *Whieldon* v. *Morrison* (1934), 48 B.C. 492. We do not wish to give the name of the prospect.

Lowe, replied.

Cur. adv. vult.

26th May, 1936.

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

MARTIN, J.A.: After a careful consideration of the cases cited to us, and others, I can only reach the conclusion that in the light of the issues raised by the pleadings this case is so much upon the line that I do not feel we should be justified in reversing the ruling of the learned judge below, that the name of the "prospect" (which I understand to mean "prospective customer") mentioned in the telegram in question should be disclosed upon discovery.

The scope of that discovery has been recently defined by us in *Whieldon* v. *Morrison* (1934), 48 B.C. 492, wherein the cases governing our practice are reviewed and I have nothing to add to what I said at pp. 497-9. It must be borne in mind, however, that herein I am only speaking of the extent of the cross-examination as it now presents itself, and it may assume another complexion at the trial in view of other evidence that may be disclosed, or a possible change in the issues, or otherwise, but as Brett, L.J., said in *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 65 "That is a matter as to which I say nothing" now.

It is not to be understood that there would be any objection in itself to the disclosure of the name of the "prospect" upon discovery in a proper case, because as Perdue, J.A., well said in *Morrison* v. *Rutledge* (1912), 8 D.L.R. 325 at 326 (on the corresponding Manitoba rule and after considering our decision in *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23):

> If it could be shewn that the answers to the questions under consideration in this case would in any way assist the plaintiff in proving his case or in meeting the defence set up, the defendant should, in my opinion, be ordered to answer them.

It is only because as the matter now stands I find myself prevented from giving effect to the careful and helpful argument of Mr. *Lowe,* that I am constrained, but only after much hesitation, to agree in the dismissal of this appeal.

MACDONALD, J.A.: I would not interfere with the discretion exercised by the learned judge who refused to make the order. An answer to the question would not advance appellant's case confined as it is to establishing a contract, its breach and the *quantum* of damages flowing therefrom. Mr. *Lowe* relied on

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Compagnie Financiere du Pacifique v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55 presumably because of the fact that the telegram upon which he based his question was disclosed in respondent's affidavit of documents. That being so he submitted that the telegram must be treated as a relevant and material document bearing on the issues and any questions based upon it might be asked. That was not an application to compel a witness to answer although inferentially it is of assistance. Brett, L.J. in considering documents that must be produced in compliance with a demand therefor, said at p. 63:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences:
> . . . .

I agree that these principles may fairly be applied to the refusal to answer questions on an examination for discovery. There it was essential to establish a contract or, on the other hand, to show by letters and documents that a contract had not been concluded. Any documents that "might," viewing it reasonably, bear on either of these points should be disclosed. But applying it Mr. *Lowe* was unable to show in what way the answer he sought "might" (not would) advance his case or damage that of his adversary confined as it was to the three issues referred to.

I would dismiss the appeal.

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

Appeal dismissed.

Solicitor for appellant: *E. R. Sugarman.*
Solicitors for respondents: *Pattullo & Tobin.*

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May 19, 22;
June 26.

IN RE ESTATE OF HELEN F. M. DRUMMOND, DECEASED.

MINISTER OF FINANCE FOR BRITISH COLUMBIA v. DRUMMOND *ET AL.*

Succession Duty Act—Executors of estate—Petition to extend time for payment of duty—Beneficiaries—Effect of order on—The word "passes" in section 10 (2) of the Act—Interpretation—B.C. Stats. 1934, Cap. 61, Secs. 10, 29 and 38.

The executors of an estate obtained an order under section 38 (1) of the Succession Duty Act extending the time for payment of duty, and fixing the date from which interest should be chargeable, on the ground that payment by them within the time prescribed by the Act was impossible owing to a cause beyond their control. The Minister of Finance appealed on the ground that the conditions set forth in section 38 of the Succession Duty Act, under which jurisdiction is given to make the order, were not proved to exist, in that there was no evidence that it was impossible for the beneficiaries under the will to pay the duty within the time prescribed by the Act. Alternatively, the Minister of Finance contended that the benefit of the order should have been restricted to the executors, and should not have been extended to the beneficiaries who made out no case for the granting of the order.

Held, varying the order of MURPHY, J. (MCQUARRIE, J.A. dissenting), that as the petition was launched at the instance of the executors only, and there was no evidence that the beneficiaries under the will of the deceased were unable to pay the duty, the order extending the time for payment should be restricted to payment by the executors, and should not be extended to include the time for payment by the beneficiaries.

Held, further, that the word "passes" in section 10 (2) of the Act is not restricted to property finally vesting in the beneficiaries upon distribution of the estate.

APPEAL by the Minister of Finance for British Columbia from the order of MURPHY, J. of the 17th of January, 1936, made under section 38 of the Succession Duty Act, whereby he ordered that the time for payment of duty chargeable upon the estate of Helen F. M. Drummond, deceased, be extended until the 18th of May, 1936, and that interest on such duty shall not be chargeable if payment is made previous to that date. Helen F. M. Drummond died in the City of Vancouver on the 19th of April, 1935, leaving a will dated the 28th of December, 1929, and a codicil dated the 26th of June, 1930. On the 4th of

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October, 1935, the executors applied by petition for an order extending the time fixed by law for payment of succession duty and interest on succession duty on the ground that it was impossible for the executors to pay the duty within the time prescribed by the Act, for the reason that they were not able to realize on the assets of the estate to obtain funds with which to pay the duty. The assets of the estate consisted principally of shares of the Bagg Corporation, a private company incorporated in Quebec. There is no market for these shares at the present time, and hence it is impossible for the executors to pay the succession duty.

The appeal was argued at Vancouver on the 19th and 22nd of May, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Craig, K.C., for the Minister of Finance: Under section 38 of the Succession Duty Act the order in question can be made only if the person or persons liable to pay the duty are unable to pay such duties within the time provided by law, owing to some cause over which the person liable has no control. The persons liable to pay the duties under the will are the persons to whom the property passes under the will. The word "passes" in section 10 of the Act is not restricted to cases where the property has vested in the beneficiaries, but includes all property on which the will operates: *Christie* v. *The Lord Advocate*, [1936] W.N. 82. The other sections of the Act support this construction of section 10. Therefore, in order to make out a case for relief under section 38, there must be evidence that it was impossible for the beneficiaries named in the will to pay the succession duties within the time prescribed by the Act, and that such impossibility arose owing to some cause over which the persons so liable had no control. No evidence was offered that the beneficiaries named in the will were unable to pay the duty, and, therefore, there was no jurisdiction to make the order. The only evidence of impossibility to pay the duty was that it was impossible for the executors to pay. There should have been evidence that it was impossible for the beneficiaries to pay.

The executors do not need any protection under section 38 for the reason that they are not liable to pay succession duty until

they have the money in hand. A person who is not presently liable to pay has no need of an extension of time, for the very reason that he is not presently liable to pay. After he has the money in hand to make payment, he has no cause for asking for an extension of time for payment.

Symes, for respondents: The word "passes" in section 10 (2) of the Act is equivalent to the word "vests." The property has not passed or become vested in the beneficiaries and, therefore, the beneficiaries are not persons liable to pay the duty. Any other construction of the Act would lead to great hardship as beneficiaries could be required to pay the duty before receiving the property, and in some cases before they knew whether it was advantageous for them to accept the property.

Craig, in reply: The fact that the powers of taxation confirmed by the Succession Duty Act could be used oppressively is no reason for holding that the power has not been conferred: Clement's Canadian Constitution, 3rd Ed., 481. The hardship suggested by the respondents is not real. There is no intention of compelling the beneficiaries to pay the duty before the money is available out of the estate, but the Crown contends that when money is available, and payment is made out of the estate, interest also should be payable.

Even if the executors are persons liable to pay, and if the order was properly made as to them, the order should be restricted to the executors. As to the beneficiaries, no case was made at all; and as regards them no order should have been made. While the appellant contends that no order should have been made in favour of the executors, the appellant will be satisfied if the order is restricted to the executors. As they are not liable to pay at the present time, not having the money in hand, the order, if so limited, while unnecessary, does no harm.

Cur. adv. vult.

26th June, 1936.

MARTIN, J.A.: Out of deference to Mr. *Symes's* careful argument I have been at pains to examine closely the whole of the statute—Succession Duty Act, Cap. 61, 1934—upon which the question depends, with the result that I find myself so much in

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Martin, J.A.

accord with the judgment of my brother M. A. MACDONALD that I do not think I can profitably add anything thereto.

The appeal will therefore be allowed and the order made below varied so that the direction in question shall be restricted to read as follows:

IT IS ORDERED that the time for payment by the executors of the duty chargeable upon the estate of the said Helen Frances Mitcheson Drummond, deceased, be extended until the 18th day of May, 1936, and that interest on such duty shall not be chargeable against said executors if payment is made before that date.

MACDONALD, J.A.: The executors of the Drummond estate obtained an order from Mr. Justice MURPHY under section 38 (1) of the Succession Duty Act, B.C. Stats. 1934, Cap. 61, extending the time for payment of succession duty and fixing the date from which interest should be chargeable. Time for payment was extended to the 18th day of May, 1936, with interest not chargeable if payment should be made prior to that date. From that decision the Minister of Finance appeals alleging that because of the general terms of the order it affects the obligations of all beneficiaries under the will (although not parties to the application) primarily liable for the payment of the duty.

I think it is clear that all to whom bequests were made by the will are persons "liable for the payment of duty" within the meaning of said section 38 (1) in respect to the property devised or bequeathed. The petition was launched at the instance of the executors and cannot be extended to include the beneficiaries. It was shown on the material filed that payment by the executors within the time and in the manner prescribed by the Act was impossible owing to some cause beyond their control but not that any of the beneficiaries were in a similar position. I think it clear that under section 38 (1) the judge "may make an order" only "where it appears" that this fact is established. For that reason alone the order must be limited to granting relief to the executors. Different facts might be relied upon in an application for relief by the beneficiaries or by any one of them.

Mr. *Symes* submitted that, at this stage, in the administration of the estate, the executors only were liable to pay the duties, the beneficiaries under the will not being "liable for payment" until

their interests vested. I cannot agree. Section 10, subsection (2) of the Act reads:

> Every person domiciled or resident in the Province to whom property situate within the Province subject to any duty imposed by this Act passes shall be personally liable for the duty.

The obligation is limited to persons domiciled or resident in the Province. They are personally liable for payment of the duty on any property passing to them by the will. If the word "passed" had been used this contention might be sound, assuming it was not defined in the interpretation section. We have a definition of the word "passing" or "passing on death" in section 2 of the Act. Without quoting it it is clear that it is not restricted to property finally vesting in the beneficiary upon distribution of the estate. The word "passes" is used in other sections of the Act in a sense inconsistent with the view that it means a vested interest.

It was submitted that the Legislature could not have intended that the beneficiaries should be liable to pay the duty before they received the property or money upon which the tax is levied, as it might later transpire from various causes that their shares might disappear or their value be diminished. By section 11 however the duties are made payable at the death although in working out the Act and in the administration of the estate it is not, I assume, demanded (or in fact ascertained) at that time. The beneficiaries are personally liable for payment where the property passes by operation of the will even though it may not be demanded at that time. That is not an unusual feature of certain taxation legislation. My brother MCQUARRIE at the hearing called attention to section 235 of the Municipal Act, B.C. Stats. 1914, Cap. 52. If the Legislature wished to make the duty due and payable before vesting or before the amount is ascertained it might do so if apt words are used. That has been done. The only practical question involved of course is the payment of interest.

The primary liability for the payment of succession duties now rests on the beneficiaries with the executors secondarily liable. The latter by section 29 are no longer personally liable except that they may be required to pay the duty out of the estate and if they failed to do so may be sued in their representa-

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tive capacity for the amount of the duty and any judgment recovered against them may be realized out of the property in their hands belonging to the estate. In respect to that secondary liability the executors may, if for reasons beyond their control they cannot arrange for payment in the time required by the Act, make an application under section 38 for an extension. There is no reason why it should not be held that the executors should have the benefit of this section although not personally liable and be in a position under it to petition for an extension of time. There is equally no reason why the persons primarily liable, *viz.*, the beneficiaries (or any one of them) should not also in a proper case take advantage of this section but if they do so compliance with the provisions of the section must be insisted upon by showing that payment is impossible from causes beyond his or their control. It is only when this is done that the judge has power to make an order. That was done in this case only in so far as the executors were concerned and the order should be restricted accordingly.

MCQUARRIE, J.A.: I cannot agree with my learned brothers that the order appealed from should be amended as suggested in their reasons for judgment.

The facts are not in dispute and practically the only question in dispute is whether the order extending time for payment of succession duty and also the date when interest shall be chargeable should be limited to duty payable by the executors or to apply to the whole amount of succession duty payable in British Columbia in connection with this estate. It seems to me that an anomalous situation would be created if it were held that on the application made by the executors such extension should apply to an undetermined portion only of the succession duty. The executors apparently have in view section 27 of the Succession Duty Act which provides a logical method for taking care of payment of succession duty.

I would dismiss the appeal.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *H. R. Wade.*

Solicitors for respondents: *Robertson, Douglas & Symes.*

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Prohibition—County Court—Interest in assets of a company—Action for declaration as to—Jurisdiction—Appeal.

The plaintiff recovered judgment in an action in the County Court in which he claimed he was entitled to a one-third interest in the assets, profits, business and goodwill of the defendant company. The defendant appealed to the Court of Appeal from this judgment, and while the appeal was pending he applied for an order *nisi* that a writ of prohibition issue, directed to the judges and officers of the County Court and the plaintiff, to prohibit them from further proceeding in the action, on the ground of want of jurisdiction. The application was dismissed.

Held, on appeal, affirming the decision of McDONALD, J., that there is no authority to support the view that after an appeal has been invoked to another tribunal which can afford complete relief, prohibition can be resorted to by the appellant so as to defeat his own invocation.

APPEAL by defendants from the order of McDONALD, J. of the 23rd of October, 1935, dismissing the defendants' application for an order *nisi* that a writ of prohibition issue to ELLIS, Co. J. and the plaintiff to prohibit them from further proceeding in the action on the ground that the Court has no jurisdiction to hear the action. The plaintiff in his plaint issued in the County Court, claimed to be entitled as against the defendants to a one-third interest in the assets, profits, business and goodwill of the defendant company. A dispute note was filed, the action proceeded to trial, and judgment was given declaring the plaintiff the owner of and entitled to a one-third interest in the assets, profits, business and goodwill of the defendant company. It was held that it appeared from the plaint and judgment that the County Court judge may have jurisdiction to hear and determine the case, and it is not to be assumed that he exceeded his jurisdiction.

The appeal was argued at Vancouver on the 26th and 27th of November, 1935, before MARTIN, McPHILLIPS and McQUARRIE, JJ.A.

J. A. MacInnes, for appellants: It must be shown on the face of the proceedings in an inferior Court that there is jurisdiction:

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see *Peacock* v. *Bell and Kendal* (1666), Saund. 73; *Beaton* v. *Sjolander* (1903), 9 B.C. 439; *Mayor, &c., of London* v. *Cox* (1867), L.R. 2 H.L. 239; *Farquharson* v. *Morgan* (1894), 70 L.T. 152; *Rex* v. *Cheshire County Court Judge and United Society of Boilermakers,* [1921] 2 K.B. 694; *Simpson* v. *Crowle,* [1921] 3 K.B. 243; *De Vries* v. *Smallridge,* [1928] 1 K.B. 482. The plaint must disclose the subject-matter showing it is within the jurisdiction. It must disclose a money claim. When there are several claims, some over the jurisdiction and some under, prohibition will lie as to those over the jurisdiction and the Court may proceed as to the others: see *Lush* v. *Webb* (1665), 1 Sid. 251; 82 E.R. 1088; *Read* v. *Chapman* (1732), 2 Str. 937; *Re Walsh* (1853), 1 El. & Bl. 383; *Reg.* v. *The County Court Judge of Westmoreland* (1887), 58 L.T. 417; *South Eastern Rail. Co.* v. *Railway Commissioners, &c.* (1881), 50 L.J. Q.B. 201 at p. 213; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 822, note (*r*). That there is no prohibition when the applicant has the alternative right of appeal see *Barker* v. *Palmer* (1881), 8 Q.B.D. 9 at p. 11. This is not against us: see *Sweetland* v. *The Turkish Cigarette Company* (1899), 80 L.T. 472; *Turner* v. *Kingsbury Collieries, Ld.,* [1921] 3 K.B. 169; Short & Mellor's Crown Office Practice, 3rd Ed., 256; *Mahomed Abdul Cader* v. *Kaufman,* [1928] W.N. 264; *In re Wingate's Patent,* [1931] 2 Ch. 272. That prohibition will lie see *Rex* v. *North,* [1927] 1 K.B. 491; *White* v. *Steel* (1862), 31 L.J. C.P. 265; *Beaton* v. *Sjolander* (1903), 9 B.C. 439 at 441; *In re Nowell and Carlson* (1919), 26 B.C. 459; *Neary* v. *Credit Service Exchange* (1929), 41 B.C. 223; *Chesterton* v. *Farlar* (1838), 7 A. & E. 713; *Hallock* v. *The University of Cambridge* (1841), 9 D.P.C. 583; *Taylor* v. *London Life Insurance Co.* (1934), 43 Man. L.R. 97; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 823, sec. 1398.

J. A. Russell, for respondent: There is only $300 at stake. It was ordered that accounts be taken. They appealed from the judgment, and after the appeal they applied for prohibition. There must be a material matter involved or prohibition will not lie: see *Butterworth* v. *Walker* (1765), 3 Burr. 1689; *Ellis* v. *Fleming* (1876), 1 C.P.D. 237 at p. 241. Want of jurisdiction

must be clear: see *In re Birch* (1855), 15 C.B. 743. The writ will not be granted when an amendment is sufficient: see *Blunt* v. *Harwood* (1838), 8 A. & E. 610. The remedy here is an appeal, and it could be referred to the Supreme Court: see *Foster* v. *Foster* (1863), 32 L.J. Q.B. 312 at p. 314; *Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424; *Elston* v. *Rose* (1868), L.R. 4 Q.B. 4. They submitted to the jurisdiction in their dispute note: see *Dutens Clerk* v. *Robson* (1789), 1 H. Bl. 100; *The Skipton Industrial Co-operative Society (Limited)* v. *Prince* (1864), 33 L.J. Q.B. 323.

MacInnes, in reply, referred to *Serjeant* v. *Dale* (1877), 2 Q.B.D. 558; *Buggin* v. *Bennett* (1767), 4 Burr. 2035.

Cur. adv. vult.

On the 14th of January, 1936, the judgment of the Court was delivered by

MARTIN, J.A.: We are all of the opinion that this appeal should be dismissed, for the primary reason (which was, strangely, not brought to the attention of the learned judge below) that the application to prohibit proceedings on the judgment of the County Court was not made to him until after an appeal from that same judgment had been launched to this Court, and after a diligent search we have not been able to find any authority to support the view that, after a litigant has invoked the appellate jurisdiction of a tribunal that can afford complete relief, prohibition to another Court can be resorted to by the appellant so as to defeat his own invocation.

Appeal dismissed.

Solicitors for appellants: *Fleishman & MacLean.*
Solicitor for respondent: *E. N. Rhodes Elliott.*

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March 30; May 19.

GIBSON v. B.C. DISTRICT TELEGRAPH AND DELIVERY COMPANY LIMITED, AND PETTIPIECE.

Negligence—Damages—Master and servant—Negligence of servant—Scope of employment—Liability of master—Servant riding bicycle home for lunch after delivery of messages—Runs down pedestrian at crossing.

P., a messenger boy of the defendant company, after delivering a number of messages on his bicycle, telephoned the dispatcher at the defendant company's office for leave to go home for lunch, which was granted. On his way home he ran into the plaintiff, an old man, who had started across an intersection. When about one-third of the way across the plaintiff saw P. on his bicycle about 120 feet to his right. He thought he could get across ahead of the boy and accelerated his speed, but when nearly across P. struck him. He was knocked over and suffered severe injuries. In an action for damages judgment was given for the plaintiff against both defendants.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. as against P. but allowing the company's appeal, that as at the time of the accident the messenger boy was not acting in the course of his employment therefore the company was not responsible.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 30th of November, 1935, in an action for damages for personal injuries sustained owing to the negligence of the defendants. On the 14th of December, 1933, the plaintiff, who is 68 years old, was walking south on the west side of Cambie Street and approaching Robson Street in the City of Vancouver. He proceeded to cross Robson Street, and when nearly across he was struck by a bicycle ridden by the defendant Pettipiece, a boy eighteen years of age, who was going easterly on Robson Street. The plaintiff said he saw Pettipiece at the lane to the west when he started to cross, but did not look again to his right. The plaintiff said that when about seven feet from the south curb he suddenly saw something on his right and close to him, and he suddenly bounded forward to get to the curb. Pettipiece claims that the plaintiff ran into him by suddenly bounding forward to get to the curb. Pettipiece was travelling at about six miles an hour. The plaintiff suffered a broken collar bone and a fractured wrist and Pettipiece had two ribs

broken. Pettipiece was employed by the defendant the B.C. District Telegraph and Delivery Co. Ltd., and just previous to the accident had made a last delivery at Fraser's on Granville Street and then 'phoned the dispatcher at the defendant company's office for leave to go home for lunch, which was granted, and on his way home the accident occurred. Judgment was given against both defendants for special damages $785, and $900 general damages.

The appeal was argued at Vancouver on the 30th of March, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

McCrossan, K.C., for appellants: The boy was riding on his bicycle west on the south side of Robson Street at about six miles an hour. The plaintiff was going south on the west side of Cambie Street. When he was crossing Robson and reached about 10 feet from the south curb he saw the boy on his bicycle to his right, but instead of stopping he bounded forward in a run and ran into the bicycle. It was entirely his fault, as had he continued at the same pace as previously the boy would have passed in front of him. The boy was taken by surprise in the plaintiff suddenly bounding forward and could not then avoid him: see *Biehm* v. *Hands* (1922), 22 O.W.N. 35; *Seiden* v. *Pinkerton* (1926), 31 O.W.N. 325; *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150 at p. 153; *Battistoni* v. *Thomas* (1931), 44 B.C. 188. The accident occurred when the defendant Pettipiece was acting outside the course of his employment. He had finished his work and by leave of his employers was going home for his lunch: see *Battistoni* v. *Thomas,* [1932] S.C.R. 144 at p. 148. Absence on leave is an interruption of the employment: see *Charles R. Davidson and Company* v. *M'Robb or Officer,* [1918] A.C. 304 at p. 319; *St. Helens Colliery Co.* v. *Hewitson,* [1924] A.C. 59 at p. 71; *Rayner* v. *Mitchell* (1877), 2 C.P.D. 357; *Mitchell* v. *Crassweller* (1853), 13 C.B. 237; *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; *Halperin* v. *Bulling* (1914), 6 W.W.R. 872 at pp. 873-4, affirmed 50 S.C.R. 471 at p. 474; *Sanderson* v. *Collins,* [1904] 1 K.B. 628 at p. 632; *Williams* v. *Jones* (1865), 3 H. & C. 600 at p. 611; *Harringston* v. *Shuttleworth & Co. Ltd.* (1931), 171 L.T. Jo. 71; *File* v. *Unger* (1900),

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27 A.R. 468 at p. 472; *Lyon and Lyon* v. *Noble Farms Ltd.*, [1935] 3 W.W.R. 582 at p. 587; *Aitchison* v. *Page Motors, Limited* (1935), 52 T.L.R. 137.

Gordon M. Grant, for respondent: The plaintiff was a pedestrian. It was Pettipiece's duty to avoid him and he was responsible in attempting to pass in front of the plaintiff. The plaintiff had the right of way: see *James* v. *Piegl* (1932), 46 B.C. 285. Pettipiece was acting in the course of his employment. Even if it is true he was going for his lunch, he was not going on "a frolic of his own" but was still in the course of his employment: see *Joel* v. *Morison* (1834), 6 Car. & P. 501; *Mitchell* v. *Crassweller* (1853), 13 C.B. 237; *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422; *Burns* v. *Poulson* (1873), L.R. 8 C.P. 563; *Battistoni* v. *Thomas* (1931), 44 B.C. 188; [1932] S.C.R. 144; *Harringston* v. *Shuttleworth & Co. Ltd.* (1931), 171 L.T. Jo. 71; *Wegener* v. *Matoff* (1934), 49 B.C. 125.

McCrossan, replied.

Cur. adv. vult.

19th May, 1936.

MARTIN, J.A.: We are all of opinion that the appeal by Pettipiece should, beyond doubt, be dismissed, but that of the defendant company should be allowed.

Putting my own views shortly they are, as regards the company, that at the time Pettipiece, its messenger boy, injured the plaintiff he was not in its employment and therefore it is not responsible for his actions. He had got leave from duty during his mid-day meal hour, and while riding his bicycle on that occasion, going on his own business and his own affairs (to his own home or otherwise makes no difference) he ran into the plaintiff.

The cases in support of this view are very many so I shall only cite some of the leading ones, and the first I refer to is *Gilbert* v. *Owners of the "Nizam"* (1910), 3 B.W.C.C. 455 in which Cozens-Hardy, M.R. said p. 459:

> This is a simple case where a man has been to his own home to get his dinner, and has met with an accident on his way back to the scene of his labours. That question has been raised and decided against the workman, not once, but again and again by this Court.

And Farwell, L.J. said, p. 460:

> . . . it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else.

Then in *Edwards* v. *Wingham Agricultural Implement Company, Limited*, [1913] 3 K.B. 596, an employee was killed by a motor-lorry while riding a bicycle provided by his employers for his optional use but while on his way home after his work was done, and it was held by the Court of Appeal that the accident did not arise in the course of his employment.

Then in *Murdoch* v. *Consolidated Mining & Smelting Co. of Canada*, [1929] S.C.R. 141, the Supreme Court of Canada unanimously reversed a decision of this Court, wherein the facts were much more favourable to the plaintiff than the present ones as regards the employee: and the decision of the Irish High Court of Justice in *Butler and O'Loughlin* v. *Breen*, [1933] I.R. 47 is founded on similar reasoning.

And fortunately there are two decisions of the English Court of Appeal within the last few weeks which I have found and are now reported in the current Times Law Reports, *viz.*, *Alderman* v. *Great Western Railway Company* (1936), 52 T.L.R. 404; and *Knowles* v. *Southern Railway Company* (1936), *ib.* 465. They dispel any possible doubt which might arise, and the first one is specially in point because the employee was, as here, subject to be called on in case of emergency during his absence on leave on his own affairs, nevertheless he was held disentitled to recover for an injury suffered during that time of absence.

MACDONALD, J.A.: This is an appeal from the judgment of the Chief Justice of the Supreme Court awarding damages to the respondent for injuries received when struck by a bicycle ridden by the appellant Pettipiece, an employee of the appellant company said to be acting in the course of his employment at the time of the accident.

The finding of negligence on the part of Pettipiece in running into the respondent at a street intersection should not be disturbed. The pedestrian was about one-third of the way across the intersection when he observed Pettipiece on his bicycle approaching from the right at a distance of 122 feet. On that state of facts alone the respondent, having substantially entered

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upon the intersection should have been permitted to pass. Further, as stated by the respondent, when he was within six or seven feet of the curb, almost safely across, Pettipiece was "coming straight for me and very fast." The appellant Pettipiece should not, by fast driving when close to the pedestrian create confusion in the minds of both. On all the facts therefore, viewed as we should regard it on appeal, I can not say that there is not sufficient evidence to justify the finding.

A serious question is raised by the submission that as Pettipiece (a messenger in the employ of the appellant Telegraph Company) was on his way home to lunch when the accident occurred he was not at that time acting within the scope of his employment or in the discharge of any duty contractual or otherwise to his employer.

On this point all the evidence and proper inferences to be drawn therefrom are important as each case depends upon its own facts. It may be that many details as to the nature and extent of the control exercised by the master over the employee during the noon hour were not elicited at the trial. Pettipiece was sent by his employer the B.C. District Telegraph and Delivery Co. Ltd., to deliver a parcel and was obliged to take back to the company's office (within I assume a reasonable time) a receipt as proof of delivery. On his return from the errand but before completing it by turning in the receipt, he telephoned to the proper official of the company for permission to go home for lunch at that time. It was, as stated, while going home on his bicycle that the accident occurred. If this is merely a case of a workman causing injury to another while on his way to lunch without any effective control being exercised over him at that hour it is free from difficulty. In *Gilbert* v. *Owners of the "Nizam"* (1910), 3 B.W.C.C. 455, Cozens-Hardy, M.R., discussing the alleged liability of the employer where the workman was killed on returning to the ship from dinner, said at pp. 458-9:

> Under these circumstances and on these facts, I think that, if this decision is to stand, every workman in any employment will be entitled to claim the benefit of the Act if any accident happens to him on his way from home towards the factory or any other place where he is employed. I decline to assent to the view that a ship is in a different position from a factory for

this purpose. This is a simple case where a man has been to his own home to get his dinner, and has met with an accident on his way back to the scene of his labours. That question has been raised and decided against the workman, not once, but again and again by this Court.

In the case at Bar there is evidence of control during the luncheon period; whether or not it is sufficient to take the case out of the scope of the principles referred to is the question for determination.

Farwell, J., at pp. 459-60 said:

> The workman has to prove that the accident arose out of as well as in the course of his employment. The necessity for food no more arose out of his employment than the necessity for sleep. The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment (as I have explained in *Gane* v. *Norton*, [1909] 2 K.B. at p. 545; 2 B.W.C.C. 42), notwithstanding that (and not because) he was eating his dinner, but it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else. Unless the words "out of his employment" are struck out of the Act, this decision cannot stand. If any authority were needed it is to be found in *Bender* v. *Owners of S.S. "Zent" (supra)* and *Marshall* v. *Owners of S.S. "Wild Rose" (supra)*.

We, of course, are not concerned with interpreting and applying the words of a statute but (without discussing it in detail) the same principles in a general way are applicable.

Again Cozens-Hardy, M.R., in *Edwards* v. *Wingham Agricultural Implement Company, Limited,* [1913] 3 K.B. 596 at pp. 599-600, said:

> It has been laid down again and again by this Court, and I should be very sorry to think there was any doubt about it, that the protection given by the Act to a workman does not extend to his going to and from his work, unless there are some special circumstances. Take a concrete case. When a number of men are leaving factory gates to go through the streets to their homes half a mile or a mile away, they are not within the protection of the Act. On the other hand the terms of the contract of employment may be such as to define not only the rights but also the obligations of the workman and satisfy the Court as to the time at which the employment begins and ends.

It is only because of "the terms of the contract" in relation to the lunch hour and the "special circumstances" that the case at Bar may, if at all, be taken out of the principles laid down in this decision.

It is true there is some evidence of control during the luncheon period and possibly more might have been disclosed by a more

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detailed examination of the witnesses. Pettipiece had to secure permission to go to lunch at that hour. The inference from this is that the employer controlled his employee's movements at that time. He might have refused permission. If for example, some parcel arrived after permission to go to lunch had been given, the employer (if he could reach him) might, I think, withdraw it and order Pettipiece to return and deliver it.

The general practice was to allow delivery boys to take a half hour for lunch but when it should be taken (within I assume reasonable limits) was within the control of the employer. "It is the usual request for a boy to make" the company's dispatcher testified "before he goes home for lunch to 'phone me and ask me if he could go home to lunch." The nature of the employer's business where messages or parcels might arrive for delivery at any moment made it of commercial value to control the actions of employees at and during the lunch hour. His employer answered in the affirmative this question "You do exercise control in special circumstances as to whether he should go for lunch at one hour or another." It may not be going too far to suggest as an inference from the evidence that if at the moment of the accident or immediately preceding it Pettipiece had been directed by the employer through another messenger to turn back and deliver another parcel he would be obliged to do so. However it is not fair to be placed in the position of having to draw inferences where direct evidence on the point might have been obtained. It is, at all events, clear that the employer could so control the employee's actions (as to the lunch hour) that he might be compelled to advance or postpone it the better to enable him to perform the master's business. If it could be postponed before the employee started to go to lunch it may be reasonable to infer that it might also be postponed or interrupted during the course of the journey home. It was of great advantage to the employer to be able to exercise that control to suit the exigencies of a special kind of business.

There is another feature. In a report made by the appellant company to the Workmen's Compensation Board after the accident, the following questions and answers appear:

What was the workman doing at the moment of the accident? Making delivery of parcels.

Was it for the purpose of your business? Yes.
Was it part of his regular work? Yes.

Whatever may be said as to the weight that ought to be given to this evidence (and I do not think it of any special value as a point of law is involved) it was, I think, admissible.

As against the inferences drawn from the foregoing evidence another incident should be considered. Pettipiece was asked if he had "any purpose in going home that day." He said— to quote his evidence—that he had "a special reason to go home other than eating," *viz.*, "I was to go home to my sister—I was to take the car over to my sister and bring it back." That is all the evidence on this point. It is relied upon to show that because of this additional reason for going home the link was broken and the master relieved from liability for the negligence of Pettipiece while on an errand in part at least concerned with a trifling service to his sister. I am inclined to regard the incident as too trivial to form a basis for the submission referred to. If, for example, Pettipiece promised to perform an errand for his sister at 12.30 and permission to go to lunch at that hour was withheld he would not be able to perform it. It was a gratuitous act to be performed only if free to do so by the conditions of his employment.

I have gone as far as possible in drawing inferences from the evidence favourable to the respondent as a basis for a discussion of the law applicable thereto. Because of similarity in the facts and circumstances in so far as the principles applicable are concerned possibly the greatest assistance may be derived from a perusal of the reasons in *Murdoch* v. *Consolidated Mining and Smelting Company* (1928), 39 B.C. 386. The decision of this Court on the point under review was reversed by the Supreme Court of Canada, [1929] S.C.R. 141. Later leave to appeal was granted by the Judicial Committee but because of a settlement the appeal was not prosecuted. The judgment therefore of the Supreme Court of Canada must be regarded as final on similar facts or on facts so nearly alike that reasonably the decision should be applied.

The facts in that case are outlined in reasons for judgment in 39 B.C. 386 and in the decision of the Supreme Court of

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CO. LTD.
AND
PETTIPIECE

Macdonald,
J.A.

Canada. It will be found upon perusal that a measure of control was there exercised by the company over the employees' manner and method of living. The company supplied the men with tents and cooking utensils. It was said too at p. 394 that "the lighting of the fire at the point in question was a necessary operation to enable them [*i.e.*, the employees] to carry on the work to the best advantage in their employer's interest" just as in the case at Bar it is submitted that it was for the benefit of the appellant company herein to control the employees during the lunch hour, at all events to the extent of controlling the hour at which lunch might be taken. I was of opinion on all the facts that the manner in which the employees lived, including sleeping and eating affected the main purpose of the employment or at all events a purpose incidental to it. That view, however, must now be regarded as erroneous.

The late Mr. Justice Lamont in the *Murdoch* case referred for general principles to *St. Helens Colliery Co.* v. *Hewitson*, [1924] A.C. 59. The reasons for judgment therein may be read with profit although unlike the case at Bar the wording of the familiar clause in the Workmen's Compensation Act was considered. As Lamont, J., referred to it with approval it may be of assistance to point out in considering the scope of the *Murdoch* decision that Lord Wrenbury at p. 91 speaking of the fact that the accident need not arise when the worker is actually engaged in the manual labour he was employed to perform (*e.g.*, a miner need not be using his pick) said: "He may be going down in the cage. He may be resting between shifts. He may be taking a meal," and even that latter act might be "incidental to the employment." And again at p. 92, giving an example of a case within the Act His Lordship said:

> If, for instance, the employer says [to the employee] "Go by the 9.45 train to Manchester and there do such and such a job" the employer is on the risk directly the man goes, as he is ordered.

Is there any similarity between that illustration and the case at Bar where the employer in effect said on the day in question:

> Go to lunch at this time [shortly before 12] in order that you may better perform your duties on my behalf.

Further, it may be said that Pettipiece was where he was at the time of the accident in consequence of his employment: in other

words if he had freedom of action in selecting his own hour for lunch or in going at the usual or at a uniform hour, *e.g.*, 12 o'clock, he would not, in all likelihood, be at the point where the accident occurred at the time in question. It was because of the exigencies of the business that he was there at that hour. Again the assumption of obligations may be part of the terms of the employment and the obligation assumed was to go to lunch at the time selected by the master.

However, I think it follows, in view of the decision by the Supreme Court of Canada with its analogous features, we must conclude as in that case that the employer was not responsible for the negligent acts of Pettipiece at the time in question.

The appeal should be allowed and the judgment set aside in so for only as it affects the appellant company.

MCQUARRIE, J.A.: I would dismiss the appeal as against the defendant Pettipiece and allow the appeal of the defendant company.

Appeal allowed in part.

Solicitor for appellants: *J. A. Campbell.*
Solicitor for respondent: *Gordon M. Grant.*

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THORNE v. COLUMBIA POWER COMPANY LIMITED.

March 3, 10.

Practice—Motion by judgment creditor to sell interest in land—Order dismissing—Appeal—Whether order final or interlocutory—R.S.B.C. 1924, Cap. 83, Secs. 38, 40 and 42.

The plaintiff's action was dismissed with costs. After taxation of the costs a motion by the defendant as judgment creditor under section 38 of the Execution Act for an order for the sale of the judgment debtor's interest in certain lands was dismissed on the 17th of December, 1935. The judgment creditor served notice of appeal on the 17th of January, 1936. On motion by the judgment debtor to the Court of Appeal:—

Held, that the order is interlocutory, the notice of appeal was delivered out of time, and the appeal should be quashed.

MOTION by respondent (plaintiff) to the Court of Appeal for an order quashing the appeal. The plaintiff brought action against the defendant company in the County Court of Prince Rupert. The action was dismissed with costs and the costs were taxed at $244.35. The defendant then applied for an order for the sale of the interest of the plaintiff in certain lots in the townsite of Smithers, Prince Rupert Land Registration District, in execution, to satisfy the judgment. The application was dismissed with costs by FISHER, Co. J. on the 17th of December, 1935. The defendant appealed from this order, the notice of appeal being served on the 17th of January, 1936.

The motion was argued at Vancouver on the 3rd of March, 1936, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

S. S. Taylor, K.C., for the motion: This was a proceeding under the Execution Act, and an application under section 38 of that Act was only a step in the proceedings: see *Blakey* v. *Latham* (1889), 43 Ch. D. 23; *Mainland Potato Committee of Direction* v. *Tom Yee* (1931), 43 B.C. 453; *Salaman* v. *Warner* (1891), 60 L.J.Q.B. 624; Annual Practice, 1936, p. 1280.

Bull, K.C., contra: The only question is whether this order is final

or interlocutory. Our rights are final and determined: see *Bozson* v. *Altrincham Urban Council,* [1903] 1 K.B. 547. It is a proceeding under the statute and final: see *Chilliwack Evaporating & Packing Co.* v. *Chung* (1917), 25 B.C. 90; [1918] 1 W.W.R. 870. They follow the English practice: see *Bank of Vancouver* v. *Nordlund* (1920), 28 B.C. 342; *Downes* v. *Elphinstone Co-operative Association* (1924), 35 B.C. 30; *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386 at p. 388; *Isaacs & Sons* v. *Salbstein,* [1916] 2 K.B. 139.

Taylor, replied.

Cur. adv. vult.

On the 10th of March, 1936, the judgment of the Court was delivered by

MARTIN, J.A.: The respondent moved to quash this appeal on the ground that it was out of time because it was an interlocutory appeal, not a final one, as submitted by the appellant. We are all of the opinion that the objection is a good one. Our brother MCPHILLIPS unfortunately is unable to be with us today, but has authorized me to say that he agrees with us. In brief the question is as to whether an order made under section 38 of the Execution Act, Cap. 83, R.S.B.C. 1924, on a motion by the judgment creditor to show cause why any land, or the interest therein, of the judgment debtor, affected by the registration of the certificate of judgment in the Land Registry office should not be sold in the usual way as the Act directs, is an interlocutory order.

Now I do not propose to say anything at large on the question of what is, or is not, an interlocutory order. In this I follow the decision of this Court, which I happened to pronounce, in the case of the *Chilliwack Evaporating & Packing Co.* v. *Chung,* [1918] 1 W.W.R. 870 (I pause here for a moment to say that the case is reported tentatively in (1917), 25 B.C. 90, but the final and full report is the one I am reading) wherein we adopted the language of the Master of the Rolls, Cozens-Hardy, in *In re Page. Hill* v. *Fladgate,* [1910] 1 Ch. 489 at 491, *viz.:*

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I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order, I leave that to others. The only point we have to decide here is whether the order in this particular case is an order which must be appealed against within the time limited for appeals from interlocutory orders.

And in *Norton* v. *Norton,* cited on the same page (1908), 99 L.T. 709, the same learned Master of the Rolls also gave that warning, Moulton and Farwell, LL.J. agreeing, and I always intend to follow it till we are clearly overruled.

The decision in the *Chilliwack Co.* case was the unanimous decision of this Court. I make that observation because other cases, in this Court in particular, were carefully discussed by the appellant's counsel, Mr. *Bull,* particularly, *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386, wherein, as the learned counsel pointed out, there are some expressions by our learned Chief Justice which are not in accord with the previous decisions of this Court, but I do not think it necessary on this occasion to say anything about those observations for two reasons: the first of which, and a personal one, is that while as it is stated in the report of the case, I sat therein, yet there is a note there that I did not take part in the judgment, which is true. The reason for that is because there was an oversight, entirely undesigned, by which I was not notified of the intention to deliver our judgment and so by an accident it was delivered in my absence and without my knowledge. There was no intention of doing this, it was simply a regrettable oversight, but it did not permit me to join in the full discussion of that case as I wished to do. Therefore, for that reason it is left open to me to review that decision in case it is necessary to do so.

The second reason is that it is not at present necessary to do so because, fortunately, we have a decision of this Court which, as I regard it, is conclusive in principle upon the point before us, *viz., Mainland Potato Committee of Direction* v. *Tom Yee* (1931), 43 B.C. 453, which is upon this very statute—Execution Act—and relates to the seizure of personal property by the sheriff, and this Court there held, my brother MCPHILLIPS and I dissenting, that an order made by a County Court judge refusing to set aside a warrant of execution to the sheriff to seize and

sell goods to satisfy a judgment for costs (p. 455) is an interlocutory order. Although I had the misfortune to differ from my learned brothers, their judgment is nevertheless binding upon me, and I loyally observe it, and it applies in principle exactly to this case, because if an order made authorizing the sale of personal property under the Execution Act is an interlocutory order, then it follows that an order made under the same Act for the sale of real property must be of the same nature, and I see no escape from the implications of that judgment. It proceeds upon the same basis, as being in effect the working out of the judgment of a Court, and if that is so, there is no doubt that it is interlocutory.

It should be noted that the unsatisfactory state of the English appellate decisions is pointed out by Pickford, J., in *Isaacs & Sons* v. *Salbstein,* [1916] 2 K.B. 139, at 148.

It follows that the objection must be sustained and the appeal quashed.

Appeal quashed.

Solicitors for appellant: *Griffin & Freer.*

Solicitors for respondent: *Williams, Manson, Brown & Harvey.*

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March 4;
April 14.

IN RE ESTATE OF EDWARD H. LINEKER, DECEASED.

JOHNSTON *ET AL.* v. LINEKER *ET AL.*

Estate—Intestate—Distribution—Brother—Nephews and nieces of the half-blood—Brothers and sisters of half-blood to share equally with those of whole blood—Appeal—R.S.B.C. 1924, Cap. 5, Secs. 116 and 119—B.C. Stats. 1925, Cap. 2, Sec. 4.

The father and mother of an intestate predeceased him. His mother by her first husband had three children, all of whom predeceased the intestate, each of them leaving issue surviving the intestate. The mother by her second husband had four children, namely, the intestate and three others, two of whom predeceased him without issue and the third, a brother, surviving him. On originating summons to determine what persons were entitled to the real and personal estate of the intestate it was held that the brothers and sisters of the half-blood inherit equally with those of the whole blood, and the real and personal estate should be divided one-quarter to the brother and three-quarters to the nephews and nieces of the deceased.

Held, on appeal, affirming the decision of ROBERTSON, J., that the learned judge below had reached the right conclusion and the appeal should be dismissed.

APPEAL by defendant F. V. Lineker from the decision of ROBERTSON, J. of the 31st of January, 1936 (reported *ante*, p. 378), on an originating summons to determine what persons were entitled to the real and personal estate of E. H. Lineker, deceased, who died intestate on the 27th of February, 1935. The intestate's father and mother predeceased him. His mother by her first husband had three children, all of whom predeceased the intestate, and each of them left issue surviving the intestate. The mother by her second husband had four children, namely, the intestate, and three others, two of whom predeceased him without issue and the third, a brother, surviving him. It was held on the trial that the brothers and sisters of the half-blood inherit equally with those of the whole blood and the real and personal estate should be divided, one-quarter to the brother and three-quarters to the nephews and nieces of the deceased.

The appeal was argued at Vancouver on the 4th of March,

1936, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

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IN RE ESTATE OF EDWARD H. LINEKER, DECEASED.

JOHNSTON v. LINEKER

Stuart Henderson, for appellant: The appellant claims the whole estate. The respondents are of the half-blood and are of the third degree. The appellant is of the full blood and of the second degree. Under section 119 of the Administration Act as re-enacted by section 4 of Cap. 2, B.C. Stats. 1925, those of the half-blood inherit equally with those of the whole blood only when they are of the same degree. As a matter of legal construction the word "brother" does not include half-brothers: see *Bridgman* v. *London Life Assurance Co.* (1879), 44 U.C.Q.B. 536. The half-blood should not be inserted into section 116: see *Gwynne* v. *Burnell* (1840), 7 Cl. & F. 572 at p. 696. The words of a statute should never, in interpretation, be added to or subtracted from without almost a necessity: *Cowper Essex* v. *Local Board for Acton* (1889), 14 App. Cas. 153; *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1888), 13 App. Cas. 595 at p. 602; *London and India Docks Company* v. *Thames Steam Tug and Lighterage Company, Limited,* [1909] A.C. 15 at p. 23; *Saloman* v. *Saloman & Co.,* [1897] A.C. 22 at p. 38; *Williams* v. *Permanent Trustee Company of New South Wales, Limited,* [1906] A.C. 249; *Courtauld* v. *Legh* (1869), L.R. 4 Ex. 126 at p. 130; *The City of Ottawa* v. *Hunter* (1900), 31 S.C.R. 7 at p. 30; *Richards* v. *McBride* (1881), 8 Q.B.D. 119 at p. 123. If a matter is omitted from a statute it cannot be added to: see *In re Sneezum, Ex parte Davis* (1876), 3 Ch. D. 463. In *Wells* v. *Wells* (1874), 43 L.J. Ch. 681, Jessell, M.R. held that nephews and nieces meant full blood and not half-blood.

A. D. Crease, for respondents other than H. E. Griffiths: Section 116 as re-enacted by section 4 of the 1925 Act is sufficient for our purposes. There is no practical difference between land and personalty. *Prima facie* "brothers" and "sisters" include half-brothers and half-sisters and there is nothing to cut down the *prima facie* meaning. Section 116 disposes of the whole question in issue. Where a claimant falls within the specified relationships in sections 112 to 116 his degree of relationship is

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IN RE ESTATE OF EDWARD H. LINEKER, DECEASED.

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immaterial. That "brother" and "sister" include half-brother and half-sister see *Grieves* v. *Rawley* (1852), 10 Hare 63; and *In re Cozens. Miles* v. *Wilson,* [1903] 1 Ch. 138; *In re Wagner* (1903), 6 O.L.R. 680; *Re Adams* (1903), *ib.* 697. The English authorities are of no direct assistance because in England it has long been expressly provided that the half-blood take next after the whole blood, in the same relationship. Our statute has been completely remodelled since the decision in *Kunhardt* v. *Cox* (1930), 42 B.C. 413. On the right of those of the half-blood to share equally see *Burnet* v. *Mann* (1748), 1 Ves. sen. 156; *Jessopp* v. *Watson* (1833), 1 Myl. & K. 665 at p. 672 (note).

Marsden, for respondent H. E. Griffiths: H. E. Griffiths is administratrix of Victor M. Griffiths, deceased, a nephew of Edward H. Lineker, deceased, who survived the said Edward H. Lineker but has since died. The judgment below is right because on the true construction of sections 116 and 119 aforesaid the estate should be distributed between the plaintiff and defendants as set out in the said judgment. The amendment of 1925 in effect re-enacted the provisions of the Statute of Distributions: see Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 603, sec. 877; *Welch* v. *Welch* (1692), Free. C.C. 189; 22 E.R. 1153; *In re Ross's Trusts* (1871), L.R. 13 Eq. 286 at p. 293; *Walsh* v. *Walsh* (1795), Prec. Ch. 53; 24 E.R. 27. There is no distinction between kindred of the whole blood and kindred of the half-blood and this has been the law for 200 years: see *Jessopp* v. *Watson* (1833), 1 Myl. & K. 665; *Grieves* v. *Rawley* (1852), 10 Hare 63; *In re Cozens. Miles* v. *Wilson,* [1903] 1 Ch. 138; *In re Wagner* (1903), 6 O.L.R. 680. In computing the degree of kindred under section 119, the share passing to children of deceased's brothers and sisters originates in their parents who are in the same degree as the surviving brother: see *Re Adams* (1903), 6 O.L.R. 697; *Morrison* v. *Grant* (1929), 41 B.C. 511 at p. 512. The share in an estate vests at the time of the intestate's death, so Victor M. Griffiths had a vested interest in his lifetime: see *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53 at p. 65; *Collins* v. *The Toronto General Trusts Corporation* (1935), 49 B.C. 398, and on appeal, 50 B.C. 122.

Cur. adv. vult.

14th April, 1936. C. A. 1936

IN RE ESTATE OF EDWARD H. LINEKER, DECEASED.

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

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

MACDONALD, J.A.: Substantially for the reasons given by the trial judge I would dismiss this appeal.

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

Appeal dismissed.

Solicitor for appellant: *Stuart Henderson.*

Solicitors for respondents other than Ada W. Hume, Lilian B. Horton and Helen E. Griffiths: *Crease & Crease.*

Solicitor for respondent Griffiths: *P. S. Marsden.*

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Nov. 19.
1936
June 26.

WARREN v. GRINNELL COMPANY OF CANADA LIMITED AND LEGGATT.

Negligence—Automobiles—Two cars travelling in same direction—One attempts to pass—Loss of control—Collision—Overturning of car—Damages.

Two automobiles were travelling in the same direction at from 35 to 40 miles an hour on a hard-surfaced road about sixteen feet wide, with strips of loose gravel from two and one-half to three feet wide on each side. The defendant Leggatt was driving a car owned by his employer, the defendant company. He was overtaking the other car and when nearing it he sounded his horn to pass. The plaintiff turned slightly to the right to let him pass and when Leggatt was six or seven feet behind and to the left of the plaintiff's car his left wheels got into the loose gravel on the left side of the road, causing him to lose control of his car, and he turned back to the right, hitting the left side of the plaintiff's rear bumper. This turned the plaintiff's car, and after sliding a distance it turned over. The plaintiff's arm being out of the window was caught between the car and the pavement and was severely crushed. Leggatt complained that when passing, the plaintiff suddenly turned his car to the left which forced him on to the loose gravel on the left of the road. This was denied by the plaintiff. The jury found that the defendant was guilty of negligence and assessed damages.

Held, on appeal, per MARTIN and MACDONALD, JJ.A., that the jury, after finding the defendant was guilty of negligence contributing to the accident, in answering a question "In what did the negligence consist?" said: "By driving too close to Warren's car, before turning out to pass, thereby necessitating an acute left turn, which took his car to the left shoulder of the highway, causing him to lose control of his car." Nowhere is there any evidence that this occurred. Not only was it not pleaded but it was never put forward in the course of the trial as the real cause of the accident, and there should be a new trial.

Per MCPHILLIPS and MCQUARRIE, JJ.A.: The defendant was guilty of gross negligence, particularly in view of the speed of the two cars when he was attempting in a most careless and negligent manner to pass. The finding of the jury is a reasonable explanation of what happened, there was evidence supporting such finding and it was open to the jury on the pleadings.

The Court being equally divided the appeal was dismissed.

APPEAL by defendants from the decision of ROBERTSON, J. of the 19th of November, 1935, in an action for damages for injuries caused by an automobile accident which occurred on the 19th of August, 1932, on a State highway between Seattle

and Spokane, about two and one-half miles west of the town of Odessa in the State of Washington. At the time of the accident Warren was driving a Ford coupe eastwards towards Spokane with his wife and daughter, and the defendant Leggatt, driving his employer's automobile (Grinnell Company of Canada), *en route* to Nelson, B.C., accompanied by his wife, was going in the same direction and catching up to Warren. Leggatt passed Warren, but a short distance further on Leggatt stopped at the side of the road to look at his tire and Warren passed him. Leggatt then started up again and catching up to Warren gave the signal to pass. Warren went to the right side of the road and Leggatt proceeded to pass at an accelerated speed. When about ten feet behind Warren, Warren suddenly swerved to the left to the centre of the road and in Leggatt's path, which forced Leggatt to turn further to his left, and his left wheels went off the hard portion of the road. At this point the road was straight and there was no other traffic, and the centre of the road was of hard surfaced oil and gravel construction, about sixteen feet wide. Beyond this on each side were shoulders of loose gravel about 3 feet in width. The gravel on each side of the road was soft, and in trying to straighten up to prevent himself going into the ditch Leggatt momentarily lost control of his car. It came out on the hard surfaced portion of the highway, and before he could gain control his right front bumper hit the left rear bumper of Warren's car. The impact caused Warren's car to swing to the left so that it ran into the gravel, and in attempting to pull out of the loose gravel and get his car under control it turned over on its side and slewed across the highway, coming to rest in the ditch on the right side of the road. When the car turned over Warren's arm was outside the window and was crushed between the car and the pavement, causing the injuries for which the claim was made. After the bump Leggatt's car proceeded at the same angle across the highway over the ditch on the right side and into the loose sand and sage-brush, stopping 200 feet beyond the place of contact.

The appeal was argued at Vancouver on the 6th and 9th of March, 1936, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

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J. W. deB. Farris, K.C., for appellant: The accident was on August 19th, 1932, and the writ was issued August 12th, 1935. We allege that the respondent, by suddenly and without warning swerving to the left in the path of our car after moving over to the extreme right-hand side of the highway to allow him to pass, was solely responsible for the accident. It is not denied that Leggatt was forced over into the loose gravel, thus losing control of his car. The jury found the appellant was negligent in driving too close to Warren's car before turning out to pass, thereby necessitating an acute left turn which took his car to the left shoulder of the highway, causing him to lose control. The pleadings make no such assertion as is contained in the jury's finding. Respondent's counsel did not suggest anything of the kind and there was nothing in the charge suggesting an issue involving the facts as found by the jury. Further there is no evidence supporting the finding. It is extremely unlikely that Leggatt in the act of passing would do what the jury has found. The finding should not be accepted because (1) It is a highly improbable suggestion: (2) it was not pleaded; (3) the suggestion was never suggested or considered; (4) there was no evidence offered in its support. See *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; *McKenzie* v. *Chilliwack Corporation*, [1912] A.C. 888; *McTaggart* v. *Powers*, [1926] 3 W.W.R. 513; *Bloudoff* v. *C.N.R.*, [1928] 4 D.L.R. 29.

Lucas, for respondent: The jury believed the evidence of Mr. and Mrs. Warren that Warren did not turn to his left as Leggatt was passing, and this is confirmed by the marks on the pavement: see Cockle on Evidence, 5th Ed., 292; *Browne* v. *Dunn* (1893), 6 R. 67 at p. 70. Leggatt's evidence on his contention that Warren turned to his left when he (Leggatt) was about to pass was not accepted as his evidence on cross-examination was uncertain and contradictory and he eventually admitted he could not disagree with Warren's evidence. The inference drawn by the jury that Leggatt drove too close behind Warren before pulling out was one they were entitled to draw: see Phipson on Evidence, 7th Ed., 650; Cockle on Evidence, 5th Ed., 8; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Burchill* v.

City of Vancouver (1932), 45 B.C. 169; *Scott* v. *Fernie* (1904), 11 B.C. 91; *Rahal* v. *Burnett* (1931), 45 B.C. 122 at p. 127; *Toronto Railway* v. *King,* [1908] A.C. 260 at 269. The judge's charge on contributory negligence was correct: see *Key* v. *British Columbia Electric Ry. Co.* (1930), 43 B.C. 288; [1932] S.C.R. 106 at pp. 108 and 111. There was proper direction to the jury as to the law of the State of Washington: see Salmond on Torts, 7th Ed., 215; Dicey's Conflict of Laws, 3rd Ed., 645; Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 278; *Machado* v. *Fontes,* [1897] 2 Q.B. 231. On the subject of negligence see *Neenan* v. *Hosford,* [1920] 2 I.R. 258 at pp. 308-9. The Court of Appeal will not interfere unless there is substantial wrong: see *Chattell* v. *"Daily Mail" Publishing Company (Limited)* (1901), 18 T.L.R. 165; *Praed* v. *Graham* (1889), 24 Q.B.D. 53 at p. 55; *Errico* v. *B.C. Electric Ry. Co.,* (1916), 23 B.C. 468; *Howard* v. *B.C. Electric Ry. Co.,* [1918] 3 W.W.R. 409; *Mercer* v. *B.C. Electric Ry. Co.* (1931), 43 B.C. 398; *Rahal* v. *Burnett* (1931), 45 B.C. 122 at p. 127; *Winch* v. *Bowell* (1922), 31 B.C. 186 at p. 191; *McTaggart* v. *Powers,* [1926] 3 W.W.R. 513 at p. 523; *Hutcheon* v. *Storey* [1935] S.C.R. 677; *Hessler* v. *Canadian Pacific Ry. Co., ib.* 585.

Farris, replied.

Cur. adv. vult.

26th June, 1936.

MARTIN, J.A.: We have given this matter further consideration. We are pleased to have our brother MCPHILLIPS with us again this morning and we have reached the conclusion that the judgment which on the 14th of April last we directed to be entered should be withdrawn. This we are able to do because it has not yet been entered, and our final conclusion is that the appeal must be dismissed, on an equal division; my brother MCPHILLIPS and my brother MCQUARRIE would dismiss the appeal; my brother MACDONALD and I would allow it.

My reasons for that judgment are that the verdict of the jury proceeds upon a finding of negligence which was not open for them to find upon. That is to say, it is a verdict upon a false issue, an issue which never was raised in the case—which was not raised in the pleadings, which was not raised in the evidence,

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Martin, J.A.

which was not raised in the charge to the jury. So the verdict of the jury is responsive to no aspect of the case. Under such most unusual circumstances the verdict, it is quite apparent to me, cannot stand. I have exercised much diligence in trying to find a case like this, and I have found none that is so striking. The jury find that the accident was caused by the defendant Leggatt

By driving too close to Warren's car, before turning out to pass, thereby necessitating an acute left turn, which took his car to the left shoulder of the highway, causing him to lose control of his car.

This means that he had approached so close to the plaintiff's car that it was improper for him to undertake at all the manœuvre of attempting to pass the plaintiff's car before he began to turn out (to the left) to pass it, as the jury thus recognizes he did do. Now, that is a purely imaginary ground of negligence to support which there is not one single word of evidence in the whole appeal book. There is nothing to show that before Leggatt attempted to pass he got in such close proximity to the plaintiff's car ahead that it was improper for him to attempt to do such a thing; on the contrary, the plaintiff admits that he was watching Leggatt through his rear window as he gradually overtook him and "he sounded a signal to me and I pulled over to give him room to pass . . . ." And again . . . . "I was watching this car behind me because it followed me about 7 miles, and then decided to pass me. He gave me the horn, and I probably gave him two or three feet more [*i.e.*, to the right] than I had" to enable him to do so. And not only this, but in opening his case to the jury the plaintiff's counsel said:

Mr. Leggatt was driving a Pontiac sedan, and was following him, and then proceeded to overtake him, and at a distance back, the usual distance one would say, probably 50 or 60 feet he sounded his horn, that is, Mr. Leggatt sounded his horn to give notice to Mr. Warren he was about to pull out ahead of him.

All this shows beyond question that the manœuvre to attempt to pass was a perfectly proper one and responded to by the plaintiff to enable it to be executed. This is important to understand because I notice that, quite unintentionally doubtless, but quite erroneously, plaintiff's counsel misstated in three places in his *factum*, pp. 3, 7, and 8, that Leggatt came up to within six or seven feet of the plaintiff's car "before turning out to pass,"

which is a serious misstatement of the evidence, because on the contrary, it shows that this approach was after that instead of before, and after the plaintiff had allegedly swerved back into the left towards him, after admittedly first swinging away to the right, *supra,* to let him pass: this inversion of the situation of the later proximity alters the whole complexion of the case and must be rejected.

To illustrate what this jury has done, it might just as well have found that the accident was due to the fact that the defendant's steering-gear was knowingly defective, and therefore it was negligent for him to pass another car, or indeed to "navigate" at all upon a highway with such a defective machine. This issue, therefore, is foreign to the case and has been perversely imported into it, and hence it comes within the decisions followed in the case of *Levy* v. *Milne* (1827), 12 Moore, 418, wherein the Court of Common Pleas in term, consisting of four judges, unanimously set aside a judgment under somewhat similar circumstances, only not so bad, if I may so term it, as these. Lord Chief Justice Best said, p. 421:

> If the judge misdirect the jury, the case may be brought to be reviewed by the Court; so, if the jury decide contrary to law, their verdict may be set aside. If this were otherwise, the trial by jury, instead of a blessing, would become a source of most baneful evil. In the present case, the jury have decided contrary to law, and contrary to the direction of the judge. . . . The jury have taken upon themselves to decide on the law in defiance of the judge, and I am therefore of opinion that the verdict should be set aside.

Herein the jury have acted "in defiance of the judge" by deciding the case on another issue than those he directed them to confine their verdict to.

I pause here to say I agree with my learned brother MCPHILLIPS that the learned judge gave a very full and proper direction. He gave it so perfectly and exactly and stated "the issues of fact which you have to determine" and set forth the conflicting "two clear-cut stories" of the parties with the evidence in support of them, neither of which had any reference to the false issue, that I cannot understand any valid reason at all for the jury departing from his direction.

The Chief Justice proceeds, after pointing out what the duty

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of the Court is where the verdict is contrary to direction (p. 422):

> If, therefore, their verdict be wrong, it ought to be set aside. A different course of proceeding would place the property and characters of the suitors in the power of any arbitrary jury.

And Mr. Justice Park said, p. 422, in language which is entirely appropriate to this case:

> Their verdict was clearly perverse, and it is the bounden duty of the Court to interfere.

And Mr. Justice Burrough said, p. 423:

> Their finding is manifestly contrary to justice. On one occasion, Mr. Justice Buller said, that a jury would not be permitted to find a verdict contrary to the facts of the case. I am of opinion that there should be a new trial.

And Mr. Justice Gaselee, a very sound judge, gave this striking comment upon the situation where the jury departs from the record and decides matters of their own creation:

> The verdict, however, was not the result of a mere misconception on their part. They did not pursue a legitimate course . . .

No course could be more "illegitimate" than to concoct an issue outside the record and course of trial. The reason for such an unwarrantable departure may be because they found difficulty on the conflicting evidence in deciding issues properly placed before them, and so to get round it originated a false issue of their own devising.

Then, fortunately, we have a case in our own Court of *Salter* v. *B.C. Electric Ry. Co.* (1916), 10 W.W.R. 617, where the Chief Justice in giving judgment said, pp. 619-20:

> As regards the defendants the Dominion Creosoting Co. Ltd., we think their appeal must succeed. They are not shown to have had any knowledge of railway business or of the precautions which experience has taught railway companies to take in the handling and disposition of cars. Moreover the negligence attributed by the jury to them was "in moving the cars without the B.C. Electric Company's shunter and crew in attendance with proper facilities." But the moving of the cars in that way did not affect the situation at all. At the time they were tampered with they were standing a short distance from the place where they had been left by the railway company's servants the night before and were braked and blocked in the same manner. It was not their moving of the cars from one position to another which brought about the collision.

And the appeal of that company was allowed and the judgment against it set aside.

This case, indeed, is even stronger than that in favour of the defendant.

Then in the decision of the House of Lords in the well known case of *Banbury* v. *Bank of Montreal*, [1918] A.C. 626 much that is of present assistance is to be found, particularly as regards the course to be adopted in appeal where there is no evidence in support of an issue, which question is one of law, and where the evidence is in conflict on another issue. In the former circumstances their Lordships allowed an appeal from the verdict of the jury finding that a local manager of the bank had authority or duty to advise the plaintiff as to his investments, and therefore it was open to the Court of Appeal to order judgment to be entered for the bank on the ground of no evidence notwithstanding that that issue had not only not been raised at the trial but had been submitted to the jury, p. 628, without objection by the defendant and found against it. In answer to the appellant's (plaintiff) submission that the failure to make the objection at the trial precluded the defendant from raising it on appeal, Lord Atkinson said, pp. 679-80 that the ordinary "admirable and just" rules requiring that to be done

> . . . . have no application whatever to a case like the present, where all the defendants ask for is to get the opportunity to show that the verdict found against them has no proper evidence to support it, and object to be shut out from doing this by the omission of a technical formality.

That view of the matter has been recently followed unanimously by the same tribunal in *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.*, [1935] A.C. 346, also a case of two distinct issues, in the leading judgment delivered by Lord Wright where he says, p. 379:

> I may add that the order of the Court of Appeal on the issue of the licence agreement, not merely setting aside the verdict of the jury, but ordering judgment to be entered upon it, was in my opinion justified under Order LVIII., r. 4. That course was followed in *Banbury* v. *Bank of Montreal*, where the verdict of the jury for the plaintiff being set aside, judgment was entered by the appellate Court for the defendants. That was a case where the verdict was set aside on the ground that there was no evidence at all to justify a verdict for the plaintiff, but I think it is clear that under r. 4 the same course is competent where the verdict is set aside as being against the weight of evidence: in this respect no distinction can be drawn between the two grounds for setting aside a verdict.

At p. 376 he had already said of the facts before him:

> The verdict was one which the jury, however comprehensible in all the circumstances their decision might be, were not competent to find, that is, "might" not find, on the evidence.

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And Lord Atkin said at p. 370:

> In these circumstances the letters plainly show that there was no contract and the jury's verdict that there was cannot stand.

And in the present case *a fortiori* it "cannot stand" because not only was there no evidence but no issue on which evidence could be given or the jury directed, and a true verdict can no more be returned upon a false issue in civil cases than in criminal —*Rex* v. *Sugarman* (1935), 25 Cr. App. R. 109, 114.

In *Gavin* v. *The Kettle Valley Ruay. Co.* (1919), 58 S.C.R. 501, 508, Mr. Justice Anglin said, the Chief Justice concurring:

> As the case was left to the jury the true issue as to "ultimate negligence" under the circumstances in evidence, in my opinion, was not fairly submitted to them. I agree, therefore, that a new trial was properly ordered on that ground.

The "true issue" was admittedly "fairly submitted" to the jury here but they disregarded it and substituted a false one of their own. Their Lordships of the Privy Council very recently decided in *Dominion Bridge Co. Ltd.* v. *Steamer "Philip T. Dodge,"* [1936] 1 W.W.R. 94, at 97, that even where the trial is by a judge without a jury, a "decision based entirely upon the finding of a specific act of negligence which was not pleaded and not investigated . . . cannot stand."

It follows that in my opinion the appeal should be allowed, the verdict set aside and a new trial had, because there has been a mistrial, indeed no concluded trial at all, upon the true issue properly submitted to the jury, and therefore these issues are still at large owing to the "illegitimate course" pursued by the jury on their own initiative.

I say nothing about the effect of this extraordinary conduct upon the costs, because nothing was said about them in the respondent's (plaintiff) argument or *factum,* and upon the plaintiff must fall the grave responsibility of "moving for judgment in accordance with the verdict" and taking and seeking to retain that judgment upon such a legally impossible verdict, which was obviously a dangerous thing to do; and, if I may say so with respect, I would not if I had been in the learned judge's position have taken the responsibility of granting the motion, at least without the fullest consideration of it, even though the defendant's junior counsel had, in the absence of his senior,

when the jury returned at 4.20 p.m., after an hour's consideration, said in reply to the judge that he had no objection to it. But doubtless the full consequences of the very unusual situation were not realized at the time and came as a surprise to all concerned. It is very likely that upon further argument and consideration a way might have been found out of the *impasse* before the jury was discharged, in the manner indicated in many decisions of this and other Courts under similar circumstances, though I have not been able to find a case which is precisely upon all fours: *cf. e.g.,* in *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121; *Shearer* v. *Canadian Collieries (Dunsmuir), Ltd.* (1914), 19 B.C. 277; *Jolicœur* v. *La Cie de Chemin de Fer du Grand Tronc* (1908), 34 Que. S.C. 457; *Arnold* v. *Jeffreys,* [1914] 1 K.B. 512; *Bank of Toronto* v. *Harrell* (1916), 23 B.C. 202, 213; *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375, 384; *Gavin* v. *Kettle River Valley Ry. Co.* (1921), 29 B.C. 195, 204; (1919), 58 S.C.R. 501, 508; *McFeteridge* v. *Canadian Pacific Ry. Co.* (1926), 37 B.C. 387, 391; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, 269; *McTavish Brothers Ltd.* v. *Langer* (1929), 41 B.C. 363 at 370; and *Dobie* v. *Canadian Pacific Ry. Co.* (1929), 42 B.C. 30 at 36; [1930] 3 D.L.R. 856; [1931] S.C.R. 277. In *Jolicœur's* case, p. 459, the Court of Revision adopted the following statement of the proper practice:

> Archbold, Vol. 1, p. 601, 7th Ed. Notes, dit:—"If the jury, through mistake, or evident partiality, deliver an improper or an informal or an insensible verdict, or one that is not responsive to the issue submitted, they may be directed by the Court to reconsider it and be recommended to make an alteration. . . .

That ancient and sound practice has, as I at present understand it, still virtue and effect, but since it has not come up for argument before us I express no final opinion thereupon and simply confine myself to the adoption of the only course, as already set out, that is open to this Court to take.

MCPHILLIPS, J.A.: At the close of the argument I was of the opinion that the appeal should stand dismissed. I have since had the advantage of reading the judgment of my learned brother

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McQUARRIE in which I concur. Therefore my judgment is that the appeal should be dismissed, both upon the facts and the law.

MACDONALD, J.A.: This is an appeal from a judgment of ROBERTSON, J., and a jury awarding to respondent damages arising from a motor collision on a public highway in the State of Washington. The facts relied upon by the respondent justifying a verdict should have been simple and direct but the case, through failure of the jury to appreciate the facts, fell into confusion, making it difficult to understand the verdict or to reconcile it with the evidence or pleadings. The act of negligence attributed by the jury to the appellant bears no true relation to the facts of the case. As I have decided that a new trial should be directed I will only discuss the facts to the extent necessary to disclose the grounds for that decision. The issues cannot be exposed, however, without some detailed discussion of the facts.

The appellant Leggatt, driving a car owned by his employer, the Grinnell Company of Canada, was held liable for injuries sustained by Warren under the following circumstances. While driving easterly in a Pontiac car he overtook Warren driving a Ford coupe and at a reasonable distance sounded his horn as a request for permission to pass. The travelled portion of the highway at this point (hard compact gravel road with oiled surface) was "about" sixteen feet in width. On either side of the travelled portion of the highway a shoulder of loose gravel extended for a distance of from two and a half to three feet. It was evidently loose enough to cause a car travelling about 40 miles an hour to get beyond the driver's control on coming into contact with it.

For some time before and at the precise moment that Warren heard the horn he was, "travelling to the right of the centre of the road." That right half of the roadway was not more and possibly slightly less than eight feet in width and all but approximately two feet of that area would be occupied by Warren's car as he proceeded on his way. It would follow that when he heard the horn the right front and right rear wheels of his car would be scarcely more, if not less, than two feet from the shoulder in

the road to his right. In that situation, if the respondent Warren had maintained his position, Leggatt could safely pass in the area of more than eight feet to the left of respondent's car.

However, notwithstanding the position of Warren's car at this stage so close to the edge of the travelled portion of the road as indicated, he testified that when he heard the sound of the horn behind him he, with more courtesy than prudence, turned still further to his right. He said: "I probably gave him two or three feet more than I had," offering thereby at the risk of danger to himself more room than necessary for Leggatt to pass. It is clear even after making an allowance for approximations that if we interpret his evidence literally two wheels of Warren's car came into contact with the shoulder of loose gravel to the right of the highway. If it did then the truth of an allegation made against him as shown by the pleadings is apparent, *viz.*, that finding himself in the gravel to the right he at once turned his car to the left precipitating the events that followed. The point of impact would appear to establish that fact once it is conceded that Warren's car touched the shoulder of the road to the right. At that moment Leggatt, travelling a few feet behind the Warren car (not necessarily directly behind it) fearing that Warren might continue in his course further to the left than he did (as it later transpired) bringing his car beyond the centre line, in order to avoid, not an actual but a potential danger (acting reasonably he might so regard it) turned his own car to the left (travelling two feet would bring him to the shoulder on his side) with the result that he entered the loose gravelled area, and lost control of his car. After that it careened without effective guidance up to the point of impact and beyond it.

It was essential that these alleged facts should be fully canvassed. Warren was not asked whether or not the right wheels of his car reached the loose gravel to the right. Clearly he could not while travelling "to the right of the centre of the road" turn out "two or three feet more" with a car at least nearly six feet in width without coming into contact with it.

However, contrary to his evidence I will assume that he only turned far enough to the right to bring his car close to the edge of the travelled portion of the highway. Assuming therefore in

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his favour that he did not touch the shoulder with the wheels of his car, by his own evidence he at least brought them close to the edge of the hard surface leaving a few inches only between his car and a dangerous area. It might be natural enough, finding he gave more room than necessary to the other to pass, bringing, in so doing, his car close to loose and treacherous gravel and knowing the difficulty of maintaining that position that he would turn to the left towards the centre of the roadway. It will be observed too that in this position he would only have to travel diagonally about two feet to reach the centre line of the highway. If he did so the appellant Leggatt at that moment (although it was not appreciated by the jury) would be about six or seven feet behind him (but on the left side of the road) and about to pass. Leggatt would not know before it was necessary to act whether or not this alleged turn to the left on Warren's part would terminate at or near the centre of the highway thus leaving him ample room to pass. He would—at all events the jury should consider it—be justified in assuming in the stress of the moment that, in order to avoid colliding with Warren's car he should endeavour to prevent it by turning his car to the left also as a possible means of escape and after doing so finding himself in a position where he could not control his car. That was his case, at all events (whether true or not it was for the jury to say) put forward in the pleadings and at the trial and if true it was submitted that reasonably he should be excused from the consequences of what followed, also that it was the erratic course taken by Warren in turning to the left that created an unavoidable situation.

I have said that the appellant in his pleadings charged respondent with negligently swerving to the left as he was about to pass. In the statement of defence (paragraph 20) this clause appears:

> When the defendant Leggatt was in the act of so passing, the plaintiff, without warning of any kind, suddenly swerved to the left in the path of the defendant Leggatt, causing a collision between the two cars.

And again his (Warren's) negligence or contributory negligence consisted (paragraph 22 (d)):

> In swerving to the left without warning when about to be passed by the defendant Leggatt.

Obviously it is dangerous, especially on a narrow road, for the driver ahead, after granting a request to pass in the usual fashion, to suddenly turn to the left again however slightly before the overtaking car has safely passed. The other driver might reasonably conclude that the invitation to pass was about to be withdrawn when it was too late to act upon it. In any event if Leggatt was negligent in misjudging Warren's movements or in indulging in groundless fears, the jury ought to consider it. Possibly they might attribute negligence to both. Instead, however, of directing attention to this salient aspect of the case the respondent ignored it. He did not even in express terms say that after conceding the right to pass he did not turn to the left before the passage was effected. It was hardly enough to say on a point so vital that Warren's general evidence in chief was of such a character as to negative the charge that he turned to the left as indicated.

The issues were fairly stated to the jury. The learned judge said:

> Here the defendant was overtaking the plaintiff and he made a signal and the plaintiff turned to the right, which was a plain intimation to the defendant that he had heard the signal and that he was keeping to his right side of the road and that he understood the defendant was going to pass him. Now, under those circumstances the duty which the plaintiff owed to the defendant was to keep to his right side of the road and not change his course without due and adequate warning under the circumstances, to the defendant. If that were not so, of course, no one could pass safely. On the other hand, the duty which the defendant owed to the plaintiff lies in this: that he was overtaking the plaintiff and his duty was not to run down with his car the plaintiff's car. That is to say, if you accept the plaintiff's story and he did not change his course, but kept on his proper course, the duty of the defendant was not to run him down; so you see the obligation and the duty towards each is reciprocal.

And again:

> The plaintiff's story was that he was going along that highway on his right side; he heard the horn sounded behind him and he turned a bit to the right and then kept on his course and never changed, and suddenly he was struck on the left rear bumper by the defendant's car, and the damage followed which he has told you about. On the other hand the defendant's story is that some distance back—the information is shown I think on Exhibit 2, the plan—he signalled by his horn, giving notice to the plaintiff of his intention to pass; that the plaintiff then turned a bit to the right, which to the defendant was an indication that the plaintiff understood his signal and would therefore keep to his course; but suddenly, without warn-

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ing, the plaintiff turned to the left, which caused the defendant in order to attempt to avoid the collision, to pull violently to the left, and his car went off on the gravel on the right-hand side, and then in an endeavour to right his car he pulled again, to the right and in so doing struck the plaintiff's car.

The only error (and it is important) occurred in stating that after the respondent turned to the right on hearing the horn he "kept on his course and never changed." He did not so testify (nor did his wife) although, whether intentionally or not, he leaves that impression without taking the responsibility of definitely saying so. As already intimated if he kept on his course "and never changed" he would by his own evidence have been travelling partly on the shoulder; or if we discard his evidence and make a liberal allowance for error he would at least be skirting the edge of the hard surface, a position difficult to maintain for any distance.

On that state of facts the jury, after finding that the appellant was guilty of negligence contributing to the accident, in answer to a question "In what did such negligence consist?" said:

> By driving too close to Warren's car, before turning out to pass, thereby necessitating an acute left turn, which took his car to the left shoulder of the highway, causing him to lose control of his car.

The jury of course were referring to the original turn to the left at the beginning of the attempt to pass. If this ground of negligence found by the jury was not pleaded, or supported by the evidence, we cannot substitute another finding for it. *Dominion Bridge Co. Ltd.* v. *Steamer "Philip T. Dodge,"* [1936] 1 W.W.R. 94. In considering what it means I will assume that the jury by returning a negative answer to the question "Was the plaintiff Warren guilty of negligence which contributed to the accident?" meant to find, notwithstanding the failure to deny it explicitly that Warren did not, as alleged, turn again to the left after making way for Leggatt to pass. The jury therefore attributed the accident to a negligent manœuvre on Leggatt's part in turning out to pass the Warren car at the outset. Leggatt, in the opinion of the jury, negligently approached so close to the other car before turning out to pass immediately after sounding his horn that he could only accomplish it by making an acute left turn thereby thrusting his car

into the gravel to the left "causing him to lose control." After that initial negligent act his car in its erratic course collided with the other. It was then beyond control without fault on his part. The negligent act consisted in placing himself in such relation to the other car that, to pass at all, he had to make an acute turn. What followed that negligent act could not be avoided.

The difficulty is that nowhere is there any evidence that this occurred. Not only was it not pleaded but it was never put forward in the course of the trial as the real cause of the accident. There is, however, an explanation for this finding. It is clear from a reading of all the material evidence that the jury were misled by failing to appreciate the significance and application of part of the testimony. Evidence properly assignable to a later period in the course of events was wrongly assigned to an earlier period. Leggatt said (not when he turned out in the first place but after he did so and was in the act of attempting to pass the Warren car) while six or seven feet behind it—not necessarily directly behind it—that the respondent swung back to the left, as already described, thus necessitating, or at all events prompting a turn to the left on his part. I am satisfied that the jury wrongly thought that originally he approached within six or seven feet of the respondent's car directly or almost directly behind it, thus necessitating the acute turn found by them. That is the explanation of the finding but it does not of course justify it. The real issue in the case therefore, *viz.*, whether or not the respondent, after turning to the right to permit Leggatt to pass, again turned to the left, thus precipitating a dangerous situation was not tried, except possibly in an indirect and most unsatisfactory manner.

If the jury had realized, having found that the appellant's car did in fact come into contact with the loose gravel to the left, did so, not because Leggatt was too close to the respondent's car before the original turn (an unlikely occurrence) but for some other reason they would then be compelled to pursue their inquiries in another direction from entirely different premises. The question would then arise in its proper setting—Did the appellant finally turn to the left negligently without any good

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reason for doing so or did he turn because, as he alleged in his statement of defence, and testified at the trial with the support of another witness, the respondent forced him to do so? This vital question was not considered by the jury in the light of the true facts. It is therefore, in my view, impossible to allow the judgment to stand.

On receipt of the jury's answer attributing to the appellant an act of negligence not pleaded or supported by the evidence the verdict should not have been accepted by the respondent's counsel. The jury ought to have been sent back on further instructions to reconsider their verdict. I refer to IRVING, J.A. in *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361 at 365, where although the facts were different the same principle applies. If that course might have been adopted at that stage we have the right at this stage to direct a new trial. I would do so, not however without some hesitation. It affords the respondent a second chance, not fully earned, to submit a reconstructed case with evidence suggested by the fate of this appeal.

MCQUARRIE, J.A.: I am prepared to agree with counsel for appellant in his *factum* at p. 7, where he states:

> The only point of controversy therefore is as to what caused the appellant to swing over into the loose gravel. Is it true, as he says, that the respondent's car swung over to the left just as he was about to pass; or is it as the jury found, that the appellant came up so close behind the respondent's car that he then had to make a sudden swerve which caused him to go across into the loose gravel?

and to give judgment on that basis. The verdict of the jury in answer to questions submitted by the learned trial judge was as follows:

> (1) Was the defendant [Leggatt] guilty of negligence which contributed to the accident? Yes.
>
> (2) If so, in what did such negligence consist? By driving too close to Warren's car, before turning out to pass, thereby necessitating an acute left turn which took his car to the left shoulder of the highway, causing him to lose control of his car.
>
> (3) Was [the plaintiff] Warren guilty of negligence which contributed to the accident? No.

In the statement of defence, paragraphs 20, 21 and 22, the appellants give details of the respondent's alleged negligence or contributory negligence. The jury in answer to Question 3

negatived all such allegations and found that the respondent was not guilty of negligence which contributed to the accident. The negligence of the respondent as asserted by the appellants was that the respondent's car swung to the left just as the appellants' car was about to pass causing the collision between the two cars. The jury found against the appellants on this point and we must conclude that the jury disbelieved the evidence of the appellant Leggatt and his wife that the respondent after hearing appellant Leggatt's warning and after turning to the right turned to the left as alleged by said appellant and his wife. It is admitted by Leggatt that when within a few feet behind respondent's car he pulled sharply over to the left in an attempt to avoid hitting the respondent's said car which threw Leggatt's car or two wheels thereof on to the gravel on the left side of the road thereby causing Leggatt to lose control of his car and that he then swung back and hit the respondent's car. The jury must have considered that Leggatt's explanation or excuse, supported to some extent by his wife, to the effect that the respondent's car turned to the left just as he was about to pass it, was a pure matter of imagination. If that explanation be eliminated or disbelieved, as was clearly done by the jury, nothing remains but Leggatt's admission of the negligence which the jury found against him. On the admitted facts I am of the opinion that it was shown beyond a shadow of doubt that appellant Leggatt was guilty of gross negligence, particularly in view of the speed of the two cars respectively which was between 35 and 40 miles per hour for the respondent's car which was ahead and some miles per hour faster for Leggatt's car when he was attempting in a most careless and negligent manner to pass, and considering the distance which Leggatt's car travelled after the collision, taking it off the paved highway, across a ditch, through a two-wire fence and some 210 feet through sand and sage-brush before stopping. I am convinced that the finding of the jury in answer to Question 2 is a reasonable explanation of what happened, that there was evidence supporting such finding and that the said finding was open to the jury on the pleadings or at least was within the ambit of the case as submitted to the jury.

Without taking up space to quote same in full I refer to

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paragraphs 9, 10, 11, 12 and 13 of the statement of claim; also to the evidence of the respondent and his wife the whole of pp. 22, 23 and 24, lines 1 to 19, pp. 42 and 43 of the appeal book and the appellant Leggatt's evidence p. 105, lines 5 to 30 inclusive, the whole of p. 106, p. 108, lines 17 to 31 inclusive, pp. 109 to 117 inclusive, p. 119, lines 25 to 30 inclusive, pp. 120 and 121, lines 1 to 11 inclusive.

I might add that even if it had been admitted, which was not the case, that respondent's car turned slightly to the left when the appellant Leggatt's car was about to pass, it is apparent from all the evidence, including that of the said appellant, that there would still have been more than one half of the width of the pavement clear at the time for the said appellant to pass respondent's car without colliding with it. If the said appellant, when a reasonable distance behind the respondent's car, had turned on to the left half of the pavement and remained there until he had cleared respondent's car no collision would have occurred.

I would therefore dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Farris, Farris, Stultz, Bull & Farris.*

Solicitors for respondent: *Lucas & Ellis.*

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Jan. 29, 30, 31; *Feb.* 6.

Criminal law—Manslaughter—Medical practitioner—Treatment of patient in hospital—Diagnosis—Intoxication of practitioner—Criminal Code, Secs. 246 and 1014.

A patient entered the hospital at Pouce Coupe on the 6th of February, 1935. He was very ill and Dr. Watson attended him daily. On the first day the doctor thought he had sciatica, but on the second, he concluded there was pus somewhere. He continued to treat him but the patient getting worse, he sent for a Dr. McRae, living 46 miles away, who came and operated on the 14th of February. There was difficulty in making a diagnosis so he made an exploratory operation and found a large amount of pus between the hip and the liver, some seven to ten quarts being taken out. The patient died the next day. A young doctor named Beckwith made an autopsy about a week later and admitted it was a difficult case to diagnose and that he would have diagnosed the case as appendicitis, but he was of opinion that if there had been an operation when he first came to the hospital his life might have been saved. Dr. McRae, who operated, said he could not say whether an earlier operation would have saved the patient's life. There was evidence of Dr. Watson being in an intoxicated condition when treating the patient on the 6th, 8th and 12th of the month, but the supervising nurse in the hospital testified that the treatment received by the patient was the only treatment that could have been given. The jury found accused guilty on a charge under section 246 of the Criminal Code and he was sentenced to one year's imprisonment.

Held, on appeal, reversing the decision of ROBERTSON, J., that too much weight was given to accused being under the influence of liquor on at least two occasions. It was still necessary to show that whether sober or not on these two visits or at any times during his attendance on the patient, some omission or failure to supply proper treatment was disclosed and by reason of it death ensued. The evidence as to this failed and the charge should be dismissed.

APPEAL by accused from his conviction by ROBERTSON, J. and a jury on the 29th of October, 1935, in the Court of Assize in and for the County of Cariboo at Quesnel, on a charge that between the 5th day of February, 1935, and the 15th day of February, 1935, he the said Wallace A. Watson undertook to administer surgical or medical treatment to one Joseph Oscar Tannhauser, a patient at the Red Cross Hospital at Pouce Coupe, and being under a legal duty to have and to use reasonable knowledge, skill and care in administering such treatment, omitted without lawful excuse to discharge that duty, and thereby did kill

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and slay the said Joseph Oscar Tannhauser, against the form of the statute in such case made and provided. . . .

The charge was under section 246 of the Criminal Code. The patient was admitted to the hospital on the 6th of February, 1935, and he died on the 15th of the same month. The patient employed the accused as his doctor and accused attended him daily. According to the evidence of a nurse the accused was in an intoxicated condition on the 6th and 12th of February when attending the patient, and the clergyman who visited the hospital said he was intoxicated on the 8th and 12th of the month. The patient was very ill when he came to the hospital and had to be helped to bed. The accused on the first day said he probably had sciatica and on the second day diagnosed the case as his having pus somewhere. The patient got worse each day, and in answer to a telegram from accused, Dr. McRae, who lived at Hythe, Alberta, about 46 miles away, came to Pouce Coupe, and after consultation with the accused he operated on the patient first for appendicitis, and finding this was not the trouble he made an exploratory operation and found a large quantity of pus in abscess between the hip and liver, about seven to ten quarts. The patient died next day from shock. A Dr. Beckwith who lived at Dawson Creek about six miles away from Pouce Coupe and has been practising medicine for about four years made an autopsy on February 23rd and said that if the patient had been operated on when first taken to the hospital his life might have been saved. He admitted it was a difficult case to diagnose and that he would have diagnosed the case as appendicitis. The jury brought in a verdict of guilty and accused was sentenced to one year in Oakalla.

The appeal was argued at Victoria on the 29th, 30th and 31st of January, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Nicholson, for accused: This is a charge under section 246 of the Criminal Code. Accused is a general practitioner and the question of what should be done involved a major operation. Watson is accused of being intoxicated when attending the patient between the 6th and 14th of February, and the whole case hinges on the fact that he did not advise an operation sooner.

In answer to this (1) Tannhauser's case was difficult to diagnose; (2) at most Watson was guilty of an error in judgment, and a mere error in judgment is not negligence in either a criminal or civil action; (3) it was not proven that Tannhauser's death did result from failure to operate sooner than the 14th of February. The Crown's evidence shows there was a fair chance of his dying anyway. The case went largely into the question of whether the doctor was drinking. Miss Crook, supervisor in charge of the hospital, who had 30 years' experience, says Dr. Watson did all that could be expected of him, and Dr. McRae who operated on the 14th of February said Dr. Watson could do no more. Dr. Beckwith, who never saw the patient until the autopsy, had only four years' experience as a doctor and said he would have diagnosed the case as appendicitis, only goes so far as to say that he would have operated earlier. The evidence as to drink does not show any misconduct or neglect. It was a difficult case to diagnose and whether there should be an operation was difficult to decide: see *Rex* v. *Homeberg* (1921), 35 Can. C.C. 240. Transcript of evidence was allowed in jury room that contained evidence that had been ruled out by the trial judge: see *Rex* v. *Minness and Moran* (1933), 47 B.C. 321 at pp. 327-8; *Reg.* v. *Murphy* (1869), L.R. 2 P.C. 535 at p. 549; *Mattox* v. *United States* (1892), 146 U.S. 140 at pp. 145-6; *Clark* v. *United States* (1932), 61 F. (2d) 695 at p. 707; *Ras Behari Lal* v. *The King-Emperor* (1933), 102 L.J. P.C. 144 at p. 147.

Macfarlane, K.C., for the Crown: Between the 6th and 14th of February accused omitted to take reasonable care of the patient. He neglected to give the patient reasonable attention to intelligently conclude as to whether it was necessary to operate or not, and this arises from evidence of drunkenness. The omission arises from his course of conduct during that period.

Nicholson, replied.

Cur. adv. vult.

6th February, 1936.

MARTIN, J.A.: This is an appeal from a conviction for manslaughter, under section 246 of the Criminal Code, at the Cariboo Assizes *coram* Mr. Justice ROBERTSON, at Quesnel in

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October last. Several questions were brought to our consideration; the first submission being that there should be a new trial because of evidence which had improperly found its way to the jury after their retirement, in some exceptional manner. It appears that what happened is this, that after the learned judge had excluded certain evidence, yet in a way which is not clear, but apparently by the voluntary action of a constable in handing the exhibits to the jury, there was included in them a copy of the depositions which, most unfortunately, contained the objectionable evidence that the learned judge had ruled out as being inadmissible, and therefore prejudicial to the accused. The affidavits upon which this particular motion was made were founded upon our decision in *Rex* v. *Minness and Moran* (1933), 47 B.C. 321, and are very commendably drawn with particularity and preciseness so as to keep the matter within the ambit of that decision, because this Court is very cautious indeed in accepting affidavits of jurors as to what occurred in their room. But in this particular case, under the very exceptional circumstances, the requirements of justice necessitate our holding that the appeal should be allowed on that ground and that there should be a new trial, because what happened did create a substantial wrong or miscarriage of justice under subsection (2) of section 1014.

The case however goes further because having reached the stage that we have to set aside the conviction and at least order a new trial, the additional and graver duty here cast upon us is to decide as to whether or not further effect should be given to the second submission on behalf of the accused, *i.e.*, that under section 1014 subsection (*a*) of the Code, the verdict of the jury should be set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence. That necessitated our giving most careful consideration to all the evidence in the case. And we have come to the conclusion that under these present circumstances, and applying them to a very difficult section of the Code, that is to say, 246 already mentioned, it would be hopeless to order a new trial, because we feel that a conviction could not be supported upon the evidence before us and there is no suggestion that it can be strengthened.

It is unnecessary for me to enlarge on that branch of the case because our brother MACDONALD is dealing very fully with it; but I would only add this, that it is a remarkable thing that what really is the most serious point in the case was not fully appreciated below, which is that the evidence of the principal witness for the Crown, Dr. McRae, who finally performed the operation that it is charged the appellant should have performed earlier, shows that at the time this man was admitted into the hospital he was in a dying state—I read his words, at pp. 61, 62 and 63 of the appeal book:

> My opinion, as a matter of fact was that he had been dying for some time but that he was in the terminal stages of tuberculosis.

And then he proceeds to say, at p. 63:

> When I walked in there I said to myself, it looks to me like tuberculosis or cancer. They get a look on their face that is hard to miss.

And then, again, on p. 62, after being asked with such circumstances before him what he would have done, he says it "was very doubtful as to whether an operation would have been successful or not."

Under such unusual circumstances as that, and bearing in mind that the Code declares that in order to sustain a conviction it must appear that "death is caused by such omission," the omission in this case, if it was anything, was an omission by appellant to operate at an earlier date in the hospital, and yet we have this witness who did operate later, saying that it was very doubtful if any operation after he came to the hospital could have saved the life of this man that he believed to be dying, so I repeat that the strange thing about the case is this, that the fact that he was in that dying condition at the time he entered the hospital and was taken charge of by the appellant was not given that primary consideration which its gravity required.

I shall not say anything more at present than to make this observation—I join with my brother MACDONALD in it—that undue weight was attached to the fact that the appellant was drunk on two occasions at least when he was attending his patient in the hospital, but however reprehensible that may be, it is a matter for the trustees of the hospital and for his own profession to deal with under the present circumstances, because it cannot

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be said that his drunkenness, which his counsel admitted frankly, caused the death of the deceased within the meaning of the said section 246.

It follows that under these very exceptional circumstances the only proper course for us to adopt under section 1014 (3) is to allow the appeal, quash the conviction, and direct a verdict of acquittal to be entered.

MACDONALD, J.A.: The accused a medical practitioner practising for many years at Pouce Coupe in the Peace River District was convicted by a jury of causing the death of a patient, under section 246 of the Criminal Code, reading as follows:

> Every one who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

The patient was admitted to the Red Cross Hospital at Pouce Coupe on February the 6th, 1935, and died on the 15th of that month following an operation on the 14th performed by a surgeon summoned by the accused for that purpose. The precise nature of the illness was not known by the surgeon until after an exploratory operation and possibly not definitely disclosed until an autopsy was performed some days after the patient's death. Failure to diagnose accurately after admission to the hospital or later cannot from the evidence be assigned as an act of negligence as all the doctors agree that it was difficult to do so.

After perusal of the evidence I have no doubt at all that this appeal should be allowed and the conviction set aside under the power conferred by section 1014 of the Code providing that:

> On the hearing of any such appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion (*a*) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.

The charge was that the accused undertook to administer surgical or medical treatment to the deceased and being under a legal duty to use reasonable skill omitted without lawful excuse to discharge that duty, such omission resulting in death.

The elements of the offence clearly appear from the words of

the section. To sustain a conviction it was necessary to establish that some treatment, operative or medicinal, known (or which should have been known) to a professional man using reasonable skill, was omitted without lawful excuse and that the omission caused the death.

Having regard to these essentials the only possible justification for allowing the case to go to the jury was furnished by the evidence of Dr. Beckwith a medical man with four years' experience, practising at Dawson Creek six and a half miles from Pouce Coupe where the accused resides and practises his profession. The testimony of the other witnesses, lay and professional, called by the Crown do not disclose any evidence whatever of oversight or neglect resulting in the death of the patient and it is unnecessary therefore to refer to their testimony in detail. I am also of opinion that the evidence of Dr. Beckwith is not satisfactory as a basis for a conviction, given as it was with the assurance derived from after-acquired knowledge obtained by an autopsy performed by him several days after the death of the patient. Had he been called in before death he would, as he stated, in view of the charts, have been of the same opinion as the surgeon who operated, *viz.*, that the patient's appendix was affected. The view of the accused, Dr. Watson, as it later transpired was more accurate. He thought on the contrary that "there was pus somewhere," without, however, definitely locating it and would have had an operation (I assume exploratory) performed were it not that the patient's consent was withheld. That, at all events, is his evidence and it is not disputed. The patient's wife might be in a position to refute it if not true, as she was present at the outset and at intervals thereafter.

The autopsy disclosed that the patient suffered from a nephritic abscess or a collection of pus around the kidney.

Dr. Beckwith testified as evidence of neglect that by inserting a needle where pus was suspected proof of its existence would have been found but as none of the medical men, except the accused—and he did not locate it—suspected, or could find indication from the history of the patient, that pus was present it can scarcely be regarded as criminal negligence on Dr. Watson's

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part in failing to insert a needle. He also referred to the advisability of an X-ray examination but did not go on to say that it would have revealed the patient's trouble and without that further step the reference is of no value. He also testified that it was Dr. Watson's first duty to diagnose accurately. To quote his evidence "the first thing to have done would have been to get an actual diagnosis" and assuming that had been done and the pus discovered an immediate operation should follow. However, when asked "would it have been possible to arrive at that diagnosis before the 14th of February (the day before the patient died) his answer was "that would be impossible to say." Again he said "the simplest procedure is perhaps to get a drop of blood from the patient and do a white blood cell count" to detect the pus. Dr. Watson stated, however, that he had no facilities for such a test and this was not disputed.

Dr. Beckwith also stated, as reported, that if on the 10th of February an operation had been performed the patient would in his opinion "have survived to the 15th of February." This must be an error, as it is valueless as evidence but in any event a definite opinion was not given by him that even if an operation had been performed at the outset the patient would have recovered. When asked the question "When would you have operated?" the answer was "I would possibly have operated on the 6th." Apart from the fact that this is wholly conjectural it is not consistent with his evidence as to the necessity of first securing an accurate diagnosis before operating and the difficulty of securing it before the 14th. Again when asked if the operation had been performed on the 6th of February would the patient have lived he said "I think that he would have lived if the operation had been performed on the 6th. I have every reason to think that he would have lived." While this answer increases in strength as it proceeds it does not in view of all his evidence remove its speculative features. It follows that if there is no satisfactory evidence of omission to administer surgical or medical treatment the second vitally important step, *viz.*, was death caused thereby need not be considered. The truth is doubtless disclosed by the evidence of Dr. McRae, a Crown witness, when in answer to the Court he could not say that any treatment

given between the 6th and 15th of February would have saved the patient's life.

Unfortunately, while the accused visited the patient regularly, on two occasions he was under the influence of liquor. That was most regrettable. I fear this fact diverted the jury's attention from the real issues although they were properly directed on this point. Obviously it was still necessary to show that, whether sober or not on these two visits or at any time during the period in question some omission or failure to supply proper treatment was disclosed and by reason of it death ensued.

This conviction was not warranted. It is significant that Miss Crook, supervisor of the hospital and a nurse with 30 years' experience, testifying with knowledge of what occurred, in reply to the question "You saw the treatment in that hospital, as a trained nurse, what do you say about it?" answered, "I think it was the only treatment that could have been given." While this is not technically a professional opinion on a medical subject it is not without value and I feel satisfied it represents a more accurate conclusion than that reached by the jury.

I would allow the appeal.

McQUARRIE, J.A. agreed in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Wilson & Wilson.*
Solicitor for respondent: *Eric Pepler.*

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March 27; *April* 14.

BANK OF MONTREAL v. MORROW.

Guarantee—Executors—Authority under will—Scope of.

William Morrow carried on the business of a coal and ice company in Vancouver. In 1929 he, with a group of Vancouver coal dealers, formed the Tulameen Coal Mines Limited, for the purpose of operating a coal mine and securing a source of supply of coal for their retail yards in Vancouver. In June, 1929, he executed a guarantee in favour of the plaintiff securing the indebtedness of Tulameen Coal Mines Limited for advances up to $2,925. He died in March, 1930, survived by his widow, one son and one daughter. By his will he appointed his wife and two others executors of his estate, and the business of the deceased "now being carried on by me in the City of Vancouver" was devised to the executors in trust with the direction that "my said trustees shall continue to carry on such business (*i.e.*, the retail coal and ice business) until my son William J. Morrow shall attain the age of twenty-three years," etc. On the 26th of June, 1930, a further guarantee in favour of the bank, securing the indebtedness of the Tulameen Coal Mines Limited for advances up to $4,875, was executed by the three trustees, of which the widow is the survivor. The plaintiff recovered judgment in an action on the guarantee.

Held, on appeal, reversing the decision of FISHER, J., that the only authority the widow had as executrix to bind the estate is obtained from the will. She is permitted by its terms to carry on the Vancouver business and would have authority to execute guarantees to secure its indebtedness, if necessary, in the usual course of business, but she had no authority as executrix to guarantee the accounts of another business entity and the appeal should be allowed.

APPEAL by defendant from the decision of FISHER, J. of the 8th of November, 1935, in an action brought under an agreement executed by the defendant together with F. C. Dunlop and A. J. Sloan as trustees of the estate of William Morrow, deceased, on the 26th of June, 1930, wherein the defendant purported to jointly and severally guarantee payment to the plaintiff of all present and future debts and liabilities of the Tulameen Coal Mines Limited up to the sum of $4,875. Tulameen Coal Mines Limited was formed in 1929 by a group of Vancouver coal dealers, and the late William Morrow, who carried on the business of a coal and ice company in Vancouver, was one of those interested. As the company required money, arrangements were made with the bank by the shareholders for advances. These took the form either of a direct loan secured by the company's

promissory note or of the discount of drafts drawn by the company upon customers purchasing coal, and as security for repayment the shareholders gave guarantees to the bank up to a certain amount. On the 29th of June, 1929, William Morrow executed a guarantee in favour of the bank to cover the indebtedness of the company up to $2,925. On March 30th, 1930, Morrow died leaving a widow, son and daughter, and by his will appointed his widow, Dunlop and Sloan his executors, and directed them to carry on his business until his son was twenty-three years old. The son is not yet twenty-three years old. In June, 1930, the company needed further money and the guarantee first above mentioned was given by the three executors of the William Morrow estate. In 1934 the company ceased to carry on business and closed down, owing the bank $14,000. Before this both Dunlop and Sloan had been discharged from the trusts of the will by an order of the Court. On February 13th, 1935, the bank made a demand in writing on the defendant for the amount of the guarantee. This action was then brought and a judgment was given in favour of the bank for $5,110.59.

The appeal was argued at Vancouver on the 27th of March, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Cosgrove, for appellant: The appellant as executrix had no power to execute a guarantee *qua* executrix and cannot bind the estate by such guarantee: see *Hall* v. *Macintyre* (1934), 48 B.C. 306 at p. 312; Chitty's K.B. Forms, 16th Ed., 683 (note (*c*)). No executrix can contract with a third party so as to give that third party the right to prove against the estate: see *Farhall* v. *Farhall* (1871), 7 Chy. App. 123; *Labouchere* v. *Tupper* (1857), 11 Moore, P.C. 198. The only right the plaintiff would have is against the defendant in her own right: see Williams on Executors, 12th Ed., 1161; Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 387; *Trewinian* v. *Howell* (1588), Cro. Eliz. 91; 78 E.R. 349; *Jennings* v. *Newman* (1791), 4 Term Rep. 347; 100 E.R. 1056. There is no proof of a debt from the coal company to the bank. The evidence is insufficient in this respect: see *Lakeman* v. *Mountstephen* (1874), L.R. 7 H.L. 17; *Kreditbank Cassell G. M.B. H.* v.

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Schenkers Ltd., [1926] W.N. 203 at p. 205; *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Ridley* v. *Plymouth Baking Co.* (1848), 2 Ex. 711. There was no evidence of the signatures of the guarantees: see *Hedican* v. *The Crow's Nest Pass Lumber Co.* (1914), 19 B.C. 416; *Ex parte Young. In re Kitchin* (1881), 17 Ch. D. 668 at pp. 671-2, 674.

Symes, for respondent: The appellant alleges that the existence of the principal debtor was not established. The bank manager at Princeton gave direct evidence of the debt incurred by direct advances to the company and by discount of drafts drawn on the company's customers. The promissory notes were produced in addition, effectively establishing *prima facie* proof of the debt owing by the company to the bank. The other ground of appeal is that the executrix had no power to execute a guarantee. The deceased had previously executed a guarantee and by his will directed that the business should be carried on. The three executors executed the guarantee and the inference is that they thought it was in the interest of deceased's business to do so. She knew that the duty was imposed on the executors to carry on the business. The law on the liability of executors in contracts is in Williams on Executors, 12th Ed., 1161 *et seq.* The question is whether or not the transaction resulting in the contract of the executor was or was not one with which the deceased was connected during his lifetime. If the conclusion of the learned judge was wrong the only result is a change in the form of the judgment from one *"de bonis testatoris"* to one *"de bonis propriis."*

Cosgrove, replied.

Cur. adv. vult.

14th April, 1936.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because, with respect, I am unable to find any evidence of substance in the appeal book to support the finding of the learned judge below that the defendant had, under the circumstances, power to give the guarantee in question as a trustee under the will of her husband; and I am also of opinion that it would not be just under the circumstances to grant the amendment asked for, and therefore the appeal should be allowed.

MACDONALD, J.A.: Appeal from a judgment awarding respondent, the Bank of Montreal, $5,110.59 and costs in an action brought by it against the sole remaining executrix of the estate of William Morrow on an agreement signed by her as executrix guaranteeing payment to the bank of debts incurred by Tulameen Coal Mines Limited up to the sum of $4,875 with interest. The material clause of the guarantee reads as follows:

> In consideration of the Bank of Montreal dealing with Tulameen Coal Mines Limited herein referred to as the customer, the undersigned hereby jointly and severally guarantee payment to said Bank of all present and future debts and liabilities (direct or indirect or otherwise) now or at any time and from time to time hereafter due or owing to said bank from or by the customer, and whether incurred by the customer alone or jointly with any other Corporation, person or persons, or otherwise howsoever. Provided, however, that the liability of the undersigned and of each of the undersigned herein is limited to Four thousand eight hundred and seventy-five Dollars with interest thereon at seven per cent. per annum from date of demand for payment of the same.

The principal defence is that appellant as executrix had no authority on behalf of the Morrow estate to guarantee payment of a debt owing not by the business she was appointed a trustee to administer but by the Tulameen Coal Mines Limited to the Bank of Montreal. Her authority of course was limited by the terms of the will. By the will the business of the deceased "now being carried on by me in the City of Vancouver" (coal and ice dealer trading under the name of Morrow Coal and Ice Company) was devised to appellant in trust with the direction that,—

> my said trustees shall, . . . continue to carry on such business [*i.e.*, the retail coal and ice business] until my son, William J. T. Morrow, shall attain the age of twenty-three years, etc.

As a commercial venture, quite apart from his business as a retail merchant in Vancouver, the late Mr. Morrow, with other coal dealers, became interested in the Tulameen Coal Mines Limited. The evidence is very fragmentary and does not disclose the nature of that interest. He was doubtless a shareholder. The manager of his Vancouver business (Mr. Strickland) was a director of Tulameen Coal Mines Limited. The possible inference from meagre evidence is that a number of coal dealers, the late Mr. Morrow included, either incorporated the Tulameen Coal Mines Limited or became shareholders in it with the object doubtless of operating at a profit and of securing a source of

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supply of coal for their retail yards in Vancouver. The indebtedness in question is that of the Tulameen Coal Mines Limited to the respondent bank. The late Mr. Morrow before his death (June, 1929) executed a guarantee in favour of the appellant bank securing the indebtedness of Tulameen Coal Mines Limited for advances to a maximum amount of $2,925. He died in March, 1930, and in June of that year a further guarantee for a larger amount (the sum for which judgment was obtained) in respect to the further indebtedness of the same company was executed by his three trustees of which appellant is the survivor.

Obviously her only authority as executrix to bind the estate committed to her care is obtained from the will. She is permitted by its terms to carry on the Vancouver business and would have authority to execute guarantees to secure its indebtedness, if necessary, in the usual course of business. She had no authority as executrix to guarantee the accounts of another business entity. It is immaterial that the deceased for speculative or other purposes used his own funds in this commercial venture. That did not make Tulameen Coal Mines Limited part of the business of the Morrow Coal and Ice Company.

On the submission that the executrix entering into an unauthorized contract is personally liable we were asked, if of opinion that she lacked authority as executrix to bind the Morrow estate, to allow an amendment changing the form of the judgment. That request—had it been made—might more readily be granted during the course of the trial. I am not disposed to grant it at this stage.

I would allow the appeal.

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

The defendant (appellant) is sued as executrix of William Morrow, deceased, on a guarantee in writing dated the 26th day of June, 1930, signed by her and two others as "Trustees Morrow Estate" to guarantee payment to the respondent of the debts and liabilities of the Tulameen Coal Mines Limited as set out in the document filed as Exhibit 1. The other two trustees before action brought had ceased to function as such, one having

died and the other having been discharged by order of Court. Neither they nor their legal representatives were proceeded against. The facts are not in dispute but it is contended on behalf of the appellant that it had not been proved that she had any power or authority to bind the testator's estate by any such guarantee. It was argued by counsel for the respondent that this came within the provisions of the will inasmuch as the trustees were therein directed to carry on the business of the testator and the giving of the guarantee was within the scope of the said business. On the other hand counsel for the appellant argued that the business referred to was specifically described in the will as "the business now being carried on by me in the City of Vancouver" and that such business did not include the guaranteeing of debts of other persons or companies. With deference to the contrary opinion of the learned trial judge I am satisfied that the contention of counsel for the appellant must prevail and that the appellant had no power to execute the guarantee as executrix.

There is another matter which appeals to me which is that although the appellant was executrix and trustee under the last will and testament of William Morrow, deceased, the guarantee was not executed by her in such capacity but as one of the "Trustees Morrow Estate" which does not mean anything. William Morrow, deceased, is not mentioned in the guarantee and it seems to me that to render the estate of William Morrow liable on the guarantee the Christian name of the deceased would have to be stated so as to identify the estate. In that respect also the guarantee is defective.

In view of what I have stated I consider it is unnecessary for me to deal with the other main point raised by counsel for the appellant that the respondent must establish a principal debtor and a principal debt covered by the guarantee. In the alternative the submission of the respondent is that if the conclusion of the learned trial judge was wrong there should be a change in the form of the judgment from one *de bonis testatoris* to one *de bonis propriis*. In that connection I am impressed by the submission of the appellant that there are certain defences which her counsel might urge to any such claim and that he had no opportunity to

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go into them on the trial. I am of the opinion that the respondent's alternative claim should not be allowed at this stage.

Appeal allowed.

Solicitor for appellant: *Mark Cosgrove.*

Solicitors for respondent: *Robertson, Douglas & Symes.*

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April 14, 15; *June* 26.

PELLE v. BERSEA AND BEATTY BROS. LIMITED: ZACKS CLEANERS & DYERS LTD. THIRD PARTY.

Negligence—Automobile collision—Intersection—Avoiding another collision prior to accident—Effect of on accident—Time to recover in interval.

The plaintiff's brother parked his car, about 7 p.m. in April when it was light, facing west near the curb on the north side of Kingsway and a few feet west of the intersection of Miller Street. He got out and entered a store leaving his brother (the plaintiff) in the car. The defendant, Bersea, was driving his car westerly on Kingsway about 30 feet behind a car driven by one Cook, Bersea driving half the width of the car closer to the centre of the road than Cook. When they reached the intersection of Miller Street a truck driven by an employee of the third party going south on Miller Street, after stopping at the stop sign, came out on Kingsway and a collision with Cook's car was narrowly avoided by Cook turning sharply to the left. Bersea, to avoid the car and truck in front of him then turned sharply to the right and behind the truck nearly reaching Miller Street when he found himself confronted by the car in which the plaintiff was sitting. He had not slackened his speed and to avoid the car, he turned as fast as he could to the left and towards the centre of Kingsway but his car skidded and the rear portion of his car struck the rear left side of the parked car. The jolt severely injured the plaintiff. On the trial Bersea was found solely to blame.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the fact that the third-party driver negligently created a situation in the roadway by nearly colliding with Cook thereby throwing the defendant Bersea into momentary confusion, does not excuse the latter from running into the parked car on the roadway at a point far enough beyond the centre of disturbance to enable one using care, to resume normal driving and so avoid the collision.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 28th of December, 1935, in an action for damages for injuries to the plaintiff caused by the negligent driving of an automobile by the defendant Bersea, whom the plaintiff

alleges was in the employ of the defendant Beatty Bros. Limited and driving the said automobile in the course of his employment by them. About 7 p.m. on the 8th of April, 1935, the plaintiff was sitting in his brother's car. The brother was driving and he parked his car near the north curb of Kingsway a few feet west of the intersection of Miller Street and went into a store to make a purchase, leaving his brother (the plaintiff) in the car. It was quite light and the defendant Bersea was driving his car west on Kingsway about 30 feet behind a car going the same way and driven by one Cook. At the intersection of Miller Street a truck travelling south on Miller Street and belonging to the third party (Zacks Cleaners & Dyers Ltd.) stopped at the stop sign and then proceeded to cross Kingsway. Cook, the driver of the car in front of Bersea, did not see the truck in time to stop so he swung sharply to the left, narrowly avoiding a collision with the truck. Bersea then swung his car to the right and behind the truck, nearly touching the entrance to Miller Street, when he found himself confronted by the Pelle car which was parked as aforesaid. He had not slackened his speed and could not stop, so he swung sharply to his left towards the centre of Kingsway, but skidded and the rear right side of his car struck the Pelle car. The plaintiff, who was sitting in the parked car suffered a fractured sacrum and coccyx and injuries to the ligaments of the dorsal spine. He was confined to the hospital, is still there and under a doctor's care.

The appeal was argued at Victoria on the 14th and 15th of April, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

Maitland, K.C., for appellants: The driver of the truck belonging to Zacks Cleaners & Dyers Ltd. should have observed the by-laws and allowed the two cars to pass, as Cook's car and the truck were at the intersection about the same time: see *Harding* v. *Edwards and Tatisich* (1929), 64 O.L.R. 98 at p. 102, and on appeal [1931] S.C.R. 167; *U.S. Shipping Board* v. *Laird Line Ld.*, [1924] A.C. 286; *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560. If not wholly responsible at any rate Zacks Cleaners & Dyers Ltd. is partly responsible: see *Moore* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 314; *Swartz*

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Bros. Ltd. v. *Wills,* [1935] S.C.R. 628; *Lechtzier* v. *Lechtzier* (1931), 43 B.C. 423; *Canadian Pacific Railway* v. *Steamship "Belridge"* (1917), 27 B.C. 537; *Swadling* v. *Cooper,* [1931] A.C. 1. However high the degree of care which might be demanded by the plaintiff, the third party is in an entirely different position: see *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129 at p. 136; *Moore* v. *B.C. Electric Ry. Co.* (1917), 24 B.C. 314; *Groh and Jeffrey* v. *Ritter* (1935), 50 B.C. 129.

L. H. Jackson, for respondent: We thought Bersea was responsible and brought action against him alone: see *Dominion Bridge Co. Ltd.* v. *Steamer "Philip T. Dodge,"* [1936] 1 W.W.R. 94. His speed was excessive and when he turned to the right in order to avoid the truck and then came into view of the Pelle car he was unable to stop and avoid the collision. The plaintiff suffered a fractured sacrum which is the second to last bone in the spine, also a fracture of the last bone in the spine. The accident was on the 8th of April, 1935, and when the trial took place in November he was still totally disabled so that the damages given by the trial judge are not excessive. The *onus* is shifted to the defendant to show he was driving in a careful and prudent manner: see *Stanley* v. *National Fruit Co. Ltd.,* [1931] S.C.R. 60; *Ristow* v. *Wetstein,* [1934] S.C.R. 128. When a car is stationary the *onus* is on the person who runs into it: see *Harding* v. *Edwards and Tatisich,* [1931] S.C.R. 167.

Burns, K.C., for respondent third party: We were not negligent in going out from Miller Street when we did, but assuming we were, Bersea got away from the danger of collision with the Cook car and our truck and after that negligently ran into the stationary car. The stop sign gives the right of way over Brisboy (driver of Zacks's car). On the validity of the by-law see *Pipe* v. *Holliday* (1930), 42 B.C. 230. The judgment of the trial judge should not be disturbed unless clearly wrong: see *Rainey* v. *Kelly* (1922), 69 D.L.R. 534; *McCoy* v. *Trethewey* (1929), 41 B.C. 295.

Maitland, in reply: On the validity of the by-law see *Lechtzier* v. *Lechtzier* (1931), 43 B.C. 423; *Rex* v. *Baker,* [1929] S.C.R. 354.

Cur. adv. vult.

26th June, 1936.

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MACDONALD, C.J.B.C.: The facts of this case show a curious mix-up between several motor-cars near an intersection. The plaintiff's brother's car in which plaintiff was riding had drawn up at the curb and parked near there while the brother went into a nearby store. The other parties to the action had got into some trouble but the driver of defendants Bersea and Beatty Bros. Limited, had entirely failed to show that he exercised proper control over his car. The driver was interested in looking at other things instead of attending to the control of his own car and therefore struck the plaintiff's properly parked car because of his faulty driving and inattention to where he was going.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should in my opinion be dismissed because no good ground has been shown for disturbing the conclusion of the learned judge below that the damage was wholly occasioned by the negligence of the defendant.

MACDONALD, J.A.: I had no doubt at the hearing of this appeal that the respondent--plaintiff in the action—as against the appellants-defendants therein—was entitled to hold the judgment in his favour for the amount awarded. He was sitting in an automobile properly parked at the curb on Kingsway near Miller Street in the City of Vancouver when the defendant Bersea in the employ of Beatty Bros. Limited, driving another car ran into him as he was so parked as aforesaid causing the injuries complained of. A finding of negligence by the trial judge cannot be set aside unless there is no reasonable evidence to support it.

The point about which any real controversy arises is in respect to the claim of the defendants in the action based upon a third-party notice, against Zacks Cleaners & Dyers Ltd., on the ground that the collision and consequent injury to Pelle was caused entirely or in the alternative, partly by the negligence of the driver of a truck owned by the third party. The trial judge found that Bersea was solely at fault and again the appellants have a finding of fact against them.

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Macdonald, J.A.

I agree that the driver of the third-party car should at least have permitted the Cook car to pass before he attempted to cross Kingsway. Where there is a stop sign at intersecting streets the rule in favour of others on the highway protected thereby should at least be as liberally construed as that concerning the right of way. But, particularly with a finding of fact of sole liability on appellant's part I would not set it aside and hold instead that the driver of the third-party car was either altogether or concurrently responsible for the accident because a question of ultimate negligence arises. The fact that the third-party driver negligently created a situation in the roadway by nearly colliding with the Cook car throwing thereby the appellant Bersea into momentary confusion does not excuse the latter from running into the respondent's (plaintiff) car parked on the roadway at a point far enough beyond the centre of disturbance to enable one, using care, to resume normal driving and so avoid hitting the plaintiff. Bersea, as the evidence showed (doubtless through curiosity), continued needlessly to watch the other two cars where throuble was barely averted instead of looking where he was going. Notwithstanding therefore the negligence of the driver of the third-party car Bersea could and should have avoided the accident.

I would dismiss the appeal.

MCQUARRIE, J.A.: I would dismiss the appeal. I agree with the learned trial judge that the defendant Bersea was solely to blame, that he was in the employment of the defendant Beatty Bros. Limited, and was so engaged at the time of the collision which resulted in the damages complained of.

Appeal dismissed.

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

Solicitor for respondent: *Lorne H. Jackson.*

Solicitor for respondent third party: *Knox Walkem.*

HOLLUM v. ROBERTSON.

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June 18, 25.

Damages—Negligence—Automobile collision—Crossing left side of road—Care to be taken by on-coming car.

The plaintiff was travelling in his car from Seattle to Everett on the Pacific Highway, a double pavement concrete road with a dirt strip in the middle. He crossed to a gas-station on his left side of the road for gas. On leaving he had to cross the left pavement to get to his proper side, and as he entered the left pavement the defendants were coming south on that pavement at about forty miles an hour. The evidence was indefinite as to how far the defendants were away when the plaintiff entered on the pavement, but it was found they were at least 150 feet away. There was a clear vision for a long distance. The defendants' car hit the left rear wheel of the plaintiff's car at the edge of the dirt strip between the two pavements.

Held, that as the defendant did not exercise the judgment she should have, either by passing to the rear of the plaintiff's car or stopping to permit him to make his crossing, her negligence was the direct cause of the accident.

ACTION for damages for injuries to the plaintiff and his car resulting from a collision between the plaintiff's car and that of the defendants. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 18th of June, 1936.

W. B. Farris, K.C., and *E. B. Bull*, for plaintiff.
Farrand, and *Hill*, for defendants.

Cur. adv. vult.

25th June, 1936.

MANSON, J.: The automobile accident out of which this action arose occurred on the Pacific Highway between the City of Everett and the City of Seattle in the State of Washington at a point approximately seven miles north of the City of Seattle and on the 17th day of November, 1934. The Pacific Highway between Everett and Seattle consists of two slabs of

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concrete each 10 feet wide on each side of a dirt strip four feet wide down the centre. At the point where the accident occurred the highway runs for a long distance in a north-north-east and south-south-west direction. The pavement at the point of accident has, going in a southerly direction, an upgrade of one and one-half per cent. On the morning of the accident the plaintiff driving his car towards Everett from the City of Seattle, accompanied by one Brickell, stopped at the McGregor gas-station on the westerly side of the highway for gas. From the gas-station the plaintiff was able to see clearly to the north along the highway for 800 feet at least and probably, as Brickell said in evidence, for half a mile. The plaintiff to resume his journey northwards left the gas-station, so he says, to proceed across the westerly pavement to the easterly pavement at an angle of about 45 degrees. There are the usual number of contradictions as among the witnesses as to a number of the facts but I am satisfied that the defendant was at the very least 150 feet away to the north when the plaintiff entered the westerly pavement from the gas-station. The husband of the defendant says:

> When we were about 150 feet away the Hollum car entered the road and Mrs. Robertson blew her horn and began turning to the left (that is from the westerly side of the west pavement upon which she had been travelling) to the easterly side of the west pavement.

I am satisfied that when the Hollum car got into motion the Robertson car was in actuality somewhere between 200 and 500 feet to the north. The visibility was good and it was not raining. Dr. and Mrs. Robertson say the pavement was damp from rain earlier in the morning. The plaintiff's witnesses say the pavement was dry but a damp concrete pavement is not a serious matter for any car well braked and with reasonably good tires. The plaintiff in moving from the gas-station, as he says, had to go some six feet to reach the westerly edge of the west pavement. He started in low, then changed to second. When he was about in the middle of the west pavement, according to his story, seeing that the Robertson car had swung over to the east half of the west pavement, he then stepped on the gas in order to pass in front of the Robertson car. Pacific Highway is an arterial

highway and anyone seeking to cross traffic on an arterial highway must do so with caution. The first purpose of arterial highways is to speed up traffic thereon.

It was urged on behalf of the defendants that Hollum should have stopped his car and allowed the Robertson car to pass in front of it. I cannot agree. It may be that Hollum was not as alert as he ought to have been. I rather think that he was not, but taking Dr. Robertson's evidence the fact remains that Hollum actually entered the westerly pavement when the Robertson car was 150 feet away. True the Hollum car would not be proceeding, when it first entered the pavement, at more than seven miles an hour or at the rate of about ten feet per second and the Robertson car had been travelling at about 40 miles an hour or at the rate of 58.64 feet per second. Upon the evidence the Hollum car was accelerating its speed and the Robertson car was diminishing speed. The Hollum car would not take more than two seconds to cross the highway even at an angle of 45 degrees. The Robertson car in that time should not have travelled 100 feet. The Robertson car hit the left rear wheel of the Hollum car at about the edge of the dirt strip between the east and west pavement. Whether at the east edge or the west edge of the dirt strip I am not clear but it is not material. Even assuming that Hollum did not keep as sharp a look-out as he ought to have done and was not as alert in making the crossing as he ought to have been the fact remains that the Robertson car had a clear vision for a long distance of the Hollum car and ought to have avoided it either by passing to the rear of it or by coming to a stop to permit the Hollum car to complete its crossing.

I am unable to find upon the evidence that Hollum's negligence contributed to the accident. The evidence indicates that Mrs. Robertson did not exercise the judgment which she ought to have exercised in the circumstances. She probably became flustered at the last moment with the result that the accident ensued. I cannot say other than it was the negligence of the defendant Robertson that was the direct cause of the accident.

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There will be judgment for the plaintiff in special damages as follows:

Dr. Frank T. Maxson.....	$125.00
Dr. Frank S. Barnes.....	30.00
Towing car	5.00
Damage to car.....	50.00
Gasoline lost	3.00
Damage to zipper jacket.....	2.50
Damage to eye glasses.....	5.00
Damage to trousers.....	2.00
Damage to sweater.....	2.00
Massage treatments	20.00
	$244.50

and in general damages in the sum of $850. Costs will follow the event.

Judgment for plaintiff.

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March 25, 26; *April* 14.

REX v. LOUIE HOW.

Criminal law—Article intended for use in disposing of property by a mode of chance—Conveyance of same—Knowledge—Evidence—Criminal Code, Sec. 236 (bb).

The accused, who drove a motor-truck, contracted with a mercantile company to carry certain goods to its premises from the Customs warehouse in Vancouver. While on his way from the warehouse with a load he was stopped under a search warrant, and ten cases were found to contain paper slips that were in a state in which they could be adapted to either a lawful or an unlawful use.

Accused was convicted on a charge for knowingly conveying articles, to wit, lottery tickets, intended for use in the carrying out of a scheme for the disposing of property by a mode of chance.

Held, on appeal, reversing the decision of LENNOX, Co. J., that the conviction be quashed.

Per MARTIN, J.A.: That assuming the finding that the company had imported the papers with the intention of illegal use was justified, there was no evidence to support the finding that the appellant had knowledge of that intention.

Per MACDONALD and MCQUARRIE, JJ.A.: That there was no evidence of an intention to use the papers in disposing of property by some mode of chance.

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APPEAL by accused from his conviction by LENNOX, Co. J. on a charge that on the 30th of November, 1935, he did knowingly convey articles, to wit, lottery tickets intended for use in the carrying out of a scheme for disposing of property by a mode of chance, contrary to section 236 (*bb*) of the Criminal Code. The accused owned a delivery truck and had a contract with Quong Man Sang Company to cart their goods, and on the present occasion he was instructed by the company to bring from the Customs warehouse in Vancouver to their premises a large consignment of goods from China. The goods had been inspected and passed by the Customs. Over three truckloads had to be taken. Thirty cases were taken on the first load and on the way to the company's warehouse the load was seized by detectives and taken to the police station where one of the detectives asked the accused to point out the cases containing lottery tickets, and as a result of further questioning ten cases were segregated from the 30 by accused. The ten cases were marked "Absorbent cut paper" but otherwise accused had no knowledge of what they contained and swore he believed they were lawful goods. The evidence disclosed these "tickets" or "papers" were in a condition in which they could be adapted for either a lawful purpose or an unlawful purpose. There was the uncontradicted evidence of the company that they sold these papers to grocery and merchandise customers and not to lottery-houses. It was found on the trial that the accused knew the papers were used for an illegal purpose and he was convicted.

The appeal was argued at Vancouver on the 25th and 26th of March, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C., for appellant, referred to *Barker* v. *Wood* (1932), 49 T.L.R. 402; *Ransom* v. *Burgess* (1927), 91 J.P. 133; *Dew* v. *Director of Public Prosecutions* (1920), 85 J.P. 81 and *Attorney-General* v. *Walkergate Press* (1930), 142 L.T. 408.

Branca, for the Crown: The charge is under section 236 (*bb*) of the Criminal Code. The word "intended" in said section means "designed": see Oxford Dictionary, Vol. 5, p. 375 and

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Vol. 3, p. 245. On the question of knowledge by the accused see *Rex* v. *Beaver* (1905), 9 Can. C.C. 415; *Rex* v. *Sbarra* (1918), 13 Cr. App. R. 118.

Farris, replied.

Cur. adv. vult.

14th April, 1936.

MARTIN, J.A.: The appellant was convicted by LENNOX, Co. J. in the County Judge's Criminal Court of Vancouver under section 236 (*bb*) of the Criminal Code

For that you on the 30th day of November, A.D. 1935, at the City of Vancouver aforesaid unlawfully did knowingly convey articles, to wit, lottery tickets intended for use in the carrying out of a scheme for disposing of property by a mode of chance contrary, etc. . . .

That section declares that every one is guilty of an indictable offence who

knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article which is used or intended for use in the carrying out of any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatsoever; . . .

There is little or no dispute about the material facts which, briefly stated, are that the appellant and his partner owned a delivery truck and they had a contract with the Quong Man Sang Company (a firm of admitted respectability) to cart their goods by piece at ten cents per case, and on the present occasion they had been instructed by that company to bring from the Customs warehouse in Vancouver to their premises a large consignment of goods from China which had been inspected and passed by the Customs, which would take in all about 3½ truckloads to handle. On the first trip to and from the Customs the appellant, who drove the truck, took on 30 cases of goods, which were being delivered to him by the Customs officer after identifying them as being those of the company by its consignee's marks (K.M.S.) and numbers, in the usual way. Of these 30 cases ten were marked (in Chinese) as "Absorbent cut paper," but otherwise the appellant had no knowledge of what they contained, and swore that he believed they were lawful goods because they had passed the Customs. On his way to the company's store with them he was stopped by two detectives with a search warrant and

they read it to him and took him with the truck to the police station and there detective McFarlane told him "to point out to me the cases containing lottery tickets," and as a result of some action by the appellant the ten cases were seized. This evidence of this order to the appellant to point out the cases containing lottery tickets and his alleged response thereto was objected to in law by his counsel and denied by him as a fact, but in the light of all the evidence given it is unnecessary to decide those questions since it clearly appeared, and is so found by the learned judge, that whatever name may be given to these printed paper slips (whether "cut soft papers," or "absorbent cut paper," or "character papers," or "character tickets," or "blank tickets," or "blank slips," or "lottery slips," or "lottery papers," or "lottery tickets," and otherwise, as they were variously described) they were capable of a legal trade use, as well as an illegal use after further written additions were made to them by any person who wished to participate by their means in a lottery. In other words these papers when seized were in a state in which they could be adapted to a lawful or unlawful purpose, and the learned judge so finds, saying:

> They might be used or might be intended to be used as scratch pads or statements of account or laundry tickets or for teaching the young student how to form characters, a sort of a correspondence school or something like that.

There was ample evidence to support that finding and the uncontradicted evidence of the company, who are merchants in a large way, shows that they sold these papers by weight to their grocery and merchandise customers all over Canada, principally in the Prairie Provinces, but not to lottery-houses.

Under these circumstances it was necessary, to support this particular charge as framed, to prove that the appellant knowingly conveyed these cases of papers, call them by what name you will, to the company's store with the knowledge that they were "intended for use" by the company, "in the carrying out of a scheme for disposing of property by a mode of chance" as, the information charges, I say, "by the company," because on the facts before us the appellant's connection with the matter, and his obligation under his trucking ("conveying") contract, and his liability, civil or criminal, for his actions thereunder, came

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Martin, J.A.

to an end when he had duly delivered these "articles" [cases of paper] to a person who could make a lawful use of them, if nothing had been brought to his notice that they were "intended for use" in an unlawful way. The case would have been very different if the appellant had "conveyed" the papers direct to lottery-houses or to "runners" in their employ, but nothing of that kind is present, and as it stands on the evidence it is really no stronger than if he had been "conveying" ten cases of ordinary playing cards which might be intended for use lawfully or unlawfully.

Unfortunately, with respect, the learned judge failed to distinguish between the intention of the company, the "consignee" and that of the appellant and erroneously fastened the illegal intention that he finds the "consignee" had, upon the appellant and treated it as conclusive against him saying:

> . . . It would be stupid to say that the consignee of these exhibits was without knowledge of their illegal use or their temptation to use. You might say he was just bringing them in under the child-like idea or plan, I think, of selling them for memo. pads and laundry marks.

Assuming that finding against the company, of importing with intention of illegal use, to be justified, it is of no avail against the appellant unless it came to his knowledge, and as there is no evidence to support such a finding against him, even if it had been made, the case against him fails and therefore the appeal should be allowed and conviction quashed.

MACDONALD, J.A.: The charge was laid under section 236 (*bb*) of the Code, reading as follows:

> Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who
>
> (bb) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article which is used or intended for use in the carrying out of any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatsoever;

Does the evidence disclose that the accused, the driver of an auto-truck, knowingly accepted for carriage or transport an article (or articles) "which is used" or on the other hand "intended for use" in the carrying out of any proposal, scheme or plan for selling or otherwise disposing of property by any

mode of chance? The "articles" were tickets or pieces of paper not completed for final use; further marks, writings or characters had to be added before they could be used as lottery tickets. The fact, that they were in an incomplete form however is not material. In that form they were "articles" (each one an article) which might be used in carrying out the scheme. There is enough evidence to disclose knowledge on the part of the accused of the special kind of merchandise he was transporting along with other merchandise. He segregated them from other cases on the truck in compliance with a demand from a police officer removing ten cases when asked to do so.

The next step is more difficult, *viz.*, to ascertain if the evidence shows that these incompleted forms were intended for use in carrying out a scheme for disposing of property by any mode of chance. Unfortunately no evidence was offered on this point (it may not have been available) except by inferences not all pointing in the same direction. No lotteries were running at that time except intermittently; in other words a market was not disclosed. All that can be suggested is that a potential market existed (that would be sufficient, if supported by evidence) and that these tickets were "intended" to supply it. The test applied to circumstantial evidence is lacking. There should be evidence to show that it was intended that these tickets should be used not only in disposing of property but in disposing of it by some mode of chance. There is an entire absence of evidence on that point. I do not agree that the word "designed" might be substituted for "intended." The former contains a shade of meaning not included in the word employed by Parliament.

I would give leave: allow the appeal and quash the conviction.

MCQUARRIE, J.A.: This is an appeal from a decision of His Honour Judge LENNOX in the County Judge's Criminal Court holden at Vancouver whereby the appellant was convicted for that on the 30th day of November, 1935, at the City of Vancouver, he

unlawfully did knowingly convey articles, to wit, lottery tickets intended for use in the carrying out of a scheme for disposing of property by a mode of chance contrary to the form of the statute in such case made and provided.

The offence is alleged to come within the provisions of section

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236 (*bb*), of the Criminal Code, which reads as follows: [already set out in the judgments of MARTIN and MACDONALD, JJ.A.]

The appellant is a motor-truck driver and was employed by a Chinese merchant to deliver to the merchant's place of business in the City of Vancouver from the Customs warehouse in the same city a consignment of tickets or sheets of paper suitable for use in Chinese lotteries. The appellant placed the consignment on his truck with other things and started on his way to the merchant's place of business. He was followed by police officers and intercepted before he had reached his destination. The consignment of tickets or papers was seized. There is no suggestion that the merchant had any intention to conduct lotteries but it is contended that he intended to sell the tickets or papers in the ordinary course of business to other persons as yet unknown who might be expected to conduct such lotteries. The intention of the merchant was not proved. As a matter of fact as appears by the oral reasons for judgment of the learned trial judge as set out in the appeal book the tickets or papers might be used or intended for use for other purposes which are there mentioned. No evidence was submitted that the merchant ever sold tickets for use in lotteries. The learned trial judge also finds that certain things which he enumerates had to be done to the tickets or papers before they could be used for lottery purposes and presumably the merchant would not so complete the papers. The complaint against the appellant involves conveying "lottery tickets" intended for use as such and it does not appear to have been clearly proved that the tickets or papers in question here in their incompleted condition came within the category of lottery tickets or that they were intended for use as such.

I would allow the appeal and quash the conviction. I might add that I cannot understand what prompted the Crown to lodge this more or less doubtful test prosecution against the admittedly harmless truckman rather than against others more vitally concerned in the transportation of the alleged lottery tickets.

Appeal allowed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

COLLINS, CORKINGS AND LEONARD v. THE TORONTO GENERAL TRUSTS CORPORATION (p. 122).—Affirmed by Supreme Court of Canada, 12th February, 1936. See [1936] S.C.R. 37; 2 D.L.R. 193; 5 F.L.J. 291.

FOXALL v. SHOBROOK *et al.* (p. 430).—Affirmed by Supreme Court of Canada, 28th April, 1936. See [1936] 4 D.L.R. 464.

KING, THE v. THE SHIP "EMMA K." (p. 97).—Affirmed by Supreme Court of Canada, 27th May, 1936. See [1936] S.C.R. 256; 3 D.L.R. 385.

LLOYD-OWEN v. BULL *et al.* (p. 370).—Reversed by the Judicial Committee of the Privy Council, 29th July, 1936. See [1936] 3 W.W.R. 146; 4 D.L.R. 237; 6 F.L.J. 83.

REX v. SCHWARTZENHAUER (p. 1).—Reversed by Supreme Court of Canada, 10th June, 1935. See [1935] S.C.R. 367.

Cases reported in 49 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BRITISH COLUMBIA LAND AND INVESTMENT AGENCY LIMITED, THE v. MONTREAL TRUST COMPANY (p. 441).—Reversed by the Judicial Committee of the Privy Council, 15th November, 1935. See [1935] 3 W.W.R. 566; 5 F.L.J. 179.

DENTISTRY ACT AND THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA, *In re* v. COULTAS (p. 459).—Reversed by Supreme Court of Canada, 8th May, 1935. Not reported.

KING, THE (AT THE PROSECUTION OF JOSEPHINE ANDLER, *et al.*) v. THE MINISTER OF FINANCE (p. 223).—Reversed by Supreme Court of Canada, 15th April, 1935. See [1935] 3 D.L.R. 316.

MAGEE (HUGH), DECEASED, *In re* ESTATE OF (p. 481).—Affirmed by the Judicial Committee of the Privy Council, 27th July, 1936. See [1936] 3 All E.R. 15; 3 W.W.R. 355; 6 F.L.J. 99.

ST. JOHN AND THE VANCOUVER STOCK & BOND COMPANY LIMITED v. FRASER AND THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (p. 502).—Affirmed by Supreme Court of Canada, 10th June, 1935. See [1935] S.C.R. 441; 3 D.L.R. 465.

WILLS v. SWARTZ BROS. LIMITED AND HUDSON (p. 140).—Reversed by Supreme Court of Canada, 18th March, 1935. See [1935] S.C.R. 628; 3 D.L.R. 277; 5 F.L.J. 243.

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CRIMINAL LAW—*Abortion—Counselling—Dying declaration—Accomplice—Corroboration—Charge—Warning to jury—Criminal Code, Secs. 69 (d), 259 (d) and 303.*] On a charge of counselling or procuring a person to commit an abortion on a girl, resulting in her death, the only evidence was a dying declaration of the girl which included statements made by accused to the girl some time previous to the abortion, advising her where to go for the operation and giving her money for that purpose. On the submission that this part of the dying declaration relating to "counselling" not being part of the *res gestæ* was inadmissible, and that the declaration should be confined to the cause of death and the circumstances immediately surrounding it: — *Held* (MCPHILLIPS, J.A. dissenting), that it is part of the *res gestæ* as appears from a perusal of sections 69 (*d*), 259 (*d*) and 303 of the Criminal Code. "Counselling" was in part the cause of death and in the true sense associated with it and part of the event. By law "counselling" leading to death creates a criminal offence and is necessarily included in the circumstances surrounding it. The charge to the jury as to convicting on the uncorroborated evidence of the deceased girl who was an accomplice recited "it may be that you may say to yourselves if there ever was a case where a jury, having the power to convict, ought to convict, this is the case. It is within your power to do it, keeping in mind everything I have tried to say to you. If keeping all those things in mind, the dangers, and the law as I have tried to give it to you, you say, 'Well, I have thought this over carefully, the judge has told us we can do it if we see fit to do it. He has warned us of the danger, and warned us we ought not to do it, still we think in this case if there ever was a case we ought to convict.' If you feel that way, gentlemen, then it is your duty to convict, but be very, very careful." On objection to the phrase "then it is you duty to convict":—*Held* (MCPHILLIPS, J.A. dissenting), that it must be read in the light of the context and it is not misdirection to tell a jury that if they go through the mental progress outlined based upon a proper charge, they are, notwithstanding proper warnings, absolutely convinced of the guilt of the accused, that in such an event it would be their duty to convict. REX v. SCHWARTZENHAUER. - - - **1**

2.——*Article intended for use in disposing of property by a mode of chance—Conveyance of same — Knowledge — Evidence—Criminal Code, Sec. 236 (bb).*] The accused, who drove a motor-truck, contracted with a mercantile company to carry certain goods to its premises from the Customs warehouse in Vancouver. While on his way from the warehouse with a load he was stopped under a search warrant, and ten cases were found to contain paper slips that were in a state in which they could be adapted to either a lawful or an unlawful use. Accused was convicted on a charge of knowingly conveying articles, to wit, lottery tickets, intended for use in the carrying out of a scheme for the disposing of property by a mode of chance. *Held*, on appeal, reversing the decision of LENNOX, Co. J., that the conviction be quashed. *Per* MARTIN, J.A.: That assuming the finding that the company had imported the papers with the intention of illegal use was justified, there was no evidence to support the finding that the appellant had knowledge of that intention. *Per* MACDONALD and MCQUARRIE, JJ.A.: That there was no evidence of an intention to use the papers in disposing of property by some mode of chance. REX v. LOUIE HOW. **554**

3.——*Charge—Disorderly house to wit a common gaming-house—Conviction—Habeas corpus — Certiorari — No offence — Uncertainty—Criminal Code, Secs. 226, 227 and 229.*] The accused was convicted on a charge that he "at a certain time and place did unlawfully keep a disorderly house, to wit, a common gaming-house." On the return of a summons for a writ of *habeas corpus* with *certiorari* in aid:—*Held*, that the words "as hereinbefore defined" contained in section 229 of the Criminal Code cannot be ignored. Section 226 contains two subsections and section 227 contains four. Two separate and distinct offences are created by section 226

2.——*Divorce—Alimony—Money payable under agreement for sale—Interest—Assignment—Priorities—R.S.B.C. 1924, Cap. 17, Sec. 15.*] The first wife of K. obtained a divorce in 1927. In June of the same year she obtained an order for permanent alimony, and by July 5th, 1935, there was due her over $8,500. On June 30th, 1930, K. agreed to sell to P. certain lands for $19,000, $2,000 payable in cash, the balance as follows: $500 on September 30th, 1930; $1,500 on August 31st, 1931; $1,000 on August 31st, 1932; $4,000 on August 31st, 1933, and $4,000 on August 31st, 1934, with interest on unpaid balance payable on the 30th of June and December each year, P. to assume payment of a mortgage on the lands for the balance of $6,000, payable on October 28th, 1932. Only the first payment was paid, but the second payment of $1,500 was further secured by P. giving a chattel mortgage for $1,500. On February 17th, 1932, K. assigned the first two payments of $500 and $1,500 and the chattel mortgage to E. H., but not the interest thereon. On February 27th, 1932, K. assigned to his first wife the payment of $4,000 due on the 31st of August, 1933, and on September 25th, 1933, he assigned to her the interest to fall due thereafter on such payments. On July 5th, 1935, the first wife obtained a garnishee order in this action against P. which was duly served on K. and P. On November 21st, 1935, K. entered into an agreement with his second wife in which, after reciting that there was still $10,500 unpaid under the P. agreement, he assigned to her the agreement for sale together with all moneys and interest payable thereunder and granted to her all his rights in the lands. On December 11th, 1935, P. paid into Court $157.50 interest for the half year ending November 30th, 1935, on $5,000, part of the principal due under the agreement, and $48.75 interest for the same period on money secured by the chattel mortgage. On an issue between the first wife and second wife as to who was entitled to the interest so paid into Court:—*Held*, that the time to decide the rights of the parties is when the garnishee order was made, and to enable a judgment creditor to obtain an order compelling a garnishee to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and at the date of the garnishee K. was entitled to sue for the instalments of $1,000 payable on the 31st of August, 1932, and the $4,000 payable on the 31st of August, 1934, making in all $5,000. He was also entitled to sue for interest on the chattel mortgage as he had not assigned this to E. H. Accordingly the interest paid into Court is payable to the first wife. KIRKHAM v. KIRKHAM. - **321**

GUARANTEE—*Executors—Authority under will—Scope of.*] William Morrow carried on the business of a coal and ice company in Vancouver. In 1929 he, with a group of Vancouver coal dealers, formed the Tulameen Coal Mines Limited, for the purpose of operating a coal mine and securing a source of supply of coal for their retail yards in Vancouver. In June, 1929, he executed a guarantee in favour of the plaintiff securing the indebtedness of Tulameen Coal Mines Limited for advances up to $2,925. He died in March, 1930, survived by his widow, one son and one daughter. By his will he appointed his wife and two others executors of his estate, and the business of the deceased "now being carried on by me in the City of Vancouver" was devised to the executors in trust with the direction that "my said trustees shall continue to carry on such business (*i.e.*, the retail coal and ice business) until my son William J. Morrow shall attain the age of twenty-three years," etc. On the 26th of June, 1930, a further guarantee in favour of the bank, securing the indebtedness of the Tulameen Coal Mines Limited for advances up to $4,875, was executed by the three trustees, of which the widow is the survivor. The plaintiff recovered judgment in an action

NEGLIGENCE—*Continued.*

highway, causing him to lose control of his car." Nowhere is there any evidence that this occurred. Not only was it not pleaded but it was never put forward in the course of the trial as the real cause of the accident, and there should be a new trial. *Per* MCPHILLIPS and MCQUARRIE, JJ.A.: The defendant was guilty of gross negligence, particularly in view of the speed of the two cars when he was attempting in a most careless and negligent manner to pass. The finding of the jury is a reasonable explanation of what happened, there was evidence supporting such finding and it was open to the jury on the pleadings. The Court being equally divided the appeal was dismissed. WARREN V. GRINNELL COMPANY OF CANADA LIMITED AND LEGGATT. - - - **512**

3.——*Automobile collision—Crossing left side of road—Care to be taken by on-coming car.* - - - - - - **551**

See DAMAGES. 10.

4.——*Automobile collision—Intersection—Avoiding another collision prior to accident—Effect of on accident—Time to recover in interval.*] The plaintiff's brother parked his car, about 7 p.m. in April when it was light, facing west near the curb on the north side of Kingsway and a few feet west of the intersection of Miller Street. He got out and entered a store leaving his brother (the plaintiff) in the car. The defendant, Bersea, was driving his car westerly on Kingsway about 30 feet behind a car driven by one Cook, Bersea driving half the width of the car closer to the centre of the road than Cook. When they reached the intersection of Miller Street a truck driven by an employee of the third party going south on Miller Street, after stopping at the stop sign, came out on Kingsway and a collision with Cook's car was narrowly avoided by Cook turning sharply to the left. Bersea, to avoid the car and truck in front of him then turned sharply to the right and behind the truck nearly reaching Miller Street when he found himself confronted by the car in which the plaintiff was sitting. He had not slackened his speed and to avoid the car, he turned as fast as he could to the left and towards the centre of Kingsway but his car skidded and the rear portion of his car struck the rear left side of the parked car. The jolt severely injured the plaintiff. On the trial Bersea was found solely to blame. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., that the fact that the third-party driver negligently created a situation in the roadway by

NEGLIGENCE—*Continued.*

nearly colliding with Cook thereby throwing the defendant Bersea into momentary confusion, does not excuse the latter from running into the parked car on the roadway at a point far enough beyond the centre of disturbance to enable one using care, to resume normal driving and so avoid the collision. PELLE V. BERSEA AND BEATTY BROS. LIMITED: ZACKS CLEANERS & DYERS LTD. THIRD PARTY. - - - - **546**

5.——*Car left for repairs—Stolen—Damaged when in hands of thieves—Cost of repairs.* - - - - - - **256**

See DAMAGES. 5.

6.——*Contributory negligence — Night driving—Truck left on highway—Distracting head-lights on third car — Finding of jury—Appeal.*] About 5.30 p.m. on the 21st of December, when P. was driving the defendant's motor-truck with a load northwesterly on Pacific Highway, having a flat tyre he stopped on the right edge of the paved portion of the road which was eighteen feet wide. There was about six feet of solid ground to the right of the paved portion of the road and a slightly used cross-road about 30 yards beyond where he stopped. P., leaving the lights on, then hailed a passing car and went to the nearest garage about one mile away. He returned with a wrecking car, fixed the tyre and then went back to the garage with the wrecking car to telephone for funds. Shortly after P. left the car the plaintiff, driving his car north-westerly on Pacific Highway, ran into the rear of the truck. As he was nearing the truck another car was passing it in the opposite direction with its head-lights facing the plaintiff. In an action for damages a jury found the defendant guilty of negligence in leaving the car unattended and not moving the car from the paved portion of the road, and that the plaintiff was not negligent. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., that the jury properly found the defendant guilty of negligence and that owing to the beam of light thrown by a third car there was enough evidence to support the jury's finding that the plaintiff was not guilty of negligence. HALL V. WEST COAST CHARCOAL AND WOOD PRODUCTS COMPANY LIMITED. - - - - - - **18**

7.——*Damages—Bare licensee—Defective railing or stairway—Liability of owner.*] A two-story building constructed in 1892 was purchased by the defendant in 1918. The upper story, containing a large number of rooms, was rented to the plaintiff's brother

NEGLIGENCE—*Continued.*

in 1930, who let out the rooms to the public. The plaintiff was his housekeeper. At the back of the upper story was a verandah, at one end of which was a stairway that went down the wall of the building to a platform, and the stairs then turned at right angles to the wall, going to the courtyard below. At one side of the platform was a railing extending at right angles from the wall to a post to which it was nailed, and at the wall end it was nailed to an upright that was held in place by a brace nailed to the floor of the platform. The plaintiff went down to the platform and when shaking a curtain over the railing she leaned against it and it gave way precipitating her to the floor of the courtyard sustaining injuries. The lease of the upper floor does not mention the verandah or the stairway but both were used for ingress and egress by the tenant who stored his garbage cans and firewood on the verandah, and had it swept from time to time. In an action for damages for negligence:—*Held*, that the tenant had an easement over the verandah and stairway, but the possession and control remained in the defendant, and the plaintiff was a bare licensee. So far as a bare licensee is concerned the occupier has no duty to insure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the premises which is not apparent to the licensee, but is known to the occupier. There is no evidence here of the creation of a trap since the tenant obtained his lease, and assuming the railing in its condition was a concealed danger there is no evidence that the defendant knew of it. The action was dismissed. DYMOND v. WILSON. - **458**

8.——*Damages — Collision — Motor-car and bicycle—Intersection—Families' Compensation Act — Apportionment of fault—Parents suing for death of son — R.S.B.C. 1924, Cap. 85—B.C. Stats. 1925, Cap. 8.*] At about 5 p.m. on the 21st of March, 1934, the plaintiff's son (ten years old) was riding his bicycle easterly on Kingsway about three feet from the south curb and about one and a half blocks west of the intersection of Royal Oak Avenue, when the defendant was driving his Chevrolet sedan in the same direction on Kingsway about half a block behind him and about seven feet from the south curb. The automobile was travelling at from 25 to 30 miles an hour and it gradually caught up to the boy. When the boy was about 10 feet from the intersection of Royal Oak Avenue, according to the evidence of two witnesses, he put out his left

NEGLIGENCE—*Continued.*

hand and when three feet from the intersection he turned to his left to cross the road and in front of the defendant's car which was from 35 to 40 feet west of the intersection. The defendant did not see any signal, but on seeing the boy turn to the left, did not put on his brakes but turned sharply to the left with the intention of going around in front of him, but he struck the boy about the middle of the intersection and went over on to the curb on the north side of Kingsway. *Held*, on the evidence that the boy did put out his hand a few feet from the intersection and the defendant was not keeping a proper look-out in not seeing the signal. The defendant's speed was excessive and he did not have his car under control in approaching the intersection, as there was sufficient space to stop after the boy turned to the left if he had had his car under control. The defendant was guilty of negligence but the boy was guilty of contributory negligence, as his hand was put out for such a short time that the signal would not be effective and the boy's degree of fault was 25 per cent. IRVINE v. MUSSALLEM. - - - **72**

9.——*Damages — Master and servant—Negligence of servant—Scope of employment —Liability of master — Servant riding bicycle home for lunch after delivery of messages—Runs down pedestrian at crossing.*] P., a messenger boy of the defendant company, after delivering a number of messages on his bicycle, telephoned the dispatcher at the defendant company's office for leave to go home for lunch, which was granted. On his way home he ran into the plaintiff, an old man, who had started across an intersection. When about one-third of the way across the plaintiff saw P. on his bicycle about 120 feet to his right. He thought he could get across ahead of the boy and accelerated his speed, but when nearly across P. struck him. He was knocked over and suffered severe injuries. In an action for damages judgment was given for the plaintiff against both defendants. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. as against P. but allowing the company's appeal, that as at the time of the accident the messenger boy was not acting in the course of his employment therefore the company was not responsible. GIBSON v. B.C. DISTRICT TELEGRAPH AND DELIVERY COMPANY LIMITED, AND PETTIPIECE. - - - - **494**

10.——*Damages—Master and servant—Waitress at lunch-counter—Fall on slippery*

PRACTICE—*Continued.*

plaintiff, whose place of business and address for service is 404 Rogers Building, 470 Granville Street, Vancouver, B.C." On motion to set aside an order made *ex parte* under section 3 of the Arrest and Imprisonment for Debt Act, that the defendant be held to bail and that the plaintiff be at liberty to issue a writ of *capias ad respondendum*:—*Held*, that the endorsement herein is not sufficient to comply with the strict interpretation which this statute requires, and the writ is set aside. SQUIRE v. WRIGHT - - - - - - - - **411**

3.——*Costs—County Court—Taxation—Review—Evidence at coroner's inquest—Plan of scene of accident — Stenographer.*] On review of the taxation of the defendant's bill of costs in an action for damages caused by an automobile accident, objection was taken to three items: (1) "Paid for transcript of evidence at inquest $19.40"; (2) "Paid T. M. for surveying and preparing of plan of scene of accident and copies, $12.90"; (3) "Paid for attendance of stenographer at trial, $15." *Held*, as to (1) that the transcript was in the nature of a luxury used by both parties to assist in the conduct of their case and the cost thereof ought to be borne equally; (2) that the taxing officer should not allow the costs of surveying and preparing plans of the scene of the accident without an order therefor, but there being jurisdiction under Order XXII, r. 35 of the County Court Rules to make the order now, it should be made, and although the plan was prepared for the defendants it was primarily used by the plaintiff as part of her case and it would be inequitable for her to now object to paying for it; (3) that there being no express agreement that the costs of attendance of a stenographer be costs in the cause, but there being an implied agreement that they would be borne equally, the item should be reduced by one-half. CREIGHTON v. CLARK. - - - **169**

4.——*County Court — Garnishee order—Application to set aside before filing dispute note — Status — R.S.B.C. 1924, Cap. 17—County Court Rules, Order V., r. 1B; Order 1., r. 14; and Order XXIII., r. 3.*] On an application by the defendant in the County Court to set aside a garnishee order preliminary objection was taken by the plaintiff that as there was no appearance by the defendant to the action, either by filing a dispute note or otherwise, he had no *status* in the action and was not entitled to take any step in the action until that *status* was acquired. *Held*, that the defendant is not, by this application, taking a step in the action, that the preliminary objection be dismissed and the defendant be allowed to proceed with his application. TROSELL *et al.* v. GREGOV. - - - - - **265**

5.——*Divorce petition—Intervener—Particulars of allegations—Affidavit verifying—Order for — Divorce Rule 27.*] The petitioner in divorce (the wife) named a woman Y., and Y. was given leave to intervene. The intervener demanded particulars of the allegations set out in the petition against her. Particulars were filed but were not verified by affidavit as required by r. 27 of the Divorce Rules, 1925. On an application to strike out the particulars because of the absence of the affidavit an order was made by MURPHY, J. on the 17th of June, 1935, that the petitioner file an affidavit verifying the particulars and that the petitioner be given leave to amend the petition. The petitioner drew an amended petition setting out the same and further allegations but did not file an affidavit in compliance with the order. On an application by the intervener for an order that the cause be stayed until the order of the 17th of June be complied with in regard to the filing of an affidavit:—*Held*, that the order of the 17th of June must be strictly complied with and that the cause be stayed until the petitioner do verify the particulars filed in the original petition as required by said order. *Re* P. v. P.: Y. INTERVENER. - - **201**

6.——*Examination for discovery—Officer of company—Refusal to answer question—Relevancy to issue.*] In an action for a declaration that an agreement was concluded between the plaintiff and one Brownridge of the one part and the defendant company of the other part, whereby the defendant company agreed to sell and deliver to the plaintiff its stock of whisky, the terms and conditions thereof being set forth in a formal contract referred to and accompanying a letter of the 12th of November, 1934, signed by the defendant company and addressed to and delivered to said Brownridge. One Wills, assistant manager of the defendant company, on his examination for discovery, admitted that he sent a telegram to one Knight, the agent of the defendant company in Ontario, who at the time was in New York, which reads as follows: "Terms of option not complied with. Go ahead with your prospect." Witness was then asked "Who was the prospect referred to in the telegram?" Witness refused to answer. An application for an order direct-

PRACTICE—*Continued.*

12.——*Notice of appeal—Style of cause—Stay of proceedings—Step in the action—Evidence abroad—Commission—Grounds in support — Sufficiency — Discretion.*] Notice of appeal to the Court of Appeal should be intituled in the Court appealed from, the notice should be filed in that Court and a copy thereof in the Court of Appeal. Giving notice of appeal is not a breach of a clause in an order for security for costs directing that "all further proceedings be stayed until such security is given." On an application for an order to examine a witness on commission in the State of Michigan, the relevant material submitted to justify the order was a clause in the affidavit of the plaintiff's solicitor which, after stating that the proposed witness was necessary and material to prove the service by him in Seattle upon the defendant of the necessary process to found the foreign judgment sued on, and that the witness had "left Seattle," goes on to say: "He has since been located at Kalamazoo, Michigan, but it is not possible to compel him to attend here at the trial, and, in any event, the expense of such an attendance would be prohibitive." There was no statement that there was any attempt to get him to come to Victoria. The order was granted. *Held*, on appeal, reversing the decision of FISHER, J., that upon the present facts the material submitted to the learned judge was so meagre that it did not afford a reasonable ground for the exercise of his discretion in granting the order, and the appeal is allowed. ROMANO v. MAGGIORA. (No. 3). **362, 273**

13.——*Summons — No time mentioned for hearing the application—Defect.*] On an application by the petitioner in a divorce cause to amend the decree made by ROBERTSON, J. on the 5th of March, 1936, the summons was in the form set forth at page 186 of the Rules of the Supreme Court, 1925, No. 1 (i), save and except that the words "at o'clock in the noon," were omitted and no time was mentioned in the summons for hearing the application. On preliminary objection by respondent that the summons was defective and a nullity:—*Held*, that the preliminary objection should be given effect to and the application is dismissed. HUMBER v. HUMBER. (No. 2). - - - - - - - **429**

14.——*Woodmen's liens—Assignment of—Two assignees as joint plaintiffs—County Court—Writ of attachment—Want of jurisdiction — Prohibition — R.S.B.C. 1924, Cap. 53, Sec. 30; Cap. 276, Secs. 7 and 32.*]

PRACTICE—*Continued.*

Forty lienholders filed their respective liens for wages against the defendant company. Twenty-six of them then assigned their liens to one lienholder, and twelve of them to another. The two claimants holding the liens then brought action in the County Court under their respective assignments and also for their personal claims, and caused a writ of attachment to issue to cover $1,246.68, being the total amount of the liens. The defendant moved for a writ of prohibition on the ground that the County Court had no jurisdiction to determine the writ of attachment, as the amount claimed was in excess of the jurisdiction of the County Court. The application was dismissed. *Held*, reversing the order of LUCAS, J., and granting prohibition, that section 32 of the Woodmen's Lien for Wages Act is a procedural one, and once the claims are joined they constitute one suit and that suit is covered by section 7 of the Act. The appropriate section of the County Courts Act (section 30) then comes into operation restricting the jurisdiction of the County Court and providing that claims which do not exceed $1,000 may be brought in the County Court, but those over that amount in the Supreme Court. MCGILVRAY AND PRITAM SINGH v. QUEENSBORO SAWMILLS LTD. - - - - - - - **63**

PREMISES—Lease of—Oral agreement varying—Evidence of refused—Payment of rent by mistake. - **466**
See MONEY HAD AND RECEIVED.

PREMIUMS—Insurance—Collection of. - - - - - - - **149**
See PRINCIPAL AND AGENT.

PRINCIPAL AND AGENT — *Sub-agent—Issue of insurance policies — Collection of premiums—Privity of contract—B.C. Stats. 1933, Cap. 28, Sec. 20.*] B., B. & B. Ltd., general agents of the plaintiff company, employed the defendant as a sub-agent to solicit insurance. The plaintiff, as required by the Insurance Act, gave its consent to the superintendent of insurance that the defendant should act as an insurance agent representing it, and a number of insurance policies were issued by the plaintiff through the defendant's agency. The business relations between B., B. & B. Ltd. and the defendant included other business than that done for the plaintiff company, and all premiums collected by the defendant including those collected on the plaintiff's policies were paid direct to B., B. & B. Ltd. The plaintiff gave the defendant notice that the