# THE
# BRITISH COLUMBIA REPORTS

BEING

## REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

## THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME LI.



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1937.

# JUDGES
OF THE
# Court of Appeal, Supreme and County Courts of British Columbia, and in Admiralty

During the period of this Volume.

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CHIEF JUSTICES OF BRITISH COLUMBIA:
THE HON. JAMES ALEXANDER MACDONALD.
THE HON. ARCHER MARTIN.

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JUSTICES OF THE COURT OF APPEAL.
CHIEF JUSTICES:
THE HON. JAMES ALEXANDER MACDONALD.
THE HON. ARCHER MARTIN.
JUSTICES:
THE HON. ARCHER MARTIN.
THE HON. ALBERT EDWARD McPHILLIPS.
THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. WILLIAM GARLAND ERNEST McQUARRIE.
THE HON. GORDON McGREGOR SLOAN.

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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. ALEXANDER MALCOLM MANSON.

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DISTRICT JUDGE IN ADMIRALTY:
THE HON. ARCHER MARTIN.

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COUNTY COURT JUDGES:

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|---|---|
| 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 |
| HIS HON. HERBERT HOWARD SHANDLEY, | Victoria |
| HIS HON. WELLINGTON CLIFTON KELLEY, | Yale |

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ATTORNEY-GENERALS:
THE HON. GORDON McGREGOR SLOAN, K.C.
THE HON. GORDON SYLVESTER WISMER, K.C.

## MEMORANDA.

On the 7th of February, 1930, Eli Harrison, retired Judge of the County Court of Nanaimo, died at the City of Victoria.

On the 13th of April, 1934, Hugh St. Quentin Cayley, retired Judge of the County Court of Vancouver, died at the City of Vancouver.

On the 11th of June, 1936, the Honourable Francis Brooke Gregory, retired Puisne Judge of the Supreme Court of British Columbia, died at the City of Victoria.

On the 1st of March, 1937, Wellington Clifton Kelley, one of His Majesty's counsel learned in the law, was appointed Judge of the County Court of the County of Yale and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour John Robert Brown, resigned.

On the 2nd of April, 1937, the Honourable Archer Martin, a Justice of Appeal, was appointed Chief Justice of British Columbia, in the room and stead of the Honourable James Alexander Macdonald, resigned.

On the 2nd of April, 1937, the Honourable Gordon McGregor Sloan, Attorney-General, one of his Majesty's counsel learned in the law, was appointed a Justice of Appeal.

On the 31st of May, 1937, Frederick McBain Young, retired Judge of the County Court of Atlin, died at the City of Vancouver.

On the 18th of December, 1937, William Ward Spinks, retired Judge of the County Court of Yale, died at the City of Victoria.

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DECIDED IN THE

# COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

## BRITISH COLUMBIA,

TOGETHER WITH SOME

# CASES IN ADMIRALTY

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## REX v. RUSSELL.

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*May* 27, 28; *June* 26.

*Criminal law—Murder—Shooting—Bank hold-up—Jury trial—Identification—Alibi—Misdirections by trial judge—Whether "substantial wrong or miscarriage of justice"—Criminal Code, Sec. 1014.*

At about noon on the 15th of January, 1936, three men entered a branch office of the Canadian Bank of Commerce at the corner of Powell Street and Victoria Drive in Vancouver and one of them shot and killed the teller and shot and wounded the manager. They took about $1,050, and going out drove away in the car in which they had driven to the bank. On the following day the accused Russell was arrested and six days later the two other men in the hold-up, being hard pressed by the police, committed suicide. On his trial for murder Russell was identified as the man who did the shooting by the ledger-keeper in the bank, by a customer and a news boy, both being in the bank at the time, also by two men who were at the street door as he went out. Russell gave evidence on his own behalf and swore that on the morning of the 15th of January he went for a walk on Commercial Drive and Broadway some distance away from the bank and did not arrive home until after the time of the hold-up. He was found guilty by the jury and sentenced to be hanged.

*Held*, on appeal, affirming the conviction (MARTIN, J.A. dissenting), that the appeal should be dismissed.

*Per* MACDONALD, C.J.B.C.: Russell was clearly identified as one of those who entered the bank and took part in the hold-up. The *alibi* which is the

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oath of the accused is not entitled to much respect, and the observations of the trial judge that an *alibi* must be proved at the earliest opportunity, assuming this is not absolutely correct on the law, did not bring about a miscarriage of justice.

*Per* MARTIN, J.A.: It is complained that the learned judge not only failed to present fairly but in effect "brushed aside" the defence of an *alibi* as one not seriously raised and further misled the jury by thus directing them: "I think perhaps in referring to the *alibi*, if you are considering it seriously, one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard." Such a direction is contrary to authority and is radically different from and goes far beyond anything that is permissible from any point of view in the circumstances. This ground of misdirection has been established, with the result that the conviction must be quashed and a new trial directed.

*Per* MACDONALD and MCQUARRIE, JJ.A.: A phrase in the charge relating to the *alibi* to which serious objection is taken, *viz.*, "one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment," is said to transgress the rule that the accused is not called upon to disclose his defence before the trial or during the prosecution of the case by the Crown. Although it is not right to say to the jury that "it must be set up at the earliest possible moment" it is clear that where a finding on the identity of the accused as the man who shot Hobbs, based on satisfactory evidence of identity, effectively disposed of the *alibi* set up, no substantial wrong within the meaning of section 1014 (2) occurred.

APPEAL by accused from his conviction at the Vancouver Spring Assizes, *coram* MORRISON, C.J.S.C., on the 3rd of April, 1936, on a charge of murder. On the 15th of January, 1936, there was a hold-up by four men of the Canadian Bank of Commerce at Powell Street and Victoria Drive, in Vancouver, and one Hobbs, the bank's teller, was fatally shot having died the next morning. The manager of the bank was shot and seriously wounded. One of the four men was driving the car in which they came to the bank and the other three entered the bank's premises. The accused Russell went to the teller's cage and shot Hobbs. He was identified by witnesses. The two other bandits in the bank were Hyslop and Lawson. Some days later when they were threatened with arrest they committed suicide. Dunbar drove the car. After the three men got out to go into the bank Dunbar drove twice round the block and came back to

the bank where he picked up the three men and they drove away. There was evidence of the four men going to a house on East 10th Avenue where they stayed with two women from the 11th of January until after the hold-up. On the morning of the 15th of January three men hired from a taxicab company a Terraplane car with driver. They went to a spot in Stanley Park where they overpowered the driver, bound him up and left him. This car was identified as the car used in the hold-up. The driver afterwards identified Russell.

The appeal was argued at Vancouver on the 27th and 28th of May, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*Hurley*, for appellant: On the charge the evidence on behalf of the accused was not fairly put to the jury: see *Rex* v. *Williams* (1934), 49 B.C. 379 at p. 383; *Rex* v. *West* (1925), 44 Can. C.C. 109 at p. 112; *Rex* v. *Warner* (1908), 1 Cr. App. R. 227; *Rex* v. *Mason* (1909), 2 Cr. App. R. 59 at p. 61; *Rex* v. *Wilson* (1913), 9 Cr. App. R. 124 at p. 126; *Rex* v. *Totty* (1914), 10 Cr. App. R. 78 at p. 79. The defence was an *alibi* and the position would have been more favourable to the defendant if the learned judge had not referred to the defence evidence at all: see *Rex* v. *Rabbitt* (1931), 23 Cr. App. R. 112; *Rex* v. *Bagley* (1926), 37 B.C. 353. Statements when not under oath were made to the jury at the bank, also in the Coroner's Court: see *Rex* v. *Walters*, [1926] 1 D.L.R. 501. On the question of identification, Workman's evidence only can be relied on. As to whether an *alibi* defence should be disclosed at the earliest possible moment see *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431; *Rex* v. *Roteliuk*, [1936] 2 D.L.R. 465; 65 Can. C.C. 205. On the danger of improper communications being made to the jury on a capital charge see *Rex* v. *Walters*, [1926] 1 D.L.R. 501.

*A. B. Macdonald, K.C.*, for the Crown: Dunbar drove the car and Lawson and Hyslop committed suicide. The four men were together in the house on East 10th Avenue from the 11th until the 16th of January. The defence of an *alibi* is only supported by his own evidence: see *Rex* v. *Miller* (1923), 32 B.C. 298; *Rex* v. *Moran* (1909), 3 Cr. App. R. 25; Crankshaw's

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Criminal Code, 6th Ed., 1103; *Rex* v. *Higgins* (1902), 7 Can. C.C. 68.

*Hurley,* replied.

*Cur. adv. vult.*

26th June, 1936.

MACDONALD, C.J.B.C.: These two men joined in one appeal book which was accepted by the Court and I think the verdict of guilty of both and the sentences imposed thereupon are beyond doubt the right sentences. Their crime was alleged to have been a hold-up of the Bank of Commerce, corner of Powell Street and Victoria Drive, Vancouver, on 15th January, 1936. Russell has been clearly identified as one of those who entered the bank and took part in the hold-up. Dunbar is just as clearly shown to be a person pursuing a common purpose with the others. He drove the three men who entered the bank, namely, Russell, Hyslop and Lawson, the latter two having committed suicide rather than stand trial. Apart altogether from the personal identification of Russell the circumstances of his actions on that day leading up to his arrival at the bank accompanied by Hyslop and Lawson are sufficient to identify him with the crime and his conduct afterwards shows that the other parties with him were equally guilty and that Dunbar was a party to the project. It was contended on behalf of Russell that his alleged *alibi* should have been given effect to. That *alibi* consists of his own oath only and he stated that at the time of the robbery he was walking about the street a long way from the bank. I do not think an *alibi* which is the oath of the accused person is entitled to much respect and I do not think that the observations of the learned trial judge that an *alibi* must be proved at the earliest opportunity, assuming that this is not absolutely correct on the law at the present time, brought about a miscarriage of justice. Dunbar pleaded that he was ordered by one of the three bandits to drive them to the bank. On his objection he was told by one of them, I think Hyslop (it does not matter which) that it would cost him his own life if he did not do it. Therefore, it was argued that he did it under compulsion but his action before that I think clearly indicates that he was in the scheme with the others from the beginning. I do not put much reliance upon the

alleged pressure put upon Dunbar. Russell and Dunbar were residing on the night of the occurrence at a house No. 1436 10th Avenue East, Vancouver, B.C. They were then preparing to move from that house to another part of the city where their hiding place would not be suspected. There was evidence to show that the accused Russell, Dunbar, Hyslop and Lawson lived at the house on 10th Avenue for some time before the crime was committed. I think the evidence is very conclusive against both Russell and Dunbar and that their conviction should not be interfered with.

MARTIN, J.A.: Several grounds of appeal were submitted to us against the conviction, at the Vancouver Spring Assizes, *coram* MORRISON, C.J.S.C., of the appellant Russell for murder, and after giving very careful consideration to all of them I have reached the conclusion that it is only necessary to deal here with what I regard as the most important one, *viz.*, that the learned judge in his charge to the jury did not adequately and fairly present the case of the accused but misled them by misdirection and non-direction amounting to misdirection, with the result that, as section 1014 (2) of the Code puts it, "a substantial wrong or miscarriage of justice has actually occurred," and therefore we are asked to direct a new trial to be held.

It is common ground that a charge must be considered as a whole in the light of the facts, as declared by the Supreme Court of Canada in *Rex* v. *Picariello and Lassandro*, [1923] 1 W.W.R. 1489, at pp. 1491, 1497, 1503, 1506; 39 Can. C.C. 229, cited by me in *Rex* v. *Miller* (1923), 32 B.C. 298, 305, and by the Court of Criminal Appeal in England, *e.g.*, *Rex* v. *Crippen* (1910), 5 Cr. App. R. 255; and it is also, or must be, conceded that "the evidence for the prisoner should be put as carefully as that for the prosecution" and with such a "lucid explanation" that the jury can "do it justice"—*Rex* v. *Warner* (1908), 1 Cr. App. R. 227-8; *Rex* v. *Keating* (1909), 2 Cr. App. R. 61; *Rex* v. *Hadijah Ahmed Caroubi* (1912), 7 Cr. App. R. 149, 153; adopted by the Ontario Court of Criminal Appeal in *Rex* v. *West* (1925), 44 Can. C.C. 109, directing a new trial, wherein it was said, p. 112:

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> . . . while the trial judge is not required in a summing up to review all the evidence in detail, it is necessary that he makes certain that the theory of the defence is fully put to and understood by the jury, and that the evidence in support of the defence is also presented to the jury as carefully as the case for the prosecution and in such a way as to make sure that the jury understand and appreciate its meaning and effect.

The Ontario Court might also have relied, as did the Saskatchewan Court of Appeal in *Rex* v. *Scott and Killick,* [1932] 2 W.W.R. 124, on a still stronger English case, *i.e., Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77, wherein the Court said, *per* Lord Alverstone, C.J., at p. 79:

> We have come to the conclusion, not without very great regret, that this conviction cannot stand. . . . But there is a principle of our criminal law which we think has been violated in this case—namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have been very foolish and unfounded, but that defence ought to have been put before the jury—this is a paramount principle of our criminal law—so that they could judge. . . .

And the same Court, exceptionally strongly constituted with five judges, in *Rex* v. *Schama and Abramovitch* (1914), 11 Cr. App. R. 45, said, *per* Lord Reading, C.J., at p. 49, in quashing the conviction:

> It is essential in cases of this character that there should be a careful and proper direction. . . . We must not be too critical in dealing with the summing up of a judge after a lengthy trial and speeches by counsel. Nevertheless, the Court must be satisfied that when the jury find the prisoner guilty they have applied the right principle of law to the facts before them.

That was a case of receiving, and, *a fortiori,* a careful and proper direction is "essential" where human lives are at stake, and in the very recent case of *Rex* v. *Currell* (1935), 25 Cr. App. R. 116, this "correct statement of the law" in *Schama's* case was affirmed in a striking way, and *Rex* v. *Newman* (1913), 9 Cr. App. R. 134 virtually overruled.

The great care that should be exercised in murder trials in seeing that weighty evidence in favour of the accused is brought to the attention of the jury, is well illustrated by another very recent case in the same volume—*Rex* v. *Mills* (1935), 25 Cr. App. R. 136, wherein the same Court set aside the conviction of one of two persons charged because the judge had not "pointed

out to the jury" a very weighty piece of evidence in his favour, and had made an unfavourable suggestion not put forward by the Crown, saying, p. 146:

> On the ground that the defence put forward on behalf of the male appellant was not put to the jury in the summing-up, and that the sentence to which I have referred excludes that defence from their consideration, we are of opinion that the conviction of the male appellant must be quashed.

And still more recently, last April, the Saskatchewan Court of Appeal decided in *Rex* v. *Harms,* [1936] 2 W.W.R. 114, a murder case, after reviewing several of the decisions I have cited, that, pp. 121-2:

> If a judge fails to direct the attention of the jury to evidence favourable to the prisoner or fails to present the issues and evidence in such a way as to assure the jury's due appreciation of the value and effect of that evidence from the point of view of the accused, it is error and valid ground for a new trial.

In the present case it is complained that the learned judge not only failed to present fairly but in effect "brushed aside" the defence of an *alibi* as one not "seriously" raised or so to be regarded, and further misled the jury by thus directing them:

> I think perhaps in referring to the *alibi*, if you are considering it seriously, one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment, and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard.

It is admitted that "it was first heard" at the trial, and it is submitted that this positive direction that the jury "must consider in an *alibi* defence that it must be set up at the earliest possible moment," and further that "it ought to include a statement of where the accused was at the time of the commission of the alleged offence" is contrary to law and a misdirection in two ways; first, that there was no obligation to set it up before the trial either generally or with particularity, at the earliest possible moment, or at all; and second, that it violated the prohibition of section 4 (5) of the Canada Evidence Act, which excluded this element from the ambit of any direction by imperatively declaring that:

> The failure of the person charged, . . . . to testify, shall not be made the subject of comment by the judge, . . .

It was conceded, in answer to my question, that the reference to the failure to set up this defence "at the earliest possible moment" relates to the preliminary inquiry, as to which many

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references occur in the appeal book which includes copious extracts from evidence there given, but this appellant did not testify thereat but only at the trial.

As to the first submission, it has already been settled in this Province in the appellants' favour by the unanimous decision of this Court in *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, wherein on a question reserved, p. 433, *viz.*:

> Was I in error in my instructions to the jury as to the prisoners failing to disclose their defence before trial?

we unanimously granted a new trial because the judge had wrongly directed the jury that there was an obligation upon the accused to set up his defence of *alibi* before his trial, in that it "should have been made clear at the earliest possible moment where they were" at the time of the offence thus using the identical language now complained of. Our Chief Justice said, p. 436:

> The reference by the learned judge to the withholding of the defence until the accused entered the witness box at the trial, standing alone and without the quotation above referred to from *Rex* v. *Maxwell*, might perhaps be considered as no infringement of the section quoted above, but when coupled with the reference to the police court contained in the quotation, the jury's mind would naturally be directed to the fact that the prisoners had not thought fit to give evidence in the police court and withheld their defence, and they might well conclude that it was because of this that unfavourable inferences against them might be drawn. The section of the Evidence Act aforesaid is wide and general in its terms. Its meaning, I think, is not to be restricted to comment on an accused's failure to give evidence in the particular trial or inquiry in which the comment is made. It seems to me that the judge is prohibited from commenting upon the failure of an accused person to give evidence at the preliminary hearing, as well as his failure to give evidence at the trial, and if I am right in this construction of the section, and if my construction of what the learned judge said to the jury is the true one, then it follows that the question submitted to us must be answered in the affirmative, and the conviction set aside and a new trial ordered.

Now it is beyond question herein that the "jury's mind would be naturally directed to the fact that the prisoner had not thought fit to give evidence in the police court and withheld his defence": indeed as this (appellant) "prisoner" was the sole witness to support his *alibi*, it must indeed have been inevitably so directed, and therefore the case is brought within the principle of the governing and later one of *Bigaouette* v. *Regem*,

[1927] S.C.R. 112, wherein the Court, *per* Chief Justice Duff, at p. 114, stated the law to be that

"It is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal."

Our brother McPHILLIPS in *Mah Hon's* case said, p. 444:

It may be reasonably said that the observations of the learned trial judge might have had the effect of producing in the minds of the jury the conclusion that the prisoners were guilty because of the delay in disclosure of their defence, *i.e.*, if innocent, the defence would have been immediately made known. This would be substantial wrong, and the comment cannot be approved. It is fundamental, as I have already said, that there should be no comment of this nature. The spirit and intention of the Parliament of Canada is clear, and whatever may be the decisions of other Courts based upon different statute law, the criminal jurisprudence of Canada does not admit of such comment.

My views, in conclusion, are to be found at pp. 441-2 and I shall not repeat them, but I will point out that the learned judge below herein was very far from giving the restricted direction that I expressed my opinion in *Mah Hon's* case as being permissible, *i.e.*, that the jury may as one element take the accused's previous silence into consideration in appraising the whole weight of his evidence; on the contrary the learned judge excluded that element of appraisement from their consideration by imperatively directing them that, without any limitation, they "must consider . . . that it [*alibi*] must be set up at the earliest possible moment," and also that it "ought to include a statement where the accused was at the time of the commission of the alleged offence"; such an intractable direction is directly contrary to authority and is radically different from and goes far beyond anything that is, in my opinion, permissible from any point of view in any circumstances.

Since *Rex* v. *Higgins* (1902), 36 N.B.R. 18; 7 Can. C.C. 68, is again relied upon it is sufficient to say that it is not a case of *alibi* and it is distinguished in *Mah Hon's* case at p. 439, and the very unusual circumstances upon which it is founded are set out in the judgment of Hanington, J., at pp. 73-5; it has no real application to the present case, nor has *Rex* v. *Moran* (1909), 3

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Cr. App. R. 25, because it was not a case of misdirection but one in which the Court of Appeal was exercising its discretion on a motion to reopen the case on fresh evidence.

It is a satisfaction that our decision in *Mah Hon's* case has been recently followed by the Saskatchewan Court of Appeal in *Rex* v. *Roteliuk,* [1936] 2 D.L.R. 465; 65 Can. C.C. 205, that Court saying, pp. 211-2, after considering the relevant Canadian and English statutes:

> For these reasons we have come to the conclusion that it was open to the appellant under the provisions of the Canada Evidence Act to testify on his own behalf at the preliminary inquiry touching his alleged offence, had he wished to do so, and that consequently the learned trial judge had no right to comment on his failure to do so. The same view was held by the Appeal Court for British Columbia in *Rex* v. *Mah Hon Hing* (1920), 53 D.L.R. 356; 33 Can. C.C. 195; 28 B.C. 431. See also Seager's Criminal Proceedings Before Magistrates, 3rd Ed., p. 197.

It is to be noted that, since my observations at p. 442 in *Mah Hon's* case, *supra,* on the English decisions up to that time (16 years ago) a limitation has been placed upon the extent to which the judge should exercise the right that he has in England to comment upon the failure of the accused to testify, as appears from *Rex* v. *Naylor* (1932), 23 Cr. App. R. 177, wherein the accused had in the police court reserved his defence saying only "I don't wish to say anything except that I am innocent." On his trial, at Sessions, the recorder charged the jury, in effect, that if he were innocent he would have disclosed his defence below instead of "hanging back" till the trial thereby not giving the prosecution time to inquire into the truth of it, but the Court of Appeal, in quashing the conviction, held *per* Lord Hewart, C.J., pp. 180-1:

> We are of opinion that that was a misdirection. The case is really *a fortiori* upon the case of *Whitehead,* 21 Cr. App. R. 23; [1929] 1 K.B. 99, where it was held that it is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it. But it is well to add something further. When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they

say and that an accused person is quite entitled to say: "I do not wish to say anything except that I am innocent."

Shortly thereafter the same Court in *Rex* v. *Parker* (1932), 24 Cr. App. R. 2, affirmed the same principle while holding that under the special circumstances the judge's reference to the appellant's reservation of his defence while the other two defendants disclosed it, was justifiable because (p. 5)

He was bound in the interest of the two other defendants to point out the difference between the cases, and there was nothing in what he said which in any way infringed the principle laid down in the authorities cited.

And still more recently, in *Rex* v. *Smith* (1935), 25 Cr. App. R. 119, the same Court held, in quashing the appellant's conviction, at Sessions, because of misdirection to the jury, p. 124:

Having commented inaccurately on that part of the case, the acting deputy-chairman proceeded to tell the jury that both prisoners had said nothing when they were before the magistrate. They were entitled to say nothing. Each had given his answer to the police, and each was represented at the police court. The fact that they said nothing at that stage ought not to have been used against them in the summing-up. We think that there was a misdirection in that respect also.

A year before this case, which is the last word on the subject, the same Court in *Rex* v. *Littleboy* (1934), 24 Cr. App. R. 192 had upheld the direction as a whole given therein (which is very different from the present one), and after admitting (p. 196) that there were "sentences" to be found in *Naylor's* case, *supra,* that appeared to be of "universal application," went on to say, pp. 196-7:

We do not think, however, that it was ever intended to lay down the proposition that a judge may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an *alibi*, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice.

And further, p. 198:

We have very carefully considered the whole matter and the various cases to which our attention has been directed and we do not think that what was said in the summing-up amounted to a misdirection. No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case, but we do not assent to the general proposition that in no circumstances may comment be made upon the failure to disclose the defence in the police court. The observations of

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the Court in *Naylor* (*supra*) were never intended to go to that length. There is a great difference between making the comment that silence on the part of the prisoner is unfortunate and a matter to be regarded with reference to the weight of the defence, when the defence of *alibi* is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice.

These references to the "force" and "weight of the defence" support precisely what I held in *Mah Hon's* case to be the limit of proper comment, but, as already pointed out, that is something radically different from the positive direction of obligation herein complained of.

There are no circumstances in the present case to justify us in departing from the general rule that we have laid down, and therefore the first ground of misdirection has been established, with the result that the conviction must be quashed and a new trial directed.

Then with respect to the second ground of misdirection (which could not arise in England owing to the said difference in statutes), *i.e.*, the violation of the said statutory prohibition against commenting upon "the failure of the person charged . . . to testify," the same result must under the circumstances follow upon the due application of the principle laid down by the Canadian cases already cited (to which I shall only add *Rex* v. *Zicari* (1936), 65 Can. C.C. 386), because the only evidence given in support of the *alibi* was that of the accused himself, who testified that he had gone for a walk alone for about two hours upon the morning of the crime at a time and place that would, if he spoke the truth, have made it impossible for him to have been present at the bank when it was committed. Such being the case, the comment complained of could only have relation to the failure of the accused to testify in his own behalf at the preliminary hearing and therefore, as the Supreme Court said in *Bigaouette's* case, *supra,* the error is fatal.

There still remains the further objection that the defence of an *alibi* and the evidence in support of it were not adequately and fairly presented to the jury as the law requires should be done in accordance with the cases hereinbefore cited. It was submitted that, on the contrary, the effect of what the learned judge told and did not tell the jury was to belittle that defence to such a degree as to withdraw it from their serious considera-

tion; in other words that, as Avory, J., said, *per curiam,* in *Rex* v. *Rabbitt* (1931), 23 Cr. App. R. 112, 115, "it was brushed aside . . . as possibly concocted." After giving very careful consideration to the passages in the appeal book which Mr. *Hurley* cited in support of this submission, I can only reach the conclusion that they disclose such "an attitude towards the defence of *alibi*" (as Avory, J., puts it, p. 116) as to render the "verdict unsatisfactory," and therefore the conviction must be quashed and a new trial ordered on this ground also. To *Rabbitt's* case should be added the following cases on *alibi*—*Rex* v. *Bundy* (1910), 5 Cr. App. R. 270; *Rex* v. *Finch* (1916), 85 L.J.K.B. 1575; and *Rex* v. *Frampton* (1917), 12 Cr. App. R. 202.

It is a serious error, as Mr. *Hurley* rightly submitted, to sever the evidence given by the Crown in support of the identification of the accused from that given by him in support of his *alibi* because they are interdependent and of necessity so interwoven as to constitute the sole defence that is set up, which clearly appears from observations in many *alibi* cases, *e.g., Rex* v. *Bundy, supra, Rex* v. *Phillips* (1924), 18 Cr. App. R. 151; and, in the House of Lords, in *Rex* v. *Thompson* (1917), 13 Cr. App. R. 61, 71, 75, 77, 83-4.

This very important point, in considering the duty of the judge to charge fully on both aspects of this interlocked defence has been unfortunately overlooked, and the weaknesses in the evidence of identification were not brought to the attention of the jury though in *Phillips's* case, *supra,* p. 152 it was held that:

> It is right that the attention of the jury should be directed to the weakness of the evidence [of identification].

And in *Finch's* case, *supra,* Avory, J., said, *per curiam,* p. 1576:

> Clearly observations should have been made to the jury with regard to the identification by some of the witnesses.

This is because it is obvious that if the evidence of identification is weakened that of the *alibi* is strengthened, and *vice versa.*

Some criticism was directed to the fact that the *alibi* depended upon the testimony of the accused alone, but there is no rule of law nor, in my opinion, any reason to justify it, for under many circumstances any person might easily be placed in a position where he could only give an account of his movements in town

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or country by his own evidence; to hold otherwise would mean that it is a danger to be alone either in seeking the pleasures of nature, or those of a moving-picture house. In *Phillips's* case, *supra,* it was said, p. 151:

> The evidence of identification in this case was weak. It is not, of course, to be said that a person is not to be convicted on the testimony of one witness identifying him. . . .

It would be a travesty of justice indeed if the converse were the case and that an accused person could not defend himself by "the testimony of one witness" alone, *i.e.,* himself: it is for the jury to decide the strength of the testimony in both cases, neither of which in law requires corroboration.

In quashing the conviction in *Bundy's* case, *supra,* the Court said, p. 273:

> In all the circumstances, it is clear the trial was not satisfactory, and the case was not put to the jury in a way to insure their due appreciation of the value of the evidence.

That language is entirely appropriate to this case as is also that which follows from the judgment of Lord Chancellor Sankey, *per curiam,* in the House of Lords in *Maxwell* v. *Director of Public Prosecutions* (1934), 24 Cr. App. R. 152, 176, in answer to the submission, made herein also, that the provisions of section 4 of the Criminal Appeal Act, 1907 (section 1014 (2) of our Criminal Code) should be applied to sustain the conviction:

> . . . It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the proviso to section 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

It follows that in my opinion the appeal should be allowed, the conviction quashed and a new trial directed.

MACDONALD, J.A.: This is an appeal from a conviction on the charge that on the 15th of January, 1936, the accused unlawfully murdered one William Hobbs, a teller in the Bank of

Commerce at Vancouver. Hobbs was fatally shot by the accused (as the jury doubtless believed) while he (the accused) was taking part with others in a successful attempt to rob the bank.

After a careful study of the evidence and the submissions of counsel, I am of the opinion that no substantial reasons were advanced nor can any be found to justify setting aside the verdict or directing a new trial. There was sufficient evidence on the decisive question of the identity of the accused, not only as a participant in the robbery but as the man who shot Hobbs, to justify the jury in fixing guilt upon him for a callous and brutal murder.

It was essential that the jury should be convinced of the guilt of the accused by conclusive evidence excluding reasonable doubt. That they were so convinced is, in my opinion, clear. And when a conviction is recorded based upon satisfactory evidence—in this case on the all-important question of identity—something substantially wrong in the course of the trial ought to be found, which had it not occurred might have brought about a different result, before the verdict of a jury should be set aside by an appellate tribunal. In saying so, I have in mind the views expressed by the Chief Justice of Canada in referring to section 1014 (2) of the Code in *Chapdelaine* v. *Regem,* [1935] S.C.R. 53 at 57 and 58 where the words of the Lord Chancellor in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57 at 70 are quoted and also the opinion of Cannon, J. at p. 59 of the same report.

Substantially the defence raised by the appellant of an *alibi* was adequately presented to the jury. I do not attach serious weight to the submission that because the trial judge did not in his address to the jury dealing with this defence refer to the possible bearing thereon of the evidence of two witnesses for the Crown, to the effect that Russell was not in a car at a certain place after the crime was committed, that because of this alleged omission the defence was not fully and fairly placed before the jury. The evidence of these witnesses in any event was not part of the defence.

Mr. *Hurley* for appellant took objection to certain parts of the charge to the jury. I will outline these extracts in full and comment thereon. First:

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The accused is presumed, as I told you, to be innocent so long as the prosecution has not proven him guilty. The prosecution lays the incriminating evidence before you, as they have done here, and aims to establish the guilt of the prisoner. If the prosecution fails in your opinion, or if they are unable to keep the defence from sustaining the innocence of the accused, then of course the original assumption is accepted as a fact.

I do not think this calls for serious discussion. The phrase "unable to keep the defence from sustaining the innocence of the accused" carries the suggestion, it was submitted, that it was for the defence to "sustain" or establish appellant's innocence. That is not the suggested meaning of the phrase reading the paragraph as a whole. It was not said that the accused must "sustain" or establish his innocence. Such an interpretation would be contrary to the whole tenor of the charge.

Second:

But it is obviously essential to the proof of an *alibi* that it should cover and account for the whole of the time of the transaction in question, or at least so much of it as to render it impossible that the prisoner could have committed the imputed act. It is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed, and the place at which the accused is alleged by the defence to have been is not far off, then the question becomes, as you readily see, one of opposing probabilities.

As to this reference dealing with the *alibi* advanced by the accused Russell (his defence by his own evidence was that he was strolling alone elsewhere in the City of Vancouver at the time the robbery was committed) and in particular the phrase "it is not enough that it renders his guilt improbable merely," etc., it is perhaps enough to say that the whole extract is a quotation from Wills on Circumstantial Evidence, 5th Ed., pp. 230-1 quoted with approval by my brother MARTIN in *Rex* v. *Miller* (1923), 32 B.C. 298 at 304. I do not think the statement is open to serious criticism.

Third:

I think perhaps in referring to the *alibi*, if you are considering it seriously, one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment, and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard.

The phrase in this extract relating to the *alibi* to which serious objection is taken, *viz.*, "one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment" is said to transgress the rule that the accused is not

called upon to disclose his defence before the trial or during the presentation of the case by the Crown at the trial. In reaching a conclusion on this point I have carefully considered the judgments in *Rex* v. *Roteliuk,* [1936] 2 D.L.R. 465; *Rex* v. *Higgins* (1902), 36 N.B.R. 18; *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, particularly the discussion by my brother MARTIN of the decision in *Rex* v. *Higgins,* the English cases later referred to and comments by Crankshaw.

Certainly evidence offered by or on behalf of an accused showing that he was elsewhere when the crime was committed could not be rejected on the ground that it was not disclosed at an earlier date. That, of course, is not suggested. Nor does it follow because the word "must" was used that the learned trial judge intimated that the jury should not consider this evidence at all because of the alleged omission on the part of the accused to disclose it before his trial. He merely treated it as an aspect the jury "must consider" in weighing that evidence. The only question therefore is the right or otherwise of the learned trial judge to comment on the *alibi* in the manner referred to.

In *Rex* v. *Littleboy* (1934), 24 Cr. App. R. 192 the earlier cases of *Rex* v. *Moran* (1909), 3 Cr. App. R. 25 and *Rex* v. *Naylor* (1932), 23 Cr. App. R. 177; [1933] 1 K.B. 685, were discussed and considered. I agree with Hewart, L.C.J. in *Rex* v. *Littleboy, supra,* where he said at p. 198:

> No doubt observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case.

It does not follow however as "a general proposition that in no circumstances may comment be made" (p. 198). It adds materially to the weight to be given to evidence of an *alibi* if the accused upon being charged with a crime adopts the course likely to be taken by an honest man of saying at once that he was elsewhere at the time of the commission of the crime, giving details, the truth of which might be verified. If he does not do so, while it falls far short of establishing guilt unless he is silent under situations pointed out by McLeod, J. in *Rex* v. *Higgins, supra,* at p. 34 yet conduct and silence under certain circumstances may be treated by the jury as an element in weighing evidence and if that is so it follows that the trial judge may

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"with care and fairness" discuss it in his charge to the jury. My brother MARTIN in *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, at 441-2 in discussing *Rex* v. *Higgins,* said:

> The conclusion I have come to is that we should affirm the long-established practice in this Province that an accused may properly reserve his defence till his trial and it is not a matter for adverse comment if he does so, and though there may in special cases be an exception to this rule, as in *Rex* v. *Higgins, supra,* yet the fact of his silence then becomes a question of his credibility if he goes into the witness box, or the credibility of the defence he sets up if he does not give evidence himself. Apart from special circumstances in certain classes of crimes, as set out by Mr. Justice McLeod, *supra,* silence *solus* does not furnish an inference of guilt or innocence, but, as Mr. Justice McLeod puts it, *supra,* is something that "may be taken into consideration by the jury in considering the evidence given by [the accused] . . . and the weight that they should give to it."

I think, therefore, the true view is that, while in our jurisprudence there is in law no obligation whatever upon the accused to disclose his defence of an *alibi* in advance, after that defence is placed before the jury, the trial judge may ("with care and fairness," having regard to all the facts of the particular case), in assisting the jury on the question of assigning proper weight thereto, comment on the failure of the accused to state at the earliest moment that he was not at the *locus* when the crime was committed. I do not think, however, with the greatest deference, it is right to say to the jury that "it must be set up at the earliest possible moment." But I am equally clear that where, as in this case, a finding on the question of the identity of the accused as the man who shot Hobbs, based upon satisfactory evidence of identity effectively disposed of the *alibi* set up by the accused no substantial wrong within the meaning of section 1014 (2), as interpreted in the cases referred to *supra* occurred by a departure from what, in my view, would be the proper course to pursue. Twice in the course of the charge the learned trial judge told the jury that it was fundamental on the part of the Crown to establish the identity of the accused as a participant in the robbery. His Lordship asked the jury to consider

> whether if they [Crown witnesses as to identity] exercised the slightest power of observation they could be mistaken as to the identity of the man who fired a shot and broke the pane of glass in the window and then came around and fired the other.

I have no doubt whatever that the decisive feature with the jury was this question of identity and the statement in respect

to the *alibi* that "it must be set up at the earliest possible moment" was not a factor in the result. Had the matter been treated in the manner outlined herein the jury "inevitably" would have reached the same conclusion.

Other points raised do not call for discussion. I would refuse leave, dismiss the appeal and affirm the conviction.

MCQUARRIE, J.A.: I agree with my learned brothers the Chief Justice and MACDONALD, J.A. that this appeal should be dismissed.

*Appeal dismissed, Martin, J.A. dissenting.*

Solicitor for appellant: *N. W. Spinks.*
Solicitor for respondent: *N. C. Levin.*

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## FOXALL v. SHOBROOK *ET AL.* (No. 2).



*Practice—Appeal—Costs—Amount claimed on cross-appeal—Appendix N, Column 4.*

In an action for trespass and damages the plaintiff recovered judgment for $3,000 less $946.94 on the counterclaim. The defendants appealed and the plaintiff cross-appealed, claiming he was entitled to $25,600 damages. It was held on appeal that the plaintiff's damages be reduced to $2,250, and that the defendants were entitled to their costs of the appeal. On taxation the defendants' costs of the appeal were allowed under Column 4 of Appendix N. On motion to review the taxation:—

*Held,* that the ruling of the registrar on taxation be affirmed.

MOTION to review the taxation of the defendants' bill of costs on appeal. Heard by MARTIN, J.A. in Chambers at Victoria on the 23rd of July, 1936.

*Lowe,* for the motion.
*Bull, K.C., contra.*

*Cur. adv. vult.*

31st July, 1936.

MARTIN, J.A.: The ruling of the registrar on taxation is affirmed. This being a case of two separate appeals—original and independent cross—Yearly Practice, 1936, p. 1253; Annual Practice, 1936, p. 1265, Court of Appeal Rule 8, the practice on claim and counterclaim does not apply: the motion is dismissed; costs to defendants.

*Motion dismissed.*

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*May* 29;
*June* 1, 26.

## REX v. DUNBAR.

*Criminal law—Murder—Bank hold-up—Common intention—Jury trial—Misdirection by trial judge—Criminal Code, Secs. 20, 69(2) and 1014(2).*

Four men, Russell, Hyslop, Lawson and Dunbar, went to a house on East 10th Avenue in Vancouver on the 11th of January, 1936, where they lived together for five days. Russell hired a car and on the morning of the 15th of January he instructed Dunbar to drive the car to a certain spot on Woodland Drive and wait for him there. Russell, Hyslop and Lawson then hired a Terraplane car and driver at a car-stand on Howe Street, and after disposing of the driver, Hyslop drove the car to where Dunbar was on Woodland Avenue, and Dunbar was ordered to drive the Terraplane car to the branch office of the Canadian Bank of Commerce at the corner of Powell Street and Victoria Drive, where the three men alighted and ordered Dunbar to drive the car round the block and come back in front of the bank. Dunbar drove round the block twice, and when he arrived the second time in front of the bank the three men came out and entered the car after holding up the bank, when Russell shot the teller and killed him. Dunbar then drove the car a certain distance, when they abandoned the car and made their way back to the house on 10th Avenue. They then divided the stolen money, Dunbar taking $190, he paying his share for the first car that was hired. On the following day the police surrounded the house and Russell and Dunbar were arrested. Hyslop and Lawson left the house before the police arrived, but six days later when hard pressed by the police, they committed suicide. On his trial for murder Dunbar's defence was that he was forced by Hyslop at the point of a gun to drive the car, to bring it back to the front of the bank after the hold-up and to take his share of the money stolen. He further stated that he did not know there was to be a hold-up until he arrived with the car in front of the bank. He was found guilty and sentenced to be hanged.

*Held*, on appeal, affirming the conviction (MARTIN, J.A. dissenting), that the appeal should be dismissed.

*Per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: Dunbar is clearly shown to be a person pursuing a common purpose with the others. It was urged that he drove the car under compulsion, but his action before that clearly indicates that he was in the scheme with the others from the beginning.

*Per* MARTIN, J.A.: While the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect. There was a mistrial and the case should be brought before another jury.

*Per* MACDONALD and MCQUARRIE, JJ.A.: This is a case where the judgment

of the jury on simple facts may safely be accepted; they did not believe the appellant's story. His early history and association with the others in and out of prison, his movements before and after the robbery, his sharing in the loot on a full partnership basis, his sharing in the expenses of the hired car, the important role he played in the execution of the plan to hold up the bank alike point to guilt and to concerted action.

APPEAL by accused from his conviction at the Vancouver Spring Assizes, *coram* MORRISON, C.J.S.C., on the 3rd of April, 1936, on a charge of murder. On the 15th of January, 1936, there was a hold-up by four men of the Canadian Bank of Commerce at the corner of Powell Street and Victoria Drive in Vancouver. One of the men (Dunbar) drove the car to the bank. He remained in the car while the three men (Russell, Hyslop and Lawson) went into the bank. Russell went to the teller's cage and without warning shot the teller, one Hobbs, who died the next morning. The manager of the bank (T. Winsby) exchanged shots with Russell, and Winsby was wounded. In the meantime Dunbar drove twice round the block and came back to the bank, where he picked up the three men and they drove away. The bandits got $1,038. There is evidence that the four men went to a house at 1436 East 10th Avenue on the 11th of January, where they stayed with two women until the 16th of January. On the morning of the 15th of January three men went to a taxi-cab company on Hornby Street and engaged a Terraplane car. With a driver they drove to Stanley Park, where the driver was overpowered by the three men, who tied him up and left him in the woods. This car was afterwards identified as the car used in the hold-up. On the evening of the 16th of January Russell and Dunbar were arrested at the house on 10th Avenue. A week later Hyslop and Lawson were surrounded at the Oak Rooms in Vancouver and the two men committed suicide. Russell was identified by witnesses Workman and McRae, the latter, a clerk in the bank, and by two other witnesses. Dunbar took his share of the money taken from the bank.

The appeal was argued at Vancouver on the 29th of May and the 1st of June, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

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*Maitland, K.C.* (*Kerr,* with him), for appellant: There was misdirection to the extent that there should be a new trial. There was a common intention by the three men to hold up the bank. They came across Dunbar and made him drive the car to the bank and threatened him if he did not come back and drive them away. He was forced at the point of a gun to do this. Dunbar had a police record but he never carried a gun. This was his defence but it was not put to the jury. We have to deal with section 69 of the Code and no one could suggest we were participating in murder. In deciding to come back for the three men he was an accessory after the fact. On the question of *onus* see *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462; *Rex* v. *Payette* (1925), 35 B.C. 81; *Rex* v. *Ball* (1924), 18 Cr. App. R. 149. Provocation reduces the crime to manslaughter: see *Rex* v. *Gray* (1917), 12 Cr. App. R. 244; *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148; *Remillard* v. *Regem* (1921), 62 S.C.R. 21; *Rex* v. *Lesbini,* [1914] 3 K.B. 1116 at p. 1120; *Reg.* v. *Smith* (1837), 8 Car. & P. 160; *Reg.* v. *Rothwell* (1871), 12 Cox, C.C. 145. A gun accompanied by a threat is certainly a provocation equal to a blow: see *Reg.* v. *Brennan* (1896), 27 Ont. 659 at p. 662; *Rex* v. *Hopper,* [1915] 2 K.B. 431; *Rex* v. *Farduto* (1912), 10 D.L.R. 669; 1 Hale, P.C. 150; *Rex* v. *Davis* (1914), 19 B.C. 50.

*A. B. Macdonald, K.C.,* for the Crown: There was common design and all equally guilty of murder: see *Rex* v. *Farduto* (1912), 10 D.L.R. 669; *Rex* v. *Clinton* (1917), 12 Cr. App. R. 215; *Rex* v. *Robinson* (1922), 16 Cr. App. R. 140. Provocation only applies to the victim and cannot go beyond that. On lack of self-control see *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148.

*Maitland,* in reply, referred to *Markadonis* v. *Regem,* [1935] S.C.R. 657; *Chapdelaine* v. *Regem, ib.* 53. We were not present at the killing of Hobbs. Murder can be reduced to manslaughter if he has lost self-control: see *Attorney-General* v. *Whelan,* [1934] I.R. 518.

*Cur. adv. vult.*

26th June, 1936.

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MACDONALD, C.J.B.C.: These two men joined in one appeal book which was accepted by the Court and I think the verdict of guilty of both and the sentences imposed thereupon are beyond doubt the right sentences. Their crime was alleged to have been a hold-up of the Bank of Commerce, corner of Powell Street and Victoria Drive, Vancouver, on 15th January, 1936. Russell has been clearly identified as one of those who entered the bank and took part in the hold-up. Dunbar is just as clearly shown to be a person pursuing a common purpose with the others. He drove the three men who entered the bank, namely, Russell, Hyslop and Lawson, the latter two having committed suicide rather than stand trial. Apart altogether from the personal identification of Russell the circumstances of his actions on that day leading up to his arrival at the bank accompanied by Hyslop and Lawson are sufficient to identify him with the crime and his conduct afterwards shows that the other parties with him were equally guilty and that Dunbar was a party to the project. It was contended on behalf of Russell that his alleged *alibi* should have been given effect to. That *alibi* consists of his own oath only and he stated that at the time of the robbery he was walking about the street a long way from the bank. I do not think an *alibi* which is the oath of the accused person is entitled to much respect and I do not think that the observations of the learned trial judge that an *alibi* must be proved at the earliest opportunity, assuming that this is not absolutely correct on the law at the present time, brought about a miscarriage of justice. Dunbar pleaded that he was ordered by one of the three bandits to drive them to the bank. On his objection he was told by one of them, I think Hyslop (it does not matter which) that it would cost him his own life if he did not do it. Therefore, it was argued that he did it under compulsion but his action before that I think clearly indicates that he was in the scheme with the others from the beginning. I do not put much reliance upon the alleged pressure put upon Dunbar. Russell and Dunbar were residing on the night of the occurrence at a house No. 1436 10th Avenue East, Vancouver, B.C. They were then preparing to move from that house to another part of the city where their hiding place would not be suspected. There was evidence to

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show that the accused Russell, Dunbar, Hyslop and Lawson lived at the house on 10th Avenue for some time before the crime was committed. I think the evidence is very conclusive against both Russell and Dunbar and that their conviction should not be interfered with.

MARTIN, J.A.: This appellant was jointly convicted with Charles Russell of murder, and I refer to the judgment that I have handed down in that case so far as it is applicable to this on the question of the general principle of the duty of a trial judge in directing the jury, adding to the cases cited the recent decision of the Supreme Court of Canada in *Markadonis* v. *Regem,* [1935] S.C.R. 657, particularly the observations of Chief Justice Duff, *per curiam,* at p. 662.

The defence herein is that the appellant was forced at the point of a pistol with threats of death and in continuous fear and peril thereof, by Hyslop, one of a gang of three robbers (who shot himself shortly after the robbery and murder to avoid arrest) to drive them (in a motor-car) as ordered by Hyslop, "down to the corner of Victoria Drive and Powell Street; turn west on Powell Street just round the corner and let us out." This, with Hyslop sitting beside him in the front seat to enforce his threats, and keeping the "gun" continuously pointing at him he did, and said orders brought them opposite the front entrance of the Bank of Commerce, upon which the three robbers alighted from the car, crossed the sidewalk and entered the bank, and Dunbar immediately upon their leaving the car, in compliance with a further threat of death upon failure to come back for them, and in fear thereof, drove away and round the block and back to the said entrance once, and not seeing them, drove round again, when the three robbers came out from the said bank entrance and entered his car, whereupon he drove them first to a street corner at a distance where two of them got out and then continued to another corner where he and the third man got out and left the car parked there. It is not disputed that he did not enter the bank, and he swears that he did not know of the design to rob it till the said orders he got to drive brought him to it and that he did not see the men enter it or hear any shooting and did not know of the robbery, or that the

teller, Hobbs, had been shot and was in a very serious condition, till he read the newspapers that evening about 5.30. That night the four met at Healey's house about 9.30, where they had been staying together since four days before, the appellant accounting for his being with the others and two women during that time because he joined with them in a succession of drinking parties for which he supplied the liquors as a matter of business in the occupation of a "boot-legger" that he was carrying on. Later that same night a sum of money, about $190, was produced by the said three robbers and offered to him saying "There is yours," which he says he took through fear of his life from the said three men constantly armed, he being unarmed, and that Hyslop had warned him that if he turned against him he would "get" him, and for the same reason, to allay suspicion, he contributed his share to pay MacNeill for his taxi-car and continued to stay with them in the house till about 9.30 p.m. the next day (the 16th of January) when the police came and he was arrested with Russell: the other two, Hyslop and Lawson, having left the house about 20 minutes before to seek a safer hiding place from the police and shot themselves six days afterwards: while he repudiates as aforesaid all knowledge of any intention to rob this bank until he got to it, yet when Hyslop ordered him to get into the car and drive the three men his suspicions of some "hold-up" were aroused and so at first he refused to do so but was coerced as aforesaid, but he admits that when he saw the bank he knew that "a hold-up was about to be perpetrated" by the men and that while death would be "likely" to result, yet he was "hopeful, absolutely," that it would not because he "had read of bank hold-ups in Vancouver lately where there was no shooting." That Hyslop was a desperate criminal, the head of a "hold-up gang" (which did not include Dunbar), and a known terrorist and "gunman" who would not be taken alive, and would stop at nothing, is clearly established not only by the evidence of Dunbar but of several police officers called by the Crown.

The case for the Crown was that its evidence showed that Dunbar and the said three men had formed a common intention to prosecute an unlawful purpose to rob the bank, and therefore

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they were upon the facts all brought within the scope of section 69 (2) of the Code, *viz.*:

> If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

It must be conceded that there is evidence upon which the jury could have properly convicted all of them on this section, provided they were properly instructed upon its application to the circumstances which in some respects are very unusual, but it is submitted by appellant's counsel that his defence was not properly or fairly presented to the jury with the result that they were confused and misled and that the appellant "has actually suffered a miscarriage of justice" and therefore a new trial should be directed.

The case obviously is one which required a very clear and careful direction to the jury because of the defence raised which involves a question not only under said section 69 but also a very unusual and difficult one under section 20 which provides that:

> Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, he being a party to which rendered him subject to compulsion, of any offence other than treason as defined by this Act, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.

This defence of "compulsion" would afford no protection to the appellant if his "common intention" under said section 69 to rob this bank was established, because it is clear that under the circumstances murder "was or ought to have been known to be a probable consequence of the prosecution of such common purpose." But even if he could not bring himself within the benefit of "compulsion" as defined by section 20 (as to which presently), he could quite apart from it rely upon compulsion as a complete answer to the existence of a "common intention" under section 69 "to assist each other therein" because it cannot exist where "assistance" is refused and only obtained by "duress *per minas*," so that "the overpowering of the will was operative

at the time the crime was actually committed" and its duration, and reassertion of the will, are for the jury to find—*Attorney-General* v. *Whelan,* [1934], I.R. 518, 525-6, which, though a case of receiving, is yet very valuable from the "standpoint of general principle" considered in the learned judgment of the Irish Court of Criminal Appeal, apart from differences and difficulties in respective laws, some of which are removed here by said section 20. It was therefore of the first importance that this destructive effect of compulsion, if it existed, upon the charge of common intention, entirely apart from its meaning and effect under section 69, should have been presented to the jury, but appellant's counsel assured us that there was not a word of instruction really directed to this vital question, and after a most careful examination of the whole charge I find this to be the case, and in my opinion this grave omission necessitates a new trial. It is also objected that in this connexion misdirection occurs in the following instruction:

> There is an aspect of the law which is outstanding in this case, and it is this, that if two or more join to commit a felony, to rob a bank, which involves violence, and the violence be shown as such that any reasonable person must have thought it likely that injury would befall the person towards whom the violence was to be exercised, injury of such a character as might cause death, then all the persons participating in or inciting to the crime are guilty of murder if death ensues.

That is misdirection in two ways at least; first, because it is uncertain and inaccurate to say that the mere "joining to commit a felony" is sufficient to convict, without giving a definition of the word "joining" and pointing out that the essential element is the common intention of all the minds; and second, because it is not that the injury "might" cause death but, as the statute declares, that it "was or ought to have been known to be a probable consequence of the prosecution of such common purpose," which is a very different thing, and the prejudicial effect of this misdirection was not later removed by the reading of section 69 without any particular apt application of it to Dunbar's evidence.

Then it is further complained that the learned judge wrongly treated all "these men as accomplices," saying that counsel had "put that before" the jury and then proceeded to instruct the jury to "take it that they are," instead of leaving that question

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for them to decide, which it was their province to do, and not the judge's, upon proper instruction, of which there was none at all, though the question of being an accomplice or not could, as concerns Dunbar, be decided only after taking into consideration and passing upon his evidence that he was coerced, and if so, then he was not an accomplice in the true sense, as we have already decided in *Rex* v. *George* (1934), 49 B.C. 345, 364. That it was prejudicial to Dunbar to be put arbitrarily into that class, and therefore one whose evidence required corroboration, is to my mind beyond question, and it was decided in *Rex* v. *Dean* (1924), 18 Cr. App. R. 21, that a co-defendant seeking to exculpate himself is in the position of an ordinary witness in so far as he is defending himself and the jury must be so instructed.

Then the following passage is also objected to as being erroneous and prejudicial:

> If you accept Dunbar's evidence that he was so bereft of reason that his reasoning faculties were suspended and that he was really in the position of having his hand held by somebody, that he had two men standing over him—you had this story of the thing put to you in the way that he would have you believe—well, then it seems to me there should be some evidence to show his mental condition.

It is urged that this misrepresents and distorts Dunbar's evidence which did not set up any defect in or impairment of his "reasoning faculties" or that they were "suspended" but simply and sensibly that he was cowed into submission, to save his life, by the "force" of a deadly weapon levelled at him, and hence the concluding observation that he should have brought "some evidence to show his mental condition" was wholly unwarranted and most harmful because the only inference that could be drawn from it was either that he had not given the evidence of a man in possession of "reasoning faculties" upon the state of his mind at the time, which was contrary to the fact because he had done so to the full extent possible under the circumstances; or else that he should have called medical evidence to satisfy the jury upon the state of his brain, which was equivalent to saying that his testimony required corroboration by other evidence which is contrary to law.

In my opinion this ground of complaint also is justified and constitutes misdirection so serious as to necessitate a new trial.

This brings me to a consideration of the defence of compulsion and said section 20. It was submitted by the Crown that the present "offence," being one of murder the appellant was, on the facts before us, excluded from any benefits to be derived therefrom even if no common intention was proved under said section 69 and reliance was chiefly placed upon the decision of the Court of Criminal Appeal of Quebec in *Rex* v. *Farduto* (1912), 21 Can. C.C. 144; 10 D.L.R. 669, wherein it was held that the appellant was rightly convicted of murder because he actively assisted in it by handing a razor to "a big Italian" who, as Cross, J. states, p. 146, "thereupon in his presence knocked the man down and cut his throat with the razor," though the appellant's defence was that he only handed the razor to the killer because he "told him that if he did not give it [razor] up he would shoot him." Now assuming that decision to be sound it must be restricted to its particular facts and they contain a fundamental distinction from the present ones in that the appellant therein was "actually present at the commission of the offence" as Cross, J. was careful to note, while here he was absent from it, and so the judgment when its foundation is understood does not support the Crown's submission.

It is to be primarily borne in mind that the "offence" in question here is not robbery but murder, and on that capital charge no other count can be joined in the indictment against the same persons (section 856). This is of vital importance because if the charge had been for robbery instead of murder there would appear to be more to say in support of the view that when, at least, the appellant got to the bank and saw the armed men enter it he must have known that a robbery was in actual progress and therefore any further compulsory "assistance" to the robbers would deprive him of any further protection arising from the compulsion he had theretofore been under. But no authority has been cited to support the view that in the absence of proof of common intention within section 69, the coerced person is under any criminal responsibility for an offence other than that in which he has involuntarily assisted if he is not present at the commission of that additional offence, and the fact that he may be even apprehensive that any other of the ten

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crimes "excepted" by section 20 may be perpetrated by his compellers, other than the one he has involuntarily assisted in, does not render him liable therefor if he is not present at their commission. In none of the authorities and cases cited to us that I have been able to find after a very diligent search on this very important question, has any one been found guilty under such circumstances but only where though absent his said common intention has first been established. The cases bearing on the point are very few in number, as was said in *Whelan's* case, *supra*, 525, but in all of them that I can find the accused has been actually present at the murder as in *Farduto's* case, *supra*, and in the instructive case of *Reg.* v. *Tyler* (1838), 8 Car. & P. 616 wherein the indictment averred that the accused were "feloniously present aiding and abetting" in the killing, and it was proved that the accused were not only present at the killing but picked up the still living body of the deceased and threw it into a ditch leaving him to die there, and also that they had a common intention being as Lord Denman, C.J. puts it, pp. 619-20,

> banded together for a common purpose, . . . they would be answerable for anything which they did in the execution of it.

And he concluded pp. 620-1:

> If you think that they kept together with the knowledge of any general purpose of resistance to the law, then they are guilty. It cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal. You will, therefore, discard that as an excuse, and say whether you find that Thom was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and concurring in his acts: and if you do so, you will find them guilty, for they are then liable as principals for what was done by his hand.

This final direction as to the necessity of finding that the accused's assistance was accompanied "by their presence" as well as "concurrence," strikingly support my opinion.

It would indeed be strange if such were not the law because otherwise this startling result would follow, *viz.*, that, if a gang of armed robbers intent upon holding-up a bank, were (as has often been done) to stop the first passing motor-car and order the driver, being a stranger, to take them to a named bank or house, and against his will compelled him to do so at the point of a pistol and under threat of instant death, nevertheless despite

that compulsion the driver would be criminally responsible not only for the offence of robbery but for any or all of four more of the said ten excepted offences under section 20, which might well happen in the commission of the offence of robbery of that kind—*i.e.*, grievous bodily harm, arson (following the blowing up of the safe or vault if necessary), attempting to murder, and murder, and also despite the fact that he was not present at their commission, nor had any means of knowing what other offences the robbers might resort to, nor "any common intention to prosecute any unlawful purpose" either before or after his compulsion. To my mind the law would be pressed quite far enough, if not too far, if it were held that he was guilty of "assisting" (under section 69) in a robbery merely because to save his life he did not persist in his refusal to drive the armed robbers to the named or unnamed place after becoming aware, by their conduct, of their intention to rob it: but to go much farther and hold him guilty also of additional crimes that they might commit in his absence after they had entered the bank would, in my opinion, be to take so grave and extreme a step, one that would shock the public conception of justice, that we should be placed under the clear and unmistakable "compulsion" of Parliament or the decision of a higher Court before it becomes our duty to take it.

On the facts of this case, if the appellant was under the continuing compulsion he swears to, *i.e.*, to take the robbers to the bank and call for them again in a few minutes, the fact that in the meantime and in his absence they had committed other offences in addition to the only one robbery, that he was assisting in, does not make him liable therefor (in the absence of common intention) and it is admitted that he drove away at once when the robbers got out of the car, and his evidence is uncontradicted that he did not hear the shooting or know of any other offence than robbery at the time they re-entered his car and were driven away at once by him under such circumstances, it is my opinion, that his responsibility must be restricted to the offence of robbery in which only he assisted, and it was essential that the jury should have been carefully and clearly instructed on the different scope and effect of sections 20 and 69—*Rex* v. *Pearce*

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(1929), 21 Cr. App. R. 79; and *Rex* v. *Scott and Killick*, [1932] 2 W.W.R. 124, 128. But instead of so doing, the true position was overlooked and misconceived and not only was no apt instruction given thereupon but the obligations imposed upon the accused by section 69 were prejudicially imported into and confused with the benefits of the defence conferred by section 20, and those sections were read to the jury as though they were complementary, instead of being so essentially detached in their object that they did not even relate to the same subject-matters: It is one thing to impose an obligation for a common intention to prosecute an unlawful purpose; it is a totally different thing to confer a defence for compulsion by threats: the two things are so far apart that they are not even antagonistic.

It must be borne in mind that it is settled law that even the presence of the accused at the offence is not of itself sufficient to convict, as was reaffirmed by the English Court of Criminal Appeal in *Rex* v. *Ashdown* (1916), 12 Cr. App. R. 34, at 37, saying:

> No doubt if the appellant stood by and did not interfere, that would not be enough to justify his conviction; but the jury might have been told that they could convict him if he was acting in concert with Woods. Although we do not feel that the case is in a satisfactory condition even at the present moment, we have come to the conclusion that it would be right to give the advantage to the appellant, and therefore the conviction must be quashed.

It must not be overlooked that the language of said section 20 deals with offences at which the parties concerned are "actually present" and therefore constructive presence is excluded unless a common intention has been proved as it was in *Tyler's* case, *supra,* and as admitted in *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148, at 154. This is the view taken by Hale, Vol. 1, 1800 Ed., 51 wherein he says:

> If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death does not excuse him, if he commit the fact; . . .

To "commit the fact" means doing the criminal act, which involves his actual presence, unless constructive presence is made sufficient by common intention.

And Hale says further, p. 440:

> If many be present, and one only gives the stroke, whereof the party dies, they are all principals, if they came for that purpose.

And further on, p. 441:

> Note also, that if divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him, and consenting to the act, or ready to aid him, altho they did but look on.

It follows that if the above views on sections 20 and 69 and the necessity of actual presence are correct then it was a most grave misdirection for the learned judge to instruct the jury that:

> The Crown say that Russell is the man who shot Hobbs and they say that Dunbar was aiding him to commit that crime. He said he abetted it.

That is obviously a complete and most damaging, indeed inevitably fatal, misstatement of Dunbar's admission of assistance, which extended to the robbery alone and then only under compulsion, and disclaimed any knowledge of or participation—abetting—in additional offences which were committed in his absence; therefore on this ground also there must be a new trial.

Then, and upon the whole case, the appellant's counsel submitted that it was presented to the jury in a way which was so prejudicial to the appellant's evidence and defence that the effect was practically to invite a disregard thereof, but without going to that entire length, a prolonged and very careful consideration of the whole appeal book does at least justify the application to this case of the following concluding statement from the judgment of the Supreme Court in *Markadonis's* case, *supra*, p. 662:

> Nor should we overlook the circumstance that while the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect. We think, . . . , that there was a mistrial and that the case should be brought before another jury.

That is, in my opinion, the judgment that we should pronounce herein on the grounds of appeal above considered.

Other grounds were raised and have received my careful consideration, but I think that upon the facts before us they are not of sufficient weight to require my dissent from the conclusion reached thereupon by my learned brothers.

MACDONALD, J.A.: A new trial is asked for because of misdirection and non-direction. It was submitted that although many of the alleged errors standing alone are of a minor char-

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acter, viewed cumulatively they are of sufficient weight to affect the result.

I will outline the evidence because it is essential to know the facts before passing upon the charge. On this appeal it was assumed by Mr. *Maitland* for the appellant that Russell (whose appeal we dismissed) together with Lawson and Hyslop agreed to hold up the Bank of Commerce and in carrying out that "common intention" Hobbs was killed by one of them. This appellant's case is that he was not a party to that common design or intention and had no knowledge that a robbery was about to be committed until a short time before the four of them arrived at the bank. His defence is that he was ordered by Hyslop (one of the bandits) at the point of a gun to drive them in a stolen car to the door of the bank; circle the block once or twice while the robbery was being committed and pick them up again when the job was over and flight necessary. Asked why he did not run away or take refuge in the police station nearby while Russell, Lawson and Hyslop were inside robbing the bank and killing the teller he said Hyslop threatened (personally or through others) to "get him" if he did not carry out the part of the job he was forced to perform. As bearing on the truth or otherwise of this story it should be said that for several days before the robbery and until his arrest he associated with the other three participants in a manner that suggested concerted action. If appellant yielded under threats to drive the car he might at least have left the men who coerced him after his short part of the work was performed. Instead he returned with them to the house they occupied on 10th Avenue in the City of Vancouver. That action on his part suggested, not only common interests but also that they had a common haven to which they might flee from pursuit. However, his explanation was that having returned to their hideout he remained there only because forced to do so by the others. Now that he had played his part and his work was finished it is not clear why the others should continue to keep him under restraint. He already received his share of the loot. However that was the appellant's defence and one of the complaints is that it was not properly placed before the jury. I think it was given to the jury with sufficient clarity and fairness.

I refer now to the evidence. A witness—Mason—testified that about a week before the robbery appellant asked him for ammunition. He did not get it. Dunbar's explanation was that he wanted it for Lawson who told him that "a friend of his was going out to the woods and he wanted some to take with him. The jury would weigh that evidence. If they believed that it was wanted for use in plying their trade it might be inferred that the appellant was implicated from the outset. From January 11th, 1936, to the 15th of the month the appellant (with a few excursions to other places) lived with Russell, Hyslop and Lawson at 1436 10th Avenue, East, Vancouver. Two women who lived with them in their temporary quarters gave evidence for the Crown. One of them said she met appellant there on the night of January 11th together with Russell and Lawson. She remained until January 16th and all remained throughout that five-day period sleeping in the house and taking their meals together at a common table. It is not suggested that the appellant was forcibly held during that period or induced to remain so that he might be available to drive the car when their plans—all unknown to him—were perfected. His case was that he knew nothing of their plans and consequently could not be a party thereto. The other girl gave similar evidence.

The appellant explained his sojourn at 1436 10th Avenue East during that period. Before that date he said he was boot-legging at 313 Cambie Street, securing his liquor from the Government Liquor store. Russell and Lawson also lived there. He knew Lawson for three years, having met him in the penitentiary. He met Hyslop also in the same institution. Appellant was associated with Lawson since the 20th of December, 1935. That he was on intimate terms with both Russell and Lawson appears to be clear. He used their permits to procure liquor for boot-legging purposes. He explained that he went to the 10th Avenue house only because Lawson told him that Russell 'phoned to say there would be a party held there "and he asked me if I would go and I said yes." Then Healey, who owned or controlled the 10th Avenue house and lived downstairs "suggested I stay there for three or four days." Lawson slept with

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him in the same bed in the attic. The other four occupied an adjoining room. He was there, he explained, during this period intermittently simply to have a good time at a more or less continuous drinking party "making his way" or earning the right to be there by supplying liquor and food.

A witness named McNeill owned a Durant car. He called at the 10th Avenue house a few days before the 15th of January, the day of the robbery, and again on the 14th in response to a call from Russell. On his first visit he saw all four, including the appellant. They were also there when he called on the 14th. An arrangement was made by Russell with McNeill for the use of the latter's Durant car on the following day. By arrangement McNeill left it on the street on the night of the 14th or the early morning of the 15th of January in front of his rooming-house at 1216 Alberni Street with the key under the mat inside the car where Russell asked him to place it.

On the afternoon of the 15th, sometime after the robbery, McNeill called at the 10th Avenue house to see about his car. He again found all four there in the attic. McNeill asked for his car. One of them said "they had a tough break" and "the car was hot." Russell said "I think your car has a flat tyre" (there was no evidence of that) and asked "how much would a new one cost?" McNeill did not know. Each of the four then gave him $10 ($40 in all) for the use of his car.

We next trace the movements of Dunbar and the other three —Russell, Lawson and Hyslop—taking part in the hold-up on the 15th of January. Russell, as intimated, had already arranged that McNeill's car should be available for their use. To escape detection in flight it was safer to be in a position to change cars.

Three men—Russell among them, but not Dunbar, appeared at a cab stand on Howe Street at 11.15 a.m. and engaged a car, a Terraplane, and a driver (Warnock). Warnock after driving some distance was held up with a gun in the hands of one of the party and his car was taken from him. He was left in the woods bound.

Dunbar, the appellant, was not in this episode. He, according to the Crown, had other duties and another plan to carry out as

a part of the scheme to rob the bank. According to his own evidence he had no part in the plan and simply did what he was asked to do. What he did is told by himself. On the morning of the 15th, he stated, Russell went down town, procured the McNeill car as arranged and brought it back to the 10th Avenue house at 9.45 a.m. Appellant had no conversation with any one as to how or why the McNeill car was obtained. He did apparently feel responsible for its use afterwards because he paid his share of the rent. However, he got into the McNeill car with Russell, Hyslop and Lawson and first drove to a beer-parlour. At that place he said "Hyslop asked me to drive the car (*i.e.*, the McNeill car) out to an apartment-house on Woodland Drive." Why he was asked to drive it to a certain spot on no special errand he does not say. He did so, first, being told by Hyslop that he (Hyslop) would be at that point in about three-quarters of an hour and "to wait for him." "I drove him out and waited there" the appellant said and his evidence is that he had no knowledge that this act on his part had anything to do with a plan to commit a crime. The jury would probably regard it as an aimless act unless related to some plan. They would think that appellant should at least display some curiosity about it. However he made no enquiries—simply drove there and waited.

The Terraplane car taken from Warnock and now driven by Hyslop accompanied by Russell and Lawson soon reached the point where the appellant waited with the McNeill car. Hyslop, appellant said, called him over and said "Get in and drive this car," *i.e.*, the Terraplane, leaving the McNeill car on the street available for a change of cars in the later contemplated flight to better elude pursuit. The jury would no doubt so infer. Appellant said to Hyslop "No, I am not going to drive that car." Up to this moment no threats were made. He had already driven the McNeill car to a designated locality without, according to his defence, knowing the reason for doing so. Why, the jury would probably enquire, before any threats were made at all should he express unwillingness to drive the Terraplane sedan when asked to do so by (or on behalf of) the same parties, all of them friends, who asked him to drive the McNeill car? Hyslop's reply to his refusal to drive was "Oh yes you are."

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"He had" appellant said "his hand in his pocket with a gun pointing at me so I got in the car." That is all that occurred by way of threat or menaces at that point assuming he is telling the truth. He does not express an opinion—he was not asked to do so—as to whether or not Hyslop was likely to disturb the neighbourhood by shooting at that time. Nor does he say if Hyslop and the others expressed surprise at his alleged refusal to drive the second car after his willingness to drive the first to a strategic point. He knew Hyslop for several years having met him in the penitentiary and, in addition, he was a much older man. They were together also for four or five days at the 10th Avenue house and were jointly interested in boot-legging. A break however, after many years of association in and out of prison developed between them according to appellant's story at this point.

We now have the appellant driving the stolen Terraplane sedan to the bank solely because of threats on his life. When he reached the bank and saw armed men enter it he knew they were about to rob it. "When I got there I knew it was a bank hold-up." He must have known it before he arrived at the bank. If his story is true and he was picked up on Woodland Drive as a forced recruit entirely ignorant of the plan to rob the bank he would necessarily have to be told where to drive, what to do, and how to act before he reached the bank. However he does not give these details. He only knew it when he got there. Now that he arrived at the bank and the three entered to his knowledge carrying guns, he might escape, sound an alarm and prevent the commission of a crime involving loss of life—he admitted that was likely to follow. Instead of doing so, for one terrorized, he acted with great coolness and precision, circling the block and a little later at top speed picking up the bandits after the robbery was completed and Hobbs fatally shot. Appellant also knew, without further threats where to go after the robbery. He drove them back to the place where the McNeill car was left available for further use. All eventually, two on foot and two in the car, found their way after the robbery to the attic in the 10th Avenue house.

As stated appellant arrived with the rest of them as soon as

possible after the robbery at this hiding place. Then all that was taken from the bank (less than $1,100) was divided. Appellant's work was in the nature of part time service. It would appear, however, that he received his full share of the loot, *viz.*, $190 and also discharged fully with the other three his share of the obligations to McNeill by paying $10 for the use of his car. Why he should be treated as a full partner is not explained. Approximately $1,050 was taken from the bank with four concerned in the hold-up, possibly five. After payment of rent and expenses it would undoubtedly appear that the appellant received his full share of the spoils. If he only drove the car because he was terrorized into doing so he at least was willing to be paid for it. The jury would decide if that was a consistent attitude. He was not forced to go back to the 10th Avenue house because the four returned in pairs and Hyslop, the man who threatened appellant, was not with him on the last part of the dash for safety.

On the night of the 16th of January for greater safety, it was decided to abandon the 10th Avenue house for one on 11th Avenue. The two women with Lawson, Hyslop and Healey left first, leaving Russell and Dunbar to be picked up later. The appellant notwithstanding alleged non-participation in the robbery, at least voluntarily, was, the jury might infer, attempting to evade capture by staying with the others and by taking steps to find, if he could, a safer place of refuge. One of the women testified (corroborated by the other) that they came back to the 10th Avenue house for Russell and Dunbar, but on arrival found it surrounded by police officers. Russell and Dunbar were arrested at 10th Avenue on the 16th of January a few minutes before it was intended to take them to another place to escape capture. Hyslop and Lawson escaped half an hour before and, after being pursued from place to place for some days, committed suicide.

The remaining evidence bearing on appellant's defence relates to his conduct, statements and actions on and after his arrest. Larder, one of the arresting police officers, entered the back door of the 10th Avenue house with sergeant Pettit on the evening of the 16th. Noticing a room where Larder thought three of the

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suspected men might be concealed, he slipped along the wall and having decided "that action was the best thing" with commendable bravery opened the door. It was dark but he saw a movement and grappled with a man who turned out to be Russell. The only point about this evidence affecting appellant (who was already arrested) is that, as Larder was about to enter the dark room where he captured Russell, he heard some one ask Dunbar to "get in there and turn the light on." The purpose of the request was obvious. It was dangerous to enter. Dunbar's reply was "not on your life; that is for the police officers to do."

Referring to appellant's words and actions when arrested for its bearing on his defence it should be pointed out that he was not carrying a gun. Also the first words of the accused to an officer were "I will tell you all I know." He said that before they left the 10th Avenue house and again at the police station. Whether or not he was telling the truth or only decided, now that he was caught, to earn if possible, his freedom by assisting the Crown with information about the others would be for the jury to decide. At all events he volunteered to give the police certain information. He asked also for a separate trial.

In a signed voluntary statement he said "I was practically forced into it." He did not say that a gun was used and the word "practically" suggests persuasion rather than force. All but the introductory part of the voluntary statement is in the form of question and answer. In answer to the question "When they drove up what happened then?" he answered "I got in the car and drove it." This was when he was overpowered. It is of some significance that neither at this appropriate place nor elsewhere does he mention a gun. As to the division of money he said "They gave me mine" with the words "there's yours."

After his arrest, *viz.*, on January 18th he made a further statement to assist the police in the capture of his companions Lawson and Hyslop. He also gave information about two men suspected of other robberies, *viz.*, Lawler and Anderson. He said he thought they were in Chicago—a postcard came from them (not addressed to him). The information proved to be right. The Crown suggested that this incident disclosed that he had knowledge of the movements of thieves only likely to be open

to others of the same ilk; the defence that it disclosed his honesty of purpose and willingness to help the Crown. Chief Foster said: "From after the night of his arrest—in a general way the attitude of Dunbar was to help the police rather than to hinder them." There is no doubt he was zealous in assisting the police. They would likely capture the others in any event but in the meantime appellant assisted. The question of fact for the jury to decide was whether or not it was done to procure freedom or more favoured treatment for himself, or, as the defence submits, the natural course of conduct for an innocent man to pursue once he was released from the terrorism of which he complained.

The foregoing is an outline of the evidence and of appellant's defence. Mr. *Maitland* submitted that whatever our view of that defence may be it ought to be fairly submitted to the jury. If we were sure the jury rejected it difficulties would disappear. I shall, however, inquire into the appellant's position in law assuming that his evidence in respect to coercion was accepted by the jury.

By section 69 of the Code

> Everyone is party to and guilty of an offence who, (*a*) actually commits it; (*b*) does or omits an act for the purpose of aiding any person to commit the offence; (*c*) abets any person in commission of the offence; or (*d*) counsels or procures any person to commit the offence.
>
> 2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

The Crown had to establish to the satisfaction of the jury that the appellant did in fact "form a common intention" with Russell, Hyslop and Lawson to prosecute an unlawful purpose. That common intention was at least formed by three men and, as the appellant submits, on their way to carry out the unlawful purpose they picked him up on the street and by threats and menaces overcame his resistance to taking part in the robbery of the bank. He was not a free agent. It was necessary to find a common intention on appellant's part along with the others to rob the bank.

Mr. *Maitland* contended that the trial judge failed to tell the jury that they must, in order to convict, find on all the facts

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(including the evidence of the appellant) as found by them, that appellant did in fact form that common intention with the others to prosecute the unlawful purpose referred to. The jury should have been asked to say "could appellant be taken to have formed a common intention with others to commit a crime under the facts and circumstances disclosed by the evidence or as found by them?" That, it was submitted, was the first step and it was not put to the jury.

Bearing on this point, although not as directly as one might wish, the learned trial judge told the jury that

if two or more join to commit a felony, to rob a bank, which involves violence, and the violence be shown as such that any reasonable person must have thought it likely that injury would befall the person towards whom the violence was to be exercised, injury of such a character as might cause death, then all the persons participating in or inciting to the crime are guilty of murder if death ensues.

And again:

It is a principle of criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. To constitute a crime it is necessary that there should be not only an act but a criminal intent; the purpose or design with which the act is done.

(The difference between "join" together and "form a common intention" in the minds of the jury would not be so marked as to be material, particularly as the section was read to them.) Also he said:

When you are considering the evidence you must be careful to segregate these two men. Consider each one's case separately.

And again, linking up the evidence as applicable to the appellant with the foregoing statements of the law:

Taking Dunbar's identity—and it was put to you as a defence, put to you himself in the witness box—there is no question about Dunbar's identity. There is no question about Dunbar being in the purlieus and the vicinity of the bank when the bank was robbed. His account of that crime was before you, but he says, "I was compelled, I was forced, held up with a pistol." It is for you to say how convincing, or was it convincing, when he answered counsel when counsel asked him, "You had ample time to leave these people. You left them in the bank and you went around a block, I think twice, and you consumed considerable time. The police station was not so far away, and you had a motor-car. Why didn't you give an alarm?" His answer was, "Well, I was afraid that some of the gang, some of the others of the confederates would get me afterwards, no matter what would have happened, though they had gone in the bank and they might have not come out alive. I was compelled" . . .

He then proceeded to read section 69 thereby directing the

attention of the jury to the fact that a finding of common intention on the part of Russell and appellant was essential. With more particularity he said:

> The Crown alleges that the common purpose was to rob the Canadian Bank of Commerce, and there were four of them in it, and they were all together, and they were all aiding and abetting.

Again the trial judge said:

> That evidence is put to you to ask you to conclude that these four men were all together.

And later:

> Beginning as I began along on the 11th of January, [*i.e.*, his narrative of the evidence] can you reasonably conclude that the whole four of them were not in and about this unlawful visit to the bank for the purpose of robbing the bank, and out of that arose the death of Hobbs?

It is clear from these extracts that the jury were told that they must find a common intention to prosecute an unlawful purpose on the part of both Russell and the appellant (they were tried together) having regard to all the evidence heard by the jury in the course of the trial. In the case of Russell that common intention was found by the jury on all the facts before them including (and notwithstanding) his own evidence that he was elsewhere when the crime was committed. Russell's defence was, not that he was coerced but that he was elsewhere at the time (an *alibi*). So in the case of this appellant while it would doubtless have been better to say to the jury more explicitly that they should make a finding on the point in the light of appellant's evidence in his own defence, *viz.*, that he did not take part in the plot with the others and only assisted under threat of death nevertheless the jury in this case, just as the jury in the *Russell* case with his defence of an *alibi* did find common intention to pursue an unlawful purpose. The jury I repeat it might have been asked more specifically to say "notwithstanding that evidence, did he in fact form a common intention with the others to rob the bank?" However, I have no doubt the jury did find it; and I think the failure to be more direct in the charge was not a serious omission.

The further point was raised that the jury ought to have been told that if they accepted appellant's evidence and believed that threats of death by Hyslop caused loss of self-control on appellant's part they might return a verdict of manslaughter. There

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is no doubt that the trial judge, while he referred to manslaughter, withdrew it from the jury as a possible alternative verdict. Counsel for appellant at the trial did not ask him to tell the jury that if appellant's evidence should be accepted they might return such a verdict but it is not excluded from our consideration. If in law the jury, accepting appellant's evidence, might, based thereon, find a verdict of manslaughter, they should have been so instructed.

Appellant's defence was compulsion—not provocation—threats which, as Mr. *Maitland* submitted, caused him to lose his self-control. The Crown's answer to that submission was, first, that the jury, with appellant's evidence before them, based upon a proper charge, found common intention on appellant's part in the plan to rob the bank within the meaning of section 69 and that being so the inquiry was at an end and section 20 of the Code relating to compulsion by threats need not be considered; second, that in any event, a finding of compulsion by threats would not displace (or interfere with the consequences flowing from) a finding of common intention under section 69 nor afford any defence to appellant on a charge of murder. Assuming, therefore, the truth of appellant's evidence that he "was practically forced into it," and assuming further (as he said at the trial), that he was threatened with a gun and believed such a threat would be carried out if he failed to comply, he was nevertheless guilty of murder and it was the duty of the trial judge to say so and equally his duty not to tell the jury that they might find him guilty of manslaughter.

Mr. *Macdonald* for the Crown relied upon *Rex* v. *Farduto* (1912), 10 D.L.R. 669. Mr. *Maitland* submitted that the question of murder or manslaughter was in fact left to the jury in that case, pointing to the judgment of Cross, J. on appeal at p. 678 where he said:

> I consider that taking the charge as a whole, the learned judge did not go as far as that, because he explained that there might be a verdict of murder or one of manslaughter or a verdict of not guilty.

If it is true that in this case it was held on the point we are concerned with that the jury should be told they might bring in a verdict of manslaughter it would not be of any assistance. Perusal will disclose however that in respect to the defence of

compulsion involving loss of self-control, it was not held to be necessary to tell the jury that they might return a verdict of manslaughter. The foregoing extract as to manslaughter is found in that part of the judgment dealing with the last question propounded for the opinion of the Court. At pp. 675 and 676 it is stated by Cross, J. that:

> The remaining questions sought to be raised involve the contention that the instructions of the learned judge, taken as a whole, were such as to anticipate a particular verdict and to exclude from the consideration of the jury another verdict which could have been rendered.

It was the charge to the jury on all the facts of the case (not merely compulsion) brought out by the Crown in a lengthy trial that was under consideration at this point. As pointed out at p. 676 it was not "until after about 28 witnesses had been examined" that the facts were elicited in reference to the so-called compulsion presently referred to. Up to that point before the additional defence of compulsion arose cross-examination of Crown witnesses

> tended to show that the reliance of the defence was upon the absence of any evidence sufficient to connect the prisoner with the death of Hotte, and upon a suggestion that it was reasonable to conclude that Hotte had committed suicide while in a state of alcoholic delirium.

While neither of these defences would appear to indicate any other verdict than guilty or not guilty of murder we are not in a position to judge from a perusal of the report the full tenor of all the evidence adduced. It was apparently of such a nature that the trial judge in that aspect of the case "explained that there might be a verdict of murder or one of manslaughter or a verdict of not guilty": p. 678.

The first of the four questions reserved for the opinion of the appellate tribunal was thus summarized by Cross, J. (p. 670):

> Was there error of law in the judge's direction to the jury, that, even if the prisoner, in handing to another man named Pardillo the knife which was used to kill the deceased, so handed the knife to Pardillo upon threat of the latter to kill the prisoner if he did not give up the knife, it would still be murder on the part of the prisoner?

That is the point we are concerned with, assuming as I do, such a similarity of facts that the same principles should be applied. A Crown witness, one Battista, testified to a conversation with the accused Farduto wherein the latter "told him of having been in the company of a big Italian, Pardillo, of Par-

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dillo having asked him if he had a razor, of having asked him for the razor and of its being given to him [Pardillo] to kill a man, and of Pardillo having thereupon in his presence knocked the man down and cut his throat with the razor," etc. (p. 670) and further:

> Pardillo told him [the accused] that if he did not give it [the razor] up he (Pardillo) would shoot him and that the revolver shot would make a noise and attract the police.

On these facts, the learned trial judge said in part to the jury (p. 671) (translation):

> I am going further than that—even if we accept the story as told by the prisoner to Battista, if it is true, that it is a big Italian who cut the throat of Hotte, the prisoner in his confession to Battista has said that he had given the razor to the big Italian after which the big Italian said it is to kill the deceased Hotte, that is to say that the prisoner at the bar following his confession made to Battista gave this razor to the big Italian knowing that the big Italian was going to commit a murder with his razor. He has furnished the instrument of death to the big Italian. Following his formal confession made to Battista he has furnished the razor himself the instrument which caused the death. He who helps to commit a crime, he who furnishes the instrument or who willingly knowing that a person who is going to commit the murder is guilty is responsible as if he had done it himself. Even if we accept the story told by the prisoner to Battista the prisoner at the bar is still responsible for the murder according to our law. Article 69 of our Code says that he who is present to help, to encourage a person to commit a crime is as guilty as the principal.

And again:

> Article 69 says that a person who encourages some one in a crime is himself responsible for that crime. That is what I say to the prisoner. If you find the story of the prisoner unbelievable, and that is my opinion, you should set it aside. If you find his story true in this case the prisoner has furnished an instrument to commit murder with it: what excuse has he? No excuse. Nobody has the right to commit a murder even if he is threatened with death by another. That is no excuse, and also "even if he was in danger of being killed he had no right to furnish the means to commit a murder."

It was held by the Quebec Court of King's Bench, appeal side, consisting of five judges, that there was no misdirection in that statement of the law. Cross, J., delivering the judgment of the Court, referred to sections 20 and 69 and to the notes of the Royal Commissioners at p. 43 of their report now appearing in Crankshaw's 6th Ed., at p. 33. At p. 673 it was held that compulsion is only an excuse for killing when "the accused person [is] a mere inert physical instrument" and illustrations

are given from Russell (Can. Ed.), p. 90. The learned judge goes on to say at p. 673:

. . . the only ingredient of compulsion is what is brought out in the cross-examination to the effect that Pardillo said he would shoot the prisoner if he did not give up the razor and the qualification that the revolver shot would make a noise and attract the police, it is clear that the trial judge could conclude that there was no case of such compulsion as could constitute an excuse, and thereupon was within the rule of section 20 of the Code in saying in substance to the jury:

"The prisoner could have resisted or could have run away, and, taking the confession as it stands, my direction is it shews that the prisoner is guilty of murder."

There was, therefore, no misdirection in the sense asserted in the first question sought to be reserved.

In the case at Bar the trial judge also told the jury that appellant might have run away—he had time to leave—the police station was not far away. This decision standing for nearly a quarter of a century has not been questioned. I can see no material dissimilarity in the facts to make it inapplicable. It cannot be material that in one case the commission of the crime followed at once upon the threat; in the other a few minutes after; or that handing over the razor, under threats was different from driving the car. Appellant admitted that he knew death might follow his act.

In Halsbury's Laws of England, 2nd Ed., Vol. 9, at p. 24 the author, after referring to the one exception to the rule, *viz.*, where threats induced rebels to take up arms against the King (see 1 East, P.C. 70) points out that:

Subject to this exception, a person who commits a crime when influenced by threats or "moral force," or by the confinement of his person, or by violence not amounting to actual compulsion, [meaning I assume such force as would destroy will power] is not excused.

He refers to *Reg.* v. *Tyler* (1838), 8 Car. & P. 616 in support of this view and for the general principle that fear of personal danger is no excuse for assisting in doing an illegal act. Lord Denman, C.J., in summing up to the jury on the facts, as outlined in the report, said at p. 620:

With regard to the argument you have heard, that these prisoners were induced to join Thom, [who alone shot the deceased] and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties for such a reason are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. You probably, gentlemen, never saw two men tried at

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a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued; yet that circumstance has never been received by the law as an excuse for his crime, and the law is, that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind.

Here the prisoners were convicted of murder although Thom who fired the shot was insane and they were in fear of personal violence at his hands. Mr. *Maitland* referred to 1 Hale, P.C. 51, quoting the extract:

> If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death does not excuse him, if he commit the fact, . . .

that is, he suggested, if he commits the actual killing. That is what the author means but it does not assist the appellant. Here appellant did "commit the fact." He brought armed men to the bank on an errand of robbery and probable death (as it proved) posting himself at the door—a strategic point—as a necessary part of a careful plan, circling the block to pick up his three companions after the robbery. All these movements disclosed that appellant "committed the fact." He committed the crime of murder if a common intention to prosecute an unlawful purpose was properly found by the jury. It would be surprising if any assistance could be obtained by appellant from the words of Sir Matthew Hale who laid down the stern rule, quoted in Crankshaw at p. 33, *viz.*:

> "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the act; or he ought rather to die himself than kill an innocent."

This, I think, is still the law, and it is based upon morals and good sense. Why should one save his own life at the expense of another or why because one's life is threatened, should one use as a shield an innocent man? Of course counsel for the appellant does not deny that it is wrong to give way to such a threat. What he says is that it may not be murder but rather manslaughter if death to another follows. It may be granted at once that there is some logic in the submission that one who, were it not for the threats, would not take part in the robbery is not so culpable as the others who conceived it. However, the

answer is, that if one yields to threats, knowing that it may lead to the death of another, his own life should be forfeited if that other is killed because of his conscious act.

Refusal to be coerced, to rob or to destroy life would not always lead to trouble. Assuming the appellant's story is true, had he refused to drive the car containing armed men bent on mischief, it is not at all likely that Hyslop would create a commotion in the neighbourhood at that point by uselessly shooting the appellant. Nor can it be suggested that the appellant was terrorized by such an overpowering physical force as to prevent his will from functioning. It was properly put to the jury in this way.

Mr. *Maitland* also submitted that even although appellant may not have been terrorized to the extent that his will could not function it did cause him (assuming his story to be true) to lose his self-control. Under section 261 murder may be reduced to manslaughter where there is provocation and any wrongful act or insult sufficient to deprive one of self-control may be provocation if the offender suddenly acts upon it. There was, however, no provocation on the part of the deceased. Section 261 does not apply: another section (20) does apply. Can it be suggested as a proposition of law or by the terms of section 20 which excepts robbery and murder that loss of self-control brought about by compulsion, will reduce the offence from murder to manslaughter? I think not. The jury were properly told that under section 20 in the case of heinous offences as therein defined, including murder and robbery, compulsion is no defence. I take it to mean that compulsion by threats to take part in a murder or robbery contemplated or about to be committed is no defence. He is in precisely the same position as if there had been no compulsion.

In *Attorney-General* v. *Whelan,* [1934] I.R. 518 the accused on a charge, not of robbery but of receiving stolen goods, was successful on appeal with a defence of duress *per minas.* In his reasons for judgment Murnaghan, J., after referring to the difficulty "of formulating a rule of universal application," says at p. 526:

> It seems to us that the threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance

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should be accepted as a justification for acts which would otherwise be criminal. The application of this general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification. We have not to determine what class of crime other than murder should be placed in the same category. We are, however, satisfied that any such consideration does not apply in the case of receiving. When the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats.

By our Code robbery is placed in the same category as murder. Assuming that this case deals with principles embodied herein it does not help the appellant.

It follows that in my opinion the trial judge was right in withdrawing from the consideration of the jury the question of manslaughter. Section 261 of the Code is not applicable to the facts. While doubtless as I already stated it might have been better on the first point I discussed if the learned trial judge had placed before the jury in a manner more direct the question based upon appellant's evidence of compulsion, as to whether or not he might properly be excluded by the jury from the common design or intention of the other three participants the omission is not of such a serious nature as to cause any substantial wrong. This viewpoint would not escape the attention of the jury on the charge as given to them.

Other alleged errors in the address referred to by Mr. *Maitland* are in the same category. They are not of serious import. This is a case where the judgment of a jury on simple facts may safely be accepted. I am satisfied they did not believe appellant's story. His early history and association with the others in and out of prison; his movements before and after the robbery; his sharing of the loot on a full partnership basis; his sharing in expenses for the rent of the McNeill car; the important role he played in the execution of the plan to hold up the bank alike point to guilt and to concerted action. I have no doubt that jurymen with knowledge of the world would not be so credulous as to believe that where not only detailed organization but loyalty and co-operation among thieves is, if not absolutely essential, at least highly desirable for the success of such

operations they would take the risk of placing at a strategic point a forced recruit acting only under compulsion, likely to desert at the critical moment. Unfortunately the number engaged in these criminal activities are not so few that no one could be found to assist without being dragged in by threats. The jury doubtless believed that it was only when appellant knew he was caught beyond hope of escape that he assumed the role of an injured party forced against his will to participate in the crime, hoping that the assistance he gave in assisting in the capture of Hyslop and Lawson would enure to his advantage. It sometimes happens, as he probably knew, that where the Crown has need of assistance immunity is granted.

However, I am not resorting to section 1014(2). Holding, as I do, the view that the so-called compulsion, if it occurred, did not relieve the accused of guilt of the more grave charge, and that a finding of common intention was made by the jury under section 69 of the Code, after taking his evidence into consideration, I would dismiss the appeal.

McQUARRIE, J.A.: I agree with my learned brothers the Chief Justice and MACDONALD, J.A. that this appeal should be dismissed.

*Appeal dismissed, Martin, J.A. dissenting.*

Solicitor for appellant: *N. W. Spinks.*
Solicitor for respondent: *N. C. Levin.*

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*May* 26, 27; *June* 26.

## SMITH v. KENNEDY AND THOMAS.

*Negligence—Automobiles—Collision at intersection—Injury—Costs—Two defendants—Costs of successful defendant payable by unsuccessful defendant.*

In an action for damages for negligence against two defendants, resulting from an automobile collision, each defendant served the other with third-party notice. The defendant Thomas was found solely responsible for the accident. Judgment was given against him, and in addition to paying the plaintiff's costs he was ordered to pay the defendant Kennedy's costs of the action and of the third-party proceedings.

*Held*, on appeal, on the question of costs, *per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A., that the evidence shows the plaintiff thought K. was not responsible and he should not therefore have joined him as a party defendant. The proper disposition of the costs is that the plaintiff recover his costs of the action from T. and that as K. was dismissed faultless, the knowledge of which was known to the plaintiff, the plaintiff should pay his costs.

*Per* MARTIN and MACDONALD, JJ.A.: That whatever their opinion might be in regard to the manner in which a sound discretion should best be exercised in this case they find themselves bound to hold that there was jurisdiction to exercise it and the learned judge was justified in the opinion he took of its effect and in judicially exercising his discretion in the way he did upon the materials before him.

*Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144, followed.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant Thomas from the decision of MURPHY, J. of the 6th of February, 1936, in so far as said judgment dismissed the application of the defendant Stanley Thomas for contribution or indemnity under third-party notice served herein, and in so far as the defendant Thomas was ordered to pay the costs of the action and of the third-party proceedings to the defendant Kennedy. The case is reported only on the latter point. On the 11th of July, 1935, the plaintiff was a passenger in an automobile driven by the defendant Kennedy. At a street intersection a collision took place between Kennedy's motor-car and a motor-car driven by the defendant Thomas, as a result of which the plaintiff suffered damage. Thomas served Kennedy with a third-party notice, and Kennedy served Thomas with a third-party notice. On the trial the defendant Thomas was

found solely responsible for the accident, and the plaintiff recovered damages against him. As to costs, it was ordered that the plaintiff recover against the defendant Thomas the costs of the action, that the defendant Kennedy recover from the defendant Thomas his costs of the action and costs of and incidental to the third-party proceedings instituted herein for and on behalf of said defendant Thomas.

The appeal was argued at Vancouver on the 26th and 27th of May, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*Craig, K.C.*, for appellant: Under rule 976 the costs follow the event, but under the judgment we were ordered to pay Kennedy's costs. The action was dismissed as against Kennedy. He was made a party to the action by the plaintiff, and the plaintiff should pay his costs: see *Goodell* v. *Marriott* (1929), 44 B.C. 239; *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75, and on appeal (1916), 10 W.W.R. 614; *Vine* v. *National Motor Car Company Ltd.* (1913), 29 T.L.R. 311; *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144 at p. 149; *Rhys* v. *Wright and Lambert* (1931), 43 B.C. 558. When a point is not raised by counsel or by any of the judges who heard the case, the Court should not regard the case as involving a decision on the point: see *Rudd* v. *Elder Dempster & Co.*, [1933] 1 K.B. 566 at p. 603; *Lord Glanely* v. *Wightman*, [1933] A.C. 618 at p. 641.

*J. W. deB. Farris, K.C.*, for respondent: He is estopped from bringing this appeal because he did not appeal against the judgment in favour of plaintiff: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 431, sec. 483; *Munni Bibi* v. *Tirloki Nath* (1931), 58 L.R. Ind. App. 158; *Cottingham* v. *Earl of Shrewsbury* (1844), 3 Hare 627 at p. 638.

*E. B. Bull*, on the same side: On the question of Thomas having to pay Kennedy's costs, the case of *Rhys* v. *Wright and Lambert* (1931), 43 B.C. 558 is in our favour, also the case of *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144. That Thomas should pay our costs see *Bestermann* v. *British Motor Cab Co.* (1914), 83 L.J.K.B. 1014 at p. 1018.

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*Craig,* in reply: The learned judge had no right in law to make the order as to costs, and there is the right of appeal: see *Donald Campbell & Co.* v. *Pollak,* [1927] A.C. 732 at p. 739. Thomas did not have to appeal against Smith's judgment. It is not disputed that Thomas was guilty of negligence, and that he was therefore properly held liable to the plaintiff, and this judgment has been paid by Thomas. But these facts are not inconsistent with the argument now advanced against Kennedy. Thomas now claims that Kennedy also was negligent and should contribute to reimburse Thomas according to the degree of Kennedy's fault.

*Cur. adv. vult.*

26th June, 1936.

MACDONALD, C.J.B.C.: The question involved in this appeal is whether the defendant Kennedy was entitled to judgment against the defendant Thomas for the costs of the action. The action was for damages caused by a collision between the defendant Kennedy's and defendant Thomas's cars. The plaintiff was a passenger in defendant Kennedy's car.

The evidence is that when the defendant Kennedy reached the intersection of two streets defendant Thomas was 170 feet from his street intersection and seeing that he was a considerable distance away defendant Kennedy attempted to cross at a very moderate speed. Thomas, however, came on and struck the defendant Kennedy's car near the rear end and plaintiff brought action against both Kennedy and Thomas for damages. Defendant Thomas was entirely responsible for the collision and the judgment of the trial judge was that the plaintiff should receive damages and costs against him and that Kennedy be dismissed as being in no way responsible. Nevertheless Kennedy's costs of the trial were given against Thomas. Now I am aware of a statute which provides in a case like this that the party entitled to costs against another may be liable directly and not in a roundabout way through a third party, but in this case I do not think that the plaintiff was justified in joining Kennedy in the action at all. In cases where there is a reasonable doubt as to which of two persons is responsible in which both may be joined and if one is dismissed the plaintiff for the reason aforesaid

may be given his costs of action against the co-defendant. This is not such a case. In the Court below in argument before the trial judge on the disposition of costs the Court said "I accept the evidence given by the plaintiff and his witness and Kennedy. In my opinion the man Thomas was solely to blame for this accident." Plaintiff, however, in his examination said:

. . . I believe if I had been and seen this car there I would not have stopped—or I would not have thought it was necessary.

Well, what you mean to say is that Kennedy was not at fault in any respect? I thought Kennedy was right.

Now, when he thought Kennedy was right I think he had no business to join him as a defendant in the action with Thomas. Therefore the proper disposition of the costs of the action is that the plaintiff recover his costs of the action against Thomas and that as Kennedy was dismissed faultless the knowledge of which was known to the plaintiff that the plaintiff should pay his (Kennedy's) costs and that he should have no right of indemnity against Thomas.

I would vary the judgment to that extent.

MARTIN, J.A.: I am of the opinion that in view of our decision in *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144 it is impossible to say that the learned judge did not have the necessary jurisdiction to make the order complained of. And therefore it comes down to the question as to whether or no he had materials before him upon which he could exercise a sound discretion. That he has done so appears, in my opinion, from his careful consideration of the matter, and his reasons for his order extend over a dozen pages of the appeal book, and, after examining them, I find myself unable to say that he omitted consideration of anything which it was proper or necessary under the circumstances to arrive at a just conclusion, if he did have the jurisdiction that I hold he had, and therefore in my opinion we should not be warranted in interfering with the judgment he pronounced even though we might have exercised our discretion differently.

He founded his jurisdiction upon our said decision in the *Southard* case, cited to him by Mr. *Branca,* and for that reason I have looked into it very carefully and examined not only the

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appeal book but also my notes upon the argument, and it is quite apparent to me that it was the opinion of this Court that the said jurisdiction does exist. It so happened in the judgment we delivered that only two of us directly touched upon the matter, my brother MCPHILLIPS at p. 149 and my brother M. A. MACDONALD at p. 153, but as to the other three justices our disposition of the appeal involved the same conclusion upon this question of costs, which had been presented to us by counsel. Therefore, whatever my opinion might be in regard to the manner in which a sound discretion should best be exercised in this particular case, I find myself bound to hold that there was jurisdiction to exercise it, pursuant to our said decision, and we should not depart from it, and the learned judge was justified in the opinion he took of its effect and in judicially exercising his discretion in the way he did upon the materials before him, which does not mean that I would have made the same order had I been in his place, but it does mean that I should not interfere with him.

As to the exercise in general of discretion below, that was referred to in *Southard's* case by our brother MCPHILLIPS, who was careful in his reasons to say that the order we approved therein was the proper order to make "in view of the special facts of this case": I mention this because it must not be considered that I am going to the length of saying that in every case the order now before us is the only proper one that can be made: that must be considered in the light of the proper application of the principle to the circumstances of each case. I refer to *Sanderson* v. *Blyth Theatre Company,* [1903] 2 K.B. 533, and *Bestermann* v. *British Motor Cab Co.,* [1914] 3 K.B. 181, wherein Vaughan Williams, L.J. said, p. 187, "It turns on the facts of each case," and see also Kennedy, L.J., at p. 188, and Swinfen Eady, L.J., at p. 191.

The appeal should, in my opinion, be dismissed on both grounds, *i.e.,* of negligence and costs.

MACDONALD, J.A.: I would dismiss the appeal on the question of costs. I am in agreement with what has just been said by my brother MARTIN.

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McQUARRIE, J.A.: In regard to the disposition of costs, I agree with the learned Chief Justice.

*The Court being equally divided, the appeal was dismissed.*

Solicitors for appellant: *Craig & Tysoe.*

Solicitors for respondent: *Farris, Farris, Stultz, Bull & Farris.*

[Reporter's Note: See *Dryden* v. *Surrey C.C.*, [1936] 2 All E.R. 535 at 541 reported since the above judgments were delivered.]

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## DES BRISAY *ET AL.* v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

S. C.
In Chambers
1936
*Oct.* 7, 8.

*Practice—Discovery—Examination of past officer of company—Rules 370c (1) and (2).*

Rule 370c (1) of the Supreme Court Rules provides that "In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of the Court or a judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation," etc.

The plaintiff applied under said rule to examine a past officer of the defendant company, an officer of the company having previously been examined.

*Held*, that the application should be granted.

*Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934), 49 B.C. 301, distinguished.

APPLICATION under Order XXXIA., r. 1, for leave to examine a past officer of the defendant company. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 7th of October, 1936.

*Bourne*, for the application.

*A. Alexander, contra.*

*Cur. adv. vult.*

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In Chambers
1936

DES BRISAY
*v.*
CANADIAN GOVERNMENT MERCHANT MARINE LTD.

8th October, 1936.

MORRISON, C.J.S.C.: This is an application under Order XXXIA., r. 1 for leave to examine a past officer of the defendant company. An officer of the company had previously been examined.

Rule 1 reads as follows:

> In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of a Court or a judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination or any part thereof may be used as evidence at the trial if the trial judge so orders.

By this rule in plain terms a past officer may be examined upon leave being given. Counsel opposing the application has drawn my attention to the case of *Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934), 49 B.C. 301 in which my brother MCDONALD, J. refused leave to examine an officer after another officer had already been examined under rule 2 of the above Order which reads as follows:

> After the examination of an officer or servant of a corporation, a party shall not be at liberty to examine any other officer or servant without an order of the Court or a judge.

In that case the learned judge was confined by the application to rule 2 which does not deal with a past officer. I see no comparison between the present application and the one which was before MCDONALD, J.

Leave is granted.

*Leave granted.*

## BEACH v. PEARCE.

S. C.
1936
*Aug.* 13, 20.

*Costs—Action for damages against two defendants—Dismissed against one —His costs to be paid by unsuccessful defendant.*

The plaintiff was a passenger in P.'s motor-car when the car collided with a car driven by N. The plaintiff, having been injured, sued both P. and N. The action against N. was dismissed and judgment was given against P. Both defendants pleaded that the sole cause of the accident was the negligence of the other. On the plaintiff's motion that P. be ordered to pay the costs that N. was entitled to against the plaintiff:—

*Held*, that in the circumstances the plaintiff was justified in suing both the defendants and there should be an order that P. pay N.'s costs direct.

*Rhys* v. *Wright and Lambert* (1931), 43 B.C. 558, followed.

MOTION by plaintiff that the defendant who was unsuccessful in an action for damages do pay the costs of the defendant against whom the action was dismissed. Heard by ROBERTSON, J. at Vancouver on the 13th of August, 1936.

*Eades,* for plaintiff.
*Ray,* for defendant Nelles.
*Nicholson,* and *Yule,* for defendant Pearce.

*Cur. adv. vult.*

20th August, 1936.

ROBERTSON, J.: The plaintiff now asks that the defendant Pearce be ordered to pay direct to the defendant Nelles the costs which Nelles is entitled to against the plaintiff because of the dismissal of her action against him. The plaintiff relies upon Order LXV., r. 32, and *Rhys* v. *Wright and Lambert,* 43 B.C. 558; [1931] 2 W.W.R. 584. The action was for damages arising out of a collision between Pearce's motor-car, in which the plaintiff was a passenger, and Nelles's motor-car. Nelles and Pearce each pleaded that the collision was caused solely by the negligence of the other, on February 14th, 1936. Mr. Justice MURPHY, in dealing with a similar situation in the case of *Smith* v. *Kennedy and Thomas* (unreported) said he did not think the plaintiff was acting unreasonably in suing two defendants and continued:

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Experience shows, and may show in this case, that it is exceedingly difficult to determine which of two people are responsible for a collision of this kind, and it is not at all infrequent that where the trial Court decides one way the upper Court takes another view of it. I think Smith was taking only an ordinary precaution when he sued both of them. . . .

In that case Mr. Justice MURPHY ordered that the costs of the successful defendant should be paid directly to him by the unsuccessful defendant. The case went to appeal*. The Chief Justice and MCQUARRIE, J.A. would have allowed the appeal, on the point as to costs, because they thought that the plaintiff Smith thought that the defendant Kennedy was not to blame and for that reason the plaintiff should not have joined him as a defendant. The other justices saw no reason to interfere with the discretion exercised by the learned trial judge. Each case turns upon its facts. In this case Pearce led a lot of evidence to show that Nelles's negligence was the sole cause of the accident. Viewing all these circumstances I think that the plaintiff was justified in proceeding against the two defendants. In *Piper and Piper* v. *Bussey and Emerson,* 24 Sask. L.R. 490; [1930] 2 W.W.R. 452, Martin, J.A. quotes at p. 457:

> In that case there was a collision, and it took place under such circumstances that the injured person would naturally not have full information as to whose fault it was, but it took place under such circumstances that it might well have been the fault of one or other or both of these people. Those being the circumstances of the case, it turns out after the trial that there is only one wrong-doer, but that wrong-doer was sued and successfully sued. Under these circumstances, was it a reasonable thing for the plaintiff, in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add as part of the costs in bringing this reasonable action in which he reasonably joined this other person the costs of that other person who is found not to be at fault.

Following the *Rhys* v. *Wright and Lambert* and *Smith* v. *Kennedy* cases, *supra,* I think that the order asked for should be made.

I see no reason to interfere with the disposition of the third-party costs.

*Motion granted.*

* Reported, *ante*, p. 52.

## REX v. GEE DUCK LIM.

S. C.
In Chambers
1936
*June* 21, 22.

*Criminal law—Charge of possession of opium—Speedy trial—On appeal new trial ordered—Right to re-elect.*

The accused having elected to be tried by a County judge when charged with possession of opium, was duly tried and acquitted. The Court of Appeal ordered a new trial. He was again tried and convicted. On application by way of *habeas corpus* for his release on the ground that before his second trial he was not required to and did not re-elect as to whether he would take a speedy trial or trial by jury, and the County judge had no jurisdiction to try him:—

*Held*, that the prisoner is not entitled to re-elect and the application is dismissed.

APPLICATION by accused by way of *habeas corpus* for his release. Heard by ROBERTSON, J. in Chambers at Vancouver on the 21st of June, 1936.

*Mellish*, for accused.
*Maitland, K.C.*, and *Owen*, for the Crown.

22nd June, 1936.

ROBERTSON, J.: The convict is charged with possession of opium contrary to The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49. He elected to be tried by a County Court judge and was duly tried and acquitted. The Crown appealed and the Court of Appeal ordered a new trial on the same charge. He was again tried and convicted. He now applies by way of *habeas corpus* for his release on the ground that after the appeal, and before his second trial, he was not required to, and did not, re-elect as to whether he would take a speedy trial or trial by jury and that therefore the County Court judge had no jurisdiction to try him. He relies upon *Rex* v. *Mattens*, 50 Can. C.C. 285; [1928] 4 D.L.R. 831. In that case there had been a conviction after a summary trial and upon an appeal a new trial was ordered. The learned County Court judge held that "the right to re-elect" was part of the trial and he therefore said the prisoner had the right to re-elect. In *Rex* v. *Deakin* (1912), 17 B.C. 13; 19 Can. C.C. 274, the accused had been

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convicted on a summary trial, given a new trial by the Court of Appeal and on appeal from the second trial he claimed that he had the right to re-elect whether he should be tried speedily or by a jury. The learned County Court judge refused this and on appeal the Court held, *inter alia*, that the election was no part of the trial at all. It said at p. 15:

*Per curiam*: The prisoner undoubtedly was not entitled to re-elect. The election is no part of the trial at all; it is a preliminary required to give the County Court judge jurisdiction. The accused is brought before the County judge, and elects to be tried by him; that is taken down and made of record. Afterwards the trial takes place, which in this case turns out to be a mis-trial. This Court sends it back to the Court where it came from, that is, back to the Court which the prisoner elected to be tried by. It cannot reasonably be contended that the form of election should be gone through again.

See also *Rex* v. *Drew (No. 2)*, [1933] 2 W.W.R. 243, at 247; 60 Can. C.C. 229.

The application is dismissed.

*Application dismissed.*

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1936
*June* 1, 8, 11.

## KNOX v. BAKER *ET AL.*

*Superannuation—Policeman—Action to recover—Parties—R.S.B.C. 1924, Cap. 247, Secs. 5, 7, 10, 11, 14, 17, 19, 21 and 44—B.C. Stats. 1930, Cap. 69, Secs. 5 and 6.*

The plaintiff, after serving nearly 25 years as a policeman in the City of Vancouver, was dismissed on the 3rd of January, 1935. Pursuant to section 5 of the Superannuation Act the city deducted each year, commencing on January 1st, 1928, 4 per cent. from his salary and paid it to the Minister of Finance as a contribution from the employee to the Superannuation Fund, and pursuant to section 7 of said Act the city paid a like amount. The plaintiff was 55 years of age on September 23rd, 1935. On the 19th of December, 1935, he was again temporarily employed as a policeman and was dismissed on the 31st of December, 1935. He was paid his salary for this period but the city did not deduct the 4 per cent. from his salary and did not make any payments either on the plaintiff's behalf or itself to the Minister of Finance. Later the plaintiff requested the paymaster to forward to the Minister the amount which should have been deducted from his salary but this

was refused. In an action for a declaratory judgment to enforce his rights under the Act:—

*Held*, that the Act applies to temporary employees of the city police department.

*Held*, further, that the Minister of Finance looks to and holds the city responsible. As soon as the plaintiff re-entered the employ of the city "he was again a contributor" and the failure of the city to pay the Minister and the acceptance by the plaintiff of the full amount of his December salary did not deprive him of his rights under the Act. There was no necessity for him to make an application for reinstatement of his account in the Superannuation Fund, and on his re-employment he again became a contributor and was reinstated in the same position as he was at the time of his dismissal.

This action was brought "against the Crown in the right of the Province of British Columbia."

*Held*, that the action should be against the Attorney-General of the Province of British Columbia as representing the Crown, and leave is given to amend the style of cause and the statement of claim and subsequent proceedings.

*Held*, further, that the duties of the Superannuation Commissioner are administrative and an action for a declaration will lie against him. An order is made that the Commissioner approve of the plaintiff's application for his superannuation allowance.

ACTION for a declaration that the plaintiff is a policeman who was in the employ of the City of Vancouver who attained the age of 55 years, that he has made application for the superannuation allowance to which he as a policeman who has attained the age of 55 years is entitled on his own behalf, that he is a person who comes within the scope of the Superannuation Act and is entitled to receive a superannuation allowance pursuant to the provisions of the said Act, and for the necessary directions to issue to the defendant Commissioner to approve of the application made by the plaintiff. Tried by ROBERTSON, J. at Vancouver on the 1st of June, 1936.

*Branca*, for plaintiff: Procedure by way of petition of right does not lie; the Crown can be sued in such an action as an ordinary person: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 688; *Feathers* v. *The Queen* (1865), 29 J.P. 709; *Esquimalt and Nanaimo Railway Company* v. *Wilson*, [1919] 3 W.W.R. 961; [1920] A.C. 358; *Smith* v. *Attorney-General for Ontario* (1922), 52 O.L.R. 469. That a declaratory judgment can be given in this case see *Dyson* v. *Attorney-General*,

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[1911] 1 K.B. 410; *Burghes* v. *Attorney-General,* [1912] 1 Ch. 173; *Great West Life Assurance Co.* v. *Baptiste,* [1924] 2 W.W.R. 920; *Johanson* v. *City of Winnipeg,* [1935] 2 W.W.R. 329; *Tuxedo Holding Co.* v. *University of Manitoba,* [1930] 1 W.W.R. 464; *Electrical Development Co. of Ontario* v. *Attorney-General of Ontario* (1919), 88 L.J.P.C. 127. There is no exercise of judicial power by the commissioner: see *O'Connor* v. *Waldron* (1934), 104 L.J. P.C. 21; *Shell Co. of Australia* v. *Federal Commissioner of Taxation,* [1931] A.C. 275 at pp. 295-7; *Everett* v. *Griffiths,* [1921] 1 A.C. 631 at pp. 652 and 682; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson,* [1892] 1 Q.B. 431 at p. 448; *The Queen* v. *Corporation of Dublin* (1878), 2 L.R. Ir. 371; *Ferguson* v. *Earl of Kinnoull* (1842), 9 Cl. & F. 251.

*Soskin,* for defendant: The Crown can be sued only by way of petition of right upon obtaining a *fiat.* The Consolidated Revenue Fund is involved: see *Smeeton* v. *Attorney-General,* [1920] 1 Ch. 85; *Esquimalt and Nanaimo Railway Company* v. *Wilson,* [1920] A.C. 358; *Attorney-General for Ontario* v. *McLean Gold Mines,* [1927] A.C. 185. Action cannot be brought against Baker as Superannuation Commissioner, as he is in a judicial position and his decisions are not subject to review: see *Lapointe* v. *L'Association de Bienfaisance de la Police de Montreal* (1906), 95 L.T. 479. The plaintiff had not attained superannuation age and his subsequent re-employment did not reinstate him. No contributions were made to the fund after his discharge. His rights are created by statute and all conditions precedent must be complied with.

*Branca,* replied.

*Cur. adv. vult.*

8th June, 1936.

ROBERTSON, J.: On the 8th of November, 1927, the City of Vancouver entered into an agreement with its police department for the purpose of securing the benefits of the Superannuation Act and later complied with section 42 whereupon Parts I. and III. of the Act applied to the city and the police.

The plaintiff was a member of the police department from long before the 1st of January, 1928, until the 3rd of January,

1935, when he was dismissed, by which time he had completed almost 25 years of service. During the period mentioned pursuant to section 5, the city deducted 4 per cent. from the plaintiff's salary and paid it to the Minister of Finance "as a contribution from that employee to the Superannuation Fund." During the same period, pursuant to section 7 the city paid a like amount to the Minister of Finance with each contribution of the plaintiff. Sections 10 and 11, in part, of the Act are as follow:

10. All contributions in the hands of the Minister of Finance shall be placed in a fund in the Treasury Department to be known as the "Superannuation Fund," and shall be accounted for as part of the Consolidated Revenue Fund. . . .

11. A separate account shall be kept for each employee and each employer showing the amount at his credit in the Superannuation Fund. . . .

At the time of the plaintiff's dismissal there was $1,171.98 standing to the credit of his account and, of course, there would be a like amount shown at credit in the employer's account.

Section 19 of the Act provides as follows:

Where a contributor has been dismissed or has resigned from service, or where a contributor within the scope of Part II. has been retired from the service before the completion of ten years of continuous service, if he makes application therefor, the amount at the credit of his account in the Superannuation Fund shall be paid to him.

The plaintiff did not, at any time, make any application for a refund. The plaintiff was 55 years of age on the 23rd of September, 1935. Section 44 provides that each contributor, who is a policeman, shall be entitled to a superannuation allowance who attains the age of 55 years and is retired from service. On the 19th of December, 1935, he was temporarily employed by the city as a policeman. He took the usual oath and was sent out to perform the ordinary duties of a policeman. There was no time fixed when his employment was to cease. He was again dismissed on the 31st of December, 1935. He was paid $15 by the city on account of his salary, and later, on December 31st, 1935, a salary cheque was issued to him for the final amount due him by the city, *viz.*, $20.54 which, apparently he cashed. The city did not deduct the 4 per cent. from his salary for December, 1935, and did not make any payments either on the plaintiff's behalf, or itself, so far as the plaintiff is concerned, to the Minister of Finance. Subsequently the plaintiff's solicitor requested

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the paymaster of the city to forward to the Minister the amount which should have been deducted from the plaintiff's salary. The paymaster said the city's position was that no deductions were made in the plaintiff's case as he was a temporary employee. The plaintiff then duly applied to the Superannuation Commissioner for a superannuation allowance and was refused on the ground that he must first comply with section 20D which, in part, is as follows:

> 20D. In the case of any contributor who was dismissed from service, and who, within the period of three years thereafter, is re-engaged in or reappointed to the service of the same employer, and who again becomes a contributor, if he makes application in writing to the Minister of Finance for the reinstatement of his account in the Superannuation Fund, accompanied by satisfactory evidence of the approval of the application by his employer, then, subject to such repayment of moneys withdrawn by the contributor and such retransfer of moneys from the employer's account in the special reserve as the Minister of Finance may require and within such time as he may fix, the Minister of Finance may reinstate the account of the contributor in the Superannuation Fund and the contributor's rights thereunder in the same position as near as may be to that in which they were at the time of his dismissal.

It is submitted that the Act only applies to permanent employees, and, alternatively, that the plaintiff could not again become a contributor until he had made the application provided for in section 20D.

As to the first point; with the exception of Provincial Government employees, the Act makes no distinction between permanent and temporary employees. Although a person may be temporarily employed in the first instance, yet that temporary employment may continue over a long period without being actually made or declared to be permanent. It is quite possible that in this case the plaintiff might have continued as an employee of the city for many months. There does not appear to be any reason why the Act should not apply to temporary employees. If money was paid in respect of a temporary employee, of course, he could, after his employment ceased, get a refund under section 19. It is significant that in the case of Provincial Government employees Part II. only applies to persons holding a permanent position in the Civil Service. It seems to me therefore that the Act applies to temporary employees of the city's police department.

Then with regard to the second point, it is to be observed that the Act not only compels the employer to deduct from his employees' salaries and to pay the deductions to the Minister of Finance but section 7 provides:

> 27. Payment of every sum of money which an employer, other than the Crown, is required by this Act to pay or forward to the Minister of Finance may be enforced by action in any Court, in the name of the Attorney-General, as for a debt due by that employer to the Crown.

The employee has nothing to do under the Act. The Minister of Finance looks to, and holds the city responsible. Under these circumstances I am of the opinion that as soon as the plaintiff re-entered the employ of the city "he was again a contributor." I hold that the failure of the city to pay to the Minister of Finance, and the acceptance by the plaintiff of the full amount of his December salary, did not deprive him of his rights under the Act. Further, as he did not apply for a refund his contributions stood to his credit in his separate account in the Superannuation Fund and likewise the moneys, paid in by the city in respect of the plaintiff, stood to its credit in its separate account in the Superannuation Fund. See section 11. There was, therefore, no necessity for him to make an application for reinstatement of his account in the Superannuation Fund and, in my opinion, when he again became a contributor, the final words of section 20D had the effect of reinstating him in the same position as nearly as might be to that in which he was at the time of his first dismissal. If he had obtained a refund then his account would have disappeared out of the Superannuation Fund and the amount to the credit of the employer in the Superannuation Fund would have gone to a special reserve account—see section 13 (*a*)—so that in such case the necessity would arise for reinstatement of both accounts and section 20D, in such case, makes it obligatory on the part of the contributor to make an application.

Then it is submitted that the plaintiff should have proceeded by petition of right. As the Crown has no beneficial interest, direct or indirect, in the Superannuation Fund the Attorney-General may be sued as representing the Crown. See *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; *Attorney-General for Ontario* v. *McLean Gold Mines*, [1927] A.C. 185; *Esquimalt*

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*and Nanaimo Railway Company* v. *Wilson,* [1920] A.C. 358 at 364-5 and *Tuxedo Holding Co.* v. *University of Manitoba,* [1930] 3 D.L.R. 250. In this case the action is brought "against the Crown in the right of the Province of British Columbia." This is entirely wrong. The action should be against the Attorney-General of the Province of British Columbia as representing the Crown. See *Esquimalt and Nanaimo Railway Company* v. *Wilson, supra,* at 367. See also *Great West Life Assurance Co.* v. *Baptiste,* [1924] 2 W.W.R. 920 at 925. In this case it is difficult to see that the Crown is interested at all but no point was raised as to this. Perhaps it was thought advisable to have the Attorney-General as a party because of section 10, which provides that all contributions in the hands of the Minister of Finance are to be placed in a fund in the treasury department to be known as the Superannuation Fund and to be accounted for as part of the Consolidated Revenue Fund and because of section 17, which provides that any deficiency between the amount paid by the contributor and employer to the Superannuation Fund and the amount required to be paid it shall be paid from the Consolidated Revenue Fund.

Leave will be given to amend the style of cause and the statement of claim and subsequent proceedings.

It is then said that the Act gives no appeal from the decision of the Superannuation Commissioner and that therefore his decision is final. The Act does not say his decision is to be final. Section 14 of the Act provides that when a contributor becomes entitled to a superannuation allowance he shall be granted a superannuation allowance. See also section 44, *supra.* Under section 25 no superannuation is to be granted to any person until the Superannuation Commissioner, after inquiry in the manner prescribed by the regulations, has found that the applicant is within the scope of the Act and entitled to receive the superannuation allowance and the grounds upon which he is so entitled. Now the Superannuation Commissioner is appointed for the purpose of administering and carrying out the provisions of the Act (section 21). The regulations merely provided for an application for superannuation (which has been done in this case) and an inquiry as to whether the applicant comes within the scope

of the Act or whether he is entitled to receive a superannuation allowance. The inquiry may consist of searching the record of the applicant kept in the office of the Commissioner or of requiring information to be given by affidavit or otherwise. The regulations set out the tables for determining the amount of superannuation allowance. There is no dispute about the facts. This is a question of law. I can see no reason why an action for a declaration should not lie against the Commissioner. Then it is said that his duties are judicial. The Act expressly says they are administrative—section 21. In *Collins* v. *Henry Whiteway & Co.*, [1927] 2 K.B. 378, Horridge, J., speaking of a "Court of Referees" constituted under an Unemployment Insurance Act for the purpose of deciding claims under the Unemployment Insurance Fund, said at p. 383:

> The Court of Referees is merely discharging administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind.

I shall not make any order that the commissioner approve of the plaintiff's application because he may have other grounds of objection which have not yet appeared.

11th June, 1936.

At my request both counsel appeared. Mr. *Soskin* said the only objections to the plaintiff's right to superannuation were those with which I have dealt. I then said the plaintiff was entitled to an order against the Commissioner and so ordered; no costs.

*Judgment for plaintiff.*

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Sept. 16, 23.

## CAMERON v. PARSONS.

*Barristers and solicitors—Costs—Action to recover—Open account—Statute of Limitations—Balance of fees re estate on solicitor and client basis—Reference of bill for taxation—Lapse of time since delivery of bill—Special circumstances.*

The plaintiff did work as solicitor and counsel for the defendant from 1921 until the end of the year 1930. He brought action in April, 1935, to recover the balance alleged to be due for his services. The defendant pleaded the Statute of Limitations.

*Held,* that the statute did not apply as it was found that the account was an open running account on which payments were made from time to time, the last on May 2nd, 1929, and letters written by the succeeding solicitors for the defendant in 1931 and 1932 constituted a sufficient acknowledgment to take the debt out of the operation of the statute.

*Catling* v. *Skoulding* (1795), 6 Term Rep. 189, applied.

As to the last item of the bill in respect to work for the estate of defendant's father in defending an unsuccessful application by the official administrator, the defence was that the bill therefor had been taxed and paid out of the estate.

*Held,* that that taxation was on a party and party basis and in view of *Payne* v. *Gammon* (1927), 38 B.C. 153, it cannot be successfully argued that the plaintiff could or should have obtained taxation on a solicitor and client basis, and this defence fails.

Although there was a lapse of over twelve months since the bill was delivered, it was

*Held,* that there was such a combination of facts here as to constitute special circumstances justifying taxation.

ACTION for balance due for professional services as solicitor and counsel for the defendant. Tried by FISHER, J. at Vancouver on the 16th of September, 1936.

*P. A. White,* for plaintiff.
*C. J. White,* for defendant.

*Cur. adv. vult.*

23rd September, 1936.

FISHER, J.: The plaintiff claims for a balance alleged to be due from the defendant for professional services as solicitor and counsel for the defendant as set out in accounts rendered February 11th, 1931, and August 5th, 1931 (Exhibits 1 and 2), less certain additional credits.

The plaintiff did miscellaneous work for the defendant from the year 1921 to about the end of the year 1930 but the action was not commenced until April 27th, 1935, and the defendant pleads the Statute of Limitations as a bar to the plaintiff's action except with respect to the last item hereinafter referred to. Counsel for the defendant contends that the statute runs from the completion of the whole of each piece of work and relies upon *Beck* v. *Pierce* (1889), 23 Q.B.D. 316, especially at 320, 323; 58 L.J.Q.B. 516. As to this contention I have first to say that in view of the uncontradicted evidence of the plaintiff I find that the account between him and the defendant was an open running account on which payments were made by the defendant from time to time, the last three of such payments on open account having been made on February 18th, April 15th, and May 2nd, 1929. Under such circumstances I would find that the case was taken out of the Statute of Limitations. See *Catling* v. *Skoulding* (1795), 6 Term Rep. 189, especially at 193; 101 E.R. 504, where Lord Kenyon, Ch.J. said, in part, as follows:

> . . . it is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is, whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the Courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute. Daily experience teaches us that if this rule be now overturned, it will lead to infinite injustice. In *Cotes* v. *Harris*, Bull. N.P. 149, all the items were on one side; and Dennison, J., who well knew what was the proper replication in such cases, and was well acquainted with the import of the Statute of Limitations, said, where all the items were on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing; but it was not doubted there but that if there had been mutual demands the plaintiff might have recovered.

I have further to say that in any event I think the letters, dated March 16th, 1931, October 23rd, 1931, and March 15th, 1932 (Exhibits 20, 23 and 24), and written by the present solicitors for the defendant constituted a sufficient acknowledgment to take the debt out of the operation of the statute and to cause the time to begin to run afresh from the making of such

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acknowledgment. See *Curwen* v. *Milburn* (1889), 42 Ch. D. 424; 62 L.T. 278, and *Spencer* v. *Hemmerde,* [1922] 2 A.C. 507; 91 L.J.K.B. 941. I therefore hold that the Statute of Limitations affords no defence to the action.

The last item shown on said Exhibit 1 of which particulars are given in Exhibit 2 was for work done in connection with the estate of the father of the defendant. With regard to such item the defendant sets up as a defence the plea that the plaintiff had secured an order of the Court for the taxation of all the costs in respect to such item and that the costs as taxed had been paid to the plaintiff out of the estate. It is apparently argued by counsel for the defendant that if the plaintiff did not secure taxation and payment of all his costs out of the estate it was his own fault and he cannot now hold defendant liable for payment of the balance. It would appear that an application made to the Court on May 5th, 1929, by the official administrator for administration with will annexed of the said estate was dismissed and that upon September 12th, 1929, an order was made upon the application of the executors named in the will granting probate to them. By such order it was ordered that "fees, charges and disbursements of Thomas Parsons, Junior"—being the defendant herein—"of and incidental to this application and of and incidental to the application of *W. D. Carter,* official administrator and all proceedings had and taken therein be taxed and be paid out of the estate."

Counsel for the plaintiff admits that a bill of costs was accordingly taxed and that the plaintiff received the taxed costs of $179.60 from the said estate. Counsel for the plaintiff, however, points out that the bill of costs was taxed on a party and party basis and contends that the plaintiff is still entitled to be paid by the defendant his bill on a solicitor and client basis after giving credit for the amount received. Counsel for the plaintiff also points out that the plaintiff did not take out the order though he approved of it and also relies upon *Payne* v. *Gammon,* 38 B.C. 153; [1927] 1 W.W.R. 506, where it was held that rule 60 of the Probate Rules of 1925 applied only to non-contentious matters and that the costs of a contested motion for the removal of an administrator and the appointment of another in his place

should be taxed under Appendix "N" of the Supreme Court Rules and not as between solicitor and client. In view of the *Payne* decision, *supra,* I cannot see that it can be successfully argued that the plaintiff could or should have obtained taxation on a solicitor and client basis so that I hold the defence set up against the last item as aforesaid also fails.

I now come to deal with the question of whether or not the plaintiff's bill should be referred to the registrar for taxation. It is contended by counsel on behalf of the plaintiff that no reference of the said bill for taxation should be made now after the lapse of far more than 12 months since the bill was delivered. The contention is based on the ground that in such a case special circumstances must be proved to justify taxation and it is argued that no special circumstances have been proved here. Counsel refers to Halsbury's Laws of England, Vol. 26, secs. 1292 and 1293, and cases therein referred to. It must be noted, however, that the very letters from the present solicitors for the defendant now relied upon by the plaintiff as taking the case out of the Statute of Limitations take the position that the account should be a matter for taxation or compromise. The plaintiff in his letter of March 17th, 1931 (Exhibit 21), says that he will consider any reasonable offer of settlement. I think it is a fair inference and I infer that thereafter counsel for the defendant relied upon the account being treated as a matter for taxation in the absence of a compromise. I have also to add that, though I would not go so far as to hold that the account as rendered is outrageous, as suggested in one of the said letters (Exhibit 24), I would say that the charges with respect to what may be called the last three items, being the items "*Re* Petition to Government, *Re* father and *Re* estate of father," seem to me to be at least very large if not unreasonably so. These facts taken along with the fact of a previous party and party taxation, as already referred to, with regard to one of the items, *viz.,* that with respect to the estate of the defendant's father, in view of which the defendant might have thought that there was nothing further to be taxed or paid in connection with such item, satisfy me that there is such a combination of facts here as to constitute special circumstances justifying taxation. See *In re Boycott* (1885), 29 Ch.D.

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571, at 579; (1886), 55 L.J. Ch. 835, and *In re Norman* (1886), 16 Q.B.D. 673; 55 L.J.Q.B. 202.

Certain other defences were set up in paragraphs 3, 4 and 6 of the statement of defence. The defence set up in paragraph 4 was withdrawn at the trial and I have to say that there was no evidence before me to substantiate the allegations contained in any of said paragraphs and they should never have been made.

There will be a reference to the proper taxing officer to tax the plaintiff's bill and judgment accordingly in favour of the plaintiff against the defendant. As to the question of costs I have to say that I see no good reason why the action should not have been brought in the County Court and I therefore allow the plaintiff only County Court costs.

*Judgment for plaintiff.*

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*Sept.* 17, 23.

McLEAN v. VANCOUVER HARBOUR COMMISSIONERS

## McLEAN v. VANCOUVER HARBOUR COMMISSIONERS.

*Practice — Costs — Appendix N — Proviso in last clause of letterpress— Question involved in action—"Special cause"—Jurisdiction.*

The last clause of the letterpress in Appendix N of the Supreme Court Rules provides that "In all other actions and proceedings there shall be taxable the amount set out opposite each respective tariff item in Column 2: Provided, however, that for special cause the Court or judge may, at any time at or after trial and before the bill of costs has been taxed, order the costs to be taxed under Column 1, 3 or 4."

In an action for damages for wrongful dismissal and for recovery of certain moneys alleged to have been wrongfully deducted from his salary, the plaintiff recovered judgment for over $3,000 damages for wrongful dismissal, but his other claim was dismissed. He then applied for an order to have his costs taxed under Column 3 or 4 of Appendix N alleging as a "special cause" the difficult nature of the questions involved in that part of the action in which he succeeded.

*Held*, that the only issue was the amount involved, the proviso is limited to actions and proceedings other than those for liquidated amounts and there is no jurisdiction to make any special order.

*Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry* (1930), 42 B.C. 315, followed.

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APPLICATION by the plaintiff for an order that the costs be taxed under Column 3 or 4 of Appendix N of the Supreme Court Rules for "special cause" owing to the difficult nature of the questions involved in that part of the action upon which he succeeded. Heard by ROBERTSON, J. at Vancouver on the 17th of September, 1936.

*G. L. Fraser,* for plaintiff.

*J. W. deB. Farris, K.C., L. St. M. Du Moulin* and *J. L. Farris,* for defendants.

*Cur. adv. vult.*

23rd September, 1936.

ROBERTSON, J.: The plaintiff was employed by the defendant for a period of five years under the terms of a written contract. After three years' service he was dismissed. His action was for damages for wrongful dismissal and for the recovery of certain moneys alleged to have been wrongfully deducted from his salary. He recovered judgment for over $3,000 damages for wrongful dismissal. His other claim was dismissed. He now applies for an order to have his costs taxed under Column 3 or 4 of Appendix N of the B.C. Supreme Court Rules, alleging as a "special cause" the difficult nature of the questions involved in that part of the action upon which he succeeded. The defendant applies for the costs of the issue upon which it succeeded. GREGORY, J. held in *Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry* (1930), 42 B.C. 315, that, where there was an amount involved, the proviso at the end of the letterpress of Appendix N did not apply and that there was no power in the Court to make an order as to taxation. The plaintiff, however, refers to *Attorney-General for British Columbia* v. *Kingcombe Navigation Co.,* [1933] 3 W.W.R. 157, and submits that that case is in conflict with the *Vandepitte* case and that the later case should be followed. In that case the Attorney-General sued the company for taxes alleged to be due under the Fuel-oil Tax Act, 1930, Cap. 71. The company set up that the Act was *ultra vires.* The action was dismissed and the judgment was affirmed on appeal to the Court of Appeal of British Columbia (47 B.C. 114). An appeal was taken to the Privy Council (103

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L.J.P.C. 1; 150 L.T. 81; 50 T.L.R. 83; [1933] 3 W.W.R. 353; [1934] A.C. 45; 1 D.L.R. 31) but while it was pending the defendant applied for an order for taxation under Column 4 alleging that it was entitled to this under the proviso, in view of the importance and nature of the relief obtained and the real question involved. The learned Chief Justice held that there never was any question as to the amount of the taxation recoverable under the Act, if the Act was valid, and therefore there was in reality "no amount involved"; that what was really sought in the action was a declaration as to the validity of the Act. He said that he did not find it necessary to base any finding on the interpretation of the proviso which had been put upon it by GREGORY, J. and therefore he did not dissent from his views on this point as expressed in the *Vandepitte* case, *supra;* but he held that GREGORY, J. had taken too narrow a view in holding that in a case in which an amount was nominally involved and in which there was another and more serious question raised, which was the real reason of the action being brought, there was no jurisdiction to consider the real issue involved and to make an order for special cause accordingly. In my view, then, this leaves unchanged the views expressed by GREGORY, J. in the *Vandepitte* case upon this point. In this case the only issue was the amount involved and following the *Vandepitte* case I hold I have no jurisdiction to make any special order.

The claim upon which the plaintiff failed was entirely separate from the claim upon which he succeeded. I think this was an issue within rule 976 and should follow the event. The defendant is entitled to the costs of this issue. I apportion the costs as follows: 80 per cent. to plaintiff—20 per cent. to defendant. Plaintiff's costs are to be taxed as a whole as if no question of separate issues had arisen and then plaintiff is to recover 80 per cent. of the amount so taxed. See *Canada Rice Mills Ltd.* v. *Morgan* (1934), 49 B.C. 202.

*Order accordingly.*

## PITT-CROSS v. MALNICK.

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Aug. 20, 27.

*Agreement — Interpretation — Lease of land—Premises never occupied by lessee—Deposit by lessee as good faith—Deposit forfeited — Liability for rent.*

Under an agreement in writing entered into between the plaintiff and defendant on the 18th of May, 1935, the plaintiff leased a premises to the defendant for five years from the 23rd of September, 1935, at the rate of $540 per annum. The agreement further provided that "The sum of $100 to be deposited as good faith, and should the lessee fail to occupy the premises on the above-mentioned date, *viz.*: the 23rd day of September, 1935, he shall forfeit his deposit." The $100 was so deposited and was retained by the lessor. The lessee never occupied the premises. The lessor sued for five years' rent from the 23rd of September, 1935, or alternatively for damages for breach of the agreement.

*Held*, that the agreement was understood by the parties to mean and should be construed as meaning that if the defendant failed to occupy the premises he forfeited the said deposit of $100, and that was the end of the whole matter. The agreement was satisfied by the forfeiture of the said sum of $100.

ACTION under an agreement between the plaintiff and the defendant for the payment of rent for the premises referred to therein for five years at the rate of $540 per annum, or in the alternative damages in respect of the defendant's alleged breach of the agreement. Tried by FISHER, J. at Vancouver on the 20th of August, 1936.

*Hogg*, for plaintiff.
*C. I. Cameron*, for defendant.

*Cur. adv. vult.*

27th August, 1936.

FISHER, J.: The plaintiff claims that under a certain agreement in writing made between himself and the defendant on May 18th, 1935, the defendant must pay him rent for the premises referred to therein for the period of five years from September 23rd, 1935, at the rate of $540 per annum or in the alternative damages in respect of the defendant's alleged breach of the agreement. The defendant has never occupied the

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premises but counsel for the plaintiff contends that the rent is due by the contract and not by the occupation, relying especially upon *Bellasis* v. *Burbrick* (1696), 1 Salk. 209; 91 E.R. 187.

It must first be noted that the agreement does contain clauses reading in part as follows:

> . . . the said lessor doth demise and lease unto the said lessee . . . from the twenty-third day of September, one thousand nine hundred and thirty-five, for the term of five years next ensuing . . . yielding and paying, therefor to the party of the first part, his heirs or assigns the clear yearly rent or sum of five hundred and forty dollars of lawful money of Canada, payable on the following days and times, that is to say: The sum of forty-five dollars ($45) shall be paid monthly in advance on the twenty-third day of each and every month during the term hereby created, the first of such monthly payments to be made on the twenty-third day of September, 1935. . . .

The agreement, however, also contains the following clause:

> The sum of one hundred dollars to be deposited as good faith, and should the lessee fail to occupy the premises on the above mentioned date, *viz.*: the 23rd day of September, 1935, he shall forfeit his deposit.

Counsel for the defendant while raising other defences also pleads:

> That the amount of damages for breach of the contract by the defendant in event of the defendant refusing to accept the premises was fixed by the plaintiff and the defendant by the agreement dated the 18th day of May, 1935, at the sum of $100 which said amount the defendant paid to the plaintiff at or before the signing of the said agreement and which said sum the plaintiff still retains.

In reply to the defendant's plea as above set out counsel for the plaintiff submits that the sum of $100 deposited here is similar to a deposit paid on a sale of real estate where there is a stipulation that if the purchaser fails to comply with the condition he shall forfeit the deposit and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses. Fry on Specific Performance, 5th Ed., p. 70, is referred to as establishing that such a condition in the case of a contract for sale "has never been held to give the purchaser the option of refusing to perform his contract if he chose to pay the penalty nor to stand in the way of specific performance of the contract." It is argued that the rule applicable on a purchase of land must be the same rule as that applicable in the case of a lease on the ground that both are dealing with an estate in land. The present case, however, seems

to me to be distinguishable from a case where the rule is applied, for in such a case of the sale of land the deposit is clearly paid in the first instance on account of the purchase-price, part of which is then payable, whereas in the present case it is perfectly clear that no rent was payable before the beginning of the term as aforesaid on September 23rd, 1935. Counsel for the plaintiff however submits that the said sum of $100 was annexed by way of penalty to secure performance and that the fact of a penal or other like sum being annexed will not prevent the Court enforcing the performance of the covenant to pay rent.

The question here, as always, is: What is the contract? I pause here to state that, in my consideration of this question, I have excluded the evidence as to what was said by the parties as to the deposit at the time the agreement was made as I have decided that such evidence which was admitted at the trial, subject to the objection of counsel for the plaintiff, is not admissible and should therefore be disregarded. On the question as to the legal effect of the written agreement between the parties reference might be made to what was said by Wilde, C.J. delivering the judgment of the Court in *Ford* v. *Beech* (1848), 5 D. & L. 610, at 613; 12 Jur. 310, at 311-12; 11 Q.B. 852, at 866; 17 L.J.Q.B. 114, at 115-6; 116 E.R. 693:

> In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied, namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

In the present case it must be noted that according to the agreement the sum of $100 was to be deposited with the defendant at the time of the making of the agreement in May. As a matter of fact such sum was so deposited and is still retained by the plaintiff. I cannot understand why such a deposit with forfeiture was provided for if the agreement meant that the defendant should be liable for payment of the rent for five years whether he occupied the premises or not. I think the intention of the parties was that the defendant could choose not to occupy the premises in which case he would forfeit the deposit of $100 but would not have to pay the rent. The question is one of construction and I have come to the conclusion that the agreement was understood

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by the parties to mean and should be construed as meaning that if the defendant failed to occupy the premises he forfeited the said deposit of $100 and that was the end of the whole matter; or, in other words, I hold that the agreement was satisfied by the forfeiture of the said sum of $100. Such being my view it is unnecessary for me to deal with the other defences raised by the defendant.

The plaintiff's claim for rent or damages for breach of the agreement is therefore dismissed as is also the defendant's claim for repayment of the said sum of $100.

I still have to consider the claim of the plaintiff for damages for assault. The defendant had also counterclaimed for damages for assault but his counsel did not press this claim at the trial. I find that the plaintiff has proved that the defendant assaulted him and I allow him damages for such assault in the sum of $100.

As to the costs, I have to say that, inasmuch as the defence based upon the clause with respect to the payment of the sum of $100 as aforesaid was not raised until the statement of defence was amended at the trial and the plaintiff has won on the assault issue, I direct that the plaintiff shall be entitled to recover the costs of the claim and any additional costs occasioned by the counterclaim both up to the date of the trial and one-half of the trial costs against the defendant who will not be entitled to recover any costs against the plaintiff. Judgment accordingly.

*Judgment accordingly.*

## REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE. (No. 3).

C. A.

1936

*April* 30; *May* 1, 4, 5, 6, 7, 8, 11; *June* 26.

*Criminal law—Homicide—Killing of constable during an arrest—Necessity for stating cause of arrest—Knowledge of by accused—Charge—Sufficiency—Criminal Code, Secs. 40, 69 and 1014 (2).*

On the 23rd of May, 1934, one of the accused, Eneas George, an Indian, committed an assault upon his wife with a knife on the Canford Indian Reserve, severely wounding her. At the instance of the Indian agent at Merritt, about twelve miles away, constable Carr and a doctor were sent to the reserve, and finding the woman severely injured, took her to the hospital at Merritt. Carr, with constable Gisbourne, then drove back to the reserve to arrest Eneas George, arriving there between 11.30 and 12 o'clock at night. Eneas was not in the village, but receiving information from others there that he was on the road back of the row of Indian houses, Gisbourne went across to the road where he saw Eneas and his three brothers, Richardson, Alex and Joseph coming towards the Indian houses. Gisbourne advanced with an electric flash-light in his hand and said "I want Eneas." Richardson George then said "Who sent you?" He answered "Barber" (the Indian agent). Gisbourne then said "Nobody can stop me. I am going to perform my duty." He then grabbed Eneas, saying "I am going to take this man to Merritt." Anticipating resistance, Gisbourne then called for Carr who was some distance away. Richardson then said "Get hold of the policeman. We are going to fight them." The Indians then attacked Gisbourne and threw him down, Richardson snatching the flash-light from Gisbourne and hitting him over the head with it. Gisbourne managed to get to his feet and he ran some 60 or 70 yards back of the houses and towards the entrance to the reserve, closely followed by the Indians. He then turned and fired his revolver. Richardson and Eneas then attacked him with sticks, Richardson finally hitting him on the head with a heavy stick and killing him. About the time Gisbourne fired his revolver Joseph fell, the medical testimony being that the wound in Joseph's head may have been caused by a glancing blow from a bullet, but the subsequent loss of hearing and concussion from which it appeared he suffered, must have been due, not to a bullet, but to striking his head when falling or to some other blow. Constable Carr then came to Gisbourne's assistance, but on the three men attacking him he ran through the entrance gate followed by the Indians, who caught up to him a short distance past the gate where they attacked him with sticks and killed him. The three Indians then put the bodies of the policemen in the police car, and forcing another Indian to drive, they drove to the main highway between Merritt and Spence's Bridge where they tried to push the car over into the Nicola River, but the car

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stuck against a tree on the way down where it stayed, and as they could not move it they took the two bodies out and threw them into the river. The accused had been tried before, and on the first trial were found guilty and sentenced to be hanged. On appeal the defence was allowed to call Joseph as a witness as he was in the hospital and very ill at the time of the trial. He admitted that he and his brothers knew why Eneas was to be arrested. A new trial was ordered by the Court of Appeal. On the second trial the four Indians were tried on the charge of murder. Richardson George, Eneas George and Alex George were convicted of murder and Joesph George was acquitted. On appeal by the three convicted:—

*Held, per* MACDONALD, C.J.B.C., that Gisbourne did not notify Eneas of the cause of his arrest as required by section 40 (2) of the Criminal Code. The trial judge's charge on this question was insufficient or if not insufficient the finding of the general verdict was perverse. I confine my judgment to what I think was the illegal arrest of Eneas, the consequences of which were not murder, but manslaughter. I would therefore set aside the conviction.

*Per* MARTIN, J.A.: The Crown's case was based on the existence of a common intention to prosecute the unlawful purpose of resisting the arrest of Eneas. In this vital respect the charge was calculated to and did mislead the jury to the prejudice of the accused beyond redemption by reason of grave misstatements of fact and misrepresentation of motives. This primary ground of misdirection on the foundation of the case has been clearly established. The appeal should be allowed and a new trial directed.

*Per* MACDONALD and MCQUARRIE, JJ.A.: The decisive facts in the case under review are simple. A charge, however erroneous, could scarcely prevent the jury from reaching a fair decision. The existence of a few simple facts in the case of a determinative nature and of comparatively easy solution should not be lost sight of in a lengthy discussion of errors, some possibly well founded in so far as legal principles are concerned, but in no sense leading or tending to lead to a miscarriage of justice. No substantial wrong occurred. The appeal should be dismissed and the conviction affirmed.

The Court being equally divided the appeal was dismissed.

APPEAL by defendants from their conviction on a charge of murder at the 1935 Fall Assizes at Vancouver, *coram* MORRISON, C.J.S.C. The facts are sufficiently set out in the head-note and reasons for judgment of MACDONALD, J.A.

The appeal was argued at Victoria from the 30th of April to the 11th of May, 1936, before MACDONALD, C.J.B.C., MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*Stuart Henderson* (*Castillou,* with him), for appellants: This was a second trial. The report of the appeal from the first trial

is in 49 B.C. 345. It was held by two members of the Court that the provisions of section 40 of the Code were imperative and by three members that they were not imperative. I would move to add a ground to the notice of appeal in relation to non-compliance with section 143 of the Indian Act. The trial judge did not question the Indians when called as witnesses under this section. He did not question them as to whether they were Christians and understood the nature of an oath.

*Sloan, K.C., A.-G.* (*Nicholson,* with him), for the Crown, *contra*: The motion should not be granted. Sections 143, 144 and 145 of the Indian Act are enabling sections. There is no presumption that an Indian has not a knowledge of God. He should have raised the question at the trial. The obligation was on him to show they had not a knowledge of God: see *Gray et al.* v. *Macallum* (1892), 2 B.C. 104 at pp. 108-9. It is a permissive section.

*Henderson,* on the merits: We propose to take up the charge. There was misdirection. It was delivered in such a way that it was hard for the jury to tell what was fact and what was law. The learned judge's definition of murder was not in accordance with sections 250, 252 and 259 of the Criminal Code: see *Woolmington* v. *Director of Public Prosecutions* (1935), 104 LJ.K.B. 433; 51 T.L.R. 446. The transcript of the charge was changed by the judge before it was submitted to the jury and the stenographer would not certify to it: see *Baron* v. *Regem,* [1930] S.C.R. 194; *Rex* v. *Hemingway* (1912), 29 T.L.R. 13; *Rex* v. *Morrissey* (1932), 23 Cr. App. R. 188; *Rex* v. *Payette* (1925), 35 B.C. 81. Mere standing by does not constitute a crime: see *Rex* v. *Gray* (1917), 12 Cr. App. R. 244; *Rex* v. *Dutchak,* [1924] 4 D.L.R. 973; *Graves* v. *Regem* (1913), 47 S.C.R. 568. There must be careful direction to the jury on the question of common intent: see *Rex* v. *Pearce* (1929), 21 Cr. App. R. 79. The learned judge did not segregate the evidence against each of the four accused: see *Rex* v. *Rice* (1902), 4 O.L.R. 223; *Rex* v. *Ebbage* (1930), 22 Cr. App. R. 50; *Rex* v. *Brooks* (1929), 21 Cr. App. R. 112; *Rex* v. *Kerr* (1921), 15 Cr. App. R. 165; *Rex* v. *Rosen* (1931), 23 Cr. App. R. 70; *Rex* v. *Smith* (1931), *ib.* 135; *Rex* v. *McEwan & Lee* (1932),

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59 Can. C.C. 75; *Rex* v. *Brown* (1930), 22 Cr. App. R. 139. The case of each defendant must be put: see *Rex* v. *Truptchuk* (1923), 40 Can. C.C. 227; *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136; *Rex* v. *Hart* (1932), 23 Cr. App. R. 202; *Rex* v. *Mordecai* (1930), 22 Cr. App. R. 146; *Rex* v. *McLocklin* (1930), *ib.* 138; *Rex* v. *Short* (1932), 23 Cr. App. R. 170; *Rex* v. *Warner* (1908), 1 Cr. App. R. 227; *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Reg.* v. *Graham* (1898), 2 Can. C.C. 388; *Rex* v. *Lovett and Flint* (1921), 16 Cr. App. R. 41; *Regina* v. *Luck* (1862), 3 F. & F. 483; *Rex* v. *Dean* (1924), 18 Cr. App. R. 21. Joseph George's evidence should be given effect to: see *Rex* v. *Harris* (1927), 20 Cr. App. R. 144; *Rex* v. *Kadishevitz* (1934), 61 Can. C.C. 193. This was not an arrest, it was an assault.

*Sloan*: Common intent was proved. They waited at the fence back of the houses for over two hours, where they entered into a combination of defence. They did not arrest Eneas at noon on the 23rd as they had to take Mary Ann to the hospital at once. Carr had reasonable grounds for thinking Eneas had stabbed his wife. All their actions until the following day indicated guilt. Richardson George gave Tommy Andrews $1.50 and asked him not to tell. This is corroborated by Jules and Matilda. The four Indians knew Gisbourne and Carr were coming to arrest Eneas for stabbing his wife. Two juries have found the accused guilty: see *Rex* v. *Merritt* (1934), 62 Can. C.C. 57 at pp. 59-60. The Crown has proved its case beyond a reasonable doubt and the verdict should not be disturbed. The issue is whether the killing of Gisbourne was justifiable or excusable. If unjustifiable or inexcusable, did it result from a common purpose of the accused to resist the arrest of Eneas? The result of carrying out that unlawful common purpose in which force was used was murder. The charge on section 40 of the Code was sufficient, but this makes no difference, as it was decided on the first trial that section 40 had been complied with. Their defence is the same as on the first trial. The judge's definition of murder and the distinction between murder and manslaughter were properly put and the words "malice aforethought" were properly used in the definition. All the

essentials of section 259 of the Code were put to the jury by the judge. The case of *Graves* v. *Regem* (1913), 47 S.C.R. 568 is clearly distinguishable as there was no misdirection here: see *Rex* v. *Bagley* (1926), 37 B.C. 353 at p. 368; *Rex* v. *Gray* (1917), 12 Cr. App. R. 244 at p. 246. There was no attempt to segregate the evidence against each separately. They did not raise separate defences, and there is no rule of law making it necessary to do so unless they raise separate defences. The various cases referred to in the Criminal Appeal Reports do not apply—they are all distinguishable. He says the defence was not put to the jury by the learned judge, that he did not deal with the defence witnesses except to abuse and belittle them. This is not so. Malice may be presumed from the acts of the accused. A judge may express his opinions: see *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197 at pp. 208-9; *Rex* v. *Coppen* (1920), 47 O.L.R. 399; *Rex* v. *Gudmondson* (1933), 59 Can. C.C. 355 at p. 362; *Rex* v. *Duguay* (1933), *ib.* 328 at p. 329. It is no misdirection not to tell the jury everything which might have been told them: see *Rex* v. *Gordon* (1924), 25 O.W.N. 572 at pp. 573-4; *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217 at p. 246. Alex was a party to the unlawful common purpose. There is no distinction between him and the others. They killed the two policemen and this is not contradicted. That section 260 of the Code was not dealt with by the judge see *Rex* v. *Picariello and Lassandro*, [1923] 1 W.W.R. 1489.

*Henderson*, in reply: On comments as to the defendants not giving evidence see *Rex* v. *Gallagher* (1922), 37 Can. C.C. 83; *Bigaouette* v. *Regem* (1926), 47 Can. C.C. 271.

*Nicholson*: As to comments on the failure of the accused to testify see *Rex* v. *Portigal* (1923), 40 Can. C.C. 63 at p. 69; *Rex* v. *Ferrier* (1932), 46 B.C. 136; *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431; *Rex* v. *Littleboy* (1934), 103 L.J.K.B. 657.

*Cur. adv. vult.*

26th June, 1936.

MACDONALD, C.J.B.C.: One of the most important points in the case, if not the decisive one, is the legality of the arrest of

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Eneas George by constable Gisbourne. The complaint against Eneas was that he stabbed his wife seriously. The arrest was made about midnight at point X on the Canford Indian Reserve which point is shown on Exhibit 3. Constable Gisbourne met the appellants there and flashing his electric torch at them said "I want Eneas." Appellant Richardson George said "Who sent you?" Gisbourne answered "Barber, [the Indian agent at Merritt] and I am going to do my duty and no one can stop me." This last is a little differently stated in some of the evidence. Richardson, after having been told that Barber had sent Gisbourne, said, "Do you want to fight?" Gisbourne said "No, I do not want to fight. I want Eneas and I am going to do my duty and no one can stop me." Thereupon he seized Eneas, as one of the witnesses said, by the throat and a fight ensued in which the appellants engaged in defence of Eneas. This affray ultimately resulted in the killing of constable Gisbourne after he had turned on them and fired a shot from his automatic pistol upon which Joseph George fell to the ground. It is doubtful whether Joseph was shot or not. The doctor says the wound on his face might be regarded as a grazed wound of a bullet but he was positive that that did not account for Joseph George's condition which was a serious injury to his head, caused, the doctor thought, by striking it upon some hard substance in his fall. A cry was raised by the other appellants "Sway [Joseph] is dead. We will kill the policeman."

Constable Gisbourne while again attempting to fire his pistol which became jammed was struck on the head by Richardson with a club killing him instantly. At this time Gisbourne had called to constable Carr, who was at his automobile some distance away, to help him. Carr was also killed.

These facts are amply supported by the evidence. Indeed there is no dispute about some of them. For instance it is not disputed that Gisbourne did not notify Eneas as required by section 40, subsection 2, which reads as follows:

> It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest.

No notice was given to anyone of the cause of the arrest which was for the stabbing of Eneas's wife. On the first trial (this is

the second) there was no charge to the jury on this subsection and on appeal a new trial was ordered by two of the appeal judges based on a failure to observe said subsection together with a finding of Mr. Justice MARTIN that the evidence failed to support the conviction of murder; the other two judges dissented. I shall refer to the trial judge's charge on the second trial. It is enough to say now that I think it was insufficient on this question or if not insufficient the finding of the general verdict was perverse. When judgment was pronounced on the 12th of December, 1934, MARTIN, J.A. said he would reserve his opinion on section 40, subsection 2. This reserved opinion was filed on the 4th of January, 1935, finding that said subsection 2 was not, but that the common law was, applicable to the arrest. Since the judgment pronounced was not a judgment founded on said subsection 2, as I find, I do not think that I am bound by the opinions adverse to said subsection 2, upon which the judgment was not founded. I therefore adhere to my first opinion while giving respectful attention to my learned brothers' views but their opinions of subsection 2 do not impress me favourably. I understand that they disregarded subsection 2 and decided the case on the common law.

There is no established common law rule of duty of a police officer to the accused. In *Pew's Case* (1630), 2 Cro. Car. 183; 79 E.R. 760 (cited in *Rex* v. *Ricketts* (1811), 3 Camp. 68) it was decided that no notice was necessary where the accused was already aware of the fact. In other cases no notice was required if the accused already knew that the person making the arrest was a police officer or carried an official staff or made the arrest in the King's name.

But aside from that I think our statute must be followed because it cannot be disregarded in favour of the common law. The only thing that could dispense with the notice here stated is that it shall be given if practicable. This presumably has not been found by the general verdict as I think on insufficient instructions to the jury or perversely.

Now look at the circumstances of the arrest. When constable Gisbourne was arresting Eneas he said, "I want Eneas," without mentioning the stabbing of his wife. I cannot see any want of

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time and circumstance, which could have prevented him from following the statute. No want of circumstance of time or opportunity was suggested in the evidence except the absurd one that the constable when he met the appellants straight away fired a shot at them and thereby commenced the fatal affray—a contention which is utterly destroyed by the evidence. But if he did fire a first shot when he met the appellants and in the absence of notice required by subsection 2, he made an unlawful arrest. The affray lasted some time and after the shot was fired the constable was working his gun in an effort to fire other shots. These circumstances in my opinion were in favour of appellants who did not know of the jamming of the gun but feared that their lives were in danger. These circumstances afford a new ground of provocation.

What are the excuses offered in favour of holding that the statute is inapplicable and applying the principles of the common law? The words of said subsection 2 are very plain and quite unambiguous. Unless the constable was denied the time and opportunity to give notice his duty was to give it. If he was denied that time and opportunity then the *onus* is upon the Crown to prove such denial when the question arises. When the *onus* thus found is decided by the jury either way then the matter of notice is settled. Subsection 3 of section 40 was relied upon as in some way, not apparent to me, favouring the substitution of the common law. I think it has no application to this case. Subsection 3 is for the protection of the constable who omits to give notice, while subsection 2 is for the protection of the accused person. Subsection 3 is applicable only when the notice is not given and proceedings are taken against the constable.

Now the charge to the jury I am driven to think was insufficient and misleading and in any case the verdict was perverse. In his charge the judge refers to several inapplicable sections of the Code and then comes to section 40. What he charged may be found beginning at p. 840 of the case, continuing on p. 841.

On p. 840 the bugaboo of escape was introduced. He speaks of the circumstances and of the attitude of these people coming at the particular time and in a way which was significant to

warn Gisbourne of trouble. Now the appellants were coming home to the house of Eneas when Gisbourne rushed out of one of the other houses and accosted them as before set out. He came to make the arrest about midnight and his attitude towards the appellants was anything but conciliatory. With regard to this the judge said:

> Are you prepared to dictate to a police officer doing this kind of work as to how he effects an arrest in the peculiar circumstances which prevailed on this occasion?

Parliament dictated to him how he should make the arrest.

Now I do not wish to unduly criticize the constable who lost his life on this occasion, but I do think he showed, in view of the fact that they were Indians, a hostile attitude towards them. He had no intimation or fear of escape for an excuse for his attitude.

Referring to the disregard of a statute Lord Justice Sumner said in *Quebec Railway, Light, Heat and Power Company* v. *Vandry*, [1920] A.C. 662 at 673:

> . . . the language of the articles is plain, in the sense that their meaning must be found in their words.

This is true of subsection 2. I refer also to the language of Lord Sumner in the same case at p. 672, where he said:

> A construction of articles which have long been before the Courts, differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution. Still, the first step, the indispensable starting-point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources.

See also the language of Lord Herschell in *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107 at pp. 144-5. See also (1917), 56 S.C.R. 22—*Brousseau* v. *Regem*—at 24.

I think the opinions of these judges are more helpful in the decision of this case than the opinion of the very able judges who drafted the English Code of Criminal Law which was not adopted in England; and also the opinion of eminent statesmen whose opinions of course I read with respect.

I would also refer to the case of *The Union Colliery Company* v. *The Queen* (1900), 31 S.C.R. 81 upon which much stress has been laid. The question there had no intimate application to said subsection 2. Mr. Justice Sedgewick delivering the judgment of the majority of the Court at p. 87, said:

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So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

He pointed out also that the common law may be applied where there is no express or implied enactment to the contrary.

There was nothing in the evidence that tended to show that the notice was not practicable and could not have been very readily given by the constable.

There is a matter which I must refer to very reluctantly which came about by reason of counsel for the appellant making very improper remarks upon the conduct of the trial judge. I think it is necessary to give a short synopsis of what happened. The learned judge in compliance with the jury's request at one period in his charge adjourned the Court for a time in order that a transcript be made of part of his oral charge to the jury. This was made and submitted to the learned judge who made as he stated some immaterial alterations in it. It is said to have been shown to appellants' counsel before being handed back to the jury where it was incorporated in the charge and appears in the appeal book as that part of his charge which had been transcribed. The allegation with regard to this was that the judge dishonestly made changes in the transcript and made them deliberately. Other charges of misconduct in connection with the trial were made against the learned judge and also against the Attorney-General who acted as chief counsel and his assistant, and against the Indian agent of bribery in connection with their duties in this case. Counsel was asked to withdraw these charges, but his answer was that they were true and that the Court in dismissing the application to call the stenographer had prevented him from proving their truth. I pointed out to him that that could not affect the case because all he had to do was to compare the revised copy of the transcript with the original copy and to find exactly what changes had been made. However, he refused to withdraw his improper imputations, whereupon I ordered him to do so when again he refused. We then adjourned the question of what penalty should be imposed upon him until the argument was closed so as not to prejudice the appellants in their

appeal. When that time came counsel again refused to make any retractions and the Court ordered that he should not be allowed to appear in this Court again until he had withdrawn his accusations and had apologized to this Court for his contempt. Now, of course, if the parties had been guilty of the charges made against them it would have affected the result of the appeal, but no attempt was made to substantiate these imputations and in this respect the matter differs from that which was dealt with by the Supreme Court of Canada in a case a few years ago. The matter so ended except that we decided to allow Mr. *Henderson* to appear in Court when necessary in connection with the present case.

The argument was a long one continuing for three weeks and every part of the appeal book was meticulously argued by counsel for the appellants. But I confine my judgment to what I think was the illegal arrest of Eneas, the consequences of which were not murder but manslaughter. I would therefore set aside the conviction. I do not order a new trial because I think the case has been sufficiently agitated.

MARTIN, J.A.: This is an appeal from the conviction at the last Vancouver Fall Assizes, *coram* MORRISON, C.J.S.C., of Richardson, Eneas and Alex George, three Indian brothers, for the murder of Indian police constable Gisbourne at the Canford (Nooaitch) Reserve on the 23rd of May, 1934. That trial was a new one which we directed on an appeal from the conviction of the same appellants on the first trial at the Vernon Assizes in June, 1934, *coram* MURPHY, J., and our reasons for ordering the new trial are to be found reported in (1934), 49 B.C. 345, mine are set out at p. 355 *et seq.*, and in brief they were that in consequence of the new evidence of Joseph George, the fourth brother (who had been incapacitated, by injuries received at the time of the killing, from giving evidence at the first trial), which we admitted under section 1021 a new trial must be ordered, saying, p. 356:

In the discharge of my duty in this case of exceptional gravity and difficulty I have given very long and careful, indeed anxious, consideration to the whole of the evidence, both old and new, weighing it all together, and have reached the firm conclusion that the new evidence of Joseph George (given, to all appearance, fairly, even to the extent of supporting the

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Crown's case on an important point) is of such substantial weight in determining the crucial facts constituting the commission of the offence charged, that "justice requires" that another jury shall give their verdict upon it before the sentence imposed upon these three appellants can safely be carried into effect. As the evidence now stands it would, in my opinion, be open to a jury to return a different verdict if they decided to give full credence and effect to that of Joseph George.

In coming to the conclusion that there should be a new trial, I adhere to the wise and long-established rule, which particularly applies to criminal appeals, that the evidence should not in such case, for obvious reasons, be canvassed, unless it is necessary to do so, and the present case is, in my opinion, peculiarly one wherein, for many reasons, the rule should be observed.

It has become necessary to make the ground of my said judgment clear because of the mistake in the judgment handed down herein by the learned Chief Justice in saying that

> . . . a new trial was ordered by two of the appeal judges based on a failure to observe said subsection together with a finding of Mr. Justice MARTIN that the evidence failed to support the conviction of murder. . . .

It will be seen from the passages cited that I was careful to refrain from making any "finding" that "the evidence failed to support the conviction," and since this very grave case will, because of the equal division of this Court, doubtless go to the highest one, it is essential that it be correctly presented thereto.

Several grounds of appeal were submitted to us and I have given them all very careful consideration, with the result that as to those already dealt with in my said judgment, at p. 357 *et seq.* I see no good reason for changing it, and as to most of the others they are not, in my opinion, of sufficient weight, under the circumstances, to be given effect to.

But there is one ground of vital importance that was strongly urged upon us, *viz.*, that the learned judge in his charge to the jury did not either in particular or as a whole, adequately and fairly present the case of and evidence for the accused but misled and prejudiced the jury by misdirection and non-direction amounting to misdirection, with the result that, as section 1014 (2) of the Code puts it, "a substantial wrong or miscarriage of justice has actually occurred," and therefore we are asked to direct a new trial to be held.

It is common ground that the charge must be considered as a whole in the light of the facts, as declared by the Supreme Court of Canada in *Rex* v. *Picariello and Lassandro,* [1923] 1

W.W.R 1489, at pp. 1491, 1497, 1503, 1506; 39 Can. C.C. 229, cited by me in *Rex* v. *Miller* (1923), 32 B.C. 298, 305, and by the Court of Criminal Appeal in England, *e.g.*, *Rex* v. *Crippen* (1910), 5 Cr. App. R. 255; and it is also, or must be, conceded that "the evidence for the prisoner should be put as carefully as that for the prosecution" and with such a "lucid explanation" that the jury can "do it justice"—*Rex* v. *Warner* (1908), 1 Cr. App. R. 227-8; *Rex* v. *Keating* (1909), 2 Cr. App. R. 61; *Rex* v. *Hadijah Ahmed Caroubi* (1912), 7 Cr. App. R. 149, 153; adopted by the Ontario Court of Criminal Appeal in *Rex* v. *West* (1925), 44 Can. C.C. 109, directing a new trial, wherein it was said, p. 112:

> . . . while the trial judge is not required in a summing up to review all the evidence in detail, it is necessary that he makes certain that the theory of the defence is fully put to and understood by the jury, and that the evidence in support of the defence is also presented to the jury as carefully as the case for the prosecution and in such a way as to make sure that the jury understand and appreciate its meaning and effect.

See also p. 113.

The Ontario Court might also have relied, as did the Saskatchewan Court of Appeal in *Rex* v. *Scott and Killick*, [1932] 2 W.W.R. 124, on a still stronger English case, *i.e.*, *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77, wherein the Court said, *per* Lord Alverstone, C.J., at p. 79:

> We have come to the conclusion not without very great regret, that this conviction cannot stand. . . . But there is a principle of our criminal law which we think has been violated in this case—namely, that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury. The appellant, during the trial, raised the defence that he had a right, as an officer of this church, to object to the proceedings which were going on. It may have been very foolish and unfounded, but that defence ought to have been put before the jury—this is a paramount principle of our criminal law—so that they could judge. . . .

And the same Court, exceptionally strongly constituted with five judges, in *Rex* v. *Schama and Abramovitch* (1914), 11 Cr. App. R. 45, said, *per* Lord Reading, C.J., at p. 49, in quashing the conviction:

> It is essential in cases of this character that there should be a careful and proper direction. . . . We must not be too critical in dealing with the summing up of a judge after a lengthy trial and speeches by counsel. Nevertheless, the Court must be satisfied that when the jury find the prisoner guilty they have applied the right principle of law to the facts before them.

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That was a case of receiving, and, *a fortiori,* a careful and proper direction is "essential" where human lives are at stake, and in the very recent case of *Rex* v. *Currell* (1935), 25 Cr. App. R. 116, this "correct statement of the law" in *Schama's* case was affirmed in a striking way, and *Rex* v. *Newman* (1913), 9 Cr. App. R. 134 virtually overruled.

The great care that should be exercised in murder trials in seeing that weighty evidence in favour of the accused is brought to the attention of the jury, is well illustrated by another very recent case in the same volume—*Rex* v. *Mills* (1935), 25 Cr. App. R. 138—wherein the same Court set aside the conviction of one of two persons charged because the judge had not "pointed out to the jury" a very weighty piece of evidence in his favour, and had made an unfavourable suggestion not put forward by the Crown, saying, p. 146:

> On the ground that the defence put forward on behalf of the male appellant was not put to the jury in the summing-up, and that the sentence to which I have referred excludes that defence from their consideration, we are of opinion that the conviction of the male appellant must be quashed.

And still more recently, last April, the Saskatchewan Court of Appeal decided in *Rex* v. *Harms,* [1936] 2 W.W.R. 114, a murder case, after reviewing several of the decisions I have cited, that, pp. 121-2:

> If a judge fails to direct the attention of the jury to evidence favourable to the prisoner or fails to present the issues and evidence in such a way as to assure the jury's due appreciation of the value and effect of that evidence from the point of view of the accused, it is error and valid ground for a new trial.

The well-known decision of the English Court of Criminal Appeal in the case (of "very great importance" and "most difficult," as Lord Alverstone, C.J., described it) of *Rex* v. *Vassileva* (1911), 6 Cr. App. R. 228 (wherein four accused were jointly tried for conspiracy, and the trial lasted eleven days) is very applicable to the present case, as shall appear, because after confirming, p. 231, the general requirements of a charge as laid down in *Stoddart's* case, the Court proceeded to hold that non-direction in the charge in question was so defective as to amount to misdirection because, p. 232, it had not "pointed out the possible alternative of innocent interpretation being put upon the proved facts," which established the presence of the appellant

in the house of the chief conspirator before and at the time the burglarious plot was carried out, and her subsequent disappearance and false account of her movements, etc. But the Court proceeded to declare that, p. 233:

> As to her false statements after the affair it must be remembered that she might then have ground for thinking that she would be accused of participation in these dreadful murders. One ought to be very careful of drawing false inferences in such circumstances; a person with more knowledge than appellant may well have thought that she would be punished if found to be in any way connected with those murders. As to the dyeing of the hair and the lies told, before she left her lodgings she was a respectable girl, and having decided to live with this man, may well have wished to conceal her identity. The point of view from which such questions must be regarded is—are there other alternatives consistent with this evidence which do not necessarily point to guilt? In such a case, which had been long and strenuously fought, and where issues had been raised which might mislead the jury, it is most important to correct such errors.

And after saying that the later passages in the charge relied upon by the Crown to remove the said wrong impression did not do so, the Court, in quashing the conviction, concluded:

> . . . it does not seem to us that it is proper to draw an inference of guilt from knowledge after the event. . . . We are not here to express an opinion whether she is innocent; we have to decide whether there has been a satisfactory trial.

Finally, on this head, there is the recent decision of the Supreme Court of Canada in *Markadonis v. Regem,* [1935] S.C.R. 657, and particularly the concluding observations of Chief Justice Duff, *per curiam,* at p. 662, which are entirely applicable to this case, *viz.*:

> Nor should we overlook the circumstance that while the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect. We think, . . . , that there was a mistrial and that the case should be brought before another jury.

The Crown's case against the four brothers jointly indicted was based on the existence of a "common intention to prosecute [the] unlawful purpose" of resisting the arrest of Eneas "and to assist each other therein" thereby making "each of them a party to every offence committed by any one of them in the prosecution of such common purpose the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose" as declared by section 69 of the Code. It must be conceded

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on the facts herein that one "probable consequence" of resisting the arrest of Eneas would be the killing of the officer who attempted to make it, and it was submitted by the Crown that the common intention was suddenly formed at the moment when the constable met the four brothers and began his attempt to arrest Eneas. In support of this submission reliance was placed upon the decision of the Ontario Court of Appeal in *Rex* v. *Rice* (1902), 4 O.L.R. 223; 5 Can. C.C. 509, wherein three prisoners in a cab suddenly attempted to escape when a parcel of revolvers was thrown into it and in the course of that attempt killed one of the constables in charge of them. The Court unanimously held that, upon the facts, this constituted a "common intention." Osler, J.A., after reviewing the evidence, said, p. 236:

> The learned counsel for the prisoner pressed upon us that the learned judge had not sufficiently instructed the jury as to what was necessary to constitute a common purpose or intention, and that there was nothing more than the individual intention on the part of each prisoner arising out of the circumstances of the moment—in other words, that no common design to effect an unlawful purpose was proved. As to this I see nothing wrong or insufficient in the charge. The common design might certainly be formed as soon as the prisoners found that weapons suitable as means of effecting an escape were in their possession; and the evidence, as reported in the case, supports the inference that there was a common design to effect an unlawful purpose by violent means.

That is a correct statement of the law, as I understand it, and if this jury had been properly directed in accordance therewith and in relation to the facts herein the base of the Crown's case would have been established, which it was essential to do because unless the common intention was proved then the "individual intention . . . arising out of the circumstances of the moment" of each of the four brothers could alone be considered (as was submitted in *Rice's* case, *supra*) and would have to be proved and a separate case made out against each of them and a separate direction given thereupon. That the jury upon such direction could have found that the common intention to resist was formed immediately upon the moment of the attempted arrest is to my mind beyond doubt, but the situation is one which obviously required a very careful and clear direction because it has long been settled law that even the presence of the accused at the offence is not of itself sufficient to convict, as was reaffirmed

by the English Court of Criminal Appeal in *Rex* v. *Ashdown* (1916), 12 Cr. App. R. 34, at 37 saying:

> No doubt if the appellant stood by and did not interfere, that would not be enough to justify his conviction; but the jury might have been told that they could convict him if he was acting in concert with Woods. Although we do not feel that the case is in a satisfactory condition even at the present moment, we have come to the conclusion that it would be right to give the advantage to the appellant, and therefore the conviction must be quashed.

Unfortunately, however, with all due respect, not only was the learned judge's direction on this difficult point of immediate intention confused and unsatisfactory but he went so far as to tell the jury in expounding section 69 to them (when they came back after being out for four hours and twice asked for further instruction upon "malice aforethought") in illustration of it that:

> Supposing one of these four men belaboured Gisbourne with a club and flash-light and the others stood there with their presence, as it were, overpowering mentally this one man being attacked, that is what may be termed aiding and abetting under certain circumstances.

That is as prejudicial as it is incorrect under any "circumstances" in the absence of proof of a common intention, and this grave error was not removed by the illustration he gave on subsection (*c*) but aggravated by what immediately followed, *viz.*:

> The Crown says they were there and for that purpose of preventing Eneas from being arrested. It may be that they thought they could do that without assaulting or killing this man and that one thing led to another and in the ultimate result they killed him. Do you for a moment doubt what this was all about, that it was to protect Eneas and prevent him being arrested? The Crown says that is the only reason it began and that is why Gisbourne was there and they knew why he was there, so the Crown says and that, therefore, they were resisting the arrest and committing a crime against the Code of Canada, legislation passed by your representatives and mine, and, therefore, passed by us. Are you going to ignore that? Have you not the vigour, that it should not be looked upon lightly, because these men are half glorified by being Indians and believe in all kinds of things? . . .

It is submitted that this is an inflammatory exhortation, completely ignoring and misrepresenting the true situation and is in furtherance of the strong but wholly erroneous view that the learned judge originated and persisted in that the Indians had "assembled" at the reserve for the purpose of "ambushing" the

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police so as to prevent the arrest of Eneas. This he had previously said:

> The Attorney-General says definitely, at least I am putting it, correct me if I am wrong, that the accused ambushed these people. They knew they were coming; they stayed there two hours after they finished the fence and they could have walked the short distance back to where all these people were asleep and instead stayed there until they saw the lights of the car.

Counsel for the accused strongly objected to the use of the sinister word "ambush," and urged that the only and uncontradicted evidence entirely negatived such an incriminating situation, but the learned judge persisted in it and instructed the jury (p. 877):

> It seems that you cannot get away from the association with the arrest and that they went there and remained in these foothills in the dark, away from the rest of the habitants who were all asleep and came down there practically in ambush. It seems to me that is the broad proposition.

But the truth about the presence of the four brothers at the Canford Reserve that night, as appears by the uncontradicted evidence, is that three of them came from their homes on neighbouring reserves at different and earlier times that same day to see Eneas (then aged 44 and the eldest) who lived at Canford with his wife Mary Ann (then aged 29) and children in the house of Chief Billy Ernest, because of serious trouble he had got into arising out of a spree that he and his wife and others had participated in at Shacklin's house, about a mile and a half away, the night before, wherein he and his wife became intoxicated on home brew choke cherry brandy to such an extent that she says she couldn't remember what happened except that Eneas helped her to get on a horse and took her back to Chief Billy's house and shortly thereafter she discovered she was "hurt bad" with wounds on her back, and a policeman and a doctor came and took her away to Merritt about the middle of the day; Eneas, she deposed, had gone to sleep at once after he took her home, and when he woke up he was surprised to find blood on his hands and asked her how it happened, but she told him she didn't know, whereupon he said he was very sorry that she got hurt and sat alongside of her on the bed and stayed with her for quite a while and then went out and before he returned she had been taken away; her aunt Mrs. Shacklin was present at the house when Eneas asked her how she got hurt and said to him: "You

don't need to worry about it or don't be sorry about it. We will see what happened later." That Eneas was still drunk and in bed that morning is also proved by the testimony of the Crown's principal eye witness, Henry Brown. It is important to note these initial facts because they disclose the true situation that the brothers had to deal with when later that day they met in family conference to consider Eneas's actions and decide what was best to be done, and this evidence shows that the wounding of his wife was not a premeditated cruelty but the unpremeditated and lamentable result of the brandy that had inflamed him and her to unconsciousness: their married life had been happy, Mary Ann testifying that they had never quarrelled.

On his way to Canford to see Eneas and his wife and children, Joseph George (the second brother, then aged 42) and his wife Cecilia and their children, and his mother-in-law, Matilda Jules, were met about a mile from the reserve by Dr. A. F. Gillis and constable Carr with Mary Ann George on their way to Merritt, and Carr told Joseph to "try and hold Eneas George and he [Carr] and constable Gisbourne would be down later for him," and Joseph George then went on to Canford and when he got there he saw Eneas sitting at the watering place for the horses, and not long after Alex George came, and not long after that Richardson came, and they four went to the Chief's house, and after their evening meal they took their horses and turned them loose in the pasture and then began to repair the fence, extending up the hillside, to prevent them from straying and doing damage to Dennis Shacklin's crop, and this took them till dusk, about 9 o'clock, and then their attention was called to Eneas's condition because "we seen he was in a very bad state" and he "looked very sad and sorry and downhearted" and "very much upset because his wife got hurt and also doesn't know how she got hurt," and he said "I have been going with my wife for a very long time and now she is hurt, whether I hurted her or not," and he reached such a remorseful and despondent state that the three brothers "didn't want him to stay around by himself, he would likely hurt himself," even to the extent of committing suicide.

After talking the matter over for a long time it was finally

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decided that Eneas should be taken by his brothers next morning to the police station at Merritt.

By the time this long "talk" was finished it was "pretty dark" and the four brothers left the fence up the hillside to return to Chief Billy's house, being compelled to "go slow through the brush and rocks," and when they got to the hay-rack behind the Chief's house, at the point X, they laid down the tie ropes (halters) of the horses they had turned loose, and were surprised to see a light coming very fast towards them and didn't know who the bearer of it was till he came up to them close to the hay-rack and flashing the light upon them said, "I want Eneas," and then they knew it was the Indian constable Gisbourne, and Joseph George says that Richardson George said to Gisbourne "Who sent you over here?" and that Gisbourne replied "Mr. Barker" (the Indian agent), and that Richardson then said: "Why didn't you come in the daytime? If you want Eneas tomorrow morning we will take him up." This statement is very significant because it shows that, doubtless, the brothers had been told (as the Crown submits) by Joseph that constable Carr had said earlier that day that he and Gisbourne would come back for Eneas "later," and Joseph swears that Eneas had been waiting for four or five hours for them to come for him. And it also shows that Joseph and his brothers had carried out Carr's request to "hold Eneas" for them, and consequently that from the very first there was not only no intention individual or common in the minds of the brothers to resist the arrest of Eneas but to assist in it, including Eneas himself who waited for the constables to come for him without any intention of resistance or escape in his mind.

It is clear beyond question, upon the uncontradicted evidence of the Crown and the accused, that the four brothers when they left the hillside to return to Eneas's home (Chief's house) had only one idea and intention in their minds, *viz.*: that since the constables had not come for Eneas which he expected and waited for up to that late hour, approaching midnight, they would take charge of him for the rest of the night and deliver him up to justice in the morning. Under such circumstances the arrival of the constables at such a very late hour, long after they were

expected and waited for, came as a complete surprise to them and a situation suddenly arose for them to deal with which they had never thought of nor provided for, nor had any reason for so doing.

It now appears that the reason for the unexpectedly long delay in Carr and Gisbourne coming to the reserve for Eneas was that Gisbourne was away and did not return till the evening and Carr (a Provincial constable) very properly thought it better to wait for his return because he belonged to the Indian Department and had a better knowledge of the Indians, but while that was a good reason for their unexpected delay, yet on the other hand the Indians were quite justified in concluding that after the constables failed to come after such a long wait for them they would not come that night, and consequently made their arrangements to cover the few hours remaining before daylight came. It follows that the element of surprise, which is the foundation for the "ambush" that the learned judge created, existed not in the mind of the constables (who were admittedly notified of the coming of the four Indians up the road in the half moonlight, but cloudy) for Gisbourne ran up the road to meet them with his flash-light in his hand after Carr "hollered to him 'here the boys come back from the road,' " as said Henry Brown testifies, but in those of the Indians, and so the result is that up to the very moment when Gisbourne "flashed the light in the boys' faces," as Brown described it, there had not only been no common or even individual intention to resist the law but both a common and individual intention to assist it, including Eneas.

It is a fair way to put the situation as it presented itself at that late hour to say that while the Indians had then no reason to think the long expected constables would come that night to arrest Eneas, yet there was no legal reason to prevent them from doing so, but at the same time things which may be done lawfully are best done circumspectly and if the two constables had taken the advice, given that night, of the experienced Indian agent, Mr. Barber, to wait till daylight before arresting Eneas there is no doubt that the dreadful consequences of their haste would have been avoided. Mary Ann's condition at the hospital was not alarming, and her injuries are well described by Dr. Gillis

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who had attended her there that afternoon, as, "They were serious wounds if there had been any infection."

The prolonged discussion by the four brothers up the hillside was not restricted to the troubles of Eneas alone because, seeing that he was to be taken to jail in the morning and his wife was already in the hospital, arrangements had to be made to provide and care for their five children, the nephews and nieces of his brothers, and it was decided that this fraternal duty would be discharged by Joseph, which he readily undertook to do, and thereupon they all set out as aforesaid, entirely unarmed, to return to the Chief's house to carry out this sensible and humane family arrangement.

But unfortunately their conduct did not in any respect commend itself to the learned judge and in pursuance of his theory of an "ambush" he continued to represent them to the jury not only as having "hearts bent on mischief to these policemen when they came from their several reserves to Canford Reserve on that particular occasion" but as being Indians of so low a type as to be destitute of ordinary human instincts, saying:

> They apparently paid no attention to Eneas's wife in the hospital and probably so far as they were concerned she might have been dead. I do not know of a word that seems susceptible of any finer definition. Now, Mr. Pyle, [a juror] does that satisfy you?

It is to my mind unnecessary to continue to make further citations from the many other passages to which our attention has been directed in support of the submission that in this vital respect the charge was calculated to and did mislead the jury to the prejudice of the accused beyond redemption by reason of grave misstatements of fact, and misrepresentation of motives. This primary ground of misdirection on the foundation of the case, has, in my opinion been clearly established, and the consequences are fatal to the verdict because even if the direction on the alleged subsequent common intention formed instantly upon the sudden advent of Gisbourne were correct (instead of being misleading and inextricably confused with that on the first alleged intention) that would not avail to cure the fatality because, first, it is impossible to say which of the two common intentions the jury acted on; and, second, the errors in direction on the first were so grave that they must have prejudiced the jury

from the outset to such an extent that it was impossible for them to take an impartial or correct view of the appellants' subsequent actions.

It follows therefore that on this head of misdirection the appeal should be allowed and a new trial directed, and also, after a most careful consideration of the charge as a whole, in accordance with the authorities hereupon cited, upon the general ground that it failed in many substantial respects to present adequately and fairly to the jury the defence of the accused and their evidence in support thereof whereby, as the statute says (section 1014), substantial wrong and miscarriage of justice have actually occurred.

MACDONALD, J.A.: The appellants were convicted of murdering the late Francis Hartley Gisbourne (a constable of The Royal Canadian Mounted Police) while he was engaged in the performance of his duty, attempting to arrest Eneas George, one of the appellants, for wounding his wife. A fourth brother, Joseph George, was acquitted. The appellants (Indians) were convicted and sentenced to death on the same charge in 1935 but on appeal the conviction was set aside and a new trial ordered. Some points raised on the first appeal were again relied upon but as the facts in evidence in relation thereto are substantially the same I will merely reaffirm the views I formerly expressed as found in the report of *Rex* v. *George* (1934), 49 B.C. 345 at 366, etc. These points were: (1) The alleged invalidity of the arrest of Eneas George because of failure to tell him why he was arrested. (As to this, the jury on the second trial, in response to the charge found that it was not "practicable" to tell him. Even if, as submitted, there was no evidence to support such a finding the final conclusion would not be altered. I think the jury might so find in view of what occurred but it is not material); (2) treatment of the evidence of Henry Brown, an alleged accomplice; (3) admissibility of conversations between Gisbourne, Carr and Barber at Merritt, B.C., to show probable cause for arresting Eneas and (4) admissibility of evidence as to the killing of Carr and the narrative of events after Gisbourne was slain.

As counsel for appellants submitted that the verdict of the

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jury was perverse I think it advisable to extract the material evidence from the record and discuss it in detail (1) to determine if leave to appeal should be given (2) as a background for the consideration of objections to the charge and (3) to see if section 1014 (2) of the Code should be applied if the need for resorting to it arises.

The trouble started with the stabbing of the wife of appellant, Eneas George. Charles Stewart, an Indian, telephoned to Dr. Gillis (physician for the Department of Indian Affairs) at Merritt on May 23rd, 1934, saying "Come down: have pity on us: there is a woman going to die here." To the operator he said "Eneas had hurt his wife." Dr. Gillis reached the Canford Reserve about 11.30 a.m. He took constable Carr with him because of the information received. The doctor found that Eneas's wife was severely wounded. Examination disclosed "five puncture or stab wounds on her chest and abdomen." Considering the danger of infection the doctor said it might have been serious "especially where the lining of the abdomen was open and infection might result."

Before returning with Mary Ann (as she is called) to the Merritt hospital the doctor and Carr called at the house of Chief Billy, the head of the tribe. I refer to this because it was urged that Carr should have approached the Chief to have him surrender Eneas and that he should have arrested him then instead of waiting until midnight. That appears to be the chief complaint made by the defence. What Carr said to the Chief we do not know. We do know that the Indian agent, Mr. Barber, at Merritt, whose duties bring him into close contact with the Indians, testified that Chief Billy was "always antagonistic to the police." This may explain Carr's decision to take with him in making the arrest the constable specially charged with work among the Indians, *viz.*, the deceased Gisbourne. In any event there was urgent need to get Mary Ann to the hospital. Further it was not for the accused or their friends to determine the time and manner of arrest. At the most a question of prudence arises and that was put to the jury.

On the return to Merritt by motor Dr. Gillis, constable Carr and Mary Ann met Joseph George, brother of the appellants and

some others with him at or near "Fraser's store." They were going towards the reserve. Dr. Gillis testified that Joseph George came over to their car and spoke to Mary Ann with constable Carr standing by. Carr, the doctor said, told Joseph "to try and hold Eneas George and he and constable Gisbourne would be down later for him." Mary Ann told Joseph (although he denied it) that "Eneas had hurt her." However, Joseph Edward, an Indian, who was also present, in answer to the question "Did she say [*i.e.*, at Fraser's store] who hurt her" answered "her husband."

Joseph George, as intimated, with his party was going to the Canford Reserve. When he arrived there and met Eneas and his other brothers he had important news. First, he was in a position to tell that Carr knew that Eneas stabbed his wife (or at least had good grounds for thinking so) and that later Carr and Gisbourne, whom all the Indians knew, were coming back to arrest Eneas. Charles Jules, Mary Ann's father, testified that he saw Eneas George with Joseph George "a little later in the afternoon." There is no doubt that on all the evidence the jury could find that appellants were fully informed. Joseph George, giving evidence for the appellants would not deny that constable Carr at Fraser's store told him in the presence of Dr. Gillis (as the latter testified) that he (Carr) and Gisbourne were coming back for Eneas. Later he said he was not sure.

What occurred on the afternoon of the 23rd is told by the Indian agent. He heard Carr say, after Dr. Gillis examined Mary Ann at the hospital, that the doctor "pronounced her to be in a dangerous condition." If her wounds had proved fatal a more serious charge would have been laid and the need for expedition would be greater. As already stated Carr did not tell Joseph George that he would return for Eneas at once; he used the word "later." He had to locate Gisbourne who was out of town and he spent the afternoon calling at Gisbourne's home and at the Indian agent's office. Asked "Why wait for constable Gisbourne?" Mr. Barbar the Indian agent replied:

> The reason he would wait for constable Gisbourne is the fact that constable Gisbourne knows this reserve. He is working for the Indian Department. He knows the Indians far better than constable Carr and therefore it was only natural Carr would wait for Gisbourne to go along with him.

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I do not think it is material but I mention it again because so much stress was laid on the fact that because of this delay—to my mind for very good reasons—the arrest was deferred until a late hour when the Indians for some reason not easily understood might be in a belligerent mood. Gisbourne and Carr, if they could not get there before dark, should, it was said, have waited until the following morning. Had they waited they might not find Eneas there. That possibility was not too remote. Arrests should be and are usually made as soon as reasonably possible after knowledge of the crime. Promptness and expedition is of the essence of efficient police work. I only discuss it because it was so persistently urged that presumably different rules should be applied to Indians. If there is any reason, psychological in its nature, why Indians, especially those living on a reserve in a well-settled community under modern conditions and in contact for years with white neighbours, should not be arrested at night it has no place in a Court of law. Police officers are entitled to the protection of the law in the performance of their duty day or night.

As to the suggestion that the constables should have approached the Chief (Carr may have done so without results) to have him, as my brother MARTIN put it in *Rex* v. *George* (1934), 49 B.C. 345 at 363 "deliver him up [*i.e.*, Eneas] to the white man's justice" such a course would not likely be successful. Mr. Barber gave this evidence:

*Henderson*: Now, Mr. Barber, wouldn't a much better way to make this arrest be to apply to the Chief? Well now, it all depends upon the Chief.

Well, was this Chief antagonistic to the Indian Department? Yes, Chief Billy—not to the Indian Department, but he was always antagonistic to any police.

Well, wasn't that because the officers went there and made arrests without first coming to him, and he would have delivered the men to him? No. There have been very few arrests made at the—on the Indian Reserve.

Very few? Very few.

THE COURT: Why was he antagonistic? I have no idea, my Lord.

What? I have no idea.

How did he manifest his antagonism? Well, I have known him to order police officers off the reserve.

Why were they on the reserve? It includes their duty.

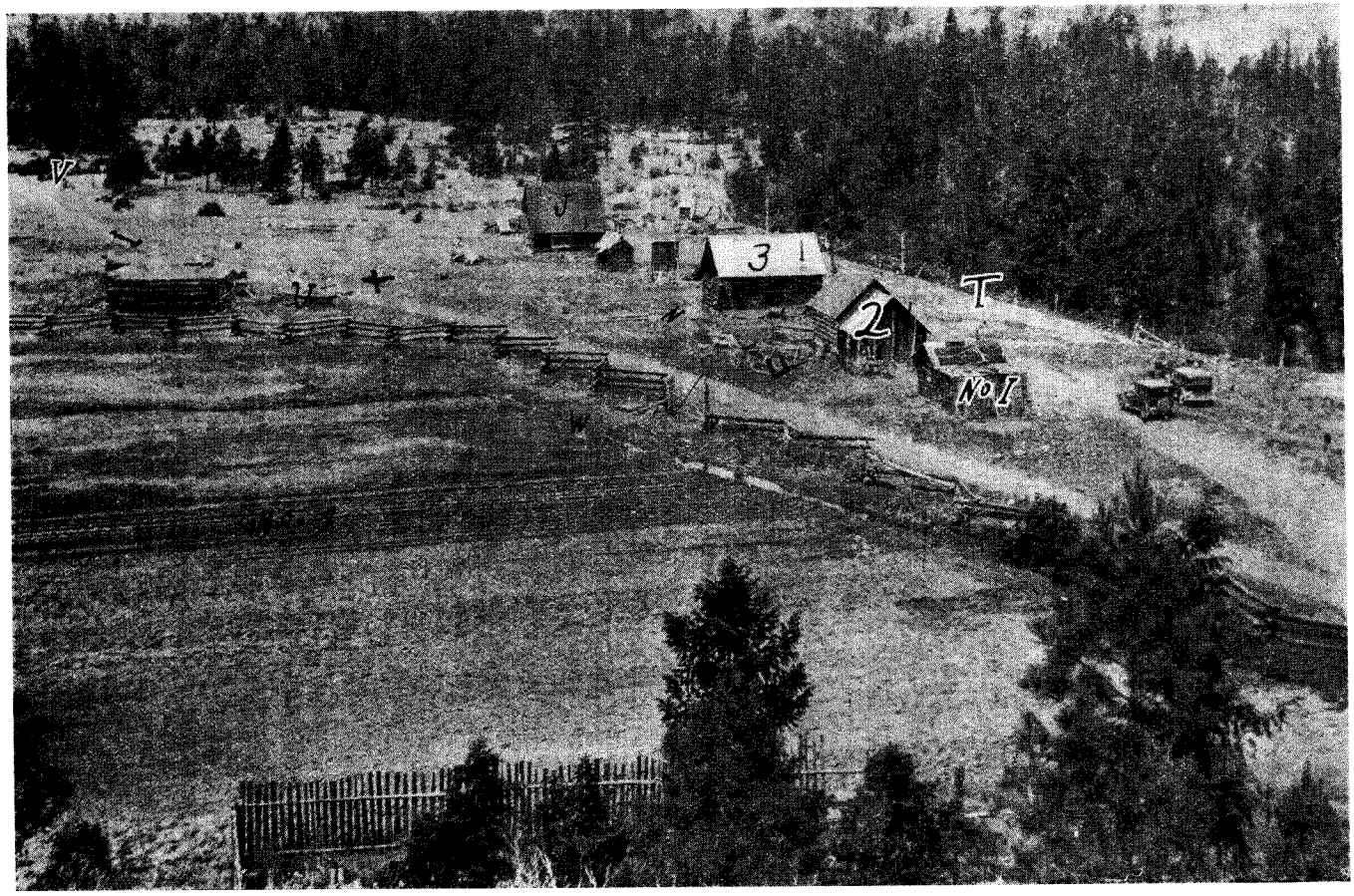
Gisbourne returned to Merritt at 9 o'clock on the evening of the 23rd. He and Carr left in an automobile for the Canford

Reserve shortly before 10 o'clock. Carr had reasonable grounds for believing that Eneas had wounded his wife, an offence for which he might be arrested without a warrant. We are concerned with Gisbourne's knowledge. Mr. Barber supplied the necessary proof on that point by admissible evidence of conversations.

Evidence as to what occurred after Gisbourne and Carr reached the reserve about midnight had to be secured from relatives and friends of the appellants. The Crown's chief witnesses were the two Indians Henry Brown and Tommy Andrews. At this second trial other Indian witnesses were called by the defence in an effort to show (not by evidence but by inferences) that the constables were more concerned with searching the shacks on the reserve for liquor and for evidence of its presence. Much testimony was given (all I think inadmissible) to show that Gisbourne and Carr treated the Indians as a group badly by needlessly pursuing them for infractions of the liquor laws to collect a moiety of the fines. Stories of alleged acts of tyranny on their part towards other Indians without proof that these incidents came to the knowledge of the appellants were detailed to the jury. As against this other witnesses, who knew the deceased men for years, paid tribute to their worth. Whatever benefit might be derived from this evidence was secured by the defence. No doubt the jury found that the true purpose of the visit of Gisbourne and Carr to the reserve on the night of the 23rd of May was to arrest Eneas. The evidence on that point was irresistible but, even if they had any additional purpose, as suggested, it would not be material.

A photograph of part of the reserve (Exhibit 3) shows the Indians' houses, two converging roads and the entrance to the east where the roads meet; also the marks placed on the exhibit by witnesses at the trial showing where the successive steps took place. For clearness in following the evidence it is reproduced in miniature. The north is at the top of the picture.

EXHIBIT 3.



As stated, the Crown relied upon the evidence of Henry Brown, a youth of 19, living in shack No. 1. He saw Dr. Gillis and Carr at the reserve on the forenoon of the 23rd taking Mary Ann from Chief Billy's house marked with the letter J where Eneas also lived at that time. Later, at midnight, while in his own shack he heard an auto approaching from the east and coming out noticed Gisbourne and Carr in it. They stopped in front of the Chief's house. Henry Brown spoke to Gisbourne and then went into the Chief's house, returning shortly. Tommy Andrew, another Indian, came out of the same house with him. Next Carr got out of the auto and Gisbourne proceeded to Johnny Martin's house marked number 3 holding a flash-light in his hand. Shortly afterwards he came out and this witness heard constable Carr call out to him "Here the boys come." The three appellants and their brother Joseph George, all on foot, were then approaching the point marked on the exhibit with a cross or the letter X, coming from the west and travelling on the road or near it. The letter U near the cross, both back of the Chief's house, is another witness's idea of the same spot. Gisbourne on hearing Carr call ran or walked fast between the Chief's and Johnny Martin's house out towards the point X and met the four George brothers there.

The first act of Gisbourne was to flash the light in their faces and as (or after) he did so Henry Brown heard Richardson George say, "Do you want to fight: do you want to fight?" Gisbourne replied "I just want Eneas." After that he said they all "started to fight; all mixed up there," *viz.*, Carr (who also crossed over to the point X), Gisbourne and the four George brothers. Henry Brown noticed the flash-light fall to the ground but so far (and this is the important point) no shot was fired. This witness, doubtless frightened, at that moment ran away to his own shack and for a time his evidence relates to voices and sounds heard by him.

After he got into his shack he "heard a gun fired" the sound coming from "somewhere around the back of my father's house" (Jimmy Brown's) marked with the figure 2. At that moment he heard Richardson say "Club him on the head. Club him on the head," in the Indian language. So far as he could judge by

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sounds the combatants were then at the point marked on the exhibit with an inverted F. This figure is referred to in the evidence as the point Y. I will so refer to it hereafter. Then, this witness heard a car stop outside (in front of his shack). The inference from this is that Carr, seeing they were likely to be overpowered, ran back to the car intending to provide a way of escape for both. Gisbourne, if able to free himself from his assailants, could jump in the moving car at the junction of the roads near the gate. This is a possible and indeed likely explanation of Carr's movements. However, Gisbourne, although he either retreated or was borne back from X to Y and used his gun at the latter point, was not able to escape. Carr, doubtless seeing his danger, again came to his rescue. Both, however, were killed. This witness heard the noise of the fight move towards the gate. At the time the shot was fired Joseph George, either as a result of it or due to a blow from Carr's baton fell to the ground. Henry Brown (witness) saw where Joseph George's unconscious body was lying. He placed it at the point Y where he heard the shot fired. The firing of the shot and the fall of Joseph George synchronized.

The evidence of Henry Brown on essentials was not materially affected by cross-examination. In saying so I am not overlooking discrepancies in different statements given by him which were before the jury. When cross-examined he said again that Richardson spoke first to Gisbourne saying "Do you want a fight?" Gisbourne replying "I just want Eneas." He did say "No" in answer to the question by Mr. *Henderson* "Did Richardson threaten to fight before Gisbourne said anything about Eneas?" This answer may be kept in mind when dealing later with common intention. Whether the words "Do you want to fight?" amounted to a threat to fight would be a question of interpretation from tones and gestures. Certainly it did not show acquiescence in the arrest of Eneas. He repeated in cross-examination that "they were all fighting," *i.e.*, at and between the points X and Y. Asked again who were fighting he said "Gisbourne and Carr and these four Indians."

A short while after these events Richardson George came into Henry Brown's shack and asked him to come to drive a car

containing the bodies of the two constables. He said "If you don't I'll lick you too." The witness went back to where they picked up Joseph George injured in the fight, marking the point where his body lay, *viz.*, Y. He said again that this point was the place the sound of the shot came from. This is the vital point in the case as the main defence is that Gisbourne fired the shot at once on meeting the four George brothers at the point X without any apparent reason for so doing; that, as a result of that shot, Joseph George fell to the ground and his brothers believing he was killed by Gisbourne became infuriated and because of that provocation beat Gisbourne to death. If the fact is, as Henry Brown testified, that the shot was fired at the point Y and Joseph fell at that point this defence fails. Other evidence disclosed that Joseph George fell at Y at or about the time the shot was fired and medical evidence also showed that by reason of the blow he received, from whatever source (a baton or a shot) he could not thereafter move or stagger from X to Y. Before collapsing he might move 8 or 10 feet. The distance from X to Y is 120 feet.

Tommy Andrew also heard the auto approach the Chief's house. He went out and saw the two officers. Gisbourne asked him, he said, "for Eneas" and "I told him" and "he walked away," going into Martin's house. Then the appellants and Joseph George approached the point X and he heard Carr say loudly "That is the man," as he recognized Eneas and he (Carr) "told Henry Brown to go after him." Then, he said, "Gisbourne ran through there and met the Indians" at the point referred to. First, he said, Gisbourne flashed his light on the four brothers and "the light dropped then." The next step was that Richardson said "Do you want to fight?" and repeated it three times. Asked what happened after that he said "They fought there then—these men here and the two policemen here." Asked if all six were in the fight, he said "Yes, the whole works." I call attention to this because it was said that there was no evidence that Alex George participated. This took place at the point X. After that he said "They moved this way then—came this way to the back of Jimmy Brown's house," *viz.*, to the point Y. Asked who started the fight he said "Richardson George." Then this

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witness "went into the Chief's house" because he "didn't want to get mixed up in that affair" and very shortly after he heard the report of a gun. This is further proof that Gisbourne did not use his gun at the outset. The combatants were then at the point Y. It was as the jury on this and other evidence doubtless believed Gisbourne's last act of self-defence, or one of his last acts as he faced death at the hands of these men. This witness, and others also, could only locate the point where the shot was fired by the report. It would be quite possible for Indians to do so with approximate accuracy. He placed it "behind Jimmy Brown's house," *viz.*, number 2. He also "heard the car going back this way towards the gate."

After Gisbourne was killed the three appellants came into the Chief's house. Tommy Andrew said they all spoke and said "We killed the policemen." He added, "They all said that," *viz.*, Richardson, Eneas and Alex. Then a moment after, Richardson again intervening said, possibly boastfully or to assume sole blame "I killed them," "I done the killing." He was undoubtedly the leader in the attack. This witness helped to carry Joseph George (who fell as stated, at or about the time the shot was fired) into the Chief's house. The inert body was "packed in" by them "from about Jimmy Brown's kitchen." The kitchen, as an addition to the shack, is shown on Exhibit 3. The body of Joseph therefore was picked up at or near the point Y where the Crown says the shot was fired or the baton used. "Joseph George" he said "looked dead to me; he was quite a while at the house before I knew he was alive."

At this time Tommy Andrew noticed that Richardson George had a handcuff on his left hand and carried a baton in the other. The baton belonged to Carr: the handcuff to Gisbourne. The jury would doubtless believe that the handcuff was placed on Richardson's wrist by Gisbourne because he was offering physical interference to the officer in the discharge of his duty in arresting Eneas. This physical evidence is significant. Gisbourne, while it might be possible to snap it on with one hand, would likely have to use both in placing it on the wrist and, if so, could not also hold a gun in position to fire at that stage. Further if the gun was fired by Gisbourne at the outset at point X, as the

defence alleges, knocking out Joseph and so infuriating the others (provocation) that they at once, acting together, attacked Gisbourne with clubs, it is unlikely that he could apply the handcuff during that attack. It was likely therefore Gisbourne's first move, acting quickly, when Richardson interfered. Many witnesses testified to the presence of the handcuff and the baton and no one disputed it. Cuts and bruises on Richardson's wrist were found. Later that night Richardson searched the dead officers' clothes and finding the keys unlocked the handcuff and threw it into the car where it was found by Mr. Barber on the following day.

Charles Jules also gave evidence for the Crown. He is Eneas's father-in-law. He heard the auto arrive and stop outside the Chief's house (marked with letter J). He knew Gisbourne was a policeman. "Everybody," he said, "knows that." He heard Gisbourne say "Is Eneas here?" This witness stayed inside the Chief's house while the fight was in progress. He said "I heard some loud talking but I could not make out what was said. It came from a point behind the Chief's house" (corresponding with the point X). He heard the words "Come here; come here," in, he thought, Richardson's voice. The same voice said "He has handcuffed me—come over this way and club him." This evidence, if the jury accepted it, would show that it was not the firing of a shot that started the attack with clubs on Gisbourne. He also said he heard the report of a gun and it was "after the shouting." The sound, he said, came "from behind Jimmy Brown's house," *i.e.*, at or about the point Y. Later Alex came into the Chief's house and said "Sway [meaning Joseph] is dead." He was in fact only unconscious but probably believed to be dead by the others at that time, *viz.*, some time after the attack started. Alex added "Gisbourne also is dead." He then went out and "not long after he came back" and said "The little policeman [Carr] is dead."

The wife of the last witness, Matilda Jules, also gave corroborative evidence on some material points. She heard "hollering" and Richardson say "He has handcuffed me—come quick." She heard a gunshot after the shouting. However, she said the report came from "this side of the Chief's house—towards the

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stable it seemed to me." She did not give definite evidence on the point but at all events did not say the report came from the point Y.

The foregoing is an outline of the principal features of the evidence offered by the Crown, more particularly on the vital points as to what occurred from and after the moment Gisbourne met the appellants and Joseph George at the point X until he was clubbed to death at or near the point Y. Unless this evidence was displaced at the trial by other evidence (and I am satisfied it was not) or so successfully attacked that it should not be regarded as credible it would be impossible to say that the jury were perverse in accepting it and in basing a conviction upon it. It shows that appellants knew that Gisbourne was a police officer; that he wanted to arrest Eneas, and said so, for an offence they knew was committed; that although he offered no violence to any one of them Richardson George at once interfered; that his action caused Gisbourne to attempt to arrest him; that clubbing followed in which all joined and later the firing of a shot and throughout it all there was no provocation to justify the attack. It would be difficult to understand how any jury could fail to find that substantially the tragedy occurred in that way.

Further proof that the shot was fired at Y is found even in the evidence of Joseph George for the defence. He "heard the report of the gun" and "didn't remember anything further." He became unconscious and could not move unless possibly a short distance in an involuntary way. Nowhere is it suggested by anyone that Joseph George was picked up at the point X. That is most significant. Dr. Gillis testified from the nature of the injuries he received—paralysis of the left side of the face—complete deafness indicating a fracture of the skull or a hemorrhage —that they were caused by a blow and he said Carr's baton could have caused it. As already stated the Crown's evidence indicated that Carr left Gisbourne to get into the auto when the fight got under way so that both might escape but finding this scheme failed returned to help Gisbourne, possibly hitting Joseph with his baton on this his second appearance in the affray. At all events, however Joseph may have received his wounds—and

that is not material—it was at the point Y they were inflicted, not the point X.

After the killing Henry Brown, Jr., was pressed into service to drive the police officers' car, now with their bodies in it, to a place where the car and all its contents might be thrown into the Nicola River which was in flood. Physical evidence indicated the course of this procession in the early morning of the 24th of May. The car was found by Mr. Barber on the afternoon of the 24th near the Canford Bridge, crossing the Nicola River over the bank between the road and the river where there was a steep incline. There was blood on the running board, apron and fender, while the back seat was "badly covered with blood." Two pairs of handcuffs were in it, and on the inside rim of one a stain of blood. Expert evidence showed that blood found here and elsewhere was human blood. The keys were found later in the clothes worn by Richardson and were stained with human blood. Also—and it is corroboration of the locality of the fight—inspector Shirras said:

> A big block of wood was found at the back or rear of the second house from the gate of the Indian Reserve,

*viz.*, the point Y. On one side it was covered with blood. Blood-stained clubs were found. Charles Jules testified that on the morning of the 24th Eneas's shirt had blood stains on it and one hand was wrapped with a handkerchief. Gisbourne, Henry Brown said, as they drove along, was dead but Carr was still moving his arms and legs in the rear of the car. He was moaning. Richardson got a rock and hit him "more than once" on the head with it, saying to Henry "Don't be afraid." Before Carr died (at least it was thought he was still alive) it was known that Joseph George was not dead. His supposed death was put forward by the defence as a ground for provocation. It should not provoke them to kill Carr presumably believed to be still alive. The witness identified a rock produced at the trial stained, as Mr. Vance testified, with human blood as "just like it." Mr. *Henderson,* counsel for the accused, charged that a police officer (naming him) planted the rock at that point and with another stained it with human blood. All he based this charge on was the fact that a few days elapsed before it was found. There was a reason for delay in finding it because a tree

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recently cut down covered it. He stated in answer to a question from me that he made this submission to the jury and I have no doubt that they treated this charge as unwarranted. There was so much physical evidence of blood and violence all along the route that planting evidence even if anyone could be found so debased, would be unnecessary. The two officers charged were not cross-examined on the point.

Alex George on the drive to the river sat in the rear seat of the car. He searched the police officers' bodies for a gun. Other evidence relating to this journey to the river; the car jamming against a tree; cutting it down; the rope used to release it so that it might be pushed over the bank with Eneas and Alex assisting throughout need not be detailed. All the appellants helped to push the car over the bank and would have succeeded had it not hit a tree. Then Richardson pulled Carr's body out of the car and dragged it down to the river. Asked if Carr was still alive Henry Brown said "He was gurgling." Later Gisbourne's dead body was dragged down. As Carr's body circled in the current Richardson got a stick ("like the one produced") to push it out into the river, getting the bottom of his trousers wet, a condition in which they were afterwards found. Two tracks in the underbrush were later found which might have been made by dragging the bodies down the bank. The water was high and had they succeeded in getting the car with the bodies in it into the river, in the opinion of Henry Brown, it would be covered up leaving possibly a mystery to be solved.

After the bodies were disposed of clothes worn by the accused were hidden on a hillside where they were later discovered bearing evidence that they were worn by appellants on the night of the 23rd. Later that morning when, as they doubtless thought, evidence of the crime was removed, Richardson George gave Henry Brown $10 telling him "not to say anything—not to tell." They then went to the Chief's house where they found the Jules, Eneas and Alex George, Tommy Andrew and Mrs. Joseph George. Richardson took up the gun and baton in his hand and said they belonged to Gisbourne. Henry Brown noticed "a cut on the sleeve of Richardson's left wrist" and "a cut on Eneas's hand," also "Alex had a swollen hand." Some days later this

witness returned to the hillside with police officers where they obtained the hidden articles of clothing, baton, etc. On the same day the officers found two flash-lights down the hill in front of the Chief's house. One was flattened, dented and stained. One of them Henry Brown said resembled the flash-light carried by Gisbourne when at the outset he approached the point X and met the accused.

I refer now to evidence relating to the movements and actions of appellants and Joseph George on the 23rd of May before and up to the time they approached the point X bearing, as it does, on the question of common intention. Eneas, alone, lived on this reserve. After the stabbing affray relatives and friends of the accused from a short distance away came to the Canford Reserve. Joseph George was among them. He went there he said to look after the children of Eneas knowing that their father was in trouble. That night he, with the three appellants worked at a fence until about 9 o'clock and having completed it remained there (some distance west of the point X) until midnight when probably hearing or seeing the police car approach they walked to that point in a body. In their favour it should be said that there is no evidence that they were armed or carried clubs up to that stage. The only evidence of what the four of them were doing together until midnight, knowing at that time as the jury might infer from the evidence of Dr. Gillis and others that Gisbourne and Carr were coming "later" for Eneas, was given by Joseph, called on behalf of the accused. He said they were discussing Eneas's plight and that they decided to take him to Merritt in the morning "so he wouldn't commit suicide" as he was threatening to do. One would think the danger of committing suicide, if it was a real danger, would be guarded against with greater certainty by permitting Gisbourne to take Eneas that night.

It is clear also that they decided that Eneas should not be arrested that night or at all events, putting it most favourably for them, that they would prefer at least that he should remain where he was until morning.

The jury might inquire why, if they were so concerned to have Eneas placed in gaol in the morning, they should attack an

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officer for relieving them of that task by taking him a few hours earlier. Joseph George at one point in his evidence for the defence said that if Gisbourne had arrived before dark no resistance would have been offered. "Why did he come in the dark?" he asked. The jury would consider whether or not that was their real reason. Why should they object to an arrest by night that was bound to occur in any event? Then Joseph George gave another reason for their action. He said "Why didn't he [Gisbourne] take him [Eneas] by his hand and take him away; this is no place to grab him" (pointing to throat) indicating that they resisted either because the arrest was made at night or because Gisbourne used unnecessary violence in arresting him. They were opposed to the arrest of Eneas that night and their later actions were consistent, if the jury wished to draw that inference, with a preconceived design to resist it. Did they assume the right to say when and in what manner Eneas should be arrested setting themselves up as a tribunal so to speak, to decide that point and, if so, did such an attitude indicate a spirit of antagonism and a common intention to resist?

There was much discussion at the hearing as to whether or not there was any evidence upon which the jury could base a finding of common intention to prosecute an unlawful purpose. The only evidence, it was submitted, was given by Joseph George and in the absence of any other must be accepted and that evidence disclosed a benevolent frame of mind and an intention on their part to surrender Eneas in the morning. To deliver up Eneas in the morning, it was said, was a good intention, not a bad one. When, it was asked, did their good intentions change? The jury might think that it was not evidence of good intentions at all for the accused, knowing that Gisbourne was to arrest Eneas "later" for good cause, to make up their minds (if they did so) that a different course should be followed. Evidence of common intention might be based not only on what was said and done but on inferences. Later acts too might be used to throw light on their probable state of mind at an earlier stage. The jury should, and doubtless did, consider Joseph George's evidence of good intention, if any, in the light of the known facts of the case as found by them, and if they thought that the appellants

decided not to let Eneas go (I am not referring now to when that common intention was reached) they would be justified in doing so. They might regard the concerted action of all in at once starting to fight at the point X as evidence of a predetermined plan or of one formed at that moment. As stated there is no evidence that they carried clubs. As it later appeared, there were plenty of clubs and stones about to be picked up when required and it would not be necessary—or so the jury might surmise—to carry clubs and arouse suspicion in advance. Certainly also the intention formed before reaching X that Eneas should be surrendered in the morning notwithstanding knowledge that the officers were coming for him before that time would be an element linked with later action to show that they did resist pursuant to a common design.

The jury however were not limited to finding evidence of a common intention formed during the period the appellants and Joseph George were together before the arrival of the officers. At the moment Gisbourne put out his hand to arrest Eneas the common intention could be formed within the meaning of section 69 of the Code. Why should Gisbourne say "nobody can stop me" unless there was interference, and if all interfered the common intention to resist might be found? The opening words of Richardson, *viz.*, "Do you want to fight?" was not—at least the jury might think so—an invitation to a parley as to when Eneas should be lodged in gaol; it was, particularly in view of Gisbourne's statement that he only wanted Eneas and the conduct of the accused in attacking him with the greatest ferocity, in itself evidence of a common intention to resist from then or at an earlier period.

I will not outline in detail the evidence of the witnesses for the defence beyond the references already made. The material evidence in this connection was given by Joseph George and Joseph Edward, the only other eye-witnesses. I have no doubt that the jury regarded their evidence, where it was in conflict with the Crown, as incredible. It would take too much space to show the many reasons disclosed in the record to support that view.

Where on evidence so convincing a jury for the second time

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found the accused guilty of murder serious errors should be found in the charge or in the course of the trial to justify interference. The only substantial points in the case revolve around the question of common intention and the firing of the shot, both questions of fact peculiarly appropriate for a jury to decide. The slightest errors or omissions in the charge should not be magnified. It should be read as a whole to ascertain if the decisive issues were placed before the jury. They were not involved. If the shot was fired at X the issue arose—was the killing of Gisbourne justifiable or excusable on the ground of self-defence or, if not, was it excusable to a degree because done "in the heat of passion caused by sudden provocation" (section 261). If it was not justifiable or inexcusable, dependent upon the decision of that question of fact, did the killing of Gisbourne result from the common purpose of the appellants to resist by force the arrest of Eneas? In that event all were guilty of murder whether or not it was intended by each one that death should ensue. This view of the case was given to the jury and it was not difficult to understand.

Mr. *Henderson* submitted, without citing cases in support, applicable to the facts, that the alleged separate defences of the appellants were not segregated and presented to the jury. I couple with this the further objection that no attempt was made to segregate the evidence against each of the accused. That is true with this exception—the jury were asked to find whether or not each one of the appellants was involved in the common intention to prosecute an unlawful purpose. Crown witnesses were unable to give evidence to show the part played by each of the appellants in the fight. They did show that all participated. If the Crown's case was that a murder was committed by physical acts of violence not necessarily of all but by one or more of the accused segregation would be necessary. Here the Crown relied upon the common intention to prosecute an unlawful purpose and the participation of all therein. The charge to the jury must be read in the light of the course pursued at the trial. There was no separate defence for each of the accused. It was essential that the jury should find a common intention to resist on the part of all the appellants. One might not be a

party to it although present. This aspect was placed before the jury, *viz.*, whether or not the "arrest" was resisted by all of them." The necessity of including all in the common intent was made clear. The jury acted upon it. Joseph George was acquitted. On whatever ground they did so it showed at least that the jury knew they were not obliged to convict or acquit all. They did not go further and accede to the plea of counsel for the defence here and at the trial that Alex George should not be convicted. They had direct evidence of his part in the attack before the death and of his conduct thereafter. Further, the defences offered were common to all, *viz.*, self-defence and provocation and separate treatment was not necessary. There is no rule that it must be done where separate and distinct defences are not raised. While objection may be taken on appeal although not taken below it is nevertheless true that to properly appraise objections to the charge one must have regard to what occurred below, the course of the trial and the attitude of the defence. The accused were defended on the charge that they were joint participants in an unlawful venture. There was one defence common to all. As Alverstone, L.C.J., said in *Rex* v. *Vassileva* (1911), 6 Cr. App. R. 228 at 231, quoted with approval by my brother MARTIN in *Rex* v. *Bagley* (1926), 37 B.C. 353 at 368:

> I repeat what I said in *Stoddart's* case. It is not to be supposed that this Court approaches a summing up, especially after a long case, without regard to the way in which the case was carried on in the Court below. As Lord Esher said, omission is not of itself necessarily misdirection; it is only when the omission is such as is calculated to mislead the jury that it amounts to misdirection.

It was also submitted that the definition of murder and the distinction made between murder and manslaughter was misleading. The complaint is that the jury were told that "murder is the unlawful killing of any human being with malice aforethought." The jury were given the common law definition of murder. Similarly as to manslaughter the trial judge told the jury "if there is no malice it may be manslaughter." That again is the common law definition, *viz.*, "unlawful killing without malice aforethought." It does not follow that because malice aforethought is not mentioned in the Code as an essential element

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of the crime of murder that it is not committed where malice exists. To put it in this way was favourable to the appellants. It meant or implied that the act was premeditated and that the jury should inquire whether or not animus or a wicked mind fatally bent upon mischief existed before the attack apart altogether from the question of common intention to do an unlawful act, later referred to. An additional hurdle to surmount was placed before the Crown. Either this is true or the fact is, as indicated in some parts of the charge that the terms were used interchangeably. It was only necessary to secure a finding of a common intention to pursue by force an unlawful object. That was put to the jury. The defence cannot complain if the jury were also asked to find malice. The provisions of the Code extend the common law definition of murder but it does not follow that to kill with malice aforethought is not murder. *Graves* v. *Regem* (1913), 47 S.C.R. 568 to which we were referred is of no assistance.

Another objection was raised to the trial judge's reference to section 69 (*b*). After quoting the general part of the section and reading (*a*) and (*b*) he said:

> Supposing one of these four men belaboured Gisbourne with a club and flash-light and the others stood there with their presence, as it were, overpowering mentally this one man being attacked, that is what may be termed aiding and abetting under certain circumstances.

The illustration it was said was misleading. This is over-refinement in criticism. First: The trial judge was merely giving a general illustration without reference to the facts of this case and second, the illustration is a sound one not necessarily as illustrative of the facts of this case but, as the trial judge said, "under certain circumstances." He follows it with an illustration that is applicable to the facts. Later in the charge it is made clear that aiding and abetting implied some overt act not merely "overpowering mentally" by standing by. The jury were not concerned with mere acts of standing by; there was evidence of active participation.

A further point was raised, *viz.*, the necessity of telling the jury that they must find as a fact a common intention on the part of the accused to prosecute an unlawful purpose and to assist each other therein (section 69). That was essential. It was the

Crown's case. This was clearly brought to the jury's attention. They were brought back time and again to that issue. At one stage after reading the relevant part of the section and stating the Crown's position the trial judge said: "Do get that in your mind." Again he said, referring to "common purpose" that the Crown "pin their case" to it and "it is for you to accept it or not." It was in fact the final matter presented to the jury in a supplementary charge. It is unlikely that the jury would ask for further instructions on the point if they were not sure it was necessary to pass upon it.

It was submitted that the defence was not fairly placed before the jury, particularly in the sense that the trial judge did not deal with the evidence given by witnesses for the defence except, it was said, to belittle it. There is no substantial basis for this complaint. The real defence if it should be believed, was that the shot was fired at the outset. That issue was prominently placed before the jury in a manner favourable to the defence. As to belittling the evidence of witnesses for the defence the trial judge was free to comment unfavourably upon it so long as the decision on this and other questions of fact was left to the jury. In truth much of that evidence was incredible and would, in all probability, be rejected by a jury whatever the nature of the charge. Joseph Edward and Joseph George (the latter in effect said so) were trying to protect their relatives regardless of inconsistencies at different stages of the case. A new trial was obtained in part on the strength of evidence given before the Court of Appeal and largely it was repudiated in the present trial. There is no mechanical rule that the trial judge must, to put the defence fairly to the jury, go over the evidence of each witness for the defence. He did not refer to the evidence of many Crown witnesses.

The Attorney-General was asked, not by Mr. *Henderson* but by my brother MARTIN, whether or not the evidence bearing on common intention was properly marshalled and presented to the jury. That was a point the jury pursued on their own initiative until they got an answer that was satisfactory to them, *viz.*, that the common intention to prosecute an unlawful purpose might be formed at the moment Gisbourne attempted to make the arrest.

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The trial judge dwelt on the possibility of that common intention being formed before that time but although it was a proper inquiry the jury presumably were more impressed with the view that their finding of fact on that point could be based on what occurred at the point X.

Misdirection on the question of the burden of proof, presumptions of innocence and legal principles incidental thereto were alleged. I will not discuss that complaint except to say that nothing substantially wrong occurred. Certain errors were later explained and corrected and the principles laid down in the recent case of *Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433 stated.

It was also submitted as serious error that the trial judge in his charge to the jury impressed his own views of the facts upon them thus interfering with a fair and unbiased consideration of the evidence on their part. It was said also that by certain observations the trial judge conveyed to the jury his own view of guilt and indicated it, *e.g.*, by saying when further instructions were given to the jury that they might retire "a moment" to consider it suggesting that only momentary consideration was necessary. A short time before, however, his Lordship said "Do not get the idea that I am trying to hurry you. I am not." Undue stress was given to isolated statements that might have been omitted. Juries should be credited with a capacity for sound judgment and discrimination. They are not deflected from their duty to pass on the facts by every phrase used by the trial judge which might, if that was the only point to consider, be open to criticism. There is evidence in the book that this jury pursued their inquiries with great persistence in the proper direction and finally secured the information sought.

It is not the law that the trial judge may not indicate or in fact state his own view of the evidence so long as the decision is left to the jury. In his charge to the jury in *Rex* v. *Farduto* (1912), 10 D.L.R. 669, at 671, the trial judge said:

> If you find the story of the prisoner unbelievable, and that is my opinion, . . .

While many trial judges refrain from indicating their own views it is nevertheless true that judges are entitled to express their opinion on the facts. In *Rex* v. *Duguay* (1933), 59 Can. C.C.

328 this question was raised. It was held that where there was sufficient evidence to support the verdict it would not be disturbed on the ground that the judge's charge "was very severe on the accused." In *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197 at 208 Channell, J., an able judge, said:

> The learned judge is said to have interfered improperly in the conduct of the case, and not to have put it fairly to the jury, and not to have stated the law properly. The latter would be fatal unless the case came within the proviso of the section. The other observations of the learned judge only become grounds for appeal if they have in fact caused substantial miscarriage of justice. In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing-up does not show that it is an improper one. When one is considering the effect of a summing-up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact.

I refer also to *Rex* v. *O'Donnell* (1917), 12 Cr. App. R. 219, at 221, referred to with approval by Meredith, C.J.O. in *Rex* v. *Coppen* (1920), 47 O.L.R. 399 at 406, also *Rex* v. *Gudmondson* (1933), 59 Can. C.C. 355 at 362.

Many other objections of a detailed nature were raised to the charge. While I do not think they merit discussion I have not overlooked them. I do not wish to encourage any tendency in appellate Courts in criminal appeals to direct a minute and critical examination to nearly every sentence and phrase in the judge's charge: criticisms on minor points to which the jury in all probability never gave a thought and would not in any event appreciate. As stated in *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217 at 246:

> This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that,

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regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument.

I refer also to observations in *Rex* v. *Picariello and Lassandro,* [1923] 1 W.W.R. 1489 in the Supreme Court of Canada in respect to judges' charges to juries. What was said by Idington, J. at pp. 1490-91 is appropriate to the facts of this case:

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

I refer also to the judgment of Mignault, J., at p. 1506. I think these words are appropriate because the decisive facts in the case under review were simple. A charge, however erroneous, could scarcely prevent the jury from reaching a fair decision. The existence of a few simple facts in the case of a determinative nature and of comparatively easy solution should not be lost sight of in a lengthy discussion of errors, some possibly well founded in so far as legal principles are concerned, but in no sense leading, or tending to lead, to a miscarriage of justice. No substantial wrong occurred. In saying so I have in mind the views expressed by the Chief Justice of Canada in referring to section 1014 (2) of the Code in *Chapdelaine* v. *Regem,* [1935] S.C.R. 53 at 57 and 58 and the opinion of Cannon, J. at p. 59.

This is the second appeal from a conviction of the appellants. A new trial was directed by a majority. It was based in part on new evidence given by Joseph George. At this trial he did not adhere to the evidence that secured for the appellants a second trial. The chief complaint now is that the trial judge impressed his own views on the jury. That was not said of the charge in the first trial where a conviction was recorded. True, evidence was offered for the accused at the second trial and not at the first. That I think made little, if any, difference.

As I have already stated the chief defence or rather criticism (because it can only be that) is that these police officers should have waited until the following morning to make the arrest. There is no dispute that Gisbourne was killed in a brutal and shocking manner nor can there be any dispute in my opinion as to the proper disposition of the case if satisfied that the jury on proper evidence did not accept the theory of the defence, *viz.*, that the first act on meeting the appellants at the point X was for no possible reason the firing of a gun by Gisbourne. Even the question as to whether or not it was a prudent thing to attempt to arrest Eneas at night was left to the jury to decide. Every vital point upon which the decision turned was left to them unobscured by any possible misdirection on other aspects of the case. If on any ground another trial should be directed another jury would inevitably reach the same conclusion arrived at by the two juries who have already considered it. I would therefore refuse leave to appeal on the facts and mixed questions of law and fact; dismiss the appeal and affirm the conviction.

McQUARRIE, J.A.: I agree with my learned brother M. A. MACDONALD that this appeal should be dismissed.

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

Solicitor for appellants: *H. Castillou.*
Solicitor for respondent: *J. R. Nicholson.*

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## *IN RE* ESTATE OF BERTHA PRUDHOMME FOWLER.

## THE ROYAL TRUST COMPANY AND BERTHA FOWLER v. EDITH ALLEN.

*Will—Testamentary capacity—Delusions—Burden of proof — Evidence—Weighing of.*

A testatrix made a will on the 13th of April, 1933, and made a subsequent will in the latter part of September or the first week in October, 1935. She died on the 17th of December, 1935, and after her death the second will could not be found. The second will was drawn by her solicitor, who was unable to fix the exact date of its execution, but testified it was probably in the latter part of September or the first week of October, 1935. He further stated the will contained a clause revoking all former wills, but further than this he could not pledge his oath as to what were its provisions. On the 9th of November following, the testatrix became violently insane and was taken to a mental hospital where she remained until her death. The solicitor testified that he was acquainted with deceased and that when the will was executed he had an extended conversation with her and she showed herself perfectly capable of giving instructions for the will and of discussing intelligently other matters. In this he is corroborated by his stenographer who conversed with testatrix about several matters. A doctor who was called in consultation to see deceased on November 10th, 1935, testified that in his opinion deceased was suffering from *senile dementia*, which must of necessity be a slow progressive condition which gradually impairs the mental powers, and he was of opinion that deceased had not the mental capacity to make a will within a period anterior to her death which would embrace the suggested date of the 1935 will. This is corroborated by another doctor, whose opinion is based on the evidence adduced at the trial. Deceased's clergyman, her sister and other friends were called as witnesses, the general purport of their evidence being that in the winter of 1934-35 deceased had an attack of influenza, and after that a great change in deceased was noticed; she became suspicious and had delusions of attempted persecution. In an action to prove the will of the testatrix with counterclaim to have the testatrix declared intestate:—

*Held*, that the defence had not established affirmatively that the testatrix was of sound mind when she executed the 1935 will and therefore the question of intestacy does not arise since it is founded primarily on the validity of the 1935 will. The result is that the will of April 13th, 1933, is the last will and testament of the testatrix and probate thereof is decreed.

ACTION to prove the will of Bertha Prudhomme Fowler in

solemn form and counterclaim to have testatrix declared intestate. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Victoria on the 25th of June, 1935.

*Norris, K.C.*, for plaintiff Fowler.
*Maunsell*, for The Royal Trust Company.
*R. A. Wootton*, for defendant Allen.

*Cur. adv. vult.*

8th October, 1936.

MURPHY, J.: Action to prove the will of Bertha Prudhomme Fowler in solemn form. Counterclaim to have testatrix declared intestate. The true issue involved is the competency of deceased to make a second will, which allegedly revoked the one propounded for probate herein. The legal requirements as to competency are set out in *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, cited with approval in *Ouderkirk* v. *Ouderkirk*, [1936] 2 D.L.R. 417 at 418-9, a Supreme Court of Canada decision. They are:

"It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence, in such a case it is obvious that the conditions of testamentary power fails, and that a will made under such circumstances ought not to stand."

The rules as to *onus* of proof are two:

the first that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator:

*Barry* v. *Butlin* (1838), 2 Moore, P.C. 480 at 482.

The contents of the will are to be given great weight in deciding whether or not this *onus* has been satisfied.

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If a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the Court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it: *Symes* v. *Green* (1859), 1 Sw. & Tr. 401 at 402.

It follows from the requirements above set out that as stated in Taylor's Principles and Practice of Medical Jurisprudence, 8th Ed., 818, where the validity of a will is contested on the ground of incapacity, the issue is not whether the testator could have made a will in general or any kind of will, but whether he had capacity enough to make the particular will in dispute.

The will which plaintiffs propound is dated April 13th, 1933. It is proven to have been properly executed in conformity with the requirements of the Wills Act. It is rational on the face of it and there is affirmative evidence that the testatrix was of sound mind when she executed it. Though the validity of this will was put in issue in the statement of defence no attempt was made to question it on the trial. Defendant, however, claims that this April will was revoked by testatrix who it is alleged made a subsequent will in 1935, which revoked the 1933 will. This later alleged will could not be found after her death and reliance is placed on the presumption of law that in such circumstances it is to be taken as having been destroyed by the testatrix *animo revocandi* with the result that she died intestate.

Bertha Fowler one of the plaintiffs contests the validity of this 1935 will. The *onus* is therefore upon the defendant to establish it in conformity with the principles of law hereinbefore stated. The date of the 1935 will is not definitely established. It was drawn by a solicitor Mr. *Bullock-Webster* who was unable to fix the exact date of its execution, but states that it was executed probably in the latter part of September or the first week of October, 1935. The defendant seeks to satisfy the *onus* upon her of showing competency in the testatrix to execute this will by reliance upon the testimony of the said solicitor and his stenographer Miss Bullock-Webster. The first difficulty which the defence meets is that it cannot produce the 1935 will nor can it give any evidence of its contents further than that the

said solicitor testified that the 1935 will contained a clause revoking all former wills. As stated at the trial I accept without question the testimony of Mr. *Bullock-Webster* and his daughter as correct.

Mr. *Bullock-Webster* stated further that he had a general memory of the contents of the will but could not pledge his oath as to what were its provisions. Miss Bullock-Webster says in effect that all she remembers about the contents of the will was that it was very short, about a third of a page in length. Its due execution is proved by these two witnesses. Mr. *Bullock-Webster* testifies that he was acquainted with deceased and that on the occasion of the will being executed he had quite an extended conversation with her and that she showed herself perfectly capable of giving instructions for the will and of discussing intelligently other matters and he expressed the opinion that she was perfectly sane and competent to make a will. His daughter corroborated his testimony as to the testatrix having carried on an intelligent conversation about several matters. If this evidence stood alone it might well be that the defence would have satisfied the *onus* upon it of showing the validity of this 1935 will, although as neither the will nor its contents (apart from the single clause already quoted) could be placed before the Court it might well be questioned (as indeed it was questioned in argument) as to whether this evidence did more than merely establish the capacity of the testatrix to make a will in general and therefore did not satisfy the requirement that capacity must be shown to make the particular will in dispute. However that may be, the evidence does not stand alone. On November 9th, 1935, the testatrix became violently insane and had to be put under an opiate. On November 10th, 1935, she was removed to a nursing home and five days later was sent to the mental hospital at Essondale where she died on December 17th, 1935. On November 10th, 1935, Dr. Miller who testified at the trial was called in consultation to see the deceased. In his testimony he swore that in his opinion the deceased was then suffering from *senile dementia* and he advised she should be put in a proper institution where she could be taken care of. Both he and Dr. McKay an expert witness for the plaintiffs agree as to the nature

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of *senile dementia*. It is a mental condition due to an impoverishment of blood supply to the brain, which is the basis of nourishment caused by hardening of the arteries. According to the medical testimony this being the case it must of necessity be a slow progressive condition which gradually impairs the mental powers. Both medical men express the opinion that the deceased had not the mental capacity to make a will within a period anterior to her death which would embrace the suggested date of the 1935 will. Dr. Miller's opinion was based on his examination of the testatrix. Dr. McKay's opinion was based on the evidence adduced at the trial as he did not at any time see the deceased. Just as I accept without qualification the evidence called on behalf of the defence so also I accept as true the evidence of the various witnesses called on behalf of the plaintiffs. These witnesses included the personal friends of the deceased, her clergyman and her sister. The general purport of their evidence is that in the winter of 1934-35 the deceased had an attack of influenza; that up to that time she had been methodical and businesslike in her habits and of a markedly affectionate disposition towards her friends and her sister Mrs. Atchison. They noticed a great change in the deceased from the Spring of 1935, and which became more pronounced in September and October. She lost much weight. She became suspicious and had delusions of attempted persecution. Particularly she believed without any foundation that her sister Mrs. Atchison who had visited her from July 18th to October 15th, 1935, had been rummaging through her desk to examine her papers. This last delusion is of particular importance in view of the legal requirements for competency hereinbefore set out. The sister might well be an object of the bounty of testatrix situated as she was as to relatives. Testatrix had in fact made her sister one of the chief beneficiaries of the 1933 will. The deceased did not mention this delusion until about the time of the execution of the will or possibly a little later but in view of the medical testimony it may well have existed for some time before she spoke of it.

Inasmuch as I have not before me either the will of 1935 or any testimony as to its contents other than that it contained a

revocatory clause, I am deprived of one of the chief means of arriving at a conclusion as to wether or not the *onus* upon the defence to establish the 1935 will has been satisfied, since I cannot say whether or not it was rational on its face under all the circumstances.

Weighing the evidence adduced by the defence and the evidence adduced on behalf of the plaintiff Bertha Fowler, and keeping in mind the fact that the contents of the 1935 will are unknown I am unable to hold that the defence has established affirmatively that the testatrix was of sound mind as above defined when she executed the 1935 will. That being my view the question of intestacy does not arise since it is founded primarily on the validity of the 1935 will.

The result is that the will of April 13th, 1933, in my opinion is the last will and testament of the testatrix and I decree probate thereof.

In view of all the facts I think this is a case where the Court should order the payment of the costs of all parties on a party and party basis to be paid out of the estate and I so direct.

*Judgment for plaintiffs.*

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## PATTEN v. SILBERSCHEIN.



*Negligence—Damages—Pedestrian run down by motor-truck—Loss of money from pocket—Liability for loss.*

The plaintiff, who was run down by a motor-truck negligently driven by the defendant, remained unconscious until he woke up in a hospital. While unconscious he lost $80 from his pocket.

*Held*, that if the defendant is negligent he is liable for the consequences of his act, whether probable or not, and the plaintiff is entitled to recover the sum so lost.

*In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, followed.

ACTION for damages resulting from the negligent driving of a motor-truck by the defendant. Tried by MCDONALD, J. at Vancouver on the 12th of March, 1936.

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*C. L. McAlpine,* and *W. H. Campbell,* for plaintiff.
*Bull, K.C.,* and *Ray,* for defendant.

*Cur. adv. vult.*

16th March, 1936.

McDONALD, J.: Upon the trial I held that the defendant was liable to the plaintiff in damages for having with his motor-truck run down the plaintiff, a pedestrian, upon a street in Vancouver, it being my opinion that the defendant's negligence was the sole cause of the accident. In the collision plaintiff was knocked down and lay unconscious upon the street and remained unconscious until he later awoke in the hospital. I assess his general damages at $1,000 and, apart from the item hereafter mentioned, I fix his special damages at $655.35.

The plaintiff has proven to my satisfaction that during the period while he was unconscious, in some way or other, he lost $80 which was in his pocket. I had thought that this claim for damages was too remote; that such loss was not the natural and probable consequence of the defendant's act of negligence. Counsel, however, brought to my attention the statement in Salmond on Torts, 7th Ed., 153-4, where the author says:

> The Court of Appeal in *In re Polemis and Furness, Withy & Co.,* [1921] 3 K.B. 560, has now definitely rejected the supposed rule that a wrong-doer is only responsible for the natural and probable consequences of his act. The probability of evil consequences is doubtless a test of whether the defendant was negligent or not; but if he was negligent, he is liable for the consequences whether probable or not.

and also the case of *Glover* v. *London and South-Western Railway Co.* (1867), L.R. 3 Q.B. 25; 37 L.J.Q.B. 57. Upon these authorities I am of opinion that the plaintiff is entitled to recover this sum of $80

*Judgment for plaintiff.*

## WIETING & RICHTER LIMITED v. BRAID TUCK & COMPANY LIMITED.

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*Sale of goods—Sale by description—Estoppel—Misrepresentation—Buyer led to believe goods same as goods previously delivered—Sale by sample —Admissibility of evidence as to.*

The plaintiff company, coffee exporters in British Guiana, entered into seven contracts by cable for the sale of coffee to the defendant company, wholesale coffee merchants in Vancouver, and action was brought for the purchase price of the coffee delivered under the last two of the seven contracts. The last two contracts were made after the arrival of the shipment under the first contract, which was accompanied by a sample. The defendant claimed in the alternative that it entered into contracts two to seven relying upon the representations of the plaintiff that the coffee to be purchased would be fair average quality Demerara Liberian Coffee and would correspond with the sample of such coffee furnished by the plaintiff, that these representations were material and believed in by the defendant, and induced it to enter into the contracts and that the coffee delivered was of an inferior quality to the sample, and it was therefore entitled to rescind. It was further submitted that the plaintiff was estopped from setting up that Demerara Liberian Coffee F.A.Q. was other than in accordance with the first shipment and the sample, that the sale was by description and there was an implied condition that the coffee should correspond with the description, and that as it did not, it was entitled to refuse to accept the coffee. According to the evidence the defendant advised the plaintiff before the arrival of the first shipment that it did not know anything about Demerara Liberian Coffee F.A.Q., that it was "working in the dark" and that it would not make any further offer until satisfied from a sample or the first shipment as to the coffee which the plaintiff proposed to sell. The plaintiff knew that the defendant did not know what Demerara Liberian Coffee F.A.Q. was and that in British Guiana there were several grades of Demerara Liberian Coffee F.A.Q. It knew that before the defendant entered into the last two contracts it had received only the first shipment and the sample which accompanied it, and that the defendant would believe that that shipment and sample represented what Demerara Liberian Coffee F.A.Q. was, and that if it ordered any more coffee it would be because of the favourable view it took of the shipment and sample. The defendant did act on the favourable view it took of the first shipment and sample, and as a result entered into the last two contracts. It was found that the first shipment and sample were of a superior grade to Demerara Liberian Coffee F.A.Q. and could not be correctly described as such and were much superior to the rejected coffee, but the sales were held to be sales by description and not by sample.

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*Held*, that the actions of the plaintiff led the defendant to believe that Demerara Liberian Coffee F.A.Q. was like the first shipment and sample, and the plaintiff was estopped from saying the first shipment of coffee and sample was not Demerara Liberian Coffee F.A.Q. As a result it did not perform its contract by shipping coffee of the description in the contract. The defendant was entitled to reject the coffee forwarded pursuant to the last two contracts and was further entitled to rescind the last two contracts because of the innocent misrepresentation which induced it to enter into the contracts.

In the case of a contract for the sale of goods in writing in which no reference is made to a sample and there is no custom or usage which implies that the sale was made by sample, parol evidence is not admissible to prove that the sale was in fact by sample.

ACTION for the sale price of shipments of 500 bags of Demerara Liberian Coffee F.A.Q. pursuant to two contracts entered into between the plaintiff and the defendant. The facts are set out in the head-note and reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 1st of October, 1936.

*Bull, K.C.*, and *Ghent Davis*, for plaintiff.
*Nicholson*, and *Yule*, for defendant.

*Cur. adv. vult.*

8th October, 1936.

ROBERTSON, J.: The plaintiff at all material times carried on business as coffee exporters in Georgetown, British Guiana. The defendant during the relevant period carried on business in Vancouver, B.C., as wholesale coffee merchants.

About September 16th, 1932, the defendant got its banker, the Bank of Toronto, to cable Barclay's Bank in Georgetown for the name of a reliable coffee exporter and for information as to the quality available, description, type, price, etc., of coffee. Barclay's Bank replied as follows:

Wieting & Richter would supply 200 bags each 160 lbs. Demerara Liberian Coffee fair average quality at 9½ cents Canadian funds F.O.B. Demerara sight draft Shipments Canadian transport line end October beginning November. New crop coming in November. Could then offer larger quantities.

Subsequent to this, the plaintiff and defendant entered into seven contracts for the sale of 1,200 bags of coffee to the defendant. The first of these contracts was made by a cable of

September 22nd, 1932, from the defendant to the plaintiff, reading as follows:

> Reference cables from Barclay's Bank and Bank Toronto ship two hundred bags Demerara Liberian Coffee fair average quality first direct steamer to Vancouver nine a half cents Canadian Funds F.O.B. Demerara. Advise shipping date;

and the plaintiff's acceptance by cable of this offer on the same day. The second contract was made by a cable dated October 8th, 1932, from the plaintiff to the defendant offering "further 100 bags Demerara Liberian Coffee" and the defendant's cabled acceptance of October 12th, 1932. It will be convenient to note here that the first shipment consisted of 286 bags, being 200 bags of coffee shipped under the first contract and 86 bags shipped at the same time pursuant to the second contract. The remaining fourteen bags covered by the second contract were shipped with the coffee purchased under the third contract. The third contract was for 100 bags and was made by cables on October 26th and 27th, 1932. The fourth contract was for 200 bags and was made by cables on November 17th, 1932. The fifth contract was for 100 bags and was made by cables of November 19th, 21st, 22nd and 23rd, 1932. On December 7th, 1932, the first shipment together with a sample, which had been forwarded at the same time, arrived in Vancouver. This was the only sample the defendant received at any time. There is no reference in these five written contracts to a sample. The plaintiff takes the position, and the defendant admits, that these five contracts were sales by description. The defendant accepted and paid for all the shipments made under those five contracts. The defendant counterclaims for damages in respect of contracts three, four and five but before dealing with this I shall first refer to the facts relating to the entering in of the sixth and seventh contracts. The defendant made a thorough examination of the first shipment and the sample, found the shipment was in accordance with the sample and was perfectly satisfied. On December 7th, it cabled the plaintiff that the first shipment had arrived and asked it "to cable price also quantity available December shipment." As a result the plaintiff cabled on December 8th, 1932, offering "firm F.O.B. 8 cents 200." The defendant made a counter offer of 7½ cents which the plaintiff

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accepted on December 9th. This was the sixth contract. These cables were confirmed by letter from defendant to the plaintiff dated December 9th, 1932. Neither in this letter nor in the cables is any mention made by the defendant of the receipt of the sample. On December 21st the defendant cabled "offer 300 bags" and the plaintiff accepted this offer on December 21st, 1932. This was the seventh contract. By letter, dated December 22nd, 1932, the defendant advised the plaintiff of the arrival of the first shipment on December 7th, 1932, and said they "are very satisfactory and we trust that all other shipments will be up to this standard." It will be noticed that nothing was said in the cables or this letter about the sample. I now return to the counterclaim. It is important to bear in mind that the first five contracts were made prior to December 7th, 1932, the date of the arrival of the first shipment. As early as September 23rd, 1932, the defendant wrote the plaintiff asking for samples. The following facts are relied upon by the defendant in support of its counterclaim and defence to the action. The plaintiff wrote on September 23rd, 1932 (received October 12th, 1932) saying it was "forwarding by next opportunity a representative sample of F.A.Q. Demerara Liberian Coffee." By letter of October 4th, 1932, the plaintiff said it would forward "*per* next opportunity samples of local coffee." By letter dated October 12th, 1932 (received by defendant on November 9th, 1932) the plaintiff advised the defendant:

> "We are forwarding you *per* bearer under separate cover two samples one of fair average quality which is the usual grade obtainable in the Colony which we have marked Demerara F.A.Q. travellers sample."

On October 27th, 1932, the defendant cabled the plaintiff to "Air mail samples." By letter dated October 31st, 1932 (which the defendant received November 12th, 1932) the plaintiff advised the defendant it had already mailed a sample and that it was forwarding another sample "*per* first ordinary opportunity instead of air mail." On receipt of the plaintiff's cable offer of November 5th, 1932, the defendant replied by cable on November 7th, 1932, that it would "telegraph firm offer as soon as sample arrives." On November 9th, the defendant wrote the plaintiff that it had not received "any samples of this class of coffee and naturally we are working right in the dark" and that

it hoped to receive some samples within the next few days and then would immediately wire the plaintiff "with reference to future orders." The plaintiff received this latter on December 2nd, 1932. The plaintiff on November 11th, 1932, cabled the defendant "First sample posted fourteenth October." However, although the defendant did not receive the sample until December 7th, 1932, it entered into contracts 3, 4 and 5 before November 24th, 1932. On November 29th, 1932, plaintiff cabled the defendant offering 100 bags to which the defendant replied by cable as follows:

Will cable offer as soon as shipment arrives next Wednesday.

The plaintiff wrote the defendant on December 2nd, 1932:

We trust by now the samples we have sent off on two different occasions, have arrived safely and we note you will telegraph firm offer for further shipments;

and that "they took particular care that all shipments should conform to samples and be up to the standard of what is required," and further said:

The shipments of Demerara Liberian Coffee which we have made to you are all of average quality and a very fair average at that, actually, with regard to the 300 bags now being shipped . . . [Contracts 4 and 5.] We have cuptested the samples and are fully satisfied the coffee is up to standard.

The defendant received this letter on December 22nd. The defendant held a meeting of its salesmen between Christmas, 1932, and the end of the year. They were supplied with samples of the first shipment and proceeded to go out to sell the coffee. They sold all the first shipment except one and a half bags and their purchasers were satisfied. They also sold about 14 bags and took orders for a lot of coffee which they proposed to deliver out of the coffee they were to receive under the contracts 3, 4 and 5. The 100 bags covered by the third contract, together with fourteen bags to be delivered under the second contract, arrived on January 11th, 1933, and a further 300 bags, *i.e.*, the coffee covered by the fourth and fifth contracts, arrived and were delivered to the defendant between the 18th and 31st of January, 1933. As I have said, on January 14th about fourteen bags out of the 114 bags had been shipped to customers of the defendant and some of these were dissatisfied with the coffee. About January 24th, in consequence of complaints of

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the coffee from its purchasers, the defendant's manager Tuck instructed Orchard, its sales manager, to visit the customers to whom the coffee had been sold and delivered, and those to whom coffee had been sold, and explain that the coffee which they had received from the plaintiff was not of the standard which they had proposed to ship to their customers; that it was not up to the sample shown to them and to come to some arrangement with these customers. Some of the wholesale and retail purchasers cancelled their orders and others insisted that the defendant carry out its contract with them. To do this the defendant had to supply other coffee which had cost it more than the coffee agreed to be purchased from the plaintiff. The defendant sold the balance of the coffee received under contracts 3, 4 and 5 and sustained a loss for which no claim is now made. The counterclaim is for Orchard's expenses on this trip and the loss on the coffee supplied to the defendant's customers in place of the coffee which the defendant had agreed to sell.

The defendant sold all the coffee delivered to it under contracts 3 to 5. In my opinion the coffee supplied was Demerara Liberian F.A.Q. and having got what it bargained for I cannot see that it is entitled to the damages claimed.

It is agreed by the parties that the laws of British Guiana govern.

Section 60 of the Sale of Goods Ordinance of British Guiana provides, in part, as follows:

(2) The rules of the English law, including the law merchant, except in so far as they are inconsistent with the express provisions of this Ordinance, and in particular the rules relating to the law of principal and agent, warranty, suretyship, and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall apply to contracts for the sale of goods, and the rules of the Roman Dutch law shall not apply.

Turning now to the plaintiff's claim for the sale price of the shipments of 500 bags pursuant to the sixth and seventh contracts: The defendant first submits that these were sales by description and sample. Section 17 (1) of the Ordinance provides, in part, as follows:

17—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

There was no express term in the contract. Was there an implied term? I think the only implied terms (unless expressly

or impliedly excluded) are those existing by virtue of custom or usage or, of course, by statute. Erle, C.J. in *Meyer* v. *Dresser* (1864), 16 C.B. (N.S.) 646, at 660; 33 L.J.C.P. 289; 143 E.R. 1280, said:

> Many contracts are construed by the course of business in the particular trade or in the particular place where they are made. But that is not at all analogous to a universal usage pervading the whole world. In the cases where such local usages are imported into the contract, it is because they tacitly form part of it, like those contracts in which we find the words "and other usual terms." They then form part of the contract itself. The contract expresses what is peculiar to the bargain between the parties, and the usage supplies the rest.

This case was cited with approval by Lord Atkinson in *Produce Brokers Company* v. *Olympia Oil &c. Co.* (1915), 85 L.J.K.B. 160; [1916] 1 A.C. 314, at 324. Other cases of terms implied by custom or usage are *Syers* v. *Jonas* (1848), 2 Ex. 111; 154 E.R. 426; *Hutton* v. *Warren* (1836), 1 M. & W. 466; 5 L.J. Ex. 234; 150 E.R. 517. See also other cases referred to in Anson's Law of Contract, 17th Ed., pp. 318-319. In *Harnor* v. *Groves* (1855), 15 C.B. 667; 24 L.J.C.P. 53; 139 E.R. 587, it appeared that the defendant's agent offered, in the shop of one Mackness, to sell to the plaintiff some flour which he represented to be "of the same quality as some that he had recently sold to Mackness" and which had given satisfaction. The plaintiff ultimately agreed to buy 25 sacks. The contract note did not mention the above statement. The flour was delivered and it was not of the same "mark" as that sold to Mackness. The plaintiff sued for breach of warranty. The defendant submitted that the written contract alone must be regarded as the contract between the parties and that parol evidence was not admissible to introduce a warranty inconsistent therewith. Maule, J., with whom Cresswell and Williams, JJ. agreed, said at pp. 674-5:

> As to the first count, which alleges the agreement to be that the defendant should sell and deliver to the plaintiff, and that the plaintiff should buy of the defendant, twenty-five sacks of flour of the same quality as certain flour which the defendant had then lately sold to one Mackness,—The contract between the parties was reduced into writing: and the rule is, that, where a contract, though completely entered into by parol, is afterwards reduced into writing, we must look at that, and at that alone, even though part of the terms previously agreed upon are not inserted in the written contract. It is by the written contract alone,—subject, of course, to be interpreted by

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the usages of trade, as in *Syers* v. *Jonas*,—that the parties are bound. And more especially is that so in a case where, as here, the contract is one which by the Statute of Frauds is required to be in writing. The object of that statute, as appears from its title and preamble, was, to prevent frauds and perjuries; the Legislature knew that parties who make bargains with each other often take very different views of them; and therefore they provided, in order to remove the temptation as much as possible, that, in cases of contracts for the sale of goods exceeding the value of 10*l.*, the contract, or some note or memorandum thereof, shall be in writing. The intention of the Legislature was, that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it. The usages of trade form the exception, because parties are supposed to contract with reference to them. Here, however, the plaintiff seeks to introduce into the contract a special stipulation as to which the writing is altogether silent; and which has no reference to any usage of trade. That would be introducing the very mischief which the Statute of Frauds intended to prevent.

For the above reasons I think the evidence was not admissible to show, if that were the case, that the sale was by sample. There are three decisions of Lord Ellenborough to which I shall now refer. In *Tye* v. *Fynmore* (1813), 3 Camp. 462; 170 E.R. 1446, the facts were the defendant refused to accept certain sassafras wood alleging that the wood shipped was not of the sort the defendant had a right to accept from the description in the sale book. The plaintiff proved that the defendant was a druggist and well skilled in articles of the sort in question and that the day before the contract was entered into a specimen of the wood was exhibited to him. He kept it for a night and had full opportunity to examine it. Notwithstanding this the plaintiff failed. Lord Ellenborough said at pp. 462-3:

> This is not a sale by sample. It is not enough for the plaintiff to prove that the wood corresponds in quality with the specimen exhibited to the defendant before the sale. The question is, whether it was in the understanding of the trade "fair merchantable sassafras wood"; which it is clearly proved not to have been. It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity.

In *Gardiner* v. *Gray* (1815), 4 Camp. 144; 171 E.R. 46, the facts were the defendant was importing some waste silk and showed several samples of it to the plaintiff's agent. Then a bargain was made and the sales note written which made no reference to the samples nor did it specify the quantity of the commodity. On its arrival the plaintiff examined it and found

it to be much inferior to the sample and of a quality not salable under the denomination of waste silk. Lord Ellenborough said at pp. 144-5:

I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity.

In *Meyer* v. *Everth* (1814), 4 Camp. 22; 171 E.R. 8, it appeared that upon the sale of goods the defendant produced a sample of certain sugar but the bought note made no reference to the sample. Lord Ellenborough said at p. 23:

You should have declared in case for a deceitful representation. It was no part of the contract that the sugar should be equal to the sample. Where goods are sold in this way, I think evidence might be admissible to show that, at the time of the sale, a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out of greatly inferior quality and value. But when the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would be contrary to *Meres* v. *Ansell* (1771), 3 Wils. 275; 95 E.R. 1053, and would amount to an admission of parol evidence to contradict a written document. In truth, the present was not a sale by sample; and the sample can only be used as evidence of a deceitful representation.

A decision of the Court of Appeal in England on this point is that of *Ginner* v. *King* (1890), 7 T.L.R. 140. There the plaintiff's traveller showed to the defendant a sample of sugar and the defendant agreed to purchase 50 bags. Afterwards the plaintiff sent a sold note to the defendant which did not mention the sample. The defendant did not return or repudiate this but sent directions as to shipment. The defendant refused the goods and the plaintiff sued either to recover their price or for damages. The defendant set up that the sale was by sample. The Court held that it was not a sale by sample. No question of misrepresentation or estoppel by representation was raised.

I hold that the sale was by description.

Alternatively the defendant pleads that it entered into contracts two to seven relying upon the representations of the plaintiff that the coffee to be purchased would be fair average quality Demerara Liberian coffee and would correspond with the sample of Demerara Liberian Coffee F.A.Q. furnished by the

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plaintiff and that these representations were material and believed in by the defendant and induced it to enter into the contracts and that the coffee delivered was of an inferior quality to the sample and it was, therefore, entitled to rescind. Further, alternatively, it submits the plaintiff is estopped from setting up that Demerara Liberian Coffee F.A.Q. was other than in accordance with the first shipment and the sample and as the sale was by description there was an implied condition that the coffee should correspond with the description (section 15), and as it did not, it was entitled to refuse to accept the coffee. It will be noticed that the three decisions of Lord Ellenborough were in common-law actions, long prior to the Judicature Act. No misrepresentation was alleged. The reason for this was plain. At common law an innocent misrepresentation was no ground for rescission or resisting specific performance unless it was a term of the contract or fraudulent. See *Meyer* v. *Everth, supra.* See Anson's Law of Contract, 17th Ed., pp. 178-180, also *Behn* v. *Burness* (1863), 3 B. & S. 751; 122 E.R. 281, in which Williams, J., who delivered the judgment of the Exchequer Chamber on an appeal from the Court of Queen's Bench, said at p. 753:

> It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing), is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue.

Jessel, M.R. said in *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1, at 12 and 13; 51 L.J. Ch. 113:

> As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made it was false. . . . . As regards the rule of Common Law there is no doubt it was

not quite so wide. There were, indeed, cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true.

In equity on the other hand an innocent misrepresentation, prior to the Judicature Act, was sufficient to justify rescission of a contract. See *Rawlins* v. *Wickham* (1858), 3 De G. & J. 304; 44 E.R. 1285. There is no doubt that since the Judicature Act an executory contract can be rescinded for an innocent misrepresentation which operated as a material inducement to the party to whom it was made to enter into the contract. In *MacKenzie* v. *Royal Bank of Canada,* [1934] A.C. 468, at 475; [1934] 2 W.W.R. 620, at 624; 103 L.J.P.C. 81, Lord Atkin, in delivering the judgment of the Judicial Committee, said:

A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently.

From the correspondence, *supra*, it appears that before December 7th, 1932, the date of the arrival of the first shipment, the defendants made it clear to the plaintiff that it did not know anything about Demerara Liberian Coffee F.A.Q.; that it was "working in the dark" and that it would not make any further offer until it was first satisfied from a sample or the first shipment as to the coffee which the plaintiff proposed to sell. The plaintiff knew that the defendant did not know what Demerara Liberian Coffee F.A.Q. was and that in British Guiana there were several grades of Demerara Liberian Coffee F.A.Q. It knew, that before the defendant entered into the last two contracts, it had only received the first shipment and the sample which accompanied it and that the defendant would believe that that shipment and sample represented what Demerara Liberian Coffee F.A.Q. was and that if it ordered any more coffee it would be because of the favourable view it took of the shipment and sample. The defendant did act on the favourable view it took of the first shipment and sample and as a result entered into the last two contracts.

The question then is: Did the rejected coffee correspond with the first shipment and sample? Edghill was the man in charge

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for the plaintiff in connection with the first shipment. He kept a sample (Exhibit 12) of the first shipment which he says is a fair sample of Demerara Liberian Coffee F.A.Q. Tuck and Orchard, who examined the first shipment and the sample (Exhibit 13) which arrived with it, said they were the same standard. After the arrival of the coffee Williams, who trucked the coffee from the wharf to the defendant's warehouse, took a large sample which is Exhibit 54. In December, 1932, Raymer took a representative sample from this first shipment which is Exhibit 57. Irish took a sample from the first shipment in December, 1932, which is Exhibit 53. He was not prepared to say it was a representative sample but Tuck, who was there, says it was. Irish also took a sample (Exhibit 56) in Court, from one of the remaining bags out of the first shipment and his comment was that this sample was brighter than Exhibit 53. Kinney drew a representative sample (Exhibit 31) from one and a half bags of the first shipment. Now I have looked at Exhibits 13, 31, 53, 54, 56 and 57 and they appear to me to have about the same appearance and quite different to Exhibit 12. Edghill was shown Exhibit 31 and he admitted it was a better grade or standard than F.A.Q.; that it was of a superior quality; that his firm would not think of "selling quality like this as fair average quality" and that it was superior in every way to F.A.Q. Edghill also admitted that a composite sample (Exhibit 47) drawn by Kinney from the last 500 bags (contracts 6 and 7) is much inferior to Exhibit 13. Walcott, an expert called on behalf of the plaintiff, speaking of Exhibit 31, says that he could not imagine an intelligent shipper sending Exhibit 31 as F.A.Q. He thought that a person who would send such a sample as F.A.Q. had made a mistake or was a fool and comparing Exhibit 31 with Exhibit 12 he said Exhibit 31 was "far superior coffee."

I find the first shipment and sample were of a superior grade to Demerara Liberian Coffee F.A.Q. and much superior to the rejected coffee. The first shipment and sample could not be correctly described as Demerara Liberian Coffee F.A.Q. The actions of the plaintiff led the defendant to believe that Demerara Liberian Coffee F.A.Q. was like the first shipment and sample and I think the plaintiff is now estopped from saying the

first shipment of coffee and sample was not Demerara Liberian Coffee F.A.Q. As a result it did not perform its contract by shipping coffee of the description in the contract. The language in *Pickard* v. *Sears* (1837), 6 A. & E. 469; 112 E.R. 179, applies to this case. It is there said:

> Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

The defendant was, in my opinion, entitled to reject the coffee. I think also that the defendant was entitled to rescind the last two contracts because of the innocent misrepresentation which induced it to enter into the contracts. The action and the counterclaim must be dismissed, each with costs.

*Judgment accordingly.*

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## REX v. JEAN McINTOSH.

*Trial—Murder—Abortion—Dying declaration—Test of admissibility.*

Dying declaration only receivable when death of declarant subject of charge and circumstances of death the subject of the declaration—then only after most careful scrutiny of circumstances in which declaration made. It is not the law that to render declaration admissible it must be shown that declarant was in expectation of "immediate" death nor is fact that declarant did not die immediately after declaration a test of admissibility. The fact that death was postponed may have weight with Court in determining whether declarant was absolutely without expectation of recovery at the time of the making of the declaration; so, too, the certainty of the immediate death may assist in guiding the Court to the conclusion that the declarant was without expectation of recovery. The fact that after the making of the declaration the declarant at a later time had some expectation of recovery is not a determining factor upon the question of admissibility. The test is: Was the declarant at the time of the declaration "utterly without expectation of recovery from her then illness"? The use of the word "hope" in the judgments on the point is unfortunate, the test is not "hope" but the sterner test of "expectation." If there is doubt as to the admissibility it should be resolved *in favorem vitæ*. Declaration admitted.

*Rex* v. *Perry*, 78 L.J.K.B. 1034; [1909] 2 K.B. 697, discussed.

TRIAL for murder at the Vancouver Fall Assizes, *coram* MANSON, J., accused being charged with performing an abortion on a woman who died. In the course of the trial a question arose as to the admissibility of a dying declaration by the deceased woman.

21st October, 1936.

*J. A. Russell,* and *Colgan,* for the Crown.
*Crux, Gonzales,* and *C. M. Stewart,* for accused.

MANSON, J.: The law casts upon me in this case a very heavy responsibility, the responsibility of saying whether a dying declaration, as it is called, is or is not admissible in evidence. Declarations of this character are to be received only in cases where the death of the declarant is the subject of the charge and the circumstances of the death the subject of the dying declaration, and then only after the most careful scrutiny of the cir-

cumstances in which the declaration was made. The language of Byles, J. in *Reg.* v. *Jenkins* (1869), 38 L.J.M.C. 82, at 86, indicates the reasons for the careful scrutiny. There the learned judge made these observations:

> These dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected.

The law as I view it may be briefly stated thus: The Crown must show that the statement was made under the influence of a settled conviction on the part of the deceased that death would ensue as a direct result of the then illness. It must be established that all expectation of recovery has been abandoned by the deceased.

Learned judges have sometimes said that the deceased must have been in expectation of "immediate" death. I do not think that is the law. I do not think it is the law that the Crown must show that the deceased was in expectation of "immediate" death, nor do I conceive it to be the law that the fact that the deceased does not die immediately after having made the statement is a test. The fact that death is postponed for a period may have weight with the Court in determining the question as to whether the declarant was absolutely without expectation of recovery at the time of the making of the declaration; so too, the certainty of the immediate death may assist in guiding the Court to the conclusion that the declarant was without expectation of recovery. The fact that after the making of the declaration the deceased at a later time had some expectation of recovery is not a determining factor upon the question of admissibility. I think the result of the cases is simply this—or the test is: Was the deceased at the time of the making of the declaration utterly without expectation of recovery from her then illness? I might add that if doubt there be it must be resolved *in favorem vitæ*, that is, in favour of the prisoner.

I think it is unfortunate that the word "hope" has been used in judgments in dealing with the admissibility of dying declarations, and frequently coupled with the word "expectation." I think it is a bold man who will venture to say when hope finally vanishes from the human breast. I do not think that it is

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necessary for us to go into the question of hope. Hope is one of those intangible things, and in a great majority some vestige of hope—hope of the miraculous, hope of the unexpected, remains almost until the last breath. The test is not, as I conceive it, hope, but rather the sterner test of expectation. Is the patient without any expectation? Perhaps I should put it even more strongly: Is she utterly without expectation of recovery? I can see that such a state of mind might exist even in the presence of a lingering hope, and I think it is upon that basis the test must be made.

The foundation for the admission of declarations of this character has been repeatedly stated, and it is one with which we are all well familiar. Lord Alverstone, C.J. in *Rex* v. *Perry* (1909), 78 L.J.K.B. 1034 at 1037 stated it this way, quoting Eyre, C.B. in *Rex* v. *Woodcock* (1789), 1 Leach, C.C. 500:

> Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice.

Lord Alverstone, C.J. in that case considers some of the prior judgments, and in view of the fact that I propose to follow what I believe to be Lord Alverstone and his Court's declaration of the law—because he was speaking specifically for his Court on that occasion, and a unanimous Court—I think it well that I should read from a portion of his judgment:

> In consequence of the arguments in the present case, I think it desirable to say that the expression, "when the party is at the point of death," which has given rise in one case to some misapprehension and in *Reg.* v. *Osman* [(1881)], 15 Cox, C.C. 1 is spoken of as "immediate death," is not really the test as to the admissibility of a statement as a dying declaration. Of course death must be imminent.

Now I construe that to be, "imminent" in the mind of the deceased. The actuality, as I have already observed, is not of importance except in so far as it may be a guide to the Court in ascertaining what was in the mind of the deceased.

> But the material test is that the statement must be made when every hope of life is abandoned by the person making the statement.

As I have said, I would substitute the word "expectation" for the word "hope."

That is the real principle, and has been recognized as such in some of the more recent cases, to one or two of which I wish to refer. In *Reg.* v. *Peel* [(1860)], 2 F. & F. 21 Mr. Justice Willes used the expression, "It must be proved that the man was dying, and there must be a settled, hopeless expectation of death in the declarant." That puts in very clear language the test which I have tried to explain. In *Reg.* v. *Gloster* (1888), 16 Cox, C.C. 471, Mr. Justice Charles, after reviewing the cases and citing *Woodcock's Case*, *Reg.* v. *Peel*, and *Reg.* v. *Osman*, where Lord Justice Lush used the words, "the person making the declaration must entertain a settled hopeless expectation of immediate death," expressed the view that the word "immediate" might be misunderstood, and laid down the principle in this way: "The whole of the facts must be looked at from first to last; and I may say before I refer to the evidence in detail that it goes no further than this: that the woman thought that she was dying, thought that she would not recover, but in my judgment—and it is a most difficult thing to form a judgment of what was passing through the mind of this unfortunate woman —she did not entirely give up hope. And unless I can come to the conclusion that every hope was extinguished and gone I cannot admit the statement." I also think it is desirable to read a passage in the earlier part of the judgment of Mr. Justice Charles in which he referred to the reasons why he differed from Lord Justice Lush. He said, after reading the passage from the judgment of Lord Justice Lush already referred to: "That is the judgment of Willes, J. with this addition, that Lush, L.J. inserts the word 'immediate' before death, and goes on to say: 'If he thinks he will die tomorrow it will not do.' With the greatest deference to the latter very learned judge I would rather prefer to adopt the language of Willes, J. and say that the declarant must be under a 'settled hopeless expectation of death.' 'Immediate death' must be construed in the sense of death impending, not on the instant, but within a very very short distance indeed. These are the principles that have been laid down and are to guide me in the exercise of my judgment." That is what I endeavoured to express when I said that all hope of life must have been abandoned, so that the person making the statement is in the expectation of imminent death, before the statement is admissible as a dying declaration. It is unnecessary to cite other cases. I have endeavoured to lay down what we conceive the true principle to be.

And then the learned judge goes on to deal with the particular facts of that case, which, oddly enough, is a case parallel to the one at Bar; and in conclusion he says:

Speaking for the Court, I think that the right view is that the judge has to be satisfied that the person making the statement made it at a time when there was a settled hopeless expectation of death in the declarant. I use the expression "hopeless expectation of death" because that is the form of language used by Mr. Justice Willes, but by that I mean hopeless expectation of life.

If I were to use my own language I would say, as I have said before, utterly without expectation of life. [It is to be

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noted that Lord Alverstone, C.J. after canvassing the cases says that the right view is that the judge must be satisfied that the declarant had a "hopeless expectation of life." Looking at the last-quoted phrase I do not think the phrase means "without hope of recovery and with no expectation of life." The learned Chief Justice is not speaking of "hope" but of "expectation" and the word "hopeless" is, in the phrase in which it is used, synonymous with the word "no." If I may say so with respect, I think the phrase "utterly without expectation of life" is more apt than the phrase "hopeless expectation of life." "Expectation" is a practical thing that a Court may ascertain; "hope," on the contrary, is something entirely different—it is intangible and metaphysical and I know of no satisfactory way in which its presence or absence can be established with certainty. *Addendum* made by MANSON, J. after the conclusion of the trial in the presence of counsel and the clerk of the Court.]

Now I come to the particular facts—that is the law as I conceive it—in this case. I am going to make reference to those portions of the evidence that I think are particularly pertinent. I turn to the evidence of Dr. MacLachlan first, and he says: "I told her she was very very ill and asked her if she knew she was going to die. She said yes, she knew she was going to die. I asked her if she would like to tell what happened before she went away." In cross-examination, Dr. MacLachlan says, "I told her she was very extremely ill, at the house." And then later on, "I think I told her she was going to die. I made it plainer to her than saying 'I told her that she was seriously ill, I told her that there was danger of her death.'" He says, "I made it plainer than that."

When reference was made to questions 74 and 75 of, I think, his evidence at the preliminary hearing, and this portion was quoted, "No, I told her I didn't think she would get better," the doctor's comment on that was, "I am positive that I told her—if I said that she could not get better, nevertheless I am positive I impressed upon her that she could not get well." That is his comment. Then he says further in cross-examination, "She replied quite quickly, 'Yes, I know I am not going to get better.'" And then the doctor adds, "I told her only once about her non-

recovery." Then we turn to the evidence of Dr. Stalker. He gives his account of what Dr. MacLachlan said. He put it this way, he says,—

I can't remember the exact words, but substantially they were these: "Mrs. Vellocette, you know that you are seriously ill?" She nodded. Dr. MacLachlan said again, "You know, Mrs. Vellocette, that I think you are going to die?" She replied, "I think so too."

Dr. McKay, of course, has certified that the girl was of sound mind, clear, and that appears from the evidence of the witnesses.

Then Mr. Crompton spoke of what Dr. MacLachlan said. He gives this account:

"You know, Mrs. Vellocette, you are a very, very sick woman and there is no chance of you getting better?" She replied, "I know that, doctor."

Then in Mr. Crompton's evidence he says that when he withdrew to draw the longhand statement which he was going to ask the girl to sign, he prefaced it by this paragraph:

I, Phyllis Vellocette, now lying at the General Hospital in the City of Vancouver, firmly believing that I am dying and have no hope of recovery, do make this my dying declaration.

He said he took that back to her, that he read it twice, and in substance asked her if she understood, and she assented that she did, and agreed that that was her condition. He says she spoke frankly and freely.

Then we turn to the evidence of Miss Trethewey, the nurse, and this is the evidence that the defence relies upon substantially in its argument that the declaration should not be admitted. It is well to bear in mind Miss Trethewey's account of the first occasion on which she gave evidence in regard to this matter. She was in attendance, she is a social worker as well as a registered nurse, and she was in attendance at the coroner's inquest in this case and was quite unprepared to be called as a witness, she had not thought of the matter from the standpoint of giving evidence at all, but being present in the Court room in the capacity of a social worker she was called on by counsel, or the coroner. We know that therefore under these circumstances she made certain answers. These answers have been the subject of a good deal of controversy and argument. She explains them in the course of her evidence here. She says now in examination-in-chief that she heard Dr. MacLachlan say to the patient that she was a very, very sick woman, that she was going to die,

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and the patient replied, "I know I am." After the doctors and the others had retired from the room, Mrs. Vellocette says—while she (Miss Trethewey) was standing by the bedside of the patient, the patient turned to her and said, "I am not going to die, am I? I want my baby." Her comment on that observation on the part of the patient is simply this—it is only comment, but it is comment of one who was at the bedside; I think it has some weight: "I think she was looking for a little comfort." Later on, in cross-examination, she gave her explanation of the answers she gave to the coroner. Before the coroner, she appears to have made this answer:

> The doctor told her that she was seriously ill and there was danger of her death.

She also appears to have made this answer to the coroner:

> He explained to her that she was very ill, and that there was a serious question as to whether she would get well or not.

With these statements recalled to her memory the nurse makes this statement:

> The statement I made today in response to Mr. *Russell's* question in chief is the correct one. When I went into the coroner's court I was not prepared."

And then she says later on, in cross-examination:

> The doctor definitely told the patient that she was going to die.

At the coroner's inquest it appears she admits that she said:

> I think she realized that she was a very sick woman, but she hoped to recover. There was no expectation in her mind that she was going to die at that moment.

She explains that, "at that moment," as being on the instant—or practically on the instant. And then the reference was made and she confirmed her explanation given at the preliminary hearing, where she said:

> I know she had it in her mind she was going to die, but not at that particular moment.

Then she makes this rather interesting observation, she says:

> I do not think that the statement of the doctor was a shock to the patient. It did not seem to be unexpected.

She then explains that occasion to which she referred in evidence, upon which the patient expressed the hope of recovery, was at a time prior to the interview of May 29th with Dr. MacLachlan, when he definitely told her that she was going to die. She says it was prior to that time that the girl had some definite hope.

Then she adds this statement, which the defence stressed: "In spite of the doctor's statement she clung to hope." And then for what it is worth she expresses this opinion as a nurse in the course of her duties precisely and clearly: "I don't think she had any real expectation of recovery." Well, one has to couple that with the other phrase, "She clung to hope."

Then we turn to detective Nicholson. I need not trouble to remember the exact words, it is so clear. He heard the statement read, and he witnessed it. Then detective Nicholson gives this account of Dr. MacLachlan's statement to the patient:

The doctor said, "You are a very sick woman. You are not going to get better. You are about to die."

That is the way the police officer tells what happened.

She said, "I know I am not going to get better. I am going to die." She made the statement.

Then with regard to that first paragraph of the statement which I have read, the detective's account is this:

Mr. Crompton told her to listen and he read the first part of the statement to Mrs. Vellocette. He turned to her and asked her if that was correct. She replied, "Yes, that is correct. I am going to die."

It is slightly different, you will observe, from the account given by the other witnesses.

The detective adds:

I remember the doctor telling her to have courage and trust in the doctors, that everything would be done that was best. This was after he had told her she was going to die. And then the doctor said, "About to die, not going to die."

This morning we were assisted, I think, somewhat by the evidence of Dr. MacLachlan that on the 27th this girl—that is when he first called upon her—asked the doctor if she was going to die. The doctor adds:

She was much concerned about dying, she was worried and concerned about dying, and thought she had done a terrible thing.

One couples that evidence with the evidence of the nurse, that final statement of the doctor explicitly telling her that she was about to die or was going to die; and the nurse says that that statement was not unexpected. One understands it when one bears in mind the evidence given by Dr. MacLachlan as to her state of mind from the 27th to the 29th. The doctor concludes:

"She smiled in a wan kind of way when she told me, 'Yes, I understand.'"

The decision which I have to make, as I said at the outset, is

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a very grave and serious one from the standpoint not only of society but of the accused, and yet that is a responsibility which I must accept. On the whole, I am constrained to follow the course pursued by Lawrance, J. in the *Rex* v. *Perry* case. The test is: Is there a reasonable doubt in my mind as to the state of mind of this girl at the time she made this declaration with respect to her expectation of life in view of her then illness? I think on the whole, taking all the circumstances of the evidence that has been made available to us into account, I cannot say that I have a reasonable doubt that this girl was under a full and complete comprehension that her death was a certainty. I think there was no expectation of life on her part. It is possible that there may have been that fragmentary hope to which I have already referred, but I think there was a certainty on her part that she was going to die, and a want of expectation of life such as brings the case within the authorities that I have cited. I feel that that, too, is the course I ought to pursue, following Mr. Justice Lawrance, because if I am in error the Court of Appeal may set me right. I think, having in view my obligation to society, as well as to the accused, and remembering, too, the obligation upon the Crown, it is better, holding the view I do as to the facts, that I should rule that the declaration is admissible.

*Declaration admitted.*

## LOWE CHONG *ET AL.* v. GILMORE *ET AL.*

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*Oct.* 28;
*Nov.* 10.

*Practice — Application for injunction — Adjournment — Undertaking by counsel—Breach—Motion to commit for contempt—Affidavits in support—Sufficiency.*

On the adjournment of plaintiff's application for an *interim* injunction, counsel for the defendants undertook that until the hearing of the motion the defendants would not interfere with the plaintiffs in carrying on the business of exporting potatoes and other natural products to points outside the Province. Alleging two breaches of the undertaking, the plaintiffs moved for an order that the defendants be committed for contempt in failing to carry out the undertaking, and in support filed affidavits, two in support of the first breach reciting that a truck laden with potatoes and onions had been stopped by an official of the defendant and a Provincial police constable who were told that the onions and potatoes were being transported to a warehouse prior to exporting, and were shown the order that recited the undertaking, but the officers refused to allow the truck to proceed. The affidavits did not state that in fact the onions and potatoes were being transported to the warehouse for storage preliminary to export. The defendants' official swore that he did not know of the Court order and was not informed of it at the time of the seizure. The affidavit in support of the second breach made by the truck-driver recited that when driving his truck loaded with potatoes he was stopped by the same officers. He told them he was taking the potatoes to his warehouse prior to exportation and also of the said order. The policeman in his affidavit swore that prior to seizure the driver said he was taking the potatoes to town, and after seizure he asked him if it would be all right if he exported them but did not indicate that he was exporting them.

*Held*, that an application to commit for violation of an order of the Court for an injunction is a matter *strictissimi juris*. There must be the strictest evidence that there has been an actual breach of the injunction and it is impossible to say upon the evidence that it is clear that there has been such a breach. The motion was therefore dismissed.

*Held*, further, that affidavits stating facts which it is more likely the deponent did not know of his own knowledge, and not stating such facts as his belief and the grounds thereof, are inadmissible.

MOTION for an order that the defendants be committed for contempt in failing to carry out an undertaking by counsel not to interfere with the plaintiffs in carrying on the business of exporting potatoes and other natural products from this Province to outside points. The facts are set out in the reasons for

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judgment. Heard by ROBERTSON, J. at Vancouver on the 28th of October, 1936.

*Bull, K.C.*, for the motion.
*Maitland, K.C., contra.*

*Cur. adv. vult.*

10th November, 1936.

ROBERTSON, J.: On the 19th of August, 1936, an application for an *interim* injunction was to be made but was adjourned until the 26th of August, 1936, upon counsel for the defendants undertaking that until the hearing of the said motion the said defendants and each of them, their servants or agents, will not interfere with the plaintiffs and each of them in carrying on the business of exporting potatoes or other natural products from the Province of British Columbia to points outside the Province of British Columbia, or from doing anything incidental thereto, or incidental to carrying on the business of a dealer under the Dominion Fruit, Vegetables and Honey Act, Statutes of Canada, 1935, chapter 62 and amendments, and will not interfere with or prevent the transportation of potatoes or other natural products over the highways of the Province of British Columbia from the farms of the growers thereof, by the said growers, their servants or agents, to the warehouse of the plaintiffs, or to any freight cars spotted by the plaintiffs at the City of Vancouver, in the Province aforesaid, preliminary to the exporting of the same to points outside the Province of British Columbia, or for storing the same preliminary or prior to exporting.

The plaintiffs now move for an order that each of the defendants "be committed to gaol for your contempt in failing to carry out the undertaking" above referred to. Whether or not there has been a contempt is a question of fact.

An undertaking entered into with the Court is equivalent to, and will have the effect of an injunction so far that any infringement thereof may be made the subject of an application to the Court:

Kerr on Injunctions, 6th Ed., 668-9.

Both the plaintiff and the defendant filed affidavits in support of their contentions. There was no cross-examination on these affidavits with the result that the facts are in a very unsatisfactory state. The plaintiff alleges two breaches of the undertaking, *viz.*, on the 27th and 31st of August, 1936. The evidence in support of the first breach consists of the affidavits of Low Yee one of the plaintiffs, and Wong Toy. Low Yee says that on that date he went to the corner of Main Street and 54th Avenue where he found a truck belonging to Chuck Duck and driven by

Chong Chung. The truck was laden with potatoes and onions and had been stopped by Creech, an official of the defendant the B.C. Coast Vegetable Marketing Board, and a Provincial police constable Bruce. He said that these officers were told by himself and by Wong Toy and by Chong Chuck that the onions and potatoes were being transported to his (Low Yee's) warehouse to be stored prior to and preliminary to exporting and that they were also shown a copy of the order of the 19th of August, 1936, but they refused to allow the truck to proceed. Wong Toy said that he told Creech and Bruce that the onions and potatoes were being delivered to the plaintiff, the Lowe Chong Company, to be stored, prior, and incidental to, exporting the same to points outside British Columbia and that he also told them about the order of the 19th of August.

As against this Bruce says that first of all he was not aware or the order of the 19th of August and that he was not told by anyone at the time that there was such an order and further that he was told by Chong Chuck and Wong Toy that the onions belonged to Chung Chuck and that he was not told that they belonged to the plaintiff. Creech says that he was assisting in inspecting onions on the 27th of August and that he was told by Chong Chuck and Wong Toy that the onions belonged to Chung Chuck and that he was not informed that they belonged to the plaintiff company and he was not shown the order made on the 19th of August. There is no direct denial by Bruce or Creech of the statements that they were told by Lowe Yee and Wong Toy that the onions were being transported to the plaintiff's premises for storage and export, but it may be argued they do so inferentially as they purport to set out what was said to them. The matter should have been cleared up by cross-examination on their affidavits.

It will be noticed that there is no statement from Low Yee that, in fact, the onions and potatoes were being transported to his warehouse for storage preliminary to export. He merely says he told Creech and Bruce this. Neither does Wong Toy's affidavit clear up this point. There is an affidavit by Chong Chuck the driver of the truck in which he makes the statement that he was transporting the onions and potatoes to the warehouse of

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Lowe Chong Company where they were to be stored prior to, and incidental to, exporting the same. Of course it is possible that he might have known of his own knowledge that the onions and potatoes were to be stored and were to be exported but it is not at all certain that he would know. It is more likely that he was told by someone, in which case, he should have stated it was his belief with the grounds thereof. Not having done so, that part of his affidavit is not admissible. See *Tate* v. *Hennessey* (1901), 8 B.C. 220.

The second breach is said to have taken place on the 31st of August. Lowe Yee says he was driving a truck loaded with potatoes grown by him on his own farm when he was stopped by Bruce and Creech. He told Bruce he was taking seven sacks of potatoes to his warehouse in Vancouver prior to and preliminary to exporting and he also told him of the order of the 19th of August, 1936. Notwithstanding this he said Bruce and Creech seized his potatoes and gave him a receipt. Bruce says before he seized the potatoes he asked Lowe Yee where they were going to and he said he was taking them into town; later on after the seizure he asked him if it would be all right if he exported them, but he did not indicate to him that they were for export. Creech says that he heard part of the conversation. He heard Lowe Yee say he was taking the potatoes into town and that he made no mention of exporting the potatoes. He did not hear the conversation after the seizure.

An application to commit for violation of an order of the Court for an injunction, was a matter *strictissimi juris*:

*Per* Lord Kindersley, V.C. in *Harding* v. *Tingey* (1864), 12 W.R. 684 at 685.

In my opinion there must be the clearest evidence that there has been an actual breach of the injunction. It is impossible for me to say upon the evidence above-mentioned that it is clear that there has been any such breach.

The motion is dismissed with costs.

*Motion dismissed.*

## REX v. POMEROY.

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*Sept.* 8, 9.

*Criminal law—Receiving stolen goods—Knowledge that goods were stolen—Identity of the goods as those stolen—Evidence—Appeal.*

The accused with his brother carried on an extensive coal business in Vancouver. About the 26th of February, 1936, two men with a truck came to their warehouse and asked him if he wanted to buy some tyres. They showed him a tyre and he said "Are you sure it was not stolen?" They replied "Yes, we are sure of it." He then bought it for $13. On the 1st of March the men came again and asked him if he wanted to buy more. He replied "Yes, I would buy them provided they were sure they were not stolen." He then bought eleven more tyres and paid $156 for the twelve tyres in cash. On the 2nd of February, 1936, the premises of the Pioneer Carriage Truck and Tyre Company were broken into and fourteen tyres were stolen. The salesman of the company testifying was asked "Tell the Court whether those twelve correspond in general appearance with those stolen." He replied "Yes." He further testified there were no serial numbers on the tyres but there was one tyre there in particular, a "heavy duty dump truck" that no other dealer in Vancouver carries in stock. The twelve tyres were worth about $400 retail. Accused was convicted on a charge of "unlawfully retaining in his possession stolen property, to wit: twelve automobile tyres, the property of the Pioneer Carriage Truck and Tyre Company, knowing the same to have been stolen."

*Held*, on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that there was no doubt the company's premises were broken into, new tyres were stolen and new tyres were found in the possession of the accused. They were tyres for use on trucks and one in particular found among them that no other dealer in Vancouver handled. Those found were of different sizes and corresponded with those that were lost. The magistrate found that those were the tyres stolen from the company and he came to that conclusion on sufficient evidence.

*Per* MCPHILLIPS and MCQUARRIE, JJ.A.: The Crown's case does not advance beyond this, *i.e.*, that the tyres are in general appearance like tyres that the claimants say were stolen. There is no proof of the numbers of the tyres or other reasonable proof; it halts at general appearance only. There is no evidence to indicate in any way that the accused was aware of the fact that the tyres were stolen. The evidence fails to establish the crime as alleged.

The Court being equally divided the appeal was dismissed.

APPEAL by accused from his conviction by police magistrate H. S. Wood, Vancouver, on a charge that he did unlawfully retain in his possession stolen property, to wit, twelve automobile

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tyres, the property of Pioneer Carriage Truck and Tyre Company Limited, knowing the same to have been stolen. The charge was made against the appellant and his brother John, but John was acquitted. The two brothers carried on a coal business as the Vancouver Coal Sales Limited. In February, 1936, a man stopped at a shed in accused's place of business and asked John if he could store some tyres, and this was refused. Later two men came into their place of business with a truck and asked James if he would care to buy some tyres. They showed him a tyre and he said to them: "Are you sure it was not stolen?" to which they replied that it was not. He then bought the tyre for $13. Two or three days later they came back with more tyres. He said he would buy them provided they were positive they were not stolen, and he bought eleven more tyres, paying in all $156 for them. The wholesale price of the tyres was $20.63 each. A short time before this sale the premises of the Pioneer Carriage Truck and Tyre Company were broken into and fourteen tyres were stolen. James Pomeroy was convicted.

The appeal was argued at Victoria on the 8th and 9th of September, 1936, before MACDONALD, C.J.B.C., MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*A. M. Whiteside, K.C.*, for appellant: The Crown must prove: (a) That the goods were stolen; (b) that they were in the possession of the accused; and (c) that the accused knew they were stolen. There is no proof whatever that the tyres found on the accused's premises were the tyres stolen from Pioneer Carriage Company. There was no identification of the tyres: see *Rex* v. *Barker and Page* (1915), 11 Cr. App. R. 191; *Rex* v. *Scheer* (1921), 34 Can. C.C. 231; *Reg.* v. *Dredge* (1845), 1 Cox, C.C. 235. The *onus* is on the Crown and where there is no evidence it cannot be assumed the goods were stolen: see *Rex* v. *Hill* (1912), 7 Cr. App. R. 250; *Rex* v. *Hampson* (1915), 11 Cr. App. R. 75. Recklessness and carelessness are not sufficient to constitute guilty knowledge: see *Rex* v. *Havard* (1914), *ib.* 2. Undervalue of payment for the goods is not conclusive proof of guilt: see *Rex* v. *Holmes and Gregory* (1915), *ib.* 130. An explanation by the defence which may reasonably be true should be accepted: see *Rex* v. *Schama and Abramovitch* (1914), *ib.* 45;

*Rex* v. *Hamilton* (1917), 13 Cr. App. R. 32. The *onus* on the Crown never shifts: see *Rex* v. *Grinberg* (1917), 12 Cr. App. R. 259; *Rex* v. *Aubrey* (1915), 11 Cr. App. R. 182. There is reasonable doubt in this case: see *Rex* v. *Hayes,* [1923] 1 W.W.R. 209; *Rex* v. *Koriney* (1931), 56 Can. C.C. 90. There is no identification of the tyres and there is no evidence of guilty knowledge.

*Carew Martin,* for the Crown: The identity of the tyres stolen is sufficiently proved: see Archbold's Criminal Pleading, Evidence and Practice, 29th Ed., 403; *Regina* v. *Gillis* (1888), 27 N.B.R. 30. The magistrate must decide on the reasonableness of the explanation of the accused: see *Rex* v. *Murphy, Kitchen and Sleen* (1931), 4 M.P.R. 158; *Rex* v. *Scott* (1919), 31 Can. C.C. 399; *Rex* v. *Wilson* (1924), 35 B.C. 64; Russell on Crimes, 8th Ed., Vol. II., p. 1239; *Reg.* v. *Langmead* (1864), 9 Cox, C.C. 464; *Rex* v. *Lum Man Bow and Hong* (1910), 15 B.C. 22.

*Whiteside,* replied.

MACDONALD, C.J.B.C.: I think the appeal should be dismissed. The foundation question in the case is, were the goods bought by the appellant the goods taken from the Pioneer Company stolen a short time before? That is a question of fact, and it is a question that can be decided on the circumstances of the case. I have to admit, of course, that it could have been decided more positively by comparison of the numbers on the tyres; but that was not apparently in the mind of the prosecutor in the case, and he did not bring out the evidence. But apart from that we have one man who swears that these were the tyres that had been stolen from the Pioneer Company. Now he was in a position to know that, from the fact that out of twelve tyres there were different names, different treads, different sizes. It would be an extraordinary coincidence that the plaintiff should have bought a parcel of twelve tyres which entirely coincided in all their circumstances, in size, name, tread, with the tyres that had been stolen. The jury would say that of course they were stolen tyres and there is sufficient evidence, in our minds, to find that they are stolen tyres.

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Now upon that finding of course the whole case for the appellant fails. He may have been guilty of want of care in buying tyres without sufficient investigation of facts and circumstances; but yet, to start out in this with the fact that these tyres produced in Court were those that were stolen from the Pioneer Company —this guilty knowledge of course only applies to knowledge of the fact that the tyres were stolen, and if they were not stolen then there is nothing in the question of guilty knowledge.

Therefore I think that the only thing we can do, in justice both to the appellant and the Crown, is to dismiss the appeal.

MCPHILLIPS, J.A.: I would allow the appeal. The charge was "Did unlawfully retain in their possession stolen property, to wit, twelve automobile tyres, the property of Pioneer Carriage Truck and Tyre Company Limited, knowing the same to have been stolen. In my opinion the evidence entirely fails to establish the crime as alleged—that is the Crown has failed to prove its case. I see no evidence to indicate in any way that the accused was aware of the fact that the tyres had been stolen; I see nothing reasonably to put him upon enquiry other than the enquiry he made. He asked, "They are not stolen tyres, are they?" And he is given the assurance that they were not stolen. What more could he do? He could refuse to buy the tyres no doubt. Some men are more careless than others, but that does not necessarily make them criminals. There is nothing to indicate a criminal intent. Here is an accused who is of substantial business standing in his community, and all at once, comes this allegation that he is a criminal, that he has bought stolen property knowing it was stolen. I think in a case of this kind the Crown should make enquiry and get the facts; and it would only be where there was a belief that the accused here was acting *mala fide*, that he had a criminal motive, and bought these tyres knowing they were stolen tyres, that the Crown would prosecute.

I do not think that has been proved. There was no attempt here to withhold these goods at all. The appellant bought these tyres on sufficient evidence, to my mind. I think this is a fair illustration: If a band of horses were stolen, and you produce these horses, they are without brands, and all that the alleged

owner can say is, well, they have the general appearance of my horses, how absurd that would be. You could convict man after man under such circumstances. I am very loath on this evidence to support the conviction by the learned police magistrate; in fact I think he had no evidence on which to convict. The evidence does not in any way in my opinion prove that the appellant at the time he bought the tyres knew them to be stolen—in fact the essential requirement of proof that the goods bought were stolen is absent. It is quite within the bounds of reasonable probability that the tyres were never stolen. The case of the Crown does not advance beyond this—that the tyres are in general appearance like tyres that the claimants say were stolen from them. It is true that the tyres were bought considerably under original market value. But in these days of depression goods are known to be sold under original market value. Here there is an entire lack of evidence that the alleged tyres are the property of the company that the appellant received. No proof of the numbers of the tyres or other reasonable proof. It halts at "general appearance" only. This must, in my opinion, be deemed to be insufficient. In my opinion there is an entire lack of any knowledge in the appellant that the tyres were stolen (*Rex* v. *Moore* (1924), 25 O.W.N. 571). I would refer to the case of *Rex* v. *Johnson* (1911), 75 J.P. 464. The Court consisted of Lord Alverstone, C.J., Grantham and Pickford, JJ. There it was held that to constitute the offence of receiving property well knowing that it was stolen the offender must know at the time he receives the property that it was stolen. I think it well to refer to the judgment of the Court as delivered by Grantham, J., as it is peculiarly applicable to this case:

We all consider that this conviction cannot stand. This gelding was stolen on April 22nd. On April 24th a man named Gough came to the house of the appellant and offered it to him for sale and the appellant agreed to buy it for £8, and having paid Gough £1 on account the gelding was handed over to the appellant. On May 1st Gough went to the appellant and asked him for the gelding, stating that it was stolen. But the appellant refused to return the horse to Gough unless he was repaid his £1. There was no evidence of any fresh dealing with the horse on that occasion, though Gough asked for it back. The appellant had already had the gelding for a week, and nothing took place on that day or subsequently which can be construed as a fresh act of receiving. Perhaps the appellant did not act very honourably in the matter; but we need not consider that now. The

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innocent receipt of a chattel, and the subsequent dishonest appropriation of it on the information that it has been stolen, do not constitute the crime of receiving. Of course, there may be a fresh act of receiving at or after the time of acquiring the guilty knowledge; or the original act of receiving may not be complete until the guilty knowledge has been acquired. In either of those cases the offence would be constituted. But here the act of receiving the property was complete before the guilty knowledge was obtained. We must accept the finding of the jury, even if the summing up by the chairman was a little too favourable for the appellant. The jury have found that the appellant at the time he received the gelding on April 24th, had no knowledge that it was stolen, and there is no evidence of any fresh receipt of the gelding on May 1st or subsequently. Accordingly, the offence charged against the appellant of receiving stolen property well knowing that it was stolen has not been made out and the conviction must be quashed.

I would also refer to the case of *Rex* v. *Norris* (1916), 12 Cr. App. R. 156, where Avory, J. said at p. 157:

> Generally it is enough to say that it is not a crime merely to be in possession of stolen property; the essence of the charge is that the defendant should be proved to have known at the time that it had been stolen.

That was never proved in the present case.

I would allow the appeal and quash the conviction.

MACDONALD, J.A.: With deference to the views of my brother MCPHILLIPS, I am of the same opinion as my brother the Chief Justice; the appeal should be dismissed. In *Rex* v. *Kolberg* recently before us (unreported) where a conviction affirmed by a divided Court was sustained by the Supreme Court of Canada, the evidence of the identity of the goods with those stolen was not more conclusive than in this case. Here the magistrate found that the tyres found in the possession of the accused, obtained by him from a comparative stranger, and for which he only paid about $13 each, were those stolen from the Pioneer Company. He came to that conclusion on sufficient evidence. There is no doubt that this company's premises were broken into; no doubt that it was new tyres that were stolen, and no doubt that it was new tyres that were found in the possession of the accused. Further, they were tyres for use on trucks. There was also one tyre in particular found among them that no other dealer in Vancouver handled except the former owner. The tyres, too, were of different sizes, as the Chief Justice pointed out, and therefore were easily identified. Not only that, but they differed in name. One set were "all weather tread," another "path-

finder," another "all weather dump truck" tyres, etc. It would be a startling coincidence if twelve similar tyres with these distinguishing features came into the hands of the accused from a source other than the Pioneer Company where a theft occurred. With all that evidence of identity there should be only one result. The Chief Justice pointed out that there was only one thing lacking, *viz.*, the serial numbers on the tyres, which of course would be conclusive proof. That evidence was not available, probably for a good reason, although I think its absence should have been explained. When, however, the magistrate, acting as a jury, finds that these were the tyres stolen from this company on the evidence outlined, we would not be justified in interfering. I think he arrived at the right conclusion.

McQUARRIE, J.A.: I agree with my brother McPHILLIPS that the appeal should be allowed. I do that because I think that there was no proper evidence of identification of the stolen tyres. The tyres that were purchased were not shown by reliable evidence to be the tyres which had been stolen. If you look closely at the evidence you will find that the only evidence of what might be called identification, outside of the question of the one tyre, "dump tyre," which my learned brother M. A. MACDONALD has referred to, is the direct examination of the witness James R. Stratton:

Would you look at the tyres we have here—I think you have already seen them—there are twelve tyres here; tell the Court whether those twelve correspond in general appearance? Yes.

Now if you analyze that question, it is hard to see that it means anything at all—"tell the Court whether those twelve correspond in general appearance." The witness does not then say that they correspond with the tyres which are said to have been stolen. The question is most objectionable in many ways; because if it does mean anything at all it certainly is a very leading question. And the answer is "Yes." Now you have nothing there. As mentioned, my learned brother M. A. MACDONALD has referred to the evidence of this witness in reference to one tyre, "all weather dump truck" tyre. He has referred to the evidence which was mentioned by both counsel, where the witness said, "There is one tyre in particular, Mr. *Orr*, there is no other dealer

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in Vancouver carries it in stock." Well, that is like the other evidence. If it were a fact that Vancouver was the only place where tyres of that description are sold it would be stronger evidence, but of course the tyres may be sold elsewhere. So that does not help very much. But then on the evidence of this witness there is a modification of that statement, because later on he says, "It is a tyre that very few people stock that tyre." Now that statement would seem to be much more reasonable than the first part, because surely in a place like that there would be more concerns than one that would stock this particular class of tyre. However, we have a modification of the evidence to which my learned brother M. A. MACDONALD referred, and do not think it is satisfactory. Surely you must press home in a more positive way a crime of this kind against an accused; otherwise no one would be safe.

I would allow the appeal.

*The Court being equally divided the appeal was dismissed.*

## McLEAN v. VANCOUVER HARBOUR COMMISSIONERS.

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*June* 19;
*Aug.* 17.

*Crown—Contract—Breach—Prerogative—Action—Right of against harbour commissioners—Liability—Claim for damages—Can. Stats. 1913, Cap. 54, Sec. 14, Subsec. 3—R.S.C. 1927, Cap. 34, Sec. 18.*

By agreement under seal, the defendants appointed the plaintiff superintendent of its terminal railway for a period of five years from the 1st of December, 1932, at a salary of $330 per month. The defendants terminated his services, without cause, on the 10th of March, 1935. He was unable to obtain other employment. In an action for wrongful dismissal, the defendants alleged they were acting as servants or agents of the Crown and might dismiss the plaintiff at pleasure, notwithstanding the fixed term of employment, it being an implied term of the contract that they could do so, further that the plaintiff could not sue them at all because they were acting as servants or agents of the Crown, or alternatively that if they could be sued proceedings could only be taken in the Exchequer Court.

*Held*, that the defendants were servants or agents of the Crown carrying on their duties under their Act of Incorporation, and as such entered into the agreement with the plaintiff.

*Held*, further, that the plaintiff may maintain this action against the defendants.

*Graham* v. *Public Works Commissioners*, [1901] 2 K.B. 781, followed.

Assuming the plaintiff may maintain the action, the defendants submit they were entitled to rely on any defence open to the Crown to the same extent as if the contract had been between His Majesty and the plaintiff, and that it is an implied term of the contract that the plaintiff could be dismissed at pleasure.

*Held*, that the defendants' position is the same as the Crown's and the law is that a servant of the Crown, although engaged for a fixed term, holds his position at the pleasure of the Crown, a condition to that effect being implied as a term of the contract unless it is excluded by statute or by reason of some term in the contract. The contract included the following term: "If during the term of said employment the superintendent shall become ill and thereby unfitted for work, such illness shall not be a ground for dismissal, and the salary of the superintendent shall be paid in the same manner as if the superintendent were actually engaged upon his duties, provided, however, that his salary shall not be payable in respect of any time he shall be absent from work in excess of six (6) months in any case of continuous illness." The principle of *Reilly* v. *The King* (1933), 103 L.J.P.C. 41, is applicable here and the implication of the power to dismiss at pleasure is excluded by this term in the contract.

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Assuming that an action may be brought, the defendants submit that it can only be brought in the Exchequer Court of Canada. Section 18 of that Act provided that that Court shall have exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown.

*Held*, that this section applies to contracts to which His Majesty is actually a party or in which someone actually contracts, in the contract, on behalf of, or as representing His Majesty. It does not apply to a contract made by a corporation such as the defendants.

*Held*, that the plaintiff is entitled to damages for wrongful dismissal.

ACTION for wrongful dismissal and for certain moneys deducted from his salary prior to dismissal. The facts are set out in the head-note and reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 19th of June, 1936.

*G. L. Fraser*, for plaintiff.

*J. W. deB. Farris, K.C., L. St. M. Du Moulin* and *J. L. Farris*, for defendants.

*Cur. adv. vult.*

17th August, 1936.

ROBERTSON, J.: On the 1st of December, 1932, the defendants entered into an agreement under seal with the plaintiff whereby they appointed him superintendent of their terminal railway for a period of five years from the 1st of December, 1932, at a salary of $330 per month. On the 10th of December, 1935, the defendants, without cause, terminated his services as of the 10th of March, 1936. He has tried to obtain other employment but has been unsuccessful. He now sues for wrongful dismissal and for certain moneys deducted from the salary paid to him prior to his dismissal. The defendants allege that in employing the plaintiff, and generally, they were acting as servants or agents of the Crown and therefore they might dismiss the plaintiff at pleasure, notwithstanding the fixed term of employment, because, they allege, it was an implied term of that contract that they could do so; further, that the plaintiff could not sue them at all because they were acting as servants or agents of the Crown or alternatively that if they could be sued, proceedings could only be taken in the Exchequer Court. The first enquiry then must be—were the defendants servants or agents of the Crown? By Cap. 54, Can. Stats. 1913, the defendants were constituted a

corporation consisting of three commissioners appointed by the Governor in Council upon the recommendation of the Minister of Marine and Fisheries, and holding office "during pleasure." Generally speaking, their occupation is for the purpose of managing and administering the public harbour of Vancouver and the properties belonging thereto which are the property of the Crown. In the exercise of their powers they are for the most part subject to the control of the Crown exercised either through the Governor in Council—that is the Governor as the representative of His Majesty acting upon the advice of His Majesty's Privy Council for Canada or through the Minister of Fisheries. They have to keep separate accounts of all moneys borrowed, received and expended by them under authority of their Act of Incorporation, and must account annually therefor to the Governor in Council in such manner and form as he directs. Their powers (and the limitation on the exercise of these powers) are very similar to those of the Halifax Harbour Commission. The latter's Act of Incorporation was considered in *City of Halifax* v. *Halifax Harbour Commissioners,* [1935] S.C.R. 215, and it was held that (p. 227):

> The services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services.

I hold that the defendants were servants or agents of the Crown carrying on their duties under their Act of Incorporation and as such entered into the agreement with the plaintiff. Indeed, this latter position was not seriously disputed by the plaintiff. He said, however, that because subsection 3 of section 14 authorized the defendants to institute and defend all actions in any Court in respect of certain Crown lands vested in them by the statute, there must be a right to maintain this action. I should have thought that the express mention of power to sue and defend in connection with certain lands only would tend to show that there was not a general right to sue the defendants. It is sufficient to say, however, that subsection 3 was repealed the next year, so that whatever the position may have been during the time the subsection was in the statute it was changed by the repeal. The plaintiff further submitted that he could maintain this action because section 30 of the Interpretation Act, Cap. 1,

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R.S.C. 1927, provides that in every Act, unless the contrary intention appears, words making a number of persons a corporation, vest in such corporation power to sue and be sued, to contract and be contracted with by its corporate name. A provision very like this has been considered in several cases of tort and as I understand them, it was held that the power to sue and be sued, etc., does not confer a right to sue except where a cause of action existed. I see no reason why this principle should not apply to actions on contract. In *Peccin* v. *Lonegan,* [1934] 4 D.L.R. 776, it was held that similar words were not sufficient to destroy the Crown's prerogative right of immunity in respect of tortious acts of the Crown's servants or agents. Russell, J. (as he then was) said in *Rowland* v. *The Air Council* (1923), 39 T.L.R. 228, when speaking of a like provision in the Air Force (Constitution) Act, 1917, *viz.,* " 'The Air Council may sue and be sued, and may for all purposes be described by that name,' " at p. 229:

> The intention of the section was to authorize the use of a name, and not to confer new rights in derogation from the Crown's prerogative.

See also *Mackenzie-Kennedy* v. *Air Council,* [1927] 2 K.B. 517 at 524, where Bankes, L.J. said:

> The respondent, not unnaturally, relied in support of his contention that he had statutory authority for maintaining the action upon the provision in s. 10 of the Air Force (Constitution) Act, 1917, that the Air Council may sue and be sued, and may for all purposes be described, by that name. Instances might be given in which this provision would confer a right of action against the Air Council, but it is unnecessary to consider them, as for present purposes it is sufficient to say that I entirely agree with the view of Russell, J. in *Rowland* v. *Air Council,* [1923] W.N. 64 when applied to an action of tort, that the authority falls far short of what is necessary to get rid of so well known and so well established a constitutional rule of law as that which I have been discussing.

In *Peccin* v. *Lonegan, supra,* the corporation defendant was in very much the same position as the defendants in this action. Davis, J.A., who delivered the judgment of the Court of Appeal, in which it was held there was no right of action for tort against the corporation defendant, after referring to *Roper* v. *Public Works Commissioners, infra,* said at p. 782:

> Whether an action founded on contract, however, might be brought, is not quite so clear.

The point appears first to have arisen in the case of *Graham* v.

*Public Works Commissioners*, [1901] 2 K.B. 781. In that case the defendants were incorporated by statute and had entered into a contract for the erection of a post office. The plaintiffs brought an action against the defendants claiming that they had wrongfully determined and repudiated the contract, and claimed damages for this breach, and in addition damages for a subsequent wrongful entry upon plaintiffs' land and the seizure there of certain plant and building materials belonging to the plaintiffs. The defence set up was that the plaintiffs' claim could only be made (if at all) by a petition of right; that the contract was "entered into by the defendants as servants and agents of the Crown and on behalf of the Crown as a department of the Government, and not otherwise." The point of law was set down for hearing and as appears at p. 783, it was argued that "A servant of the Crown, who contracts on behalf of the Crown, cannot be sued on his contract." The case was heard by Ridley and Phillimore, JJ., who decided that the action for tort would not lie; but would for contract; but for different reasons. Ridley, J. held that the defendants in that case had not contracted in their capacity as agents for the Crown. Phillimore, J. said at pp. 789-90:

> I think the Attorney-General rightly treated this case as depending upon whether or not the principle applied that a servant of the Crown as such cannot be sued. The Crown cannot be sued; and, that being so, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract made by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow subject.

Again at p. 791 he said:

> Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley, L.J. in *Dixon* v. *Farrer* (1886), 17 Q.B.D. 658; 18 Q.B.D. 43 as "a nominal defendant sued as representing one of the departments of State." There is no reason in principle why they should not be. As I have pointed

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out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued. Having regard to the facts that they are made a corporation, that there is no restriction with respect to them which would prevent their being subject to the ordinary incidents of a corporation, and that in fact they have been sued in cases where their powers have been specially derived from certain Acts of Parliament, I see no reason for holding that their liability to be sued is restricted to cases coming under those Acts. I think that they have a general liability to be sued for the purpose of obtaining a decision, although, of course, no execution can go against them because their property (if they have any, and probably they have not) is Crown property, as was the case in *Reg.* v. *McCann* [(1868)], L.R. 3 Q.B. 677, and the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament for that purpose.

The *Graham* case was followed in *Roper* v. *Public Works Commissioners,* [1915] 1 K.B. 45. In that case an action was brought against the defendant, which was a corporation, on contract and for tort. Upon a point of law raised on the pleadings, it was held that the action for tort must be stayed but the claim for breach of contract was allowed to proceed. Shearman, J. said at p. 52:

Now as to whether being servants of the Crown, although created a corporation to all intents and purposes by the Works and Public Buildings Act, 1874, they can be sued in contract, that question has been decided by *Graham* v. *Public Works Commissioners,* [1901] 2 K.B. 781. I am bound by that decision. Therefore the present action must proceed as to the claims founded on breach of contract.

The matter was again considered in *Gilleghan* v. *Minister of Health,* [1932] 1 Ch. 86. In that case an action was brought against the Minister of Health upon the breach of a contract entered into by him. It was held that the action did not lie because the Minister of Health was incorporated for a limited purpose. Mr. Justice Farwell, who tried the case, after referring to the *Graham* and *Roper* cases, said at pp. 93-4:

It must also be noticed that in *Rowland & Kennedy* v. *Air Council,* [1923] W.N. 64; 39 T.L.R. 228, Russell, J. expressly referred to the fact that the Air Council was not a corporation sole as one of the grounds for his decision. That being the position, I should follow the decisions of Phillimore and Shearman, JJ., if I thought they applied, without expressing any view of my own, leaving the matter to be determined if necessary by the Court of Appeal. But in my judgment those decisions do not apply, because the purpose for which the Minister of Health is made a corporation sole is expressly stated in s. 7, sub-s. 3—namely, "for the purpose of acquiring and

holding land." That is the only purpose for which he is created a corporation sole. If it had been intended to create him a corporation sole for all purposes, with the usual results, there would be no object in sub-s. 4.

That being so, I do not think that the fact that the Minister of Health is constituted a corporation sole for the one purpose of holding and acquiring land is sufficient to take this case out of the well established rule, and the provision that the Minister may sue and be sued by the name of the Minister of Health is wholly insufficient to do so.

It would appear, therefore, that the law in England since 1901 has been that an action on contract could be brought against a corporation upon a contract entered into by it as the servant or agent of the Crown. The *Graham* case was considered and approved of by Mr. Justice Cassels in *Johnston* v. *The King* (1910), 13 Ex. C.R. 155. The facts were that a contract had been entered into with the Commissioners of the National Transcontinental Railway which was a body corporate having power to sue and be sued on their contracts. Johnston and another person presented petitions of right. The learned judge held, in dismissing the petitions, that the action could be taken directly against the respondent, and that action therefore should have been taken against it and not against the Crown. This case was affirmed on appeal, but on different grounds. See (1911), 44 S.C.R. 448. In view of these decisions I hold that the plaintiff may maintain this action.

The defendant submits, that even if the plaintiff may maintain this action, it is entitled to rely on any defence open to the Crown to the same extent as if the contract had been between His Majesty and the plaintiff, and that it is an implied term of such a contract that the plaintiff could be dismissed at pleasure. I think it is the case in this regard that the defendants' position is the same as the Crown's. In *The Quebec Liquor Commission* v. *Moore*, [1924] S.C.R. 540, Duff, J. (as he then was) said at pp. 551-2:

The broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute. It is desirable, perhaps, to advert first of all to a discussion of the subject in *The Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1864), L.R. 1 H.L. 93. Mr. Justice Blackburn, delivering the opinion of the judges in that case, proceeded upon the principle stated by him in these words (p. 107):

"It is well observed by Mr. Justice Mellor in *Coe* v. *Wise* (1864), 5 B. & S. 440; 4 New Rep. 352, of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act with-

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out reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works."

An exception is recognized, however, in the judgment of Mr. Justice Blackburn, as well as in the speeches of the Lords in the case of public officers who are servants of the Government; that is to say, officers fulfilling a public duty, appointed directly by the Crown and acting as officers of the Crown. Such a public officer is not responsible for the acts of inferior servants or officials merely because the superior officer had the right of the selection and appointment, as well as the right of removal at pleasure. *Canterbury* v. *The Attorney-General* (1842), 1 Ph. 306 at p. 324. It is now recognized also that there is nothing to prevent the Crown being served by a corporation, and nothing to prevent such a corporation claiming the same immunity as an individual. *Bainbridge* v. *The Postmaster-General,* [1906] 1 K.B. 178 at pp. 191-192, and *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings,* [1915] 1 K.B. 45.

Then was the agreement in question subject to the implied condition? The general law is that a servant of the Crown, although engaged for a fixed term, holds his position at the pleasure of the Crown, a condition to that effect being implied as a term of the contract. See Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 488; *Dunn* v. *The Queen,* [1896] 1 Q.B. 116; *Gould* v. *Stuart,* [1896] A.C. 575; *Hales* v. *The King* (1918), 34 T.L.R. 589; *Denning* v. *The Secretary of State for India in Council* (1920), 37 T.L.R. 138; unless it is excluded by statute or by reason of some term in the contract. See *Reilly* v. *The King* (1933), 103 L.J.P.C. 41. In that case the facts were the plaintiff had been appointed a member of an Appeal Board, as he alleged, for a term of five years subject to a provision that he could only be dismissed for cause. The Privy Council held that from the language of the Board in *Gould* v. *Stuart, supra,* where the terms of appointment definitely prescribe a term and expressly provide for a power to determine for cause, it appeared necessarily to follow that any implication of a power to dismiss at pleasure was excluded. Now the only paragraph of the agreement in question upon which it might be argued that the implied condition was effected is paragraph 6, which reads as follows:

If, during the term of the said employment, the superintendent shall become ill and thereby unfitted for work, such illness shall not be a ground for dismissal, and the salary of the superintendent shall be paid in the same manner as if the superintendent were actually engaged upon his duties; provided, however, that his salary shall not be payable in respect of any time he shall be absent from work in excess of six (6) months in any case of continuous illness.

There is no express term in the contract for dismissal for cause. There is an express term that there is not to be a dismissal for sickness. Sickness is not, under all circumstances a ground for dismissal for cause—see Smith's Law of Master and Servant, 8th Ed., 91—but the parties thought it was, and provided there should not be dismissal for it. In my opinion the principle of *Reilly* v. *The King, supra,* is applicable here and the implication of a power to dismiss at pleasure is excluded. As Lord Wrenbury said in *Bank Line, Limited* v. *Arthur Capel & Co.,* [1919] A.C. 435 at 462:

A term cannot be implied which is inconsistent with an express term of the contract; but it is no objection that it enlarges or adds to the express terms; every implied term does that.

Again in *In re Comptoir Commercial Anversois* v. *Power, Son and Company,* [1920] 1 K.B. 868 at 879 Bailhache, J. said:

It is also true that the term to be implied must not be in conflict with any express term in the contract; although it may, and indeed must, if it is to be of any use, add to or vary it.

Next it is said that assuming an action may be brought, it can only be brought in the Exchequer Court of Canada. Section 18 of that Act provides that Court shall have exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown. This section, I think, applies to contracts to which His Majesty is actually a party, or in which someone actually contracts, in the contract, on behalf of, or as representing, His Majesty. In my opinion it does not apply to a contract made by a corporation such as the defendants.

It is further argued that the contract was of no force or effect because there was no by-law as required by section 10 of the Act, fixing the salary to be paid to the plaintiff or alternatively such by-law had not been confirmed by the Governor in Council and published in the Canada Gazette as required by section 20

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of the Act. I think Exhibit 15 is a complete answer to this contention.

The plaintiff is entitled to damages for wrongful dismissal. He has not had anything to do down to the date of trial. He said, then, that he had a very indefinite promise of employment in the future, but he gave no details of this. There is no difficulty in fixing the damages down to the date of trial. The difficulty is to arrive at a sum which will compensate him for the loss of opportunity of earning, against which should be set off something for the saving of his time and labour by his not having to work. I must also speculate on the chances of the plaintiff getting work. See Smith's Law of Master and Servant, 8th Ed., at pp. 122-3, note (*f*). I fix the damages as follows: Salary from March 10th, 1936, to June 19th, 1936, at $350 per month, $1,155; subsequent damages $2,100.

The plaintiff also claims that there was no right to deduct anything from his salary pursuant to The Salary Deduction Act, 1932. I think he was a member of the Public Service of Canada as defined by subsection (*b*) of section 2 of that Act, and the amounts claimed were properly deducted from his salary. The plaintiff relied upon a regulation of the Treasury Board made pursuant to section 6 of The Salary Deduction Act, 1932, which he said expressly excepted his contract out of the Act. I do not think that the regulation excepts the plaintiff's contract.

There will be judgment for the plaintiff for $3,410 and costs.

*Judgment for plaintiff.*

## WARNOCK v. FOSTER *ET AL.*

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1936
Oct. 14, 15, 19, 20; Nov. 7.

*Arrest without warrant—False imprisonment—Photographing and fingerprinting—Liability of police for damages—Criminal Code, Secs. 30 and 1144—R.S.C. 1927, Cap. 38, Sec. 2.*

At about 11.15 on the morning of the 15th of January, 1936, three men went to The Vancouver Taxi Company in Vancouver and hired a taxi. The plaintiff, a chauffeur, who was in its employ was directed to drive them. They drove to Stanley Park where at the point of a gun two of the men took him down a trail some distance where they bound and gagged him. The three men then took his car and drove off. After a time he managed to get rid of the gag, and calling, he was heard by a park employee who released him. He then telephoned the police advising them what had happened. Shortly after, a prowler car came out and took him to the police station where he told the police all the facts. In the meantime there was a hold-up at the branch of the Canadian Bank of Commerce at the corner of Victoria Drive and Powell Street and one of the bank's staff was shot and killed. The taxi with which the hold-up was carried out was identified as a taxi of The Vancouver Taxi Company. Later in the day the plaintiff was arrested under instructions by the chief constable and remained in custody for five days. He was never charged with an offence and while in custody he was photographed and fingerprinted. In an action for damages for wrongful arrest and false imprisonment:—

*Held,* that the evidence did not disclose that the chief constable believed on the day of the murder or on any later date that the plaintiff had committed an offence on January 15th. He therefore had no right to arrest him without a warrant; and even if the chief constable had the right to arrest him without a warrant he should at once have laid a charge and brought him before a justice of the peace as soon as practicable.

*Held,* further, that as the chief constable knew that there was no charge against the plaintiff he could not have "purported" to act under the Identification of Criminals Act, when he authorized the taking of the photographs and fingerprints, and therefore section 1144 of the Criminal Code, requiring notice to be given to a proposed defendant of an action for anything "purporting" to be done in pursuance of an Act of Parliament, did not apply.

ACTION for damages for wrongful arrest and false imprisonment. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 14th, 15th, 19th and 20th of October, 1936.

*J. A. MacInnes,* for plaintiff.
*McTaggart,* for defendants.

*Cur. adv. vult.*

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WARNOCK
v.
FOSTER

7th November, 1936.

ROBERTSON, J.: On the 15th of January, 1936, four men held up the branch of the Canadian Bank of Commerce at Victoria Drive and Powell Street in Vancouver and one of its staff, Hobbs, was shot and killed.

The criminals went to the bank in a taxi belonging to The Vancouver Taxi Company, which had earlier that day been stolen from the plaintiff who was driving it for the company. The plaintiff says that about 11.15 a.m., his taxi was at the premises of the company and he was told there was a fare in his taxi. He went out and was ordered by one of the three men in the back seat of the taxi to drive to French's Wharf. On arrival there one of the men got out, looked around and then told the plaintiff that the boat he wanted was at the Vancouver Rowing Club wharf on the opposite side of Coal Harbour and directed him to drive there. On arrival there the same man got into the front seat and shoving a gun against the plaintiff's side told him to drive slowly around Stanley Park. Finally he was told to stop, to get out and walk down a trail, which he did, for some distance, the other two men following behind him. These two "taped" his wrists together behind his back and tied his legs together with a rope, put adhesive tape over his mouth; told him to lie down and left him, saying they would telephone his office where to find him. The plaintiff could not break his bonds. He managed to hobble to a tree where he scraped the tape off his mouth by rubbing against a tree. He called to a man walking through the trees who, he afterwards learned, was Browning, a park employee, who released him from his bonds. He then telephoned to the police station, advising what had happened. A prowler car came out and took him to the police station. He says he told the police all the above facts. In the meantime the hold-up and murder had taken place, the criminals using the car which they had stolen from the plaintiff. On arrival at the police station the plaintiff gave a statement in writing to detective Morrison in which he gave a description of the three men but said he would be unable to identify any of them. He also says he examined that same afternoon at the police station books of photographs of criminals to see if he

could identify any of these as his assailants. Late on the night of the 15th the plaintiff was placed under arrest under instructions by the defendant chief constable Foster, and remained in custody until the 20th when he was released. He was never charged with an offence. On the 16th or 17th of January he was photographed and fingerprinted by one Gray and up to the trial these were in the possession of the police.

The authority for arresting without a warrant is to be found in section 30 of the Criminal Code which is as follows:

30. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

Now there is no question that on the 15th of January an offence, namely, the hold-up and murder had been committed, and, for the commission of this the offenders might have been arrested without a warrant. If, therefore, Foster believed on reasonable and probable grounds that the plaintiff had committed either one of these offences he was justified in arresting him without a warrant, whether the plaintiff was guilty or not. Of course, if the plaintiff was an accessory before the fact he would by virtue of section 69 of the Criminal Code be a principal and would therefore, in my opinion, be one who had committed an offence within the meaning of section 30. The question then is did Foster on reasonable and probable grounds believe at the time of the arrest, namely, on the night of the 15th of January, that the plaintiff had committed either one of these offences? It is his belief at the time which is important and that belief must have been founded on reasonable and probable grounds. Now I propose to state all the facts Foster had in his possession as regards the accused. On the 15th of January he knew of the hold-up and murder and that the plaintiff's taxi was used by the criminals and he knew the other facts which I have related which the plaintiff told the police. On that same day he was told by detective Hann that the police could not get any information from the plaintiff; that it did not appear to him as if the plaintiff wished to give information and, in fact, he said the

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plaintiff did not even wish to look at the photographs of criminals at the police station to see if he could identify his assailants. Foster also knew that a "friendly" taxi-driver was one of the essentials to the commission of the crimes of the 15th of January. On the 16th of January he was told that the plaintiff had been taken out to Stanley Park by detectives Pitts, Stewart and Berry when he was asked to bind Stewart, as nearly as he could remember, in the way in which he had been bound. He did so. Stewart after a little effort broke the tapes on his wrists and said to the plaintiff "You were a very willing victim." The plaintiff made no reply to this.

On the 16th of January Browning signed a report in which he stated, *inter alia,* that the plaintiff when he first saw him was "very cool and collected and casual and did not seem excited." Foster also learned on that date that when the car stopped at French's Wharf a bag, containing revolvers which must have been those which were afterwards used in the hold-up and murder, was obtained by the man who got out of the taxi.

On the 16th Russell and Dunbar were arrested and Russell made a confession which, I presume, did not implicate in any way the plaintiff. Further on the evening of the 16th Foster was told "if you get the plaintiff and McNeill who actually drove the car at the time of the hold-up we would learn who the murderers were." On the 17th of January Foster was told that Rogers, one of the plaintiff's employers, had an unenviable criminal record and that the plaintiff also had a criminal record. After the plaintiff's release Foster learned this was not true of the plaintiff. Foster does not pledge his belief that at any material time he thought the accused had committed an offence on the 15th of January. He does say that he thought that Warnock knew a great deal more about the matter than he had been willing to admit to the police and he felt that if the plaintiff would help the police he might be of material assistance in locating the murderer. He said that he thought the plaintiff was going to be a great help to him, that is, in solving the crime. He said that he had reason to believe that the plaintiff was associated with those responsible for the crime, but not actually in the

commission of the crime. He explained what he meant by association as follows:

> The association was that he takes them in his taxi under conditions where he had every opportunity of seeing them. They stop at a place mentioned this morning; they go to the park and they go right around the park; they get in and out of the car and he is tied up; and it seems to me that any normal man could have done more than he did to identify them. That is the point I wanted to bring out.
>
> That is the full extent? No. There is the instance in the police station, where according to my information he would not give any assistance in identifying photos. There is the instance upon the reconstruction of the crime. I am informed that he could have if he wished to apparently loosened himself from his bonds. I think those things, with what subsequently took place, would be justification for detaining him as he was. There was every reason to suppose there was an association.

Foster's view on the 15th of January was that Warnock "was either a principal or else was very dense and unwilling to help" and "as the information lay there he might have been an accessory."

Foster says that on the 16th of January warrants were got out for "those known to be accessories." He says that on the 17th or 18th he asked Mr. *Orr* the police court prosecutor whether it was possible to charge the plaintiff as an accessory, yet no charge was laid against the plaintiff. Further an entry in the photograph book shows that the only "charge" against the plaintiff was that of a material witness. Foster said that after the 16th of January he was not sure how Warnock was situated. He just instructed that he should be kept under observation. He presumed one of two courses would be followed, either a charge against him as an accessory or as a material witness.

In these circumstances I am unable to say that Foster believed on the 15th of January or on any subsequent date that the plaintiff had committed an offence on the 15th of January. Accordingly I think he had no right to arrest the plaintiff without a warrant.

Further, even assuming he had the right to arrest him, he should at once have laid a charge and brought the accused before a justice of the peace and then the responsibility for keeping the plaintiff in custody would have been his. Under the Code, where there has been an arrest under a warrant the accused must be brought, as soon as is practicable, before the justice who issued

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it, who must either proceed with the inquiry or postpone it to a future time in which latter case he either commits the accused person to proper custody or admits him to bail, etc. See section 664. Of course the warrant does not issue until an information or complaint has been laid as provided in section 654. Where a person is arrested without a warrant he should, at least, be brought before a justice of the peace as soon as if he had been arrested under a warrant. Therefore he should be brought before a justice as soon as is practicable. A charge would have to be preferred against him before he was brought before the justice.

In *Beckwith* v. *Philby* (1827), 6 B. & C. 635, Lord Tenterden, C.J. said at p. 638:

> The only question of law in the case is, whether a constable having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated.

In *Walters* v. *W. H. Smith & Son, Limited* [1914] 1 K.B. 595, the Chief Justice of England, in speaking of the right of a private person to arrest a person on suspicion of having committed a felony, said at pp. 605-6:

> On behalf of the defendants Mr. Clavell Salter attached some importance to Chitty on Pleadings, vol. iii, pp. 333 and 334, which contains a plea in bar in an action for trespass, and no doubt there the plea was in terms that the arrested person was given into custody (I am not using the exact language) for the purpose of setting on foot a judicial inquiry or legal proceeding, and that was very persistently and very ably relied upon before me. For the reason I have already given I do not think that in this case it assists the defendants, as I am quite convinced that the dominant intention in the minds of the defendants, as was shown by the fact of the arrest, was to give the plaintiff into custody for having stolen the book and not merely for the purpose of setting on foot a judicial inquiry or formulating subsequently the charges upon which he was arrested. I think on examination of that plea it will be found that it does not support, or at least does not assist in, this case, because as a matter of law I think it is perfectly right to say (and it will be found in the pleas in all the old books on pleading) that there is a statement such as Mr. Salter argued must be pleaded, that it must be pleaded in substance that the plaintiff had been given into custody for the purpose of setting on foot a judicial inquiry, because were it otherwise there could be no justification for the arrest, and no private person would be justified in detaining a person in his own room or in his own house merely for the purpose of detention or punishment. His only justification, given the other circumstances which I have indicated, must be that he did it for the purpose of setting on foot a judicial inquiry. It is only by means of judicial process that the arrest can otherwise be justified. The mere fact of arrest for the purpose of detaining a person

and not setting on foot a judicial inquiry could not be justified. It is in that connection that reference was made to the pleas in Bullen and Leake's Precedents of Pleadings in the edition which I have quoted.

In *Wright* v. *Court* (1825), 4 B. & C. 596, it was held that a constable arresting a man on suspicion of a felony must take him before a justice to be examined as soon as he reasonably can. In that case, the Court said, pp. 597-8:

> *Per Curiam.* The plaintiff alleges that he was imprisoned for three days, and the first special plea admits that he was imprisoned for that space of time before he was taken to the magistrate for examination, and avers that it was a reasonable time for that purpose, and for enabling Clarke to collect and bring his witnesses to prove the felony. But it is the duty of a person arresting anyone on suspicion of felony to take him before a justice as soon as he reasonably can (Com. Dig. Imprisonment, H. 4), and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined (*Ib.* H. 5). The justice might have been justified in ordering this plaintiff to be detained until Clarke could bring his witnesses, but it is clear that the defendants had no authority to detain him without such order.

This case was followed in *Dunne* v. *Clinton,* [1930] I.R. 366. In that case a Civic Guard requested two plaintiffs who he suspected of complicity in a felony to go to the Civic Guard Barracks which the plaintiffs voluntarily did. They were detained at the barracks while the guards were endeavouring to procure evidence. They were not charged with any crime nor were they formally arrested. They were detained in the barracks from an early hour of the morning of one day until the evening of the following day when they were formally arrested and charged with the crime and brought before a Peace Commissioner who remanded them on bail to the next District Court. At that Court the charge was dismissed. It was admitted the plaintiffs could have been brought before a Peace Commissioner on either of the two days in which they were detained. The plaintiffs were successful in an action for damages for false imprisonment and it was held that the duty of the defendant, as the officer responsible for such detention, was to have brought the plaintiffs before a Police Commissioner as soon as he reasonably could and that as he did not do so he was liable to the plaintiffs in damages in respect to the period which elapsed between the time when the plaintiff could reasonably have brought the prisoners before

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a Police Commissioner and the time he in fact did so. Hanna, J., said at p. 374:

> It is, in my opinion, clearly the law that, once a person is detained by the guards, or, in other words, in custody of the guards, on suspicion of having committed a felony, it is the duty of the police officer arresting him to take him with reasonable expedition before a Peace Commissioner. He can be retained in custody only during such a time as is reasonable for that purpose. Any question of the time necessary to investigate the offence, or to obtain evidence upon which to found a charge, is quite irrelevant. It is for the Peace Commissioner and not the guard to determine whether the suspected person is to remain in custody or to be released on bail.

Even assuming Foster was justified in arresting the plaintiff on the 15th of January he could have brought him before a justice on the morning of the 16th, and not having done so he would be liable for the imprisonment from the morning of the 16th. But then it is said the action will not lie as to the photographs and fingerprints as section 1144 of the Criminal Code has not been complied with. Section 1143 provides that every action against any person for anything "purporting" to be done in pursuance of any Act of the Parliament of Canada relating to criminal law shall be laid in the district where the act was committed, etc. Section 1144 provides that notice in writing "of such action" and of the cause thereof shall be given to the defendant one month at least before the commencement of the action. The Act authorizing the photographs and fingerprints is the Identification of Criminals Act to be found at p. 1564 of Crankshaw's Criminal Code of Canada, 6th Ed. Section 2 provides:

> Any person in lawful custody, charged with, . . . an indictable offence, may be subjected, . . . to the . . . Bertillon signaletic system. . . .

I think this includes taking photographs and fingerprints. It is only a person who is in lawful custody and charged with an indictable offence who may be photographed and fingerprinted. Now Foster knew that there was no charge against the accused and therefore he could not have "purported" to act under this Act. See cases collected in Bullen & Leake's Precedents of Pleadings, 9th Ed., 936.

I think no notice was required as against Foster. The remaining defendants were not shown to have had anything to do with the photographing and fingerprinting. After the trial I asked

the registrar to ask counsel for the defence if they were willing to have the photographs and fingerprints destroyed and I am now informed by the registrar that he is in receipt of a letter from them stating that the photographs and the fingerprints have been destroyed. The registrar under my instruction advised plaintiff's counsel of the request and reply. It is not shown that the photographs and fingerprints were circulated and so far as the members of the police were concerned they of course know that no charge had been laid against the plaintiff; so that he has suffered no damages from this, apart from the indignity.

What was Foster's position? He was a public officer trying to carry out his duties in trying and difficult circumstances. A terrible crime had been committed on the 15th of January, and he was trying to discover who were the criminals. While Foster says now that the plaintiff is a "decent living citizen," yet at the critical period from the 15th to the 20th of January he was very suspicious of the plaintiff and on the facts which he knew, and which I have set out, I think he was justified in this. It is clear now that the plaintiff had no wrongful association with the criminals, but from the information which Foster had I would think he was justified in a strong suspicion, not amounting to a belief, that the plaintiff might have been associated in a criminal way with the criminals who committed the hold-up and murder.

I am satisfied, and so find, that Foster was not actuated by any malice against the plaintiff. The same is true of the other defendants. The plaintiff while in gaol was treated with consideration. It was true he was not allowed to communicate with anyone until at least the 18th of January and part of the time he had to live on gaol food. If there had been malice or harsh treatment of the plaintiff while in gaol or matters of that kind I should have given very considerable damages. In the circumstances I assess the damages against Foster at $500. The other defendants Berry, Pitts and Stewart although they were merely carrying out orders are also liable—see *Griffin* v. *Coleman* (1859), 4 H. & N. 265.

I assess damages against each of these defendants, at the sum

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of $10. There will be judgment against these defendants for the amounts mentioned.

At the trial I dismissed the action as against Darling but reserved the question of costs. All the defendants were represented by the same solicitor and counsel. Pursuant to rule 977, I direct that Darling's costs be taxed and that he be paid one-tenth thereof.

*Judgment for plaintiff.*

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S. C. In Chambers 1936 Nov. 2, 13.

## REID v. McKINNON.

*Practice — Substitutional service — Order for — No affidavit in support — Application to set aside—Rule 63.*

An order for substitutional service should not be made unless an affidavit setting forth the ground upon which the application is made has been filed.

APPLICATION to set aside an order for substitutional service. Heard by ROBERTSON, J. in Chambers at Victoria on the 2nd of November, 1936.

*Clearihue,* for the application.
*Jackson, K.C., contra.*

*Cur. adv. vult.*

13th November, 1936.

ROBERTSON, J.: Mr. Justice MURPHY has requested me to deal with this application—see *Mit Singh* v. *Kehar Sing Gill* (1935), 50 B.C. 332; [1936] 1 W.W.R. 396. I have no doubt in this case the learned judge thought that the statements of counsel, upon which he made the order for substitutional service, were based upon an affidavit which had been duly filed. I think that an order for substitutional service should not be made unless an affidavit setting forth the ground, upon which the application is made, has been filed. See rule 63. Otherwise there would be no evidence before the Court. For these reasons I think the order and all subsequent proceedings should be set aside with costs to be set off against the moneys due under the mortgage.

*Order accordingly.*

## CHUNG CHUCK AND MAH LAI v. GILMORE *ET AL.*

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*Oct.* 15, 16; *Nov.* 4.

*Constitutional law—B.C. Coast Vegetable Marketing Board—Powers of—Seizure of potatoes alleged to be for export—Natural Products Marketing (British Columbia) Acts, 1934 and 1936—Interim injunction—B.C. Stats. 1934, Cap. 38; 1936, Cap. 34.*

The plaintiffs raised potatoes in the Municipality of Delta. When carrying a truck load of potatoes from their farm to Vancouver they were stopped by officers of the B.C. Coast Marketing Board, who seized the potatoes and removed them from the truck. The potatoes were not tagged as required by the regulations of the Board, but the plaintiffs stated the potatoes were for export and they were taking them to Vancouver for storage prior to export, and authority to proceed was not required. The plaintiffs obtained an *interim* injunction restraining the Board from preventing the plaintiffs from moving potatoes from their farm to any point in the Province for the purpose of storing same prior to export.

*Held*, on appeal, MACDONALD, C.J.B.C. dissenting, that what the Board had done was within the authority given it by the 1936 Act, said authority was not, as applicable to the facts of this case, *ultra vires*, and the appeal should be allowed.

APPEAL by defendants from the order of MURPHY, J. of the 8th of July, 1936, whereby he restrained the defendants until after the trial of the action from in any way interfering with or preventing the plaintiffs from exporting potatoes from any point within the Province, and from interfering with the plaintiffs in the use and enjoyment of the public highways of the Province for the purpose of moving potatoes from Ladner, B.C. to points within the Province for the purpose of storing same preliminary to export. The plaintiffs raised potatoes on a farm in the Municipality of Delta. On three occasions in June and July, 1936, the plaintiffs, when carrying a truck load of potatoes from their farm to Vancouver, were stopped at the Fraser Avenue Bridge by officers of the B.C. Coast Vegetable Marketing Board, who seized the potatoes and removed them from the trucks, the officers stating they had instructions from the Board not to allow any potatoes to come into Vancouver whether for export or otherwise. Upon the application of the plaintiffs a restraining order was granted.

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The appeal was argued at Victoria on the 15th and 16th of October, 1936, before MACDONALD, C.J.B.C., MCPHILLIPS and MCQUARRIE, JJ.A.

*Maitland, K.C.* (*Tuck*, with him), for appellants: What was done the Board had a right to do under the Provincial Act. The potatoes must be tagged and the police seized them because they had not complied with the regulations. An *interim* injunction is never granted where there is an arguable case. I am not relying on the Dominion Act at all. The only ground upon which this judgment can be sustained is that the Province had no power to pass it, but the Attorney-General of Canada and the Attorney-General of British Columbia have not been served. The scheme is local and analogous to the liquor cases. In the case of *Canadian Pacific Wine Co.* v. *Tuley*, [1921] 2 A.C. 417, the Act was found *intra vires*, also in *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499. We are not trying to prevent export: see *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73; *Rex* v. *Shaw* (1917), 29 Can. C.C. 130. This is stopping the Board's work altogether, resulting in injury to the industry: see *Radenhurst* v. *Coate* (1857), 6 Gr. 139. There are 2,591 growers involved in the scheme. An injunction will not be granted against a public body and this is a public body: see *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at p. 363; *Roper* v. *Public Works Commissioners*, [1915] 1 K.B. 45; *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284. Preponderance of convenience must be in favour of the injunction: see *Jones* v. *Victoria* (1890), 2 B.C. 8.

*Bull, K.C.*, for respondents: The potatoes were seized because: (1) Too small; (2) No licence; (3) No tags. The issue was that we had "No business to export potatoes without a licence from the Board." We do not have to have a licence. There is no doubt of our *bona fide* intention to take these potatoes out for export. I am not attacking the validity of the Provincial Act. The purpose of the Act is marketing in British Columbia and does not apply to the export business. This was decided in *Lawson* v. *Interior Tree Fruit and Vege-*

*table Committee of Direction*, [1931] S.C.R. 357. You must look to the stated purpose and intent of the Act. We are not within the scheme at all: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *Re Hudson's Bay Co. and Heffernan*, [1917] 3 W.W.R. 168; *Rex* v. *Western Canada Liquor Co.* (1920), 29 B.C. 499. That the Act does not purport to deal with potatoes for export see *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*, [1897] A.C. 231; *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91 at p. 120. As to there being an arguable case, that is a reason why an injunction is given: see Annual Practice, 1935, p. 902; *Litchfield-Speer* v. *Queen Anne's Gate Syndicate (No. 2) Ltd.*, [1919] 1 Ch. 407 at pp. 411 and 415; *Shelfer* v. *City of London Electric Lighting Company*, [1895] 1 Ch. 287 at p. 314; *The Directors, &c. of the Imperial Gas, Light and Coke Company* v. *Broadbent* (1859), 7 H.L. Cas. 600.

*Maitland*, in reply, referred to *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, [1936] S.C.R. 398.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: This is a case arising under an amendment by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, to the Natural Products Marketing (British Columbia) Act of 1934. The first mentioned Act, chapter 34 of the Acts of 1936, Sec. 4 (1) makes this declaration:

> The purpose and intent of this Act shall, from the time of the coming into operation of this section, be to provide for the effective regulation and control in any respect or in all respects of the marketing of natural products within the Province, including the prohibiting of such marketing in whole or in part.

That amendment I think confines the marketing under the 1934 Act and this amendment to the regulation and control of marketing in the Province itself and does not extend to products intended to be exported.

The plaintiff is a potato grower within the district defined by the said Act and who was bringing a load of potatoes to Vancouver to be delivered to a broker there for the purpose of export. An official of the Board stopped him at the entrance to the New

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Westminster Bridge and demanded his authority from the Board to proceed with the potatoes. The plaintiff said the potatoes were for export and that authority was not necessary and he therefore demanded to be allowed to proceed. The representative of the Board thereupon seized the potatoes and sent them to the Board's warehouse. Now in my opinion that section 4 (1) restricts the authority of the Board to regulation and control of potatoes when being marketed in the Province and has no reference at all to potatoes intended for export. Cases of liquor control in this Province have been referred to as analogous to the control of potato marketing but I think these cases are inapplicable to the present one. When liquor is imported into British Columbia then the Province may have jurisdiction over the regulation and control of that liquor as has been held in the said cases. But import is very different from export. When they are for export the buyers may exercise control over the marketing of the potatoes if their laws provide for that but in this Province the Legislature is confined to regulation and control of potatoes which are intended to be sold in the Province. Therefore I think the plaintiff was entitled to have succeeded in his contention. The appeal must be dismissed.

MCPHILLIPS, J.A.: This is an appeal from an order or injunction of the 8th of July, 1936, inhibiting the appellants from interfering with the plaintiffs in transporting potatoes for marketing in wagons upon the public highways without first complying with regulations of the B.C. Coast Vegetable Marketing Board acting under the provisions of the Natural Products Marketing (British Columbia) Act, B.C. Stats. 1934, Cap. 38 and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, Cap. 34. At the outset it may be said that a great number of regulations have been made but the following regulations may be said to fully indicate the powers of the Board and under which the Board acted: [After setting out the regulations of the 29th and 30th of June, 1936, the learned judge continued].

Now it would appear that when the Board only desired, so far as the facts would appear, to search the vehicles containing

the potatoes this was refused by the respondents. It was evident though that the potatoes in the vehicles were not tagged. Then it was that the potatoes were seized under the authority residing in the Board and in pursuance of the regulations to be disposed of through the agency of the Board. Now the question is, did the appellants act in any manner contrary to the statutes and regulations? If the Board did not, then where was the right to the order or injunction granted and now under appeal? If we turn to the argument of counsel for the respondents it is this only. It was stated upon the highway that the potatoes were for export and that was sufficient to oust the authority of the Board. If this be a sufficient answer it would result in complete paralysis of the functions of the Board and effectively destroy the whole Provincial statute law in the matter. It cannot but be said to be idle contention to have a Provincial statute so dealt with. We have here a statute well within the constitutional powers of the Province, that is, "Property and Civil Rights" within the Province. That being so how is it possible to say here that the Board, acting under the Provincial Act, has been guilty of an illegal Act? There is no interference with the use of public highways. If it were it would be lawful enough if authorized by Provincial legislation, notably, take the case of toll gates. Here we have in the Board the legislative authority. It is not the case of the Board interfering with the right to export the potatoes at all—the requirements are merely in the way in which property in the Province is to be held and dealt with. So long as the property is in the Province it must be subject to the law of the Province. Nothing was done by the appellants to prevent export; as a matter of fact all that was desired to be done was the right to inspect the property in the wagons, although it was evident that the bags were untagged. If the bags of potatoes had been tagged and there had been compliance with the regulations of the Board generally the potatoes would not have been interfered with. Nothing that was done by the Board can be said to have invaded the realm of Dominion legislation—compliance with the Provincial law is in no way an interference with Dominion constitutional powers. All that the respondents had to do was comply with the Provincial law and

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so doing could without trammel of any nature or kind export the potatoes if so advised. In truth we have upon the statute books of both the Dominion and the Province joint action and the Acts were framed so that where the power did not reside in the Dominion it resided in the Province. In the Natural Products Marketing (British Columbia) Act of 1934, we find this section:

5. Every Provincial Board may co-operate with the Dominion Board to regulate the marketing of any natural product of the Province and may act conjointly with the Dominion Board, and may perform such functions and duties and exercise such powers as are prescribed by this Act or the regulations.

Then we see that there was further legislation in 1936—the Natural Products Marketing (British Columbia) Act Amendment Act, 1936—and we see that all that the Board has done here is completely authorized: see sections 5 and 6.

Upon the facts as sworn to and before the learned judge upon the application for the injunction, it was evident that the respondents could not support their contention that there was any *bona fide* intention to export the potatoes. It was said warehouse accommodation had been arranged for. That was denied by the named warehouseman and further the respondents admitted that some of the potatoes might not be exported. Now the guiding principle in the Courts as to granting or not granting an injunction is this—it must be just and convenient. In my opinion it is a flagrant attempt to flout the law. It cannot be for a moment admitted that all that is needed to be said by the person driving a wagon filled with potatoes is immune from complying with the statute laws and the regulations thereunder by the mere statement "these potatoes are for export" and admittedly here the bags of potatoes were without the tags, labels or stamps designated by the Board. I would here refer to sections 3 and 4 of the regulations of June 29th, 1936, which read as follows:

3. All persons are prohibited from carrying or transporting within the area the regulated product unless the same is tagged or marked in such manner as the Board may designate.

4. That any of the regulated product kept, transported or marketed in violation of this or any orders of the Board shall be seized and disposed of through the agency designated by the Board. All costs and charges occasioned by such seizure and disposing, shall be paid by the person so keeping.

transporting or marketing the regulated product, and the amount of such costs and charges shall be deducted and retained from any moneys realized from the sale of the regulated product so seized and applied in satisfaction of such costs and charges.

It will be seen that the respondents refusing to comply with regulations of the Board persisted in their contention that they were entitled to proceed along the highway within the Board area although there was non-compliance with the regulation that the bags should be tagged. What followed? The appellants did what they were entitled by statute law, seized the potatoes—not for confiscation at all—as they said they would be sold for the best possible price and the moneys accounted for. This was acting under the statute law. See amended section 5 of the Natural Products Marketing (British Columbia) Act Amendment Act, 1936.

It is plain upon the facts, as I read them, that there was an absence of *bona fides* on the part of the respondents throughout. The requirements of the Board—covered by statute law and regulation—were binding upon the respondents and they did not comply with them. They are binding even if the potatoes were to be exported. They can be complied with with no inhibition or curtailment of right to export. The Provincial law is supreme as to property and civil rights and, the property being in the Province, so long as it is, it is subject to the Provincial law. Here nothing was done or attempted to be done which would interfere in any way with export or trade and commerce. If the respondents had complied with the Provincial law they could have proceeded on their way and could, if so minded, have exported the potatoes. Can it be said that anything that was done by the appellants was contrary to law? With great respect to the learned judge who granted the injunction, I am compelled to say that it was not a case for an *interim* injunction (until after the trial). There was nothing in the case to at all establish that the Board was in any way "interfering or preventing the plaintiffs (the respondents) their servants or agents from exporting potatoes"; the duty upon the respondents was to comply with the Provincial law, then export the potatoes when they were so minded.

The appeal of course only has reference to an interlocutory

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injunction and I do not find it necessary to cite authorities going into the merits of the action.

That the Provincial law is effectual in respect of "property and civil rights" is beyond question. That being the case, there must be compliance with that law. The respondents have not complied with it and seek by the statement only, that the potatoes are for export, to escape from compliance with the provisions of the Provincial law the Provincial law in no respect affecting the right to export the potatoes. To admit of any such claimed right would be the complete nullification of the Provincial law.

No questions of *ultra vires* as to the Provincial Marketing Act require to be dealt with as the learned counsel for the respondents stated he was not contending that.

I would allow the appeal, the injunction to be set aside.

MCQUARRIE, J.A.: I agree with my learned brother MCPHILLIPS that this appeal should be allowed and the injunction dissolved and discharged.

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

Solicitor for appellants: *D. C. Tuck.*
Solicitor for respondents: *W. W. Walsh.*

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## PLUNKETT AND PLUNKETT v. MILLS BROTHERS LIMITED *ET AL.*

*Sept.* 9, 10, 11, 14; *Nov.* 3.

*Negligence—Damages—Contributory negligence—Collision—Automobile and motor-cycle — Right of way — Findings of trial judge — Evidence to support—Appeal.*

The collision in question took place on 12th Avenue about 20 feet east of the intersection of 12th Avenue and Larch Street. The plaintiff Plunkett with the plaintiff Beazley as a passenger, was driving his motor-cycle east on 12th Avenue, and the defendant Mills on his way home was driving his car west on 12th Avenue, intending to turn south on Larch Street. The plaintiffs allege that before reaching Trafalgar Street (first street west of Larch Street) a car came out of Trafalgar Street and turned east on 12th Avenue in front of them and they followed close behind this car and did not see the defendant's car until they were past the intersection at Larch Street, when the defendant, who was then about the centre of the road, suddenly turned to his left in front of them, that Plunkett then swerved to the right and nearer the curb to avoid him, but he was too close and he crashed into the left front of the defendant's car, and both plaintiffs were thrown over the left side of the car and severely injured. The defendant Mills swore that as he approached Larch Street he gradually went over to the centre of the road. He saw the motor-cycle coming for half a block at 40 miles an hour and there was no intervening car between the motor-cycle and himself. He held out his hand showing his intention to turn south on Larch Street, and when he saw the motor-cycle coming straight for him he slowed down and was barely moving when he was struck, and he could not turn back to the right owing to the traffic going west. The learned trial judge found that the defendant was on the wrong side of the centre line of the road and found him solely responsible for the accident.

*Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. dissenting), that the finding acquitting the driver of the motor-cycle of any negligence causing or contributing to the accident cannot be interfered with if there is reasonable evidence to support it. It is enough to say that the car travelling ahead of Plunkett (and we should assume that evidence was accepted) going in the same direction, obscuring or at all events partially obscuring his view, would explain his inability to see the on-coming motor-car sooner than he did. With the findings of fact (one of negligence on Mills's part and the other of no negligence on Plunkett's part) both supported by evidence, the appeal must be dismissed.

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APPEAL by defendants from the decision of FISHER, J. of the 20th of May, 1936, in two actions that were consolidated for trial. The action arose from a collision near the intersection of 12th Avenue and Larch Street in the City of Vancouver at about 7.15 p.m. on the 11th of May, 1935. The respondent Plunkett was driving a motor-cycle with the respondent Beazley sitting on the saddle behind him, in an easterly direction along 12th Avenue. The appellant Mills was proceeding west along 12th Avenue, intending to turn south on Larch Street. He was alone in his car, and when nearing the intersection he held out his hand indicating that he was about to turn south, his car at the time being, according to his evidence, about the centre of the road. He then says he saw the motor-cycle coming at an excessive speed straight for him and he slowed down almost to a stop when about 30 feet from Larch Street. The plaintiffs' evidence was that Mills turned his car towards the curb on the south side of 12th Avenue when he was about 30 feet from Larch Street, and there was not sufficient room to pass between him and the south curb; further that there was an intervening car going east in front of the plaintiff which cut off his view of the defendant until he was too close to the Mills car to stop. The result was that Plunkett ran into the front of the Mills car and both he and Beazley shot over the side of the Mills car and were severely injured.

The appeal was argued at Victoria on the 9th, 10th, 11th and 14th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*Ray*, for appellants: On the evidence the learned judge was wrong in finding that Mills was so close to the south curb that there was a space of at least 14 feet between him and the curb. Plunkett had a clear vision, his speed was excessive and he was entirely responsible for the accident: see *Swartz* v. *Wills*, [1935] S.C.R. 628 at p. 634; *Howard* v. *Henderson* (1929), 41 B.C. 441. That Mills was admittedly slightly over on the left side of the road does not excuse Plunkett from deliberately running into him: see *Hollum* v. *Robertson* (1936), 50 B.C. 551. The finding that Mills had turned to the left was erroneous,

as he still had 30 feet to go before entering the intersection, and when the car was struck the impact turned the car over to the left and near the curb. Plunkett's father, with whom he was living as a minor, comes under the provisions of the Motor-vehicle Act and is also responsible for his son's negligence. As to the appellant company, the evidence does not disclose that Mills was acting as a servant or agent of the company. Mills had finished his work for the day on Saturday afternoon, and at the time of the accident was on his way home, where he would remain until the following Monday: see *Ruff* v. *Sutherland* (1930), 43 B.C. 218; *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece* (1936), 50 B.C. 494. As to the damages allowed, both plaintiffs were minors and earned very little.

*S. S. Taylor, K.C.* (*Skaling,* with him), for respondent: The learned judge has found Mills solely responsible for the accident. He concluded there was not sufficient room between the Mills car and the south curb for Plunkett to get past: see *Swadling* v. *Cooper,* [1931] A.C. 1 at pp. 7, 8 and 9. That the trial judge's judgment should not be disturbed see *Owen* v. *Sykes* (1935), 105 L.J.K.B. 32 at p. 36. As to the amount of damages allowed not being excessive see *Trache* v. *Canadian Northern Ry. Co.,* [1929] 1 W.W.R. 100 at p. 107. Mills was driving the company's car and the presumption is he was acting in the course of his employment: see *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece* (1936), 50 B.C. 494; *McKay* v. *Drysdale* (1921), 30 B.C. 81; *Drulak* v. *Harvey and General Steel Wares Ltd.,* [1935] 3 W.W.R. 65. As to the liability of Plunkett's father, he could be proceeded against for lack of licence but not in respect of damages for negligence.

*Ray,* in reply, referred to *Lysnar* v. *National Bank of New Zealand Ltd.,* [1935] 1 W.W.R. 625 at p. 636; *Jones* v. *Great Western Railway Co.* (1930), 47 T.L.R. 39 at p. 45.

*Cur. adv. vult.*

3rd November, 1936.

MACDONALD, C.J.B.C.: These cases were consolidated and judgment was delivered on the 20th of May, 1936, in favour of the individual plaintiffs against the individual defendant R. E.

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Mills, and also against the appellant Mills Brothers Limited. The question in this case in my opinion depends upon whether or not R. E. Mills was solely responsible for the accident or whether respondent Plunkett was solely responsible or on the other hand whether both were guilty of negligence in connection with the occurrence which was a collision between Mills's motor-car and Plunkett's motor-cycle. The learned judge held that R. E. Mills's negligence was the sole cause of the accident and gave judgment against him and the appellant Mills Brothers Limited. He also held that respondent Plunkett had failed to keep a proper look-out but he held that that failure did not contribute to the accident.

The appellant R. E. Mills was driving a motor-car on 12th Avenue in the City of Vancouver, near the intersection of that street and Larch Street into which he proposed to turn at the intersection. Plunkett and Beazley were riding a motor-cycle both sitting on the one saddle. Plunkett who was driving failed to notice Mills's car until within 20 or 30 feet from it although the street was straight and the light good. Jack Thomas Yelf, a boy of fourteen, said to be a bright boy, gave evidence on behalf of the respondents that he was in his mother's car at the intersection of the two streets and was an eye-witness of the collision. It is admitted by appellants' counsel that Mills was on the wrong side of the street. He was on the north side of 12th Avenue, approaching Larch Street into which he intended to make a left-hand turn. He had his hand out as a warning and was proceeding very slowly as the boy Yelf stated in his evidence. His car was almost astraddle of the centre line of the street which had a 30-foot pavement from curb to curb. Yelf says that his right wheels were about a foot over the centre line which was marked on the street. That means, of course, that there was the width of the Mills's car and a foot in addition over on the left side of the street leaving ample room for a car coming in the opposite direction to pass between him and the curb on that side. R. E. Mills who was driving says he saw the motor-cycle approaching and was keeping a careful eye on it. Plunkett on the other hand says that he did not see the Mills car until he was almost upon it and he gives his excuse for this that there was a motor-

car ahead of him which obscured his view. It is sworn to by the two plaintiffs in the actions, but no one else saw it. But even if it were admitted that the car was there driving ahead of the motor-cycle that would not obscure the view of the plaintiffs or at all events of the plaintiff Plunkett unless he was driving very close to the car. One therefore should not be surprised at the finding of the trial judge that he had not been keeping a proper look-out. Now in addition to this witness called by the respondents there is the evidence of Mills who saw the motor-cycle approaching for a considerable distance and who did not see any motor-car and says there was none between him and the approaching motor-cycle. The driver of the motor-cycle came within 20 or 30 feet of the Mills car before he saw it and was therefore probably excited and confused at being suddenly confronted with it. He is said to have swerved to the left but when he got to the left probably he saw approaching traffic coming on that side of the street and made a sharp curve to the right striking Mills's car about the centre, lifting it a couple of feet from the ground when it swung round on its wheels and rolled down to the curb on that side of the street. Now Plunkett had an alternative if he had been keeping a proper look-out. He could have gone through between the Mills car and the curb which left a clearance of about 9 or 10 feet, without any trouble; instead of that in his confusion because of his failure to keep a proper look-out he made a false move. Now in these circumstances it might be said, although I do not say it, that the fault was altogether Plunkett's. Of course Mills was on his wrong side of the street, but having regard to the width of the street at that point, and the circumstances above mentioned there was quite enough room for Plunkett to have passed, for if the alleged car ahead of him could have passed he could. Now it is contended by the appellant that Mills was going at a crawl and at the time of the collision was about to make a left turn into Larch Street and was not parallel with the centre as appears from some other evidence and therefore was in a sense blocking the side of the street which Plunkett had a right to pass on. This, I think, is a contention not well established. It is based strictly on the position of the Mills car after being struck by the motor-cycle and swung around to the

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curb. It is apparent that if he had been making the turn the collision would have taken place nearer Larch Street. The appellant had his hand out as a warning that he was about to turn on to Larch Street, and respondent Plunkett says that if he had seen his hand out he would have slowed down but that he did not see it. That was his fault and shows that the absence of a proper look-out had a good deal to do with the collision. The appellant R. E. Mills and others gave evidence as to the signal.

The two plaintiffs had been watching a ball game in a public playground adjoining this intersection and had left it to go for a pleasure ride on the motor-cycle towards the University and were returning to the scene of the ball game and probably had their attention engrossed by the game which was still going on. The mother of the boy Yelf was called as a witness for the respondents and makes no mention of this mysterious car which was supposed to have been ahead of the motor-cycle. Another witness Hobkirk was walking on 12th Avenue towards Larch Street when she heard the crash some distance behind her so it is reasonably clear that Mills was not making the left-hand turn at that time. On the whole evidence I am inclined to think that Plunkett was at least as much to blame as Mills. He seems to have been travelling at a high rate of speed and apparently was paying no attention whatever to other cars on the street. He had passed Larch Street before he saw Mills, showing that Mills was some distance back from Larch Street and therefore would not likely have commenced to turn into Larch Street. Now, of course, it is proper to consider the negligence of Mills in coming on to the wrong side of the street. He may have contributed and in the circumstances I think probably did contribute to the cause of the accident and therefore I think the proper conclusion to make from all the evidence in the case which I do not further particularize is that both parties were guilty of negligence and it would be fair to find that they were equally negligent. I am convinced that would be entirely fair to Plunkett. One can understand how a motor-cycle driven at a high rate of speed, striking the motor-car in the centre, would lift it a couple of feet off the ground as the evidence shows it was lifted, and then swing over to the side of the street where it ran down

to the curb. That seems a particularly reasonable conclusion from the evidence, and I think the judge was therefore in error in saying that Mills was entirely responsible for the collision. I would therefore order that the damages be equally divided between the parties.

That brings me to the question of the reasonableness of the damages. It strikes me that the amount might be considered excessive, but I am not disposed to interfere with the trial judge on the amount of the damages. He has exercised discretion and I would assume that he exercised it properly in this case, so far as the amount of the damages is concerned.

With reference to the extent of the liability of Mills Brothers Limited, the defendant R. E. Mills was using the car which belonged to the company of which he was president. In other words he was entrusted by his company with the control of the car and therefore under the Motor-vehicle Act the owner is also liable for the accident which occurred in this case. I therefore would not interfere with the finding of the trial judge on this point.

It was contended that Plunkett's father was liable for the acts of his son because he had paid for his son's licence. I cannot think that because the father paid for the licence which was really a loan to the son that the father becomes responsible as owner of the car and had entrusted it to the son. I think the learned trial judge came to the right conclusion on this point.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed because the learned judge below has, upon its very unusual facts, reached the right conclusion.

MCPHILLIPS, J.A.: After careful consideration of both the facts and the relevant law applicable I cannot come to any different conclusion to that arrived at by the learned trial judge. There was not, in my opinion, ultimate negligence—the only way in which the appellants could escape liability. The motor-car was unquestionably where it ought not to be, that is on its wrong side of the road and, upon the facts, the collision was due to the negligence of the appellants. Further, no contributory negligence was established. Therefore in my opinion the learned

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trial judge was right in imposing liability upon the appellants and the assessment of damages was rightly and properly made. The *quantum* of damages I would not disturb. The well-known principle is that the learned judge assesses them as best he can, and I see no error here in the assessment and I would not disturb that assessment. The appeal should be dismissed.

MACDONALD, J.A.: This is an appeal from the decision of FISHER, J., awarding damages to two respondents in the combined sum of $9,413.90 for injuries sustained by them while riding on a motor-cycle driven by the respondent Plunkett on 12th Avenue near the intersection of Larch Street. The motor-cycle collided with an automobile owned by the appellant Mills Brothers Limited, and driven by its president Robert E. Mills.

On the facts as found by the trial judge, we must assume that the collision occurred because the appellant Mills before he actually reached the intersection where he intended to make a left turn to go south on Larch Street negligently swerved to the left (he was driving westerly) invading in so doing that part of the roadway reserved to the respondents and all others driving in an easterly direction. That being so the finding of negligence against the appellant Mills cannot be interfered with.

Strangely enough as intimated this invasion was not made to enable Mills to make the left turn at the intersection because the time for doing so properly had not arrived unless (and it may be so) he intended to "cut the corner." Physical evidence would indicate that he turned so far to the left at this point that very little space was left between his car and the southerly curb for the respondents on the motor-cycle to pass through safely and proceed on their way. The street was 36 feet wide from curb to curb. Even if only nine of the 18 feet to the left of the centre line was invaded (and of that at least there is no doubt) a lane of nine feet only would be left for respondents to pass through when suddenly confronted with an emergency. At that moment (when Mills swerved to the left) respondents were close to the point of impact; too close to be charged with negligence for failing to pass in safety. In the agony of collision with a moving object in front of them invading their territory any seeming negligence in not being able to pass cannot be imputed to them.

I do not think on the evidence that nine feet to the left of the centre line was left unoccupied. If it were, however, the result would be the same.

It is suggested that if Plunkett, the driver of the motor-cycle, had kept a proper look-out he could have avoided the accident. On this point the trial judge at the outset stated that it gave him considerable anxiety. After considering it, however, he said:

> . . . that his [Plunkett] not seeing the motor-car before he did cannot be considered as negligence causing or contributing to causing this accident.

This finding acquitting the driver of the motor-cycle of any negligence causing or contributing to the accident cannot be interfered with if there is reasonable evidence to support it. It is enough to say that the car travelling ahead of Plunkett (and we should assume that evidence was accepted) going in the same direction, obscuring or at all events partially obscuring his view, would explain his inability to see the on-coming motor-car sooner than he did. The question too of keeping a proper look-out only became important from and after the time Mills improperly swerved to the left invading a foreign area. Had he not so swerved both vehicles would have passed safely. A sharp look-out on the part of Plunkett at the moment Mills swerved would not have enabled him to avoid the accident. The fact is that the swerve to the left and the collision nearly synchronized. With therefore two findings of fact—one of negligence on Mills's part and the other of no negligence on Plunkett's part—both supported by the evidence, the appeal must be dismissed.

I would not reduce the damages.

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

*Appeal dismissed, Macdonald, C.J.B.C. dissenting.*

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

Solicitor for respondents: *A. C. Skaling.*

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## DYMOND v. WILSON.

*Practice — Judgment and notice of appeal given — Death of appellant— Executor—Order of revivor—Application for—B.C. Stats. 1934, Cap. 2, Sec. 2, Subsec. (4).*

The plaintiff's action for damages for injuries sustained owing to the alleged negligence of the defendant was dismissed on the 25th of April, 1936. The plaintiff gave notice of appeal on the 28th of April, 1936. On the 8th of June following she died. On motion to the Court of Appeal by the executor of the deceased for an order that the proceedings herein be continued between himself as executor of deceased and the respondent, and that he be added as appellant in substitution for deceased under the provisions of subsection (4) of section 2 of the Administration Act Amendment Act, 1934:—

*Held*, that the expression "action pending" in the above-mentioned subsection, when used in its natural meaning, refers to any proceeding in the nature of litigation between the plaintiff and the defendant. The action should therefore be continued in this Court.

MOTION to the Court of Appeal for an order that the proceedings herein be continued between William P. Dymond as executor of Sophia Dymond and the respondent, and that the said William P. Dymond be added as appellant in substitution for the said Sophia Dymond. The action was dismissed by ROBERTSON, J. on the 25th of April, 1936. On the 28th of April, 1936, the plaintiff gave notice of her intention to appeal from the judgment of ROBERTSON, J. On the 8th of June following, the plaintiff Sophia Dymond died. On the 18th of August following, said William P. Dymond made a motion in Chambers before MCDONALD, J. for the order above stated, and the motion was referred by MCDONALD, J. to the Court of Appeal.

The motion was argued at Victoria on the 8th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*Whittaker*, for the motion: Notice of appeal was given on the 28th of April, 1936, and the plaintiff died on the 8th of June, 1936. The action is for personal damages for injuries and the plaintiff died after judgment and after notice of appeal was

given. The motion is made under section 2 (4) of the Administration Act Amendment Act, 1934.

*F. C. Elliott, contra*: If the plaintiff dies her personal action in tort dies with her. The action was dismissed and the action ends with judgment. It is a question as to the interpretation of the above subsection of the Act: see 1 Bac. Abr. 52; 2 Co. Litt. 289. a. It is an invasion of common law rights and the Act must be strictly construed. There is a judicial determination of the action when judgment is given: see Wharton's Law Lexicon, p. 471; *Fielding* v. *Morley Corporation,* [1899] 1 Ch. 1. An action and an appeal are entirely distinct: see *Cropper* v. *Smith (No. 2)* (1884), 28 Ch. D. 148 at p. 151; *In re Riddell: Ex parte Earl of Strathmore* (1888), 20 Q.B.D. 512 at p. 514. The facts disclose that she did not die by reason of this accident: see *Pulling* v. *Great Eastern Railway Co.* (1882), 9 Q.B.D. 110.

*Whittaker*, in reply: This is a Court of rehearing. The words "action pending" include the appeal: see *Johnson* v. *Refuge Assurance Company, Limited,* [1913] 1 K.B. 259 at p. 264; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 2; 2 Co. Litt. 285. a.

*Cur. adv. vult.*

30th September, 1936.

MACDONALD, C.J.B.C.: I have come to the conclusion that the motion should be granted, that the word "action" includes an appeal, and that you ought to have the order that you are asking for. I think it follows from the decision in *Sunder Singh* v. *McRae* (1922), 31 B.C. 67 where it was held that where everything had not been done under the action, that it had not been closed up, the solicitor had the power to accept notice of appeal; that imports that he had some interest in the appeal; and I think the Court took the right view there, following the English cases, a number of them to the same effect, taking a liberal view of the word "action" and extending it to an appeal to the Court of Appeal.

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MARTIN, J.A.: By this motion we are called upon to put a construction upon the expression "action pending" in subsection (4) of section 2 of Cap. 2 of the Administration Act Amendment Act, 1934. In the argument presented to us against the motion the matter was dealt with largely as though there was some expression in the statute which would compel us to put a limited construction upon the ambit of the words "action pending." Now, when they are considered it is quite apparent they cannot be limited to actions in certain Courts. A consideration of the whole matter shows that this is a general expression and it relates to actions pending not only in the Supreme Court but in the County Court, or any other Court of this Province; the expression is one of application to Courts in general and not to any Court in particular.

To found that said limited view of the section so presented to us we were referred to the definitions of "action" in the Supreme Court Act, and we were invited to consider the *status* of an action in that Court. But the more the question is considered the more it appears quite unjustifiable so to limit it: we must give a general effect to the general expression "action pending." The references to the definitions of "action" and "cause" in, *e.g.*, the Supreme Court Act were based upon the assumption that this Administration Act relates to that Court alone, and doubtless they are valuable in assisting us to arrive at a conclusion as to the intention of the Legislature in using language of well known application but in this case we are not thrown back upon any particular definition of "action pending," because there is none in this statute, so we must view the matter at large as aforesaid.

We derive much benefit on that view from the case which Mr. *Whittaker* cited to us, *Johnson* v. *Refuge Assurance Company, Limited,* [1913] 1 K.B. 259, and the expression of that sound judge, Lord Justice Kennedy, at p. 264, where he says that the word "action" when used in its natural meaning "refers to any proceeding in the nature of a litigation between a plaintiff and defendant." Now that exactly covers this point in principle, and not only that, but we have a further striking confirmation of the view that the language applies to this Court, in that, after

reading carefully the whole of our Court of Appeal Act to see what assistance can be derived from it to support this view, I was rewarded by finding in section 10 the very expression used in an exact equivalent, *viz.*, "In any cause or matter pending before the Court of Appeal. . . ." Well, that really settles the question, because the words "action" and "cause" even in the statute mainly relied upon (Supreme Court Act, Sec. 2) are mutually inclusive *ad hoc*. Therefore since we have the precise expression in the very Act establishing this Court it is impossible for us to say that this present action which is "pending" in it should not be continued: the statute to my mind clearly contemplates its continuance because it is "litigation" in the shape of an appeal *inter partes* that has been duly brought within our jurisdiction.

I would therefore grant the motion.

MCPHILLIPS, J.A.: I am of like opinion as expressed by the learned Chief Justice and my learned brother MARTIN, as to the result of the motion.

MACDONALD, J.A.: I agree for the reasons given by my brother MARTIN.

MCQUARRIE, J.A.: I agree.

*Motion granted.*

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## PAVICH *ET AL.* v. TULAMEEN COAL MINES LIMITED *ET AL.*

*Sept. 22, 23; Nov. 4.*

*Mechanics' liens—Coal mine—Supply of posts and lumber for timbering mine—Partially used in actual timbering—Right of lien—R.S.B.C. 1924, Cap. 156, Secs. 6 and 25.*

Ninety-eight claimants brought action on their respective liens against the defendant company and recovered judgment. On appeal the defendant abandoned its appeal against all the claims with the exception of one (that of Hewitt) as they were less than the minimum under which an appeal lies under section 35 of the Mechanics' Lien Act. Hewitt's claim was for posts and other lumber supplied for timbering the mine. Only a portion of lumber supplied was actually used in timbering.

*Held,* on appeal, affirming the decision of BROWN, Co. J., that if the timber was in fact used for constructive or development purposes the plaintiff is within the provisions of section 6 of the Mechanics' Lien Act. As a constructive operation the props are put in when they are required, and although the timber has not been all used, yet the person who supplied it is entitled to a lien when it has actually been supplied at the mine.

APPEAL by defendant from the decision of BROWN, Co. J. of the 9th of July, 1936, pronounced at the City of Princeton in the County of Yale, in a mechanic's lien action. There were 98 claimants, and of these 97 claimed less than $200 each. One claim was for $434.67. On preliminary objection by the respondents it was admitted that under section 35 of the Mechanics' Lien Act there was no right of appeal against those claiming less than $250, and the appeal proceeded in respect of the one claim of $434.67.

The appeal was argued at Victoria on the 22nd and 23rd of September, 1936, before MACDONALD, C.J.B.C., MARTIN and MACDONALD, JJ.A.

*S. S. Taylor, K.C.,* for appellants: In this case they are depleting the mine and the Mechanics' Lien Act does not apply. A lien is given under section 6 of the Mechanics' Lien Act. No work is going on except mining coal for sale commercially. Work of a mining nature does not come within the statute. There is no question of building or erecting here. No constructive work

is being done: see *Wester et al.* v. *Jago et al.*, [1917] 1 W.W.R. 1338; *Holden* v. *Bright Prospects* (1899), 6 B.C. 439. Coal-mining is not a mechanic's lien operation.

*J. A. MacInnes,* for respondents: The material supplied was lumber and was used for safety purposes. The lien applies in this case as it is constructive work: see *Anderson* v. *Godsal* (1900), 7 B.C. 404; *Re Ibex Company* (1903), 9 B.C. 557; *Anderson* v. *Kootenay Gold Mines* (1913), 18 B.C. 643; *Venness* v. *Stoddard* (1915), 9 W.W.R. 832; *Law* v. *Mumford* (1909), 14 B.C. 233; *Isitt* v. *Merritt Collieries, Limited* (1920), 28 B.C. 62; *Andrews* v. *Pacific Coast Coal Mines Ltd.* (1922), 31 B.C. 537; *Hutchinson* v. *Berridge,* [1922] 2 W.W.R. 710.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: This action was commenced by a large number of workmen upon liens on the defendant's property. At the hearing of this appeal, however, they abandoned all the claims with the exception of one, that of Arthur Hewitt, on the ground that they were incompetent under the Mechanics' Lien Act, on account of their claims being less than the minimum under which an appeal lies. Hewitt's claim at the trial was above that minimum and therefore it was competent for him to be heard on the appeal. Hewitt was the materialman who supplied the timber to the mine for the purpose of props, etc. It was contended by defendants' counsel that timbermen are not entitled under the Mechanics' Lien Act, where the operator is a lessee (as here) and where the timber supplied has not been yet placed in the mine. This is, I think, an entirely wrong submission. I think the man who supplies timber as well as the man who works as a miner is given the benefit of the Act. Now it appears that the timber supplied in this case was for the purpose of timbering the mine. A lease having been granted to a lessee it was provided therein that the mining should be done in a minerlike manner. Now the timbering of the mine was a proper minerlike operation and it was not very strenuously contended that if all the timber had actually been used in the

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mine the lien could be claimed by the person supplying it at the mine. As a constructive operation the props are put in when they are required and although the timber has not been all used yet the person who supplied it is entitled to a lien when as here it has actually been supplied at the mine. I think the plaintiff Hewitt is entitled to a lien for the amount of timber that he supplied $434.67.

The appeal should be dismissed.

MARTIN, J.A.: After a careful consideration of this appeal, I have come to the conclusion that, on its particular facts, it must be dismissed. In so doing my mind has not been free from doubt on the difficult question raised on said facts, but the doubt is not sufficient to justify me in disturbing the conclusion reached by the learned judge below.

MACDONALD, J.A.: This appeal is limited to the claim of the respondent Hewitt; it was quashed in respect to all others.

The point as presented by Mr. *Taylor* is a narrow one and no doubt an argument of some weight may be advanced in support of it. He submitted that the work carried on by the lessees was of an operative character, not constructive in the sense of development work adding to the value of the property. That is true with however one qualification. To enable the lessees to carry on the destructive work of removing coal constructive work might be necessary in which timber such as that supplied by the respondent would be required. As by the terms of the lease they were required to carry on the work in a minerlike manner some work of a constructive nature would be necessary to enable them to do so (*e.g.*, to prevent collapse) and thus carry out the original design. If they did not do work of this character with the timber supplied by the respondent the mine or part of it might cease to exist.

It was conceded—at all events it is the fact—that if this timber was in fact used for constructive or development purposes the respondent is within the provisions of section 6 of the Mechanics' Lien Act, Cap. 156, R.S.B.C. 1924. I think on a fair interpretation it was so used. The respondent, a stranger to the actual work of operation leading to depletion, supplied

timber. It, when used, brought about an alteration in working conditions. It was necessary to use it therefore for the construction, maintenance, alteration and repair of the mine in one of the aspects in which these words are used in section 6. Without this constructive or development work operations could not be carried on at all. He has, therefore, the benefit of the statute. The cases referred to are not against this view.

It was conceded by Mr. *Taylor* that if this view prevailed the owner is bound.

I would dismiss the appeal.

*Appeal dismissed.*

Solicitor for appellants: *W. C. Thomson.*
Solicitor for respondents: *R. E. Read.*

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## *IN RE* ESTATE OF WALTER CAMERON NICHOL, DECEASED.



*Will—Trustee—Income and capital—Adjustments between life tenants and remaindermen—Securities purchased at premium and others at discount—Opinion of Court.*

By the will of Walter C. Nichol, deceased, apart from an annuity to his sister, he gave the income of his entire estate to his wife and children for their lives, with remainder to his grandchildren. By originating summons his trustee submitted the following questions: (a) As to the procedure to be followed by the said trustee in administering the assets of the said estate consisting of bonds and income therefrom heretofore purchased or which may hereafter be purchased by the trustee at a discount or at a premium; (b) as to the determination of the amounts to be accounted for as capital and revenue respectively as between life tenants and remaindermen in respect to bonds so purchased; (c) as to the procedure to be followed by the trustee in adjusting the respective interests of life tenants and remaindermen in respect to bonds heretofore sold or which may hereafter be sold by the trustee at a discount or at a premium; (d) as to the procedure to be followed by the trustee in adjusting the respective interests of life tenants and remaindermen in respect to bonds forming part of the said estate at the date of the death of the said Walter Cameron Nichol.

*Held*, that in answering questions (a), (b) and (c) the Court is not dealing with cases where the interest in respect of authorized investments has

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not been paid but only with cases where there has been no loss of income to the life tenant and the answer is that the life tenant is entitled to the actual interest paid. In case of a sale the proceeds are capital. The point arising under question (d) is whether the difference between the value of the securities at the date of the death of the testator and the amount of the proceeds of the sale is income which should go to the life tenant or is capital and should be held for the remainderman. The life tenants did not suffer any loss of income. The matter is concluded either by the latter part of paragraph 4 (a) of the will which provides that no part of the proceeds of such selling or calling in or conversion, etc., shall be paid or applied as past income or by the authorities. The answer therefore is that the life tenants are not entitled to the moneys which represent the proceeds of the sale of the securities over and above their value at the time of the death of the testator.

ORIGINATING SUMMONS by the trustee of the estate of Walter C. Nichol, deceased, submitting certain questions with relation to the administration of the estate. Heard by ROBERTSON, J. in Chambers at Victoria on the 17th of November, 1936.

*Lawson, K.C.*, for life tenants.
*Macrae, K.C.*, for remaindermen.
*G. S. Clark*, for The Royal Trust Company.

*Cur. adv. vult.*

2nd December, 1936.

ROBERTSON, J.: This is an originating summons to determine certain questions arising in the administration of the assets of the estate of Walter Cameron Nichol who died on the 19th of December, 1928, leaving a will which, apart from an annuity to his sister, gave the income from his entire estate to his wife and children for their lives with remainder to his grandchildren. The questions are as follow: [already set out in head-note].

He directed his trustee, The Royal Trust Company, to sell and convert into money all such parts of his estate as should not consist of money or of investments authorized by the will at such time or times or in such manner as should seem expedient to his trustee, and out of the moneys arising from such sale, calling in or conversion to pay his debts and to invest the residue of such moneys in or upon "any of the public stock funds or

securities of the Dominion of Canada" and to stand possessed of such investments, and of such parts of his estate as should at his death consist of such investments, and of any part or parts of his real and personal estate as should for the time being be unconverted, upon trust to pay the income as before mentioned.

Paragraph 4 (a) of the will gave the trustee power

to postpone in their absolute discretion for such period as they shall think fit without any liability for loss thereby occasioned the sale calling in and conversion of all or any part of my real or personal estate including any investment not hereby authorized even though of a wasting speculative or reversionary nature and I DECLARE that pending such sale calling in and conversion the whole of the income of property actually producing income shall be applied as from my death as income and that on the other hand on such sale calling in and conversion or on the calling in of any reversionary property no part of the proceeds shall be paid or applied as past income.

At the time of his death he owned a large amount of Dominion Government securities (which were securities authorized by the will), which were then at a premium and which subsequently appreciated in value. The trustee sold certain of these securities at the increased value. The point arising under Question (d) is whether the difference between the value of the securities at the date of the death of the testator and amount of the proceeds of the sale is income which should go to the life tenant or is capital and should be held for the remaindermen. The life tenants did not suffer any loss of income. I am of opinion that the matter is concluded by the latter part of paragraph 4 (a), which provides that no part of the proceeds of such selling or calling in or conversion, etc., shall be paid or applied as past income.

Assuming that not to be so, I am further of the opinion, upon the authorities, that the increased value is capital.

Counsel for the life tenant relies upon *Re Armstrong* (1924), 55 O.L.R. 639, in which case the trustee under the terms of the will held a fund upon trust for investment, the income to be paid to one, and upon his death to others. The trustee had purchased certain investments at a premium and certain others at a discount. The learned judge held that, in the case of a stock purchased at a discount, the difference between the price paid, and the amount which would be repaid at its maturity, was just as truly part of the earnings of the investment as the coupon interest itself and the life tenant was entitled to this and he

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pointed out how this could be arranged. Conversely, where the security had been purchased at a premium he held that a part of the actual income received from year to year should be retained by the trustee, sufficient to make good the deficiency in the capital which would arise when the security was paid off at maturity, that is at the par value, so that the capital might be intact. Since that decision, in my opinion the question so far as it relates to securities purchased at a discount, and afterwards sold, has been settled by judgments of the Privy Council and the Supreme Court of Canada.

In *In re Armitage. Armitage* v. *Garnett,* [1893] 3 Ch. 337, the facts were a testator gave his estate upon trust for conversion with a power to postpone conversion and a direction that during the interval all income produced by the property in its actual state should be treated as income for the purposes of the will. Part of his estate consisted of £10 shares in a company with £8 per share paid up. Some years after the testator's death the company was wound up and reconstituted, and the new company paid for the testator's shares £9 5*s.* apiece, being £1 5*s.* per share more than had been paid up. This excess arose from two funds; one of them consisted of profits which the directors had retained to meet contingencies. The other was a fund which, by the articles, was created by retaining the excess of dividend over 10 per cent. in every year in which it exceeded that amount and was to be applied in making up the yearly dividend to 5 per cent. in any year in which it should fall short of that amount.

It was held that the life tenant was not entitled to the £1 5*s.* per share, which, though it was profits was not income to which the life tenant was entitled but must go as capital. Lord Lindley at p. 346, said:

> Now, there has been a great discussion about the nature of this £1 5*s.* 6½*d.* as to whether it is capital or income, and whether it is profit. I should say it is profit. When a person gets out of a concern more than he puts into it the difference is profit. If I put £100 into a concern and get out £105, I get £5 profit. In that sense of the word this £1 5*s.* 6½*d.* is profit, being the excess of the money produced by the sale of the investment over the amount of money invested. But is it income to which the tenant for life is entitled? That is a totally different matter, and I say that it clearly is not. What does a man mean when he leaves shares to a tenant for life? He means that that tenant for life shall have the income arising from the

shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense. He does not mean him to have such profits, for example, as arise by a realization of shares; he never dreamed of such profits going to the tenant for life. What he means is, that the tenant for life shall have the income derived from the dividends or bonuses declared by the company; and when you ask me whether this £1 5*s.* 6½*d.* is income payable to the tenant for life, it seems to me as plain as possible that it is not, although it is profit in the sense I have just explained.

See also *In re Sale. Nisbet* v. *Philp*, [1913] 2 Ch. 697 at 703. In *Hill* v. *Permanent Trustee Co. of New South Wales*, [1930] A.C. 720 Lord Russell of Killowen who delivered the judgment of the Judicial Committee, referring to *In re Armitage, supra*, said at pp. 734-5:

Before parting with the *Knowles* case [(1916)], 22 C.L.R. 212 their Lordships desire to say a word in reference to *In re Armitage*, [1893] 3 Ch. 337, upon which reliance was placed by Griffiths C.J. and Barton J. The legal position in that case was quite plain. The old company had sold its assets (including accumulated profits) to the new company for a price which produced surplus assets in the winding up of the old company to the amount of 9*l.* 5*s.* 6*d.* for each share of the old company upon which only 8*l.* per share had, in fact, been paid up. Upon no theory could it be said that any part of the 9*l.* 5*s.* 6*d.* was payable to the tenant for life. The moneys paid were all surplus assets distributed in a winding up and took place in the trust estate of the shares themselves. The difference between the 9*l.* 5*s.* 6*d.* and the 8*l.* was a profit to the trust estate, just as if the shares had been sold and had realized 9*l.* 5*s.* 6*d.* per share; but no part of the 9*l.* 5*s.* 6*d.* was income of the tenant for life.

See *In re Keating Estate*, [1934] S.C.R. 698, at pp. 705-6, following the *Hill* case, and approving what Lord Lindley said, as quoted, in the *Armitage* decision.

Stirling, J., in *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, said at p. 258:

The scheme of the company appears to me to be to put the shareholders for the time being in the same position as regards dividends as are tenants for life under an ordinary settlement of personal property, while the persons amongst whom the capital would be divided in the event of a winding-up are intended to stand in the position of the remaindermen entitled to the *corpus* of the settled property. Tenants for life under such a settlement would take the whole income of all duly authorized investments, notwithstanding any shrinkage or decrease in their value, and would not be entitled to share in any augmentation in the value of the *corpus*, however great that might be, or however insignificant in comparison might be the increase of the income.

I am of the opinion that the life tenants are not entitled to the moneys which represent the proceeds of the sale of the securi-

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ties over and above their value at the time of the death of the testator.

I now consider the first three questions.

It is stated in Underhill's Law of Trusts and Trustees, 7th Ed., 280:

> Formerly it was held that where a non-British government stock was above par, and within a few years of redemption at par, it was not a proper investment for trust funds; because the effect of such an investment might be to benefit the tenant for life at the expense of those in remainder.

In support of this the learned author cites several cases to two of which I shall refer. The first *Cockburn* v. *Peel* (1861), 3 De G. F. & J. 170. In that case there was a petition by the life tenant (the mother—her children being the remaindermen) to sanction a change of investment from Consols to East India stock which paid a higher rate of interest. The East India stock was, at that time, considerably above par but was redeemable at any time, in which case, of course, the par value only would have been realized. The learned Lord Chancellor pointed out at p. 172:

> There is a risk, that if the East India stock were redeemed there would be a serious loss to her children on the reinvestment.

Lord Justice Turner took the same view. Lord Justice Bruce was of the opinion that under the circumstances the application should not be granted.

The second case is *Waite* v. *Littlewood* (1872), 41 L.J. Ch. 636, in which case the trustees applied for advice as to a change of securities:

> The Master of the Rolls said that what he held in all these cases was, that the only restriction to be placed on the trustees was that they might not invest in any redeemable security at a premium.

Another case is that of *Equitable Reversionary Interest Society* v. *Fuller* (1861), 1 J. & H. 379. In that case there had been a settlement. The settlor who was tenant for life asked that certain stock held in connection with the settlement might be sold and the proceeds invested in East India stock or stock of the Bank of England. The remaindermen were her children and others. The Vice-Chancellor granted the application. He said (p. 382):

> The difficulty I have felt throughout is, that there is considerable injury to those interested in the capital in all investments of this description. In the case before me, there has been a large fluctuation in the value of the

stock since the petition was first presented. In the course of a few years East India stock may be redeemed at a reduction of 9 per cent. upon its present market value, which will be a clear loss of capital.

He concludes by saying:

As the change of investment is a clear loss to the reversion, the costs must come out of the income.

These cases seem to show that where there is a loss arising from an authorized investment purchased at a premium the loss falls on the reversion and not on the life tenant. It would also seem to follow from the cases I have referred to on question (d) that the reversion should suffer any loss there may be in the case of a sale of authorized investments purchased at a premium.

In answering questions (a), (b), and (c) I am not dealing with cases where the interest in respect of authorized investment has not been paid. I am dealing only with cases where there has been no loss of income to the life tenant.

I answer questions (a), (b), and (c) by saying the life tenant is entitled to the actual interest paid. In case of a sale the proceeds are capital. Costs of all parties out of the estate.

*Order accordingly.*

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## *IN RE* DESERTED WIVES' MAINTENANCE ACT. HARRAP v. HARRAP.



*Deserted Wives' Maintenance Act—Order for monthly payment—Application to enforce payment—Pension husband's only income—Order for payment therefrom—Case stated—Appeal—R.S.B.C. 1924, Cap. 67, Sec. 10; Cap. 245, Sec. 89—R.S.C. 1927, Cap. 157, Sec. 42—Can. Stats. 1932-33, Cap. 45, Secs. 7 and 14.*

On the 14th of November, 1934, an order was made by MCINTOSH, Co. J., that the husband should pay his wife $10 per week. At the instance of the wife a summons was issued under section 10 of the Deserted Wives' Maintenance Act calling on the husband to show cause why the above order should not be enforced. It appeared that the husband's only income was under the Pension Act. Formerly the allowance was $100 per month, consisting of $75 for the husband and $25 as a wife's allowance, but the $25 allowance was discontinued by the Pension Commissioners. It was ordered that unless the husband paid his wife

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$25 on account of the payments owing, within ten days, that he be imprisoned for ten days. On appeal by way of case stated, the question for the opinion of the Court was whether the magistrate had jurisdiction to make the above order in view of the provisions of the Pension Act.

*Held*, that once the money reaches the pensioner's hands it loses its character of pension and is just the same as any other money which the pensioner may have. The question should be answered in the affirmative.

APPEAL by way of case stated from the order of police magistrate Henry C. Hall of the 23rd of October, 1936, whereby it was ordered that unless Norman W. Harrap paid his wife $25 on account of payments owing by him under an order of MCINTOSH, Co. J. of the 14th of November, 1934, within ten days of the date of his order, he be imprisoned for ten days. Heard by ROBERTSON, J. in Chambers at Victoria on the 23rd of November, 1936.

*F. C. Elliott*, for appellant.
*Beckwith, contra.*

*Cur. adv. vult.*

3rd December, 1936.

ROBERTSON, J.: This is a case stated by Henry C. Hall, K.C., police magistrate in and for the City of Victoria, under the provisions of section 89 of the Summary Convictions Act.

The case stated is as follows:

1. On the 23rd day of September, 1936, at the instance of the above named Eileen Harrap a summons was issued by me under section 10 of the Deserted Wives' Maintenance Act calling upon the above named husband, Norman W. Harrap, to show cause why the order of His Honour Judge MCINTOSH dated the 14th day of November, 1934, made in the County Court of Victoria ordering that the said Norman W. Harrap pay to the said Eileen Harrap for her maintenance a weekly sum of $10 commencing on the 14th day of October, 1934, should not be enforced.

2. The said summons came on for hearing before me on the 29th day of September, 1936, and the 8th day of October, 1936, and after hearing the evidence of the husband and reading the exhibits and after hearing counsel for both parties I reserved my decision and on the 23rd day of October, 1936, ordered that unless the said Norman W. Harrap should pay to his wife, the said Eileen Harrap, within ten days from the date of my said order the sum of $25 on account of the payments owing under the aforementioned order of Judge MCINTOSH he be imprisoned for ten days; but at the request of the solicitor for the said Norman W. Harrap I state the following case for the opinion of this Honourable Court:

It was shown before me that:

(a) Nothing whatever had been paid by the said Harrap in obedience to the said order of Judge McINTOSH; (b) The only income of the said Harrap was a pension allowed him under the provisions of the Pension Act being chapter 157 of the Revised Statutes of Canada, 1927; (c) The said pension had formerly amounted to $100 per month consisting of $75 allowed the husband in respect of disability and $25 allowed the husband as a wife's allowance: the allowance of $25 was discontinued by the Pension Commissioners; (d) The husband had been from the date of the said order of Judge McINTOSH and still was in regular receipt of the disability allowance of $75 per month; (e) I held on the facts that there was evidence to show that Harrap could, out of the allowance of $75 per month, make some provision for his wife.

3. The husband contends that the Board of Pension Commissioners for Canada has the sole jurisdiction in regard to disposition of his pension, and that I have no jurisdiction to make the order complained of as it would have to be paid out of his pension moneys only.

The question for the opinion of the Court is:

1. Was I right in holding that I had jurisdiction to make the order hereinbefore set out, in view of the provisions of the Pension Act, being chapter 157 of the Revised Statutes of Canada, 1927, and amending Acts?

I take it that the word jurisdiction in the question does not relate to the magistrate's jurisdiction, in the strict sense, but rather to his right to make the order under the circumstances.

Counsel for Harrap refers to section 42 of the Pension Act, as enacted in section 14 of Cap. 45, Can. Stats. 1932-33. This does not in any way affect or limit the powers of a Court. He also submitted, that, as it is provided in section 7 of the same statute that when the pensioner is not maintaining the members of his family to whom he owes the duty of maintenance, the Commission may direct that his pension be administered for the benefit of the pensioner and/or the members of the family, etc., the Pension Board alone has jurisdiction to deal with Harrap's pension. Assuming this to be so, in my opinion it did not affect the right of the magistrate in this case to make an order. He has been receiving a pension for several years and will continue to receive it. Once the money reaches his hands it loses its character of pension and is just the same as any other money which the pensioner may have. See *Jones & Co.* v. *Coventry*, [1909] 2 K.B. 1029 at 1038 and 1042.

The order does not in any way disturb the money before it reaches Harrap's hands. In fact it does not in any way affect

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the money. When Harrap gets the money he can then take his choice of paying the $25 out of money, which is no longer pension money, or going to gaol.

I think the learned magistrate had both jurisdiction and right to make the order.

The question is answered in the affirmative.

*Question answered in the affirmative.*

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## BRISCOE v. YORKSHIRE & CANADIAN TRUST LIMITED *ET AL.*

*Detinue—Securities Act—B.C. Stats. 1930, Cap. 64, Sec. 29; 1935, Cap. 68, Sec. 4.*

The plaintiff, the owner of placer-mining leaseholds on Hixon Creek, B.C., by agreement dated March 9th, 1933, agreed to sell the leaseholds to the Hixon Creek (Cariboo) Gold Limited (N.P.L.) and assigned the said leases to the company on condition that on default in payment of rentals of the leaseholds to the Government of British Columbia the same should be reassigned to him. The indentures of lease with an assignment thereof to the plaintiff were placed in escrow with the Canadian Bank of Commerce to be delivered to the plaintiff upon deposit of a statutory declaration by him that default had occurred. By request the escrow documents were later deposited with the defendant the Yorkshire & Canadian Trust Limited with the same directions. Subsequently the superintendent of brokers requested that these documents of title should be made subject to his directions expressed in a certificate of registration granted to the Hixon Creek Company. This direction was not complied with. In 1935, upon instructions from the superintendent of brokers, the Yorkshire Company transferred the documents with the escrow agreement to the defendant the London & Western Trusts Company Limited. Upon default in payment of rentals the plaintiff deposited a declaration of such default with both defendants and demanded delivery of his documents but delivery was refused by the Yorkshire Company on the ground that the documents had been transferred to the London & Western Trusts Company Limited at the direction of the superintendent, and by the London & Western Trusts Company Limited on the ground that the superintendent of brokers had directed them to refuse delivery pending his approval. The plaintiff brought an action of detinue, for a declaration that he was entitled to delivery of the documents and for an order directing the holders thereof to deliver them to him.

*Held*, that the plaintiff is entitled to the documents and to nominal damages against the defendants for delay in delivery thereof.

*Held*, further, that the direction of the superintendent of brokers did not deprive the plaintiff of his rights and is not effective to delay delivery of the documents; that the plaintiff became entitled to them under the agreement of March 9th, 1933.

*Held*, further, that section 5 (2) as amended by section 4, Cap. 68, B.C. Stats. 1935, does not affect the plaintiff's right to his documents.

*Held*, further, that the order of the superintendent of brokers directing the defendants to withhold delivery of the documents to the plaintiff according to his contract is not sufficient to bar the plaintiff from his action under section 29 of the Securities Act, B.C. Stats. 1930, Cap. 64.

PURSUANT to an agreement between the plaintiff and the Hixon Creek (Cariboo) Gold Limited (N.P.L.) dated March 9th, 1933, the plaintiff deposited his documents in escrow to be delivered to him upon production of a statutory declaration stating in effect the default of the said company in payment to the Government of rentals due under the leases comprised in the documents of title. The defendant the Yorkshire & Canadian Trust Company, at the direction of the superintendent of brokers, without the consent of the plaintiff, delivered the plaintiff's documents to the London & Western Trusts Company Limited who refused to deliver the documents to the plaintiff upon default unless with the approval of the superintendent of brokers, which the superintendent refused, basing his refusal upon the authority of the Securities Act, B.C. Stats. 1930, Cap. 64. The plaintiff brought action in trover and detinue. Tried by MCDONALD, J. at Vancouver on the 5th, 6th and 9th of November, 1936.

[*A. M. Whiteside, K.C.*, for plaintiff, referred to *St. John* v. *Fraser*, [1935] S.C.R. 441 at p. 451; *The London, Brighton and South-coast Railway Co.* v. *The London and South-western Railway Co.* (1859), 5 Jur. (N.S.) 801; *Minet* v. *Leman* (1855), 20 Beav. 269; *Rex* v. *Bishop of Salisbury*, [1901] 1 K.B. 573; *In re Brockelbank. Ex parte Dunn & Raeburn* (1889), 23 Q.B.D. 461; *Simms* v. *Registrar of Probates*, [1900] A.C. 323; *Reg.* v. *Symington* (1895), 4 B.C. 323; *Ex parte Corbett. In re Shand* (1880), 14 Ch. D. 122.

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*McLorg,* for defendant Yorkshire & Canadian Trusts Limited, referred to *Bartley & Co.* v. *Russell* (1934), 49 B.C. 274, and *St. John* v. *Fraser*, [1935] S.C.R. 441 at p. 451.]

*Gillespie,* for defendant London & Western Trust Co. Ltd.

*Cur. adv. vult.*

12th November, 1936.

MCDONALD, J.: On March 9th, 1933, the plaintiff, being the owner of 13 placer-mining leases, agreed to sell same to Stanley Basin Mines Limited, the name of which was afterwards changed to Hixon Creek (Cariboo) Gold Limited, herein for brevity called the Hixon Company, the price being certain shares in the company. Under the terms of the agreement for sale the company undertook certain obligations; the plaintiff executed an assignment of his leases; the company executed a reassignment of same and these documents together with the leases and a letter of instructions were deposited in escrow with the Canadian Bank of Commerce upon the terms that the plaintiff, upon filing with the escrow holder a declaration that the purchaser had made default, should be entitled to delivery of his leases and the reassignment of same to himself. These terms (see Exhibit 9) are clear and unmistakable.

On November 10th, 1933, the Hixon Company having applied to the superintendent of brokers under the Securities Act, for a certificate of registration by virtue of which it might be enabled to sell its shares to the public, duly received such certificate but the superintendent entered upon that certificate the following condition:

(a) That certificates relating to 360,000 of the ordinary and all preference shares referred to in clause (1) together with the documents of title relating to said placer mining leases, and also certificates for the 300,000 shares referred to in clause (2) shall by not later than the 17th day of November, 1933, be delivered to the Yorkshire & Canadian Trust Limited of Vancouver, B.C., to be held in escrow by it until the superintendent of brokers consents in writing to the release of any of said shares from escrow; and a letter directed to the said superintendent shall without delay be obtained in due course from the escrow holder in acknowledgment of the receipt of said shares and of said documents of title, and giving particulars of the serial numbers and names of the owners of said shares, and agreeing to abide by the condition hereby imposed.

It will be seen at once that the superintendent in imposing this

condition assumed without the knowledge or consent of the plaintiff, to abrogate the solemn contract theretofore entered into between the plaintiff and the Hixon Company. Nothing can be clearer than this and the main question that falls for decision in this case, is whether or not the superintendent in imposing that condition in his certificate and the various renewals thereof exceeded his statutory authority.

On November 25th, 1933, by agreement between all parties, including the plaintiff, the defendant Yorkshire & Canadian Trust Limited herein called the Yorkshire Company, became the escrow holder in the place and stead of the Canadian Bank of Commerce and received into its possession the agreement and the documents to be held by it on the identical terms and conditions upon which they had been held by the bank. In or about March, 1934, the trust officer of the Yorkshire Company having learned meanwhile of the aforementioned condition imposed by the superintendent, made it known to the plaintiff's solicitors that his company feeling itself bound by the action of the superintendent proposed to hold the documents subject to the superintendent's instructions and directions. Plaintiff's solicitors strongly protested against this invasion of their client's contractual and property rights and the Trust Company officer (without having taken legal advice) just as strongly insisted that he proposed to hold the documents and deal with them according to the instructions of the superintendent. It is suggested in the pleadings (though counsel for the defendants were frank enough not to argue it) that the plaintiff acquiesced in being thus deprived of his rights but there is no evidence whatever of anything of the sort. It is true that the plaintiff was at all material times a director of the Hixon Company but he took little part in its operations or management and it is not suggested that his position as director affected in any way his right as an individual.

The Hixon Company being in possession of its certificate of registration proceeded to sell its shares through its selling agents. The defendant London & Western Trusts Company Limited, herein called the London & Western Company, acted as transfer agents of the Hixon Company and on September 30th, 1935, at the suggestion of the Yorkshire Company's trust officer, it was

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agreed with the Hixon Company with the approval of the superintendent, for the sake of convenience, that the London & Western Company should become the escrow holder, not upon the terms under which the bank had acted and under which the Yorkshire Company had undertaken the trust, but upon the terms under which the Yorkshire Company had assumed to act under the directions of the superintendent. This change of trustees was made without the knowledge of the plaintiff.

For the purposes of this action and as between the parties to this litigation I hold (indeed it is not here contested), that in the summer of 1936 the Hixon Company made default and if the documents had remained with the bank the plaintiff, upon filing with the bank a declaration proving such default, would have been entitled forthwith to receive his documents of title free and clear from any claim of the Hixon Company or any other person whomsoever. The plaintiff did make such declaration of default, which declaration was duly filed with both defendants, and demand for delivery of his documents was duly made, the answer of the Yorkshire Company being in effect "We no longer have your documents" and the answer of the London & Western Company being in effect "We refuse to deliver as we consider ourselves bound by the directions of the superintendent of brokers."

It is contended by the defendant, the Yorkshire Company, in this suit for a declaration that the plaintiff is entitled to his documents of title, and for damages, and for an order that such documents be delivered up, that it is not a proper party to the action and that in no event can judgment go against it. With this contention I do not agree. This defendant contested the suit and insisted throughout upon its right to abide by the decision of the superintendent and to part with the documents held by it under a trust clearly defined, and to disregard entirely the rights of the plaintiff; all of this in the teeth of the agreement under which it had come into possession of the plaintiff's documents. If I am right in the conclusion which I have reached upon the whole case then I think that the plaintiff is entitled to at least nominal damages for this defendant's breach of contract.

In dealing with a statute such as the Securities Act one must not be lured into a consideration of the question whether or not such legislation is in the best interests of the mining world or of the investing public. It is the judicial function not to discuss the wisdom of legislation but to strive to interpret the will of the Legislature, and having ascertained such will to see that it is carried out. In this quest the Courts are guided by certain cardinal rules and principles. Amongst the most important duties is to try to ascertain what was "the disease of the Commonwealth" and "the true reason of the remedy." The statute was passed in 1930 following the crash of 1929 and it seems clear that the purpose of the Act was to protect the public (the members of which might always be relied upon to invest their money without investigating the titles of the companies in which they were about to purchase shares), from investing in shares of companies which might be guilty of misrepresenting their schemes, their plans and their assets. It became the duty of the officer appointed to administer the Act, to refuse a certificate of registration to any company which might be guilty of any dishonest practice or any failure to comply with the provisions of the Act and the regulations thereunder. The Act provides for registration of brokers (which term by a deft turn of the legislative wrist is made to include companies selling their own shares). It provides for the regulation of brokers in their trading operations, for auditing of brokers' accounts and for the fullest investigation of their transactions. I cannot think that it was intended that the Act should provide a means whereby persons who had acquired contractual rights as against the company might without being heard, without compensation and without remedy, be despotically despoiled of such rights.

In these days of bureaucratic government, the dangers of which have been dealt with so fully by Lord Chief Justice Hewart in his recent book "The New Despotism" one is not easily shocked by legislation which reposes almost despotic powers in an individual; but when such legislation comes to be judicially considered it must be most carefully scanned in order to ascertain whether the individual is actually possessed of the powers which he assumes to exercise. In the present case the

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defendants contend that the superintendent in abrogating the plaintiff's contract with the Hixon Company, did so pursuant to the powers conferred upon him by the amendment to the Act assented to on March 23rd, 1935, and reading as follows:

(2) The superintendent may attach to any registration such terms, conditions, and restrictions as he thinks advisable all of which shall be set out in the certificate of registration, and he may from time to time by notice in writing to the holder of the certificate vary, add, or omit any terms, conditions, or restrictions.

In my opinion the Legislature did not intend to confer, and did not confer, upon the superintendent any such authority as he has assumed to exercise. The amendment I think is quite plain. It was intended that the registrar in granting a certificate might require the applicant company to comply with any terms or conditions he might see fit. For instance, in the present case, he might have insisted that the Hixon Company before receiving its certificate must pay off the plaintiff and procure a clear title to the properties in question. One might cite a score of conditions which the registrar might impose before issuing a certificate but it does not follow that, because as between the registrar and the applicant even the most drastic conditions might be imposed, the registrar is therefore vested with the power to interfere with the properties and rights of strangers. Indeed such a suggestion is so fantastic as to refute itself by its mere statement.

But it is further contended that in any event this action does not lie, and this by reason of section 29 of the Act which for our present purposes may be read as follows:

No action whatever, . . . , shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying-out of the provisions of this Act or the regulations where such person is the Attorney-General or his representative, or the registrar, or where such person or company was proceeding under the written or verbal direction or consent of any one of them. . . .

This enactment, rigorous as it may be thought to be, is quite within the competence of the Legislature as is pointed out by Davis, J. in *St. John* v. *Fraser*, [1935] S.C.R. 441 at 451, but when we come to ascertain to what length this enactment actually goes one must be mindful of what his Lordship said in the same connection:

It is fundamental that a subject cannot without express words or necessary intendment be deprived of the protection of the Courts.

In my opinion there is nothing whatever either in section 29 or in the amendment of 1935 upon which any sound argument can be based to justify the authority exercised in this case by the superintendent or by these companies acting under his directions. What was done here was not done "in connection with the administration or carrying out of the provisions of the Act," it was done without jurisdiction and entirely outside the scope of the Act and was not within the intent of the Legislature.

One does not need many authorities to fortify this conclusion but authorities are not by any means lacking and many were cited by Mr. *Whiteside* in his able and careful argument. I refer in the first place to the remarks of Lord Esher, M.R. in *In re Brockelbank* (1889), 23 Q.B.D. 461 at pp. 462-3:

In this proviso the Legislature have used language of the widest kind—"in all cases"—so wide that, if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the Legislature construed literally involves such consequences, the Court has over and over again acted upon the view that the Legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words. The Courts will not infer such an intention from the use of mere general words.

I am strongly of the opinion that no such intention as is contended for here can be read into the words either of section 29 or of the amendment of 1935.

Looking at the question from another angle, see also the remarks of Lord Hobhouse in *Simms* v. *Registrar of Probates*, [1900] A.C. 323 at p. 335:

But where there are two meanings each adequately satisfying the language, [of the Act] and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other.

The Act which we are considering may I think be given its full and true meaning without in any way doing injustice to any person or company and that is the sense in which the Act should be read. It follows that in my opinion the plaintiff is entitled to the declaration asked for; to damages from each company in the nominal sum of one (1) dollar (which is all he asks) to delivery up forthwith of all the documents in question and to his costs against both defendants. If I am wrong in the

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conclusion which I have reached then it is well that the prospectors who toil year in and year out among our hills should be advised of the risk they undergo when they allow to pass from their work-worn hands their documents of title, even when they entrust them to gentlemen of the responsibility and integrity of those who conduct the operations of these defendant companies, whose only fault after all is that they obeyed the behest of a duly accredited government official.

*Judgment for plaintiff.*

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Nov. 24;
Dec. 5.

## *IN RE* ESTATE OF SIR FRANK STILLMAN BARNARD, DECEASED.

## THE CANADA TRUST COMPANY *ET AL.* v. LADY MARTHA A. S. BARNARD *ET AL.*

*Will—Construction—General legacy—Gift of shares—Testator not possessed of the shares—Misdescription in name of the company—Validity of bequest.*

The testator died on the 11th of April, 1936, and his will dated the 20th of July, 1935, contained the following provisions: "I give and bequeath to my brother, George Henry Barnard of Victoria, B.C. eighty-seven (87) shares of common stock of the British Columbia Telephone Company, Limited and all my shares in the Victoria Realty Company Limited." The Vernon and Nelson Telephone Company was incorporated by Provincial statute in 1891 with power to amalgamate with any other company having similar objects. By a statute of 1903 the company was authorized to extend its operations throughout the Province and to change its name. Pursuant thereto the company changed its name to "British Columbia Telephone Company, Limited." By Dominion statute of 1916 a company was incorporated under the name of "Western Canada Telephone Company" which included a provision for amalgamation with the Provincial company, and with power to change its name to "British Columbia Telephone Company." In 1922 the two companies amalgamated under the name of "British Columbia Telephone Company." Since that time the Provincial company ceased to carry on business. All the shares of the common stock of the new company with the exception of fifteen, had, prior to deceased's death, been acquired and still are held by the Anglo-Canadian Telephone

Company. They are not for sale and cannot be purchased. It is agreed that at the time of testator's death the 87 shares were worth $13,050. From the date of his will to the time of his death the testator did not own any common shares in the British Columbia Telephone Company or in the Provincial company, but some years prior to the date of the will he had owned a greater number of common shares in the British Columbia Telephone Company than 87, and at the time of his death and for some years prior thereto he owned preference shares in the British Columbia Telephone Company. Evidence disclosed that the name "British Columbia Telephone Company, Limited," is often erroneously applied by members of the public to the British Columbia Telephone Company. In answer to questions (1) Whether or not George Henry Barnard is entitled to benefit under the above provision; (2) In case he is, the nature thereof; (3) In case he is entitled to 87 shares of common stock of the British Columbia Telephone Company, what amount the executors are entitled to expend in the purchase thereof; (4) In case the stock cannot be purchased whether the executors are entitled to pay him in lieu thereof a sum of money, and if so, what sum:—

*Held*, that the "British Columbia Telephone Company, Limited" on the facts applies to no subject at all, since the Provincial company has ceased to exist. The description "British Columbia Telephone Company" applies to one subject and one subject only. The erroneous addition in the description does not vitiate the gift. George Henry Barnard is entitled to benefit by the said bequest of 87 shares of common stock of the British Columbia Telephone Company. He takes the shares as a general legacy. A general legacy not being a particular thing but something which is to be provided out of the testator's general estate, the executors should expend in the purchase of the shares the sum of $13,050, and if the stock cannot be purchased they should pay him the sum of $13,050.

ORIGINATING SUMMONS by the executors of the estate of the late Sir Frank Barnard, propounding certain questions to the Court as to the interpretation to be placed upon certain portions of the will of the said deceased. The facts are set out in the reasons for judgment. Heard by MURPHY, J. at Victoria on the 24th of November, 1936.

*Manzer*, for the executors.
*A. Bruce Robertson*, for Senator Barnard.
*Bullock-Webster*, for residuary beneficiaries.

*Cur. adv. vult.*

5th December, 1936.

MURPHY, J.: Sir Frank Barnard died in Victoria on April 11th, 1936. His will, dated July 20th, 1935, and a codicil bearing same date were probated on July 22nd, 1936.

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The said will contains the following provisions:

"I GIVE AND BEQUEATH to my brother, George Henry Barnard of Victoria, B.C. eighty-seven (87) shares of common stock of the British Columbia Telephone Company Limited and all my shares in the Victoria Realty Company Limited."

By Cap. 67, B.C. Stats. 1891, a company was incorporated under the name of the Vernon and Nelson Telephone Company. The said company is hereafter referred to as "the Provincial company."

By Cap. 43, B.C. Stats. 1903, the Provincial company was authorized to extend its operations to all parts of the Province and by section 8 thereof was given power to change its name in accordance with the provisions of the Companies Act, 1897.

Pursuant to the said statute the Provincial company changed its name to British Columbia Telephone Company, Limited and published notice thereof in the British Columbia Gazette, 1904, p. 1298. By the said statute of incorporation and amendments thereto the Provincial company was empowered to amalgamate with any other company having the same or similar objects.

By Cap. 66, Can. Stats. 1916, a company was incorporated under the name of Western Canada Telephone Company. Such company is hereinafter referred to as the Dominion company and such statute as the Dominion statute. By section 9 of the Dominion statute the Dominion company was empowered to purchase, take over, lease, amalgamate with or otherwise acquire from any other company or companies having objects in whole or in part similar to its own all or any part of the property and/or undertaking of any such company. By section 11 of the Dominion statute provision was made for the amalgamation of the Provincial company with the Dominion company. By section 15 of the Dominion statute the Dominion company was empowered to change its name to British Columbia Telephone Company with the consent of the Provincial company and of the Secretary of State of Canada.

Pursuant to the powers in that behalf conferred by the said statutes the Provincial company was amalgamated with the Dominion company in or about the year 1922 and the name of the resulting corporation was changed to British Columbia Telephone Company. The agreement for such amalgamation was

dated the 11th day of December, 1922, and was made between the said companies and the London and British North America Company Limited, as trustee, and is on file with the Registrar of Companies at Victoria, B.C.

By the said agreement it was provided that the Provincial company should transfer all its undertakings and assets of every kind to the Dominion company, which should assume the contracts and pay all the debts of the Provincial company, and as to the balance of the consideration for such transfer that the Dominion company should allot to or to the nominee of every shareholder of the Provincial company shares of the Dominion company as follows: (1) To each preference shareholder of the Provincial company one $100 preference share of the Dominion company; and (2) To each ordinary shareholder of the Provincial company three ordinary shares of the Dominion company for every two ordinary shares of the Provincial company held by such shareholder; and (3) Where an exact exchange of shares upon the foregoing basis proved impossible, compensation was to be made in cash.

The evidence shows that following the aforesaid amalgamation the Provincial company ceased to carry on business and for all practical purposes ceased to exist and that since that time there has not been, nor is there now in existence anywhere, any company with the name British Columbia Telephone Company, Limited and that upon such amalgamation all the shares in the Provincial company were surrendered for shares in the amalgamated company. The evidence further shows that all save 15 shares of the common stock of the British Columbia Telephone Company had, prior to the deceased's death, been acquired and at all material times have been and still are held by the Anglo-Canadian Telephone Company; that the shares held by the said company are not for sale and cannot be purchased; that there is no free market for such shares. It is agreed by all parties concerned that the value of 87 shares in the British Columbia Telephone Company at the date of death of the deceased was $13,050. The evidence further shows that neither at the date of his death, nor at the date of his said will or codicil, did the deceased own any common shares in the British Columbia

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Telephone Company or in the Provincial company but some years prior to any of the said dates he had owned a greater number of common shares in the British Columbia Telephone Company than 87 and at the date of his death he owned, and for some years prior thereto, had owned, preference shares in the British Columbia Telephone Company. It is further shown in evidence that the name "British Columbia Telephone Company, Limited" is often erroneously applied by members of the public to the British Columbia Telephone Company. On this set of facts the executors by originating summons propound the following questions to the Court:

1. Whether or not the defendant, George Henry Barnard, K.C., is entitled to benefit under the following provision contained in page 2 of the said will, namely: "I GIVE AND BEQUEATH to my brother, George Henry Barnard of Victoria, B.C. eighty-seven (87) shares of common stock of the British Columbia Telephone Company, Limited and all my shares in the Victoria Realty Company Limited"; and

2. In case the said defendant is entitled to any benefit under the said provision, the nature thereof; and

3. In case the said defendant should be held entitled to 87 shares of common stock of the British Columbia Telephone Company what amount the plaintiffs are entitled to and should expend in the purchase thereof; and

4. In case 87 shares of such stock cannot be purchased, whether the plaintiffs are entitled to and should pay to the said defendant in lieu thereof a sum of money and if so, what sum?

5. What provision should be made for the costs of this application?

No question arises about the shares in the Victoria Realty Company Limited, it being agreed by the legatee that he is not entitled to any benefit in respect of such shares on the facts affecting this bequest which have not been set out because of such agreement.

I would answer Question 1 in the affirmative that the legatee George Henry Barnard is entitled to benefit by the said bequest of eighty-seven (87) shares of common stock of the British Columbia Telephone Company.

I think the case falls within the principle set out in Halsbury's Laws of England, Vol. 28, p. 686 as follows:

If there is in any part of a description a sufficient description of the subject-matter, with convenient certainty of what was intended, any erroneous addition or error in part of the description does not vitiate the gift. The characteristic of cases within this rule is that the description so far as it is false applies to no subject at all, and so far as it is true applies to one only.

The description the "British Columbia Telephone Company, Limited" on the facts as hereinbefore set out applies to no subject at all since the Provincial company has ceased to exist. The description the "British Columbia Telephone Company" applies to one subject and one subject only. The language of the Master of the Rolls in *Lindgren* v. *Lindgren* (1846), 9 Beav. 358 at p. 361; 50 E.R. 381 at p. 383 *mutatis mutandis* seems to me to be apposite when he says:

> I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty. It ought rather to be assumed that she had a rational meaning.

The fact that the public frequently refer to the British Columbia Telephone Company as the British Columbia Telephone Company, Limited is a matter of some consequence in favour of the view which I have adopted—*Flood* v. *Flood,* [1902] 1 I.R. 538.

I would answer Question 2 as follows:

The legatee George Henry Barnard takes the said eighty-seven (87) shares of common stock of the British Columbia Company as a general legacy.

> A general legacy is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate . . . , a specific legacy is a gift of a severed or distinguished part of the testator's property. . . . A gift of a particular thing—for instance, of shares of a particular description—if there is nothing on the face of the will to show that the testator is referring to shares belonging to him, is a general legacy, though he may in fact possess the shares in question:

Theobald on Wills, 8th Ed., 159, citing *In re Gillins. Inglis* v. *Gillins,* [1909] 1 Ch. 345; *Mack* v. *Quirey,* [1909] 1 I.R. 124.

The clause in the will above cited, in my opinion, illustrates the difference between a general and a specific legacy. The bequest of "my shares in the Victoria Realty Company Limited" is a specific bequest since it is a gift of a severed or distinguished part of the testator's property. The bequest of the British Columbia Telephone shares on the other hand is a general bequest because it is a legacy not of any particular thing but of something which is to be provided out of the testator's general estate. The case of *In re Willcocks. Warwick* v. *Willcocks,* [1921] 2 Ch. 327 furnishes I think a clear illustration of the difference between a general and a specific legacy.

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I would answer Question 3 as follows:

The plaintiffs are entitled to and should expend in the purchase of said eighty-seven (87) shares of common stock of the British Columbia Telephone Company the sum of $13,050. This amount is the amount agreed upon by all parties as being the value of said shares at the date of the death of deceased.

The legatee is entitled to a sum equal to the value of the shares at the time when he is entitled to the legacy: Theobald on Wills, 8th Ed., 159—*Macdonald* v. *Irvine* (1878), 8 Ch. D. 101 and *In re Gray. Dresser* v. *Gray* (1887), 36 Ch. D. 205.

I would answer Question 4 as follows:

The plaintiffs are entitled to and should pay to the said George Henry Barnard the sum of $13,050, if said eighty-seven (87) shares of British Columbia Telephone Company stock cannot be purchased. This follows from the authorities cited in answer to Question 3 and in addition I cite *Re Millar,* [1927] 3 D.L.R. 270.

I would answer Question 5—Costs of all parties in connection with this application are to be paid out of the residue of the testator's estate.

*Order accordingly.*

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## REX v. GOLDEN.

*Criminal law—Sale of flowers without a licence—Order by police officer to desist—Failure to comply with order—Obstruction—Criminal Code, Sec. 168 (a)—B.C. Stats. 1933, Cap. 79, Sec. 13 (10).*

The accused with three other men each occupied one of the four corners of the intersection of two streets in the City of Vancouver, offering flowers for sale. A police officer asked accused if he had any lawful right to sell flowers. Accused replied he had not. The policeman then told him it was contrary to the city by-law and that he would have to move. Accused then moved across the street to another corner. The policeman then crossed the street and told accused that he did not mean that he was to move across the street from one corner to the other, but that he was to move off the street altogether and to cease selling these flowers. The policeman then went to each man on each of the other

corners and told him the same thing. He waited a few minutes and as the four men failed to do as they were told he went to each of them and told them they were under arrest. On a charge that accused unlawfully did wilfully obstruct a police officer in the execution of his duty, he was convicted and sentenced to six months' imprisonment.

*Held*, on appeal, affirming the conviction by deputy police magistrate Matheson (MARTIN, J.A. dissenting), that accused understood the police officer, that he persisted in doing what he was told he had no legal right to do, and there was obstruction of the police officer in the discharge of his duty.

APPEAL by accused from his conviction by deputy police magistrate Matheson in Vancouver on the 23rd of September, 1936, on the charge that in the City of Vancouver on the 22nd of September, 1936, he "unlawfully did wilfully obstruct a peace officer, to wit, police constable 64, K. Harrison, in the execution of his duty."

The appeal was argued at Victoria on the 19th of October, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*Gordon M. Grant*, for appellant: The charge is obstructing the police. These men were selling flowers at the intersection of Granville and Robson Streets, one being at each of the four corners. It is conceded they were committing an offence against the city's licence by-law but they did not obstruct a police officer. By merely continuing the offence of attempting to sell flowers they are not guilty of obstructing the police. The police are not charged with the duty of removing people who are violating a by-law. In the case of *Pankhurst* v. *Jarvis* (1909), 22 Cox, C.C. 228, the right to remove arose by Act of Parliament. See also *Despard* v. *Wilcox* (1910), *ib.* 258 at p. 267; *Rex* v. *Cook* (1906), 11 Can. C.C. 32. His duty was to carry out the arrest in accordance with the by-law.

*C. G. White*, for the Crown: Under section 13 (10) of the 1933 amendment to the Vancouver Incorporation Act, a police officer has the power to prevent any infraction of the by-laws. That this is a case of obstructing a police officer see *MacFarlane* v. *Reginam* (1889), 16 S.C.R. 393; *Rex* v. *Magee* (1923), 40 Can. C.C. 10; *Rex* v. *Leclair* (1906), 12 Can. C.C. 332; *Rex*

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v. *Johanson* (1922), 31 B.C. 211; *Rex* v. *L.* (1922), 38 Can. C.C. 242; *Rex* v. *Gallant*, [1929] 1 D.L.R. 671.

*Grant*, in reply: The by-laws have their appropriate penalties: see *City of Vancouver* v. *Burchill*, [1932] S.C.R. 620 at p. 625.

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

MARTIN, J.A.: My opinion is that this appeal should be allowed. It is quite apparent to me that there has been confusion in this matter, and that the case has been misconceived. There is no real element at all here of "wilful obstruction of a peace officer in the execution of his duty" in the legal sense under section 168 of the Code. What happened is that when the constable told appellant to stop offering flowers for sale at a street corner he at once stopped doing so, and went across the street to another corner and offered them for sale there. Now whatever real or fancied powers of arrest, or ejection from that "vicinity" (as the constable expressed it) that the constable possessed, he did not at first attempt to exercise them: he did not then say, "I arrest you now," or " move out of the 'vicinity' now," but, "I am stopping you now from selling flowers because you have no city licence . . . and you will have to move." and he did then move across the street to the other corner. If the constable had the power to arrest him or eject him from the public streets in that "vicinity," or entirely, and the man had resisted his action in doing so, then of course there would be an obstruction of him in his duty. But, on the contrary, this man did not offer physical or other obstruction to the slightest extent, either by word or action, to the constable's execution of his duty; admittedly he did not obstruct the highway, all that he did on being warned was merely to go over to the other side of the street and begin there to offer again the flowers for sale in the same way as before, *i.e.*, in dumb show, as admitted, merely by exhibiting a box, with a placard around his neck inviting support for the unemployed, but not speaking to pedestrians or stopping them, or holding out or shaking cans to attract attention, or money. After he moved across the street the constable shortly followed him, and thus describes what occurred:

I went over there and told him that I did not mean that he was to move across the street from one corner to the other, that he was to move off the street altogether and to cease selling these flowers or soliciting. He failed to do so. I then went to each man on each corner and told him the same thing. I waited a few minutes and they failed to do so, and I went to each man and told them they were under arrest.

It is therefore apparent that upon the instant that the constable attempted to exercise whatever powers of action he had, the appellant peacefully and promptly submitted himself to arrest, without offering any obstruction whatever by speech or act. In other words, instead of obstructing the peace officer he commendably submitted to him. It follows that the conviction made under such very exceptional circumstances can only be explained by the fact that there has been confusion, I say it with respect, between the consequences of obstructing a highway (which admittedly was not done here) and the consequences of obstructing an officer in the execution of his duty; and there has been also the failure to recognize the distinction between disobedience of a command and obstruction to the enforcement of it. No case has been cited to support the view that mere repetition in a peaceable way of an infraction of a by-law involves "obstruction" in the criminal sense. When the decisions relied upon are examined they turn on circumstances widely different, as *e.g.*, in *Rex* v. *Leclair* (1906), 12 Can. C.C. 332, where the offence was under the Railway Act and a railway was the owner of the premises concerned and its officer in charge thereof, p. 338; and *Rex* v. *L.* (1922), 38 Can. C.C. 242, where threatening, violent, and abusive language counselling others to resistance was successfully resorted to in preventing police officers from discharging their duty.

To illustrate: if a pedlar is found by a policeman selling vegetables on a street without a licence, and is ordered by the policeman to stop it, and does so, and moves on, but goes to another street where he resumes peddling, and is found doing so by the same or another policeman, could it be even plausibly submitted that he has in the meaning of the statute (section 168) "wilfully obstructed" both or either of the policemen in the execution of their duty? To my mind, clearly not, and yet that is the allegation on essentially similar facts that is made against

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this appellant. It is well to keep in mind what that great lawyer Lord Russell of Killowen, C.J., said, *per curiam,* in the celebrated case of *The Queen* v. *Jameson,* [1896] 2 Q.B. 425, at 429:

> In considering the question of the validity of a criminal pleading one must have some regard to the ordinary interpretation of language, and apply some measure of common sense to its construction.

It will be an unfortunate thing, I feel, if this conviction is given the sanction of this Court, because what really has happened is this, that the minor charge which could, admittedly, have been properly laid for breach of the by-law under Provincial summary jurisdiction, has been translated and magnified into a National crime of a serious character, which magnification is in my opinion not only oppressive but illegal, and therefore, as aforesaid, this appeal should be allowed and the conviction quashed.

MCPHILLIPS, J.A.: In my opinion there was clear obstruction here. It was accentuated by the conduct of the accused when he went across the street. It is perfectly apparent to me that he understood the police officer, and that he persisted in doing what he was told by the police officer he had no legal right to do; and therefore he accentuated his position, that is obstruction to the officer. I would dismiss the appeal.

MCQUARRIE, J.A.: I agree with my brother the Chief Justice and my brother MCPHILLIPS.

*Appeal dismissed, Martin, J.A. dissenting.*

## ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE ROYAL BANK OF CANADA AND ISLAND AMUSEMENT COMPANY LIMITED.

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*"Bona vacantia"—Company—Dissolution—Company funds in bank—Subsequent order for restoration to register—Motion for declaration that moneys property of Crown—Refused—Appeal—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 the restoration to the register, the Crown demanded from the defendant bank, as *bona vacantia*, moneys on deposit with it to the credit of the company at the time of the striking off and which were still so deposited after the company was restored to the register. 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, was dismissed.

*Held*, on appeal, affirming the decision of ROBERTSON, J. (MARTIN, J.A. dissenting), that where the Crown receives a fund because of a step taken under a statute, it, by necessary implication is bound, not by part of the Act only but by all its relevant sections. It is clear from the words of sections 199 and 200 of the Companies Act that, by necessary implication, the nature of the enactment and the language employed, it was intended that the Crown should restore this money to the revived company, and the appeal should be dismissed.

APPEAL by plaintiff from the decision of ROBERTSON, J. of the 15th of November, 1935 (reported, 50 B.C. 268) in an action for a declaration that the moneys deposited in the defendant bank to the credit of the defendant company at the time said company was struck off the register, pursuant to section 167 of the Companies Act is the property of His Majesty the King in the right of the Province. The Island Amusement Company Limited was struck off the register of companies on the 25th of October, 1828, and thereby became dissolved by reason of the effect of section 38 of the Companies Act. At the time of disso-

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lution the company had a bank account with The Royal Bank of Canada. On the 5th of April, 1935, upon the petition of its former shareholders, the company was restored to the register of companies, the order providing that the company be restored to the register of companies for one year to enable the company to be wound up voluntarily, and that the company should be deemed to have continued in existence as if its name had never been struck off the register, but without prejudice to the rights of any parties which may have been acquired prior to the date on which the company was restored to the register. At the time of dissolution in 1928 the company had on deposit in The Royal Bank of Canada in a savings account the sum of $7,000 odd. This money was subsequently claimed by the Attorney-General as Crown property on the ground that it became *"bona vacantia"* on the dissolution of the company. The writ in this action was issued on the 10th of June, 1935, against the bank, claiming a declaration as to the ownership of this account, and on the application of the bank the Island Amusement Company Limited was added as a party defendant. The defendant bank filed a defence admitting the facts as set out but denying the plaintiff's right to the money on the ground that the restoration of the company to the register put an end to the plaintiff's right to recover the former property of the company as *"bona vacantia."* The plaintiff's motion for judgment on the admitted facts was dismissed.

The appeal was argued at Victoria on the 24th and 29th of January, 1936, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*H. Alan Maclean,* for appellant: When the company became dissolved in 1928 all personal property of the company became *"bona vacantia"* and as such the property of the Crown in the right of the Province: see *In re Sir Thomas Spencer Wells. Swinburne-Hanham* v. *Howard,* [1933] Ch. 29 at p. 43; *The King* v. *Attorney-General of British Columbia,* [1924] A.C. 213. The order restoring the company contained no direction made pursuant to section 200 (2) of the Companies Act, but it did contain a provision declaring that the order should be without prejudice to the rights of parties acquired prior to the date on

which the company is restored to the register. The learned judge relied on section 199 which describes the effect of the restoration order "shall be deemed to have continued in existence as if it had not been struck off." We submit that under section 33 of the Interpretation Act the above sections cannot have the effect of depriving the Crown of property which the Crown has once obtained title to as *bona vacantia*. The right of the Crown to receive and deal with property which has become *bona vacantia* remains unaffected by the restoration order. Section 16 of the Dominion Interpretation Act is similar to said section 33, and as to that section see *In re Silver Brothers, Ld.*, [1932] A.C. 514; *Re W.* (1925), 56 O.L.R. 611. There were no directions given in the order and if it was intended that the Crown should be bound directions should have been given in the order providing for a revesting in the company of the property in question. The judgment below was wrong in reciting that the cases of *In re Joplin Brewery Company, Limited*, [1902] 1 Ch. 79; *In re Spiral Globe, Limited, ib.* 396, and *In re Ehrmann Brothers, Limited*, [1906] 2 Ch. 697 assist the defendant's contention that the words in the "without prejudice" clause do not apply so as to protect the right of the Crown in property acquired as *bona vacantia*. In fact the cases are in our favour.

*D. M. Gordon*, for respondent bank: It is immaterial to the bank who is entitled to the money. No conclusion can be drawn from the failure of the respondent company to defend, because the company is in liquidation and its liquidator is dead. Apart from the appellant's contention being grossly unjust, the wording of the Act indicates that the Legislature never contemplated anything of the sort. The Legislature could not contemplate a company which had been stripped of all its property making an application to be restored to the register. The only reasonable construction of section 200 (2) of the Act in using the words "without prejudice to the rights of parties acquired prior to the date on which the company is restored by the registrar" is that it was not intended to include the Crown at all. It is submitted alternatively that section 200 may be construed as making revival subject only to outsiders' rights which accrued between the order of restoration and the registrar's acting upon

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the order, and not between the striking off and the order. The section refers to rights acquired prior to restoration "by the registrar" and the intention is to save not rights which accrued prior to the order, but after it. Prior to the consolidation in 1921, on restoration the company was deemed "to have continued in existence as if it had not been struck off" and this was only changed by the consolidation which should not effect any drastic change in the law: see *Mitchell* v. *Simpson* (1890), 25 Q.B.D. 183. The bank should be allowed its costs out of the fund on hand irrespective of the result. It could not interplead: see *The Mogileff (No. 2)*, [1922] P. 122; *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15 at pp. 51-2; *New York Security and Trust Company* v. *Keyser*, [1901] 1 Ch. 666.

No one, for respondent company.

*Maclean*, replied.

*Cur. adv. vult.*

4th November, 1936.

MARTIN, J.A.: By this action the plaintiff seeks a declaration that the sum of $7,219 on deposit with the defendant bank at Victoria is the property of the Crown as *bona vacantia* because it was money in the hands of the bank to the credit of the defendant company when it was dissolved on the 25th of October, 1928, upon being struck off the register of companies pursuant to the Companies Act, Cap. 38, R.S.B.C. 1924, Sec. 167, now section 198, Cap. 11 of 1929, subsections (2) and (4).

In view of the decision in a well-known case arising in this Province, *The King* v. *Attorney-General of British Columbia*, [1924] A.C. 213; (1922), 63 S.C.R. 622, reported below in the Exchequer Court as *The King* v. *Rithet and the Attorney-General of B.C.* (1918), 17 Ex. C.R. 109 (wherein the facts and proceedings more fully appear) it became the duty of the defendant bank, upon the dissolution of the defendant company, to hand over to the Crown, in the right of this Province, the said money as *bona vacantia*, and still more should it have brought it into Court (as was done in *Rithet's* case, 17 Ex. C.R. at p. 111) after this action was begun upon its refusal to pay over. But instead of so doing, though admitting by its defence that it had no claim to the money, it nevertheless continued to keep it, after

the Crown had demanded it, and still continues to do so while expressing its willingness to dispose of it as the Court might direct, and asking that it should "be indemnified against costs out of the said money."

It is clear that under these circumstances the bank had no *status* as a litigant, and, as it rightly admitted in its *factum*, could not even ask for an interpleader as against the Crown, but despite this obvious defect it solely contested the proceedings below even though it had obtained an order joining the company as a party defendant, and continued the contest before us. We were, however, not satisfied with this position, and the more so because the company had not entered an appearance, though still upon the record, and it became manifest that the complete final judgment upon the merits that is desired could not be pronounced for that reason, and also because the order of Mr. Justice ROBERTSON appealed from was only an interlocutory one dismissing the plaintiff's motion for judgment, and therefore the action would still have to proceed to trial, though in the learned judge's reasons it is said "I think, therefore, the action fails."

Upon pointing out these obstacles to counsel, they took them into consideration and on the 13th of October last they appeared before us with Mr. *W. H. Langley,* who appeared for the defendant company, through its recently appointed liquidator, and stated that it had been agreed by all concerned that the said judgment of ROBERTSON, J. should be considered and dealt with by us as a final judgment upon a trial and that counsel for the liquidator should be allowed to appear at this stage and submit his claims to the money as fully as though he had been an active defendant below and a respondent here, to the intent that the whole question in all its aspects should be determined by us. We confirmed this agreement, and thereupon Mr. *Langley* submitted that the said money should be declared to be that of the company, and in support of his submission adopted the argument that had been presented by counsel for the bank.

Upon further consideration of the case pursuant to this agreement, we reached the conclusion that as regards the bank it had, on its own admission, no right to the money and therefore

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had no *status* below or here to contest the plaintiff's right thereto and consequently the appeal against it must be allowed: as the Privy Council said in *Rithet's* case, *supra,* p. 215, it had "passed out of the story." But as regards the claim of the company, through its liquidator, to the money, my brothers are of opinion that it should prevail and that a declaration to that end should be made and therefore the appeal against it must be dismissed, though, with every respect, I am unable to agree with this latter disposition, and am of opinion that the right of the plaintiff to the money has been established and should be so declared.

It is at the outset necessary to consider the scope of the prior order made on 5th April, 1935, by ROBERTSON, J. because the question that is now before us on the said admission and consequent change in the record is in certain substantial respects quite different from what it was below, and our judgment must necessarily be given on a broader basis. By that prior first order made on the petition of "three members of the company"

> It is ordered that the name of the above named Island Amusement Company Limited be restored to the register of companies for a period of one year from the date of its restoration to said register for the purpose of enabling the company to be wound up voluntarily, and that pursuant to the Companies Act the company shall be deemed to have continued in existence as if its name had never been struck off, without prejudice however to the rights of any parties which may have been acquired prior to the date on which the company is restored to the register.

Apparently the petition was dealt with both under sections 199 and 200 of said Cap. 11 of 1929, which provide that

> 199. (1.) Where a company or an extra-provincial company or any member or creditor thereof is aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, subject to section 200 and if satisfied that the company was at the time of the striking-off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence, or, in the case of an extra-provincial company, to be a company registered under Part VII., as if it had not been struck off. . . .
>
> 200. (1.) The Court may make an order restoring a company to the register for a limited period or for the purpose of carrying out a particular purpose, and after the expiration of that period or the execution of that purpose the company shall forthwith be struck off the register by the Registrar.
>
> (2.) The Court may by an order restoring a company to the register give such directions and make such provisions as seem just for placing the

company and all other persons in the same position as nearly as may be as if the company had not been struck off, but, unless the Court otherwise orders, the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored by the Registrar.

After a prolonged and careful consideration and reconsideration of these two sections (which differ essentially from those in the English Act, as shall appear) I can only reach the conclusion that they are directed to the accomplishment of two distinct purposes and are under the present circumstances in no way interdependent. Section 199 is aimed at the general restoration as a whole of a company which though struck off the register for non-observance of the requirements of the Act, is nevertheless in practical existence as a "company [that] was at the time of the striking-off carrying on business or in operation," *i.e.*, a company which had lost its legal *status* as a matter of record upon the register but was still a going concern and therefore worthy of special consideration in the public interest as well as its own. That, to my mind, is obviously the prime object of the section, and to accomplish it the power of restoration is, by way of precaution, enlarged to include, in the necessary "satisfaction" of the Court, other circumstances wherein "it is just that the company be restored" in general to its former position so that it can "continue its existence" legally as well as actually, by carrying on business as theretofore. To attain that object, the general provision that after restoration "thereupon the company shall be deemed to have continued in existence" is a necessary and proper one to avoid confusion and uncertainty during the illegal interval, but this whole power of restoration is made "subject to section 200," which section is introduced for the purpose, doubtless, of preventing "prejudice to the rights of parties acquired prior to the date on which the company is restored," and was in fact so invoked by the order now under consideration.

The object of section 200 is, to my mind, obviously quite distinct from, and independent of, the preceding one, in that it clearly does not contemplate the permanent and general re-establishment of the company as a going concern, but only its temporary resurrection in two specified cases, *i.e.*, "for a limited period or for the purpose of carrying out a particular purpose,"

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after which it relapses into its defunct state and is to be "forthwith struck off the register by the Registrar," as the subsection summarily directs. For the accomplishment of these two "particular purposes" there is not only no necessity for the provision that the "company shall be deemed to have continued in existence" (as is necessary for the general fulfilment of section 199) but such a provision would be antagonistic to the object in view. This construction is confirmed by the following subsection (2) which goes on to empower the Court in its order for restoration to

> give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off. . . .

This power to place "as nearly as may be" in the former position shows that the positive and general declaration, without limitation, in section 199 that "the company shall be deemed to have continued in existence" (without the important addition of the words "as nearly as may be"), is in direct conflict with section 200 in this primary respect, and can only be properly applied to the purpose of a general and permanent re-establishment in "carrying on business or in operation." And still further confirmation is to be found in the protective proviso in subsection (2) that

> unless the Court otherwise orders the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored. . . .

which casts upon the Court an additional safeguarding duty in the consideration of the necessary directions and provisions that it would "seem just" to make to restore the "position as nearly as may be."

That the object of the application made to restore this company to the register was solely to "carry out a particular purpose," *i.e.*, to get said money and to fix "a limited period" of one year to do so, is settled beyond question by the said order itself, and therefore the application is brought precisely within that section 200 (1), and the result of the views above expressed is, in my opinion, that it could only have been rightly made thereunder, and hence it follows that the direction in the order "that pursuant to the Companies Act the company shall be deemed to have continued in existence as if its name had never

been struck off" was, with every respect, made improvidently and without jurisdiction, and it is our duty to disregard it and base our judgment upon the real meaning of the section and the jurisdiction it confers, not only because it is a nullity in that respect, in my opinion, but also because it is not binding upon the plaintiff herein as being made in a proceeding to which he was a stranger, as the order itself shows. Indeed, it appears from the very recent decision of the Privy Council in *Jackson* v. *Cooke,* [1936] 3 All E.R. 680, that even in a case where the parties involved consent to a wrong view of the jurisdiction of a tribunal, an appellate Court should take the right one where the Court below (p. 682)

took at least some responsibility, and this is not the less true because the admission of counsel for the appellant seemed to justify the view expressed by the Court.

Now in the making of said order the Court "took" much responsibility.

If this view be correct, this appeal must be decided in favour of the plaintiff, because the only really substantial answer put forward to the claim of the Crown was based upon the said words in section 199 that the "company shall be deemed to have continued in existence," which, it was submitted, restore and preserve its rights uninterruptedly inviolate, but if that expression cannot be invoked then the company must resort to said section 200, and in that there is nothing to justify the Court depriving the Crown of the right it had acquired to this money as *bona vacantia* which, as the Privy Council said in *The King* v. *Attorney-General of British Columbia, supra,* p. 221 (a case, be it remembered, like this of a dissolved company) form part of those

venerable rights, such as the *jura regalia* of the Crown must always be, [and] necessarily . . . far beyond their current pecuniary value.

And at p. 219:

. . . the principle on which *bona vacantia* and escheats fall to the Crown is the same, that is, that there being no private person entitled, the Crown takes.

It is not questioned that the money herein is *bona vacantia,* and could not be, because as Mr. Justice Anglin said in the Supreme Court in the same case, *supra,* p. 634:

It is common ground that the moneys paid into Court by . . . Rithet are *bona vacantia.*

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And Mr. Justice (now Chief Justice) Duff said, p. 633, that the "title" to *bona vacantia* remains in the Queen as Sovereign Head of the Province and became

> the property of the Province in the sense only that the Legislature and Government of the Province had been invested with the power of appropriation over it.

From the present order it appears that it did not "seem just" to the Court to make any "directions" or "provisions" under subsection (2) "for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off," so the result is that there was a "particular" restoration *simpliciter* and for a "limited purpose," and the company can take what benefits there may be from that, but nothing more, and even that benefit can only be taken "without prejudice to the rights of parties acquired prior to the date" of restoration, "unless the Court otherwise orders"; but not only was no such "order" made but a clause was inserted in the order that was made declaring that the restoration was made

> without prejudice however to the rights of any parties which may have been acquired prior to the date on which the company is restored to the register.

The significance of this is that though the Court had its attention directed to the matter of "prejudice" yet it did not "seem just" to make any order relieving the company from the obligation imposed by said protective clause.

That the "venerable rights" of the Crown to *jura regalia* are included in the general expression "rights of parties" is, in my opinion, beyond doubt, assuming that the Crown can be affected at all by these sections; if it can, the words are of the widest scope and cannot in this context be restricted to, *e.g.*, the narrow meaning of parties litigant because, under section 200, there is no *lis*, but only a special procedure under the Companies Act to attain a special object, upon which the Court becomes *functus ad hoc*, and the rights of all *bona fide* claimants to the property, real or personal, must be considered. While it is true as a rule that in Acts of Parliament in referring directly to the Sovereign he is not "named by the name of 'party'"—*Reg.* v. *Tuchin* (1704), 2 Ld. Raym. 1061, 1066—yet that does not mean that the rights of the Crown may not in appropriate proceedings in

Court be included in general words descriptive of persons, "parties," of a class to whom rights are reserved: thus, *e.g.,* by our rule 133 providing for the adding of "parties," the Attorney-General representing the Crown (as herein) may be added as a "party": *cf. Attorney-General* v. *Pontypridd Waterworks Company,* [1908] 1 Ch. 388, 398, wherein he was added as a co-plaintiff for the protection of the public right; and in *Boyce* v. *Paddington Borough Council,* [1903] 2 Ch. 556, the Court of Appeal added, p. 561, him as a plaintiff "in respect of the rights of the public"; and in *Esquimalt and Nanaimo Railway Company* v. *Wilson,* [1920] A.C. 358, 369; (1919) 27 B.C. 144, he was added as a defendant by the Privy Council; *cf.* also *Attorney-General for Ontario* v. *McLean Gold Mines,* [1927] A.C. 185.

Indeed, if this is not the case, the argument tells against the respondent, because it is unthinkable that if these sections 199-200 affect the Crown at all (as to which presently) they can only be invoked to its prejudice so as to divest it of its "venerable rights," but not to protect them.

Such being the case, it follows that if the only benefit the company took under this order and subsection (2) was its temporary restoration for a particular purpose, but subject to the prior rights of the Crown, then as against the Crown it has no right to the money in question as *bona vacantia* which became vested in the Crown immediately upon its dissolution not under the Companies Act or any other statute but by common law as a "venerable right."

I pause to say that in the learned judge's reasons the view was expressed that if the Crown's claim to the money as *bona vacantia* be upheld then the company would, unless its property was restored to it upon its restoration to the register, be

> a mere shell without any assets, and it is difficult to see any reason under such circumstances for any one wishing to restore it to the register.

That is quite true, and it also affords the best reason why this order in question should not have been made, if the property were only personal, in accordance with the principle that the Court will not lend itself to futile proceedings. It is to be observed, however, that the company might well have had real property, as well as personal, to which the Crown would have no claim;

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this situation has been overlooked in the respondent's argument (*factum*, pp. 5-6) whereby it was submitted that it could not have been in the contemplation of the Legislature that the company should "remain stripped of its property on restoration": if a company ill-advisedly applies for an order which under the circumstances will be of no benefit to it and therefore futile the Court ought not to grant it, and if the company assumes the risk of taking a useless order it must abide the consequences.

To resume. In the present case the Crown was in the position when it began this action in June, 1935, that the money should have been handed over to it voluntarily by the bank in 1928, nearly seven years before, in accordance with the Privy Council's decision in *Rithet's* case finally settling the law, and the solution of the questions involved herein must be determined on that basis because it would not "seem just" under subsection (2) or otherwise that the rights of the Crown should be in a worse position when under consideration because the bank had illegally kept this money for all this time after notice of the dissolution of the company had been published in the official Gazette pursuant to section 198 (4). The test therefore of the construction and general application of these sections must be applied on some general principle, apart from particular deviating circumstances, and under the present ones the condition of what "seems just" can only be satisfied by regarding, on the equitable principle of justice, that as done which should have been done, and hence the present question should be viewed in the light that in 1928 the bank had in pursuance of its manifest duty handed over this money to the Crown; and if the Crown had, as beyond question it would have, promptly spent the money as part of its general revenue to answer the urgent calls of public depression, how could it "seem just" to order it to restore it (assuming subsection (2) confers that power) after a time barred even had it been a debt by the Statute of Limitations (Cap. 145, Sec. 3, R.S.B.C. 1924) when such a stale demand would not be recognized even in equity—Snell's Equity, 21st Ed., 16-7-8, 222-3. It is clear that whatever may be the extent of the power of "placing the company and all other persons" conferred by subsection (2) (which it is unnecessary to consider) it cannot be exercised

so as to deprive anyone of property to which it is at least entitled to possession without taking into consideration what is "just" to be under the circumstances (including those referred to, *e.g.*, by Idington, J. in *Rithet's* case, *supra,* p. 627; and *cf. Re Henderson's Nigel Co.* (1911), 105 L.T. 370) to the end that no prejudice may result to such person unless the Court decides that special circumstances exist which would justify the infliction of a prejudicial order, and it is of weight to notice that, as the learned judge says in his reasons, the company did not obtain its restoration till after the Crown had demanded the money from the bank and been refused.

Viewing this case (as was agreed) as if it had gone to trial, and on the only facts in evidence, the Crown was, in my opinion entitled to judgment under section 200 because the effect of the order was to declare that it "seemed just" that no "directions" or "provisions" should be made for placing the company and all other persons "in the same position as nearly as may be if the company had not been struck off," and therefore it must as regards "rights . . . acquired prior" to restoration remain without qualification in the original position of being struck off, *i.e.,* dissolved and defunct, and hence by the operation of subsection (2) the said prior rights are fully preserved and retained "without prejudice" of any kind, *i.e.,* remain intact as the consequence of that dissolution.

It must not be overlooked that at said trial the Court now appealed from had no jurisdiction to exercise or review any of the special powers conferred and exercised by the Court in making said order under sections 199-200, but was bound to give effect thereto and to sustain "without prejudice" the said "rights."

If, therefore, the views above expressed are correct, this appeal should be allowed, but *ex abundanti cautela* it is well to say that if they are not and that the company can invoke section 199 and the expression "shall be deemed to have continued in existence . . . as if it had not been struck off," yet that invocation will not assist it because an order made under that section can only be made "subject to section 200" and so the protection of the "without prejudice" proviso thereof applies

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equally and fully to section 199, with the result that the state of "continued existence" under section 199 can no more come into operation to prejudice prior rights without a special order justifying that prejudice, than can the "placing [of] the company and all other persons in the same position as nearly as may be" under section 200. If these two sections are to be read into each other as submitted, that cannot be done in such an obviously unfair way as to include obligations in favour of the company and exclude safeguards in favour of the prior acquired rights of all other parties. The matter therefore is brought back to where it was, *viz.*, that all prior rights are preserved intact by section 200, and the restoration of the company is just as much "subject" to them under section 199 as under section 200.

It was submitted that, in some undefined way, which, with all due deference, is to my mind obscure and inconsistent, the right of the Crown to *bona vacantia* is under the Companies Act curtailed and that the Crown must be regarded as having only the temporary use or custody of personal property of any kind that should properly be handed over to it after dissolution as *bona vacantia* (which this money admittedly is) but after a prolonged consideration of the statute and a great number of decisions I have been unable to find anything to support such a view, when the peculiar prerogative nature of *bon vacantia* is understood. On this, in addition to the citations from *Rithet's* case already given, it is well to add two more leading cases, the first of which is the well-known decision of the Privy Council in *Dyke* v. *Walford* (1846), 5 Moore, P.C. 434, wherein at 495-6, their Lordships say:

> The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to "*bona vacantia*"; to property which has no other owner. We consider it, therefore, to be perfectly clear that, . . . . , the right in question, was vested in the Crown, as one of its "*jura regalia*," . . .

And at p. 498:

> We are of opinion, that the right of goods belonging to persons dying intestate, without leaving husband, or widow, and without kindred, was vested in the King, in right of His Crown, at the date of these Charters; that this right, within the County Palatine, passed, with other "*jura regalia*," to the Duke of Lancaster, and is now vested in Her Majesty, in right of Her Duchy. . . .

This opinion was reaffirmed by the Privy Council in *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767 at 779, saying this *"jus regale"* . . .

"stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights."

Following *Dyke's* case the Court of Appeal in *In re Wells* (1932), 101 L.J. Ch. 346, held that even the equity of redemption in leaseholds mortgaged by a company subsequently dissolved is vested in the Crown as *bona vacantia;* Lord Justice Lawrence at pp. 351-2 said, very aptly to the present case:

The right of the Crown to succeed to the personal estate vested in a company at the time of its dissolution does not, in my opinion, differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next-of-kin. In both cases the title of the Crown arises because the property has no other owners; such property must not of course be confused with property the owner of which is unknown. The old text-book writers on the law of corporations, such as Kyd (1794), Vol. II., p. 516, and Grant (1850), p. 304, expressed the opinion that the Crown is entitled to the personal estate of a dissolved corporation, and so far as I know the correctness of that opinion has never been doubted.

The only difference between the case of an intestate and of a dissolved company is purely one of form. In the case of an intestate, his personal estate immediately on his death formerly vested in the ordinary and now vests in the probate judge pending the grant of letters of administration. As the right of administration follows the right of property, letters of administration in the case of an intestate dying without next-of-kin are granted to the nominee of the Crown, but subject to the usual condition of paying the administration expenses and debts of the intestate. In the case of a dissolved company, the personal estate passes directly to the Crown, and there is no necessity to provide for the payment of any administration expenses or debts, because the Legislature has provided that these must be discharged before the company is dissolved.

And Lord Justice Romer at p. 356:

On the other hand, Lord Brougham in *Henchman* v. *Attorney-General* ([(1834)] 3 Myl. & K., at p. 492), said that the Crown "may take personalty as *bona vacantia*, but real estate it can never take unless by escheat." In these circumstances the question whether an equitable interest in real estate used to devolve on the Crown as being *bona vacantia* cannot be regarded as being clear. But the Crown's right to equitable interests in personal estate of which interests there is no other owner does not, in my judgment, admit of doubt. This was established by the decision in *Middleton* v. *Spicer* [(1783), 1 Bro. C.C. 201]. In such cases, however, the equitable interest vests in the Crown, not because the legal interest is vested in trustees, but in spite of that fact. The right of the Crown to take as *bona vacantia* all legal interests in personal property of which there is no other owner had been established centuries before that case. . . .

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Now if the Crown be entitled, as in my opinion it is, to the whole personal estate of an intestate dying without a widow or next-of-kin, why should there be any doubt as to the right of the Crown to the personal estate of a corporation which has ceased to exist? The right of the Crown to *bona vacantia* depends upon the fact that there is no other owner of the property claimed, and cannot depend upon the particular reasons for the existence of that fact. I know of no authority for drawing any distinction between the case of such a corporation and the case of a man dying intestate and without kin except the decision of the Divisional Court in the case of *Higginson and Dean, In re; Attorney-General, ex parte* [(1898), 68 L.J.Q.B. 198; [1899] 1 Q.B. 325]. And he goes on to declare that the decision of Wright, J., in that case "is unsound and cannot be supported."

It was, indeed, conceded by the learned judge below and by counsel that "the right of the Crown to *bona vacantia* is no doubt a right of property" and therefore the Crown had some rights in this fund and though they were not defined, as they must be, he gave as an example "the right of a purchaser from the Crown," which can only aptly mean a title derived from a sale of *bona vacantia* which had come into its hands immediately upon the dissolution of the company, *i.e.*, "passed directly to the Crown," as Lawrence, J. held, *supra*. But it is obvious that if the Crown can create a "right" by sale of *bona vacantia* to a purchaser it can only do so because the title thereto has already vested in itself, and if so, then it cannot be divested of that title simply because being the owner it chooses to keep the property instead of selling it: that an owner entitled to property has a good title to sell it validly but not to keep it for his own use would be indeed a startling proposition. It would, to my mind, create an impossible situation to hold that it was the duty of the Crown to retain for an indefinite period any and all personal property, goods or money, that became vested in it as *bona vacantia*, for the mere purpose of preserving and restoring them upon demand to the company to forestall the very doubtful chance of its ever being restored to the register, no matter how many years had elapsed, even if restoration were possible in the case of goods which would be worn out or consumed by proper use, such as clothing or food given by the Crown to relieve the sick and the poor or unemployed or to welfare societies for similar purposes, or to hospitals, etc. (as is done by the Turkish Government—*In the Estate of Musurus, Deceased,* [1936] 2 All E.R. 1666); and also, to

take from our leading industry a trade example, in the case of logs, booms, scows, tugs, or machinery used in lumbering operations. To impose an onerous and everlasting duty of such a novel kind of involuntary and hybrid bailment upon the Crown is something I cannot conceive as being the intention of the Legislature, and, it follows that if there be no such obligation upon the Crown as regards goods neither is there one to keep and restore money which, *e.g.*, it had distributed directly for the above charitable purposes, or given to municipalities for that object. If this be not the correct view, then not only must the Crown restore the property but the purchaser to whom it has sold it must also do so, because if the Crown had no power to alienate then its vendee acquired no "rights" whatever and cannot claim the protection of subsection (2) of section 200. That there can be nothing in the nature of a trust attaching to *bona vacantia* appears from the *Musurus* case, *supra*.

The truth is, as both law and reason dictate, that the right of the Crown to *bona vacantia* is indivisible and cannot be curtailed or dismembered (except by Parliament as has been done in England, as shall appear) in the attempt to meet uncontemplated conditions which are incapable of being adjusted to or worked out under this Act in a practical and reasonable way. But if the said "right" of the Crown is fully recognized as it ought to be and the operation of the Act is confined to the rights of the subject in the company's real property to which the Crown has no claim, then all said difficulties disappear.

This result brings me to, and furnishes a strong ground in support of the submission of the Crown that this Act does not affect its rights, and reliance is placed upon section 33 of the Interpretation Act, Cap. 1, R.S.B.C. 1924, *viz.*:

> 33. No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

It was held by Mr. Justice Riddell in *Re W.* (1925), 56 O.L.R. 611, upon a similar, though not so strongly worded section in the Ontario Interpretation Act (not containing the words "no provision or enactment in" and "in any maner or way whatsoever" that are in ours) that such an express declaration prevented any "modification of the statute" by the common

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law rule which "is relaxed when there is a necessary implication that the King is meant to be bound," and in my opinion that reasoning is sound and should be followed, confirmed as it is, in effect, by the decision of the Privy Council in *In re Silver Brothers, Ld.*, [1932] A.C. 514, 523. The cases, therefore, which were cited to us in support of the common law "relaxation" do not apply, and the position of the Crown herein is what it was in *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 419, 420, wherein the Privy Council upheld the submission that the prerogative of the Crown then in question was excluded from the operation of the Insolvent Acts by a section of the Canada Interpretation Act which is identical with ours. But even if any "relaxation" of the common law could be resorted to it would not under present circumstances assist the respondents because they afford no ground for its "relaxation." In a case cited by Riddell, J., *supra, Roberts* v. *Ahern* (1904), 1 C.L.R. 406, the Supreme Court of Australia well stated the matter at common law at pp. 417-8:

> It is a general rule that the Crown is not bound by a statute unless it appears on the face of the statute that it was intended that the Crown should be bound by it. This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of Alderson, B., delivering the judgment of the Court of Exchequer in *A. G.* v. *Donaldson*, 10 M. & M. 117, at p. 124: "It is a well established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect; for it is inferred *prima facie* that the law made by the Crown with the assent of Lords and Commons is made for subjects and not for the Crown." The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by statute unless that intention is apparent. The doctrine is well settled in this sense in the United States of America. In the language of Story, J.: "Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was in contemplation of the Legislature, before a Court of law would be authorized to put such a construction upon any statute. In general, Acts of the Legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law that the general words of a statute ought not to include the Government unless that construction be clear and indisputable upon the text of the Act." *United States* v. *Hoar*, 2 Mason (U.S. Circuit Court), 311.

And, applying that "safe rule," the Court went on to say:

> With regard to the statute now under consideration, so far from its test suggesting a clear intention to control the action of the Executive Government a contrary intention is, *prima facie*, more probable.

If that "safe rule" is applied to this present statute it is, to my mind, beyond question impossible to say that its "construction is clear and indisputable" in favour of the inclusion of the Crown, and so the Royal prerogative stands unaffected thereby: the language of Mr. Justice Story applies most aptly hereto.*

But it was further submitted that the Crown had taken a benefit under this Act and therefore should be bound by it, and our recent decision in *Attorney-General of Canada* v. *Registrar of Titles of Vancouver* (1934), 48 B.C. 544, was cited, and others, none of which is in point, whatever this undefined alleged principle may be. But that was a case where the Crown (Dominion) voluntarily and unnecessarily applied for and obtained under the Land Registry Act of this Province a service from the land registry system established thereby, and there was no reason why it should not pay "for a service actually done" (pp. 551-2) by the Province in the same way that it would have to pay for other services, *e.g.*, electricity, water, telephone, etc. There is no analogy between that case and this. Furthermore it is not, in my opinion, at all correct to say that the Crown derived any benefit under this Companies Act. Its prerogative rights are not derived therefrom and it made no application thereunder, but simply took as was its ancient right the personal property of a company which was dissolved, *i.e.*, became dead, by the operation of the Act just as it would take the same property in the case of the death of a person who had made an invalid will under the Wills Act and therefore became intestate: in both cases the Crown takes not as a benefit from the Act but as a consequence thereof.

A benefit, in the true and present sense, would be some right created or conferred by the Act, and an illustration of this is to be found in the change made by the English Companies Act,

*NOTE. Since this was written the report of the judgment of the Exchequer Court in *The King* v. *Kussner*, [1936] 4 D.L.R. 752, at pp. 757-9, has arrived (on 4th January, 1937) and should be added to the authorities I have relied upon.—A.M.

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1929, Sec. 296, which extended *bona vacantia* to include after dissolution "all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution," with two exceptions, but as an offset to that benefit the section went on to declare that *bona vacantia* (as thus enlarged) "shall belong to and vest in the Crown" but "subject and without prejudice to any order which may at any time be made by the Court under the two last foregoing sections of this Act"—*cf.* Stiebel's Company Law and Precedents, 3rd Ed., 903; Buckley's Companies Acts, 11th Ed., 494, 593-6; Palmer's Company Law, 15th Ed., 452, 584-5. It will be noted, first, that this position is the reverse of that created by our said section 200 (2) because ours preserves "without prejudice" the right of *bona vacantia* (in its original sense of personal property) in common with all rights; and, second, that there is no provision in the English section 295 (6) corresponding to our subsection (1) of 200; and, third, that there is no section in the English Act corresponding to our subsection (2) of section 200, all of which differences are of vital importance in the solution of the question before us.

For all the foregoing reasons this appeal should in my opinion be allowed against the company as well as the bank.

MACDONALD, J.A.: This is an appeal by His Majesty's Attorney-General for British Columbia from the judgment of ROBERTSON, J., deciding that a sum of $7,219.08 on deposit with the respondent bank to the credit of its co-respondent Island Amusement Company Limited, was not *bona vacantia* falling to the Crown in right of the Province.

The Island Amusement Company Limited was struck off the register of companies on October 25th, 1928, under section 167 of the Companies Act, Cap. 38, R.S.B.C. 1924, for failure to make returns. Thereupon as a *sequitur* to dissolution its personal property—the fund in question—became *bona vacantia* and for the time being at all events, if not absolutely, vested in the Crown. On the 5th of April, 1935, certain members of the one-time company petitioned the Court under sections 199 and 200 of the Companies Act of 1929, Cap. 11, for an order restoring it to the register for a period of one year and for a limited purpose as

permitted by section 200. It is provided by section 199 that a company so restored "shall be deemed to have continued in existence as if it had not been struck off." An order was made reading: [already set out in the judgment of MARTIN, J.A.].

Briefly, the Attorney-General submits that by reason of the reservation in the order disclosing that it was made "without prejudice to the rights of any parties which may have been acquired prior to the date on which the company is restored to the register" his right, on behalf of the Crown to the fund cannot be invaded nor can it be claimed by the company now restored to the register.

The point is important, affecting all companies struck off the register, and later reinstated. The English Companies Act and the Acts of other Provinces are not similar. I do not think it was contemplated that under such circumstances the Crown should retain the company's original assets: if it was it is difficult to assign a satisfactory reason for restoring any company to the register.

The result of dissolution is conceded. The point is, by the terms of the statute, expressly or by implication, did the money revert to the company on revival pursuant to the order? To determine it only sections 199 and 200 are material. Two orders are provided for by the Act, one general under section 199; the other limited under section 200. Under section 200 the company may be restored to the register for a limited period or for a particular purpose, and, as appears from the order, it was made under this section. It is, however, in section 199 only under which a different kind of order might be made permitting a company on revival to resume operations for all purposes that we find the words "thereupon the company shall be deemed to have continued in existence . . . as if it had not been struck off." The respondent to succeed must have the benefit of these words; his case depends upon it yet he secured a special order under a special section (200) in which these words are not found. Because of this it was suggested during the argument that we were confined to the consideration of section 200 under which the order was made. I do not agree. Whatever effect should be given to the words found only in section 199,

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*viz.*, "shall be deemed to have continued in existence, . . . , as if it had not been struck off" must also be given to an order made under section 200 as if incorporated therein. Section 200 simply adds a proviso for a special order without excluding the general terms of section 199, all of which are common to both sections.

It was submitted (and for the first time in this Court) that whatever may be the effect of the words just quoted against parties other than the Crown, in view of section 33 of the Interpretation Act, Cap. 1, R.S.B.C. 1924, reading: [already set out in the judgment of MARTIN, J.A.] they cannot have the effect of divesting the Crown of property to which it obtained title as *bona vacantia*. True the Crown is not expressly mentioned in the statute but before discussing the question of depriving the Crown of alleged property or other rights of an indefeasible nature it is necessary to determine precisely what its rights are. There must be in fact a right before it can be invaded. In my view the right of His Majesty to this fund is not absolute; it is a right to retain it for the time being subject to termination by a step taken under the authority of the statute by which the Crown procured it, *viz.*, by obtaining an order restoring the company to the register. It was solely because of a step taken under section 167 of the Companies Act that the fund reverted to the Crown. If on the proper construction of sections 199 and 200 of the same Act it provides, either expressly or by implication, that upon revival of a company the fund must be restored to its coffers no rights are invaded at all. The Crown must invoke the Act (*i.e.*, a step must be taken under it) to obtain any colour of right to the fund. It cannot rely on that part of the Act by which the right is acquired and ignore that part which (if its true construction warrants it) puts an end to a right temporarily enjoyed. The nature and extent of the right depends upon the wording of all relevant sections of the Act. In the words of Orde, J., in *Re Excelsior Electric Dairy Machinery Limited* (1922), 52 O.L.R. 225 at 228:

> The Crown could hardly claim the benefits of the Bulk Sales Act without being also subject to its limitations.

The question therefore of His Majesty not being expressly mentioned in the statute as a condition precedent to the depriva-

tion of rights does not arise if on its proper construction there is no right to permanently retain the fund (and consequently no right invaded) after an order is made to restore the company to the register.

It follows that the Crown's right depends upon the interpretation of the relevant sections of the Act. We turn therefore to the meaning of the words in section 199 providing that after the company is restored to the register it shall be "deemed to have continued in existence as if it has not been struck off." If it had not been struck off it would have continued in existence with all its assets and the intention was to enable it to resume its former *status*. If that is not obvious, for further light we may look at the whole Act to ascertain its general purport and if it is reasonably possible by interpretation to advance the object in view we should do so. Clearly the Legislature did not intend to stultify itself by providing for the restoration of a company to the register if, deprived of all its property, it would be quite useless to do so. I think, for the reasons given by the trial judge, the intention is clear. It was not intended that companies should be restored in a truncated form. Life, in its old form and stature was to be restored as if it had never ceased. To do so the custodian of the fund, His Majesty, in right of the Province, must restore it because that, in the language of the cases presently referred to, was the intendment of the Act.

Mr. *Maclean* submitted that the point was concluded in his favour by the cases. A judgment of Riddell, J., in *Re W.* (1925), 56 O.L.R. 611 was referred to. He dealt with the property of an illegitimate escheating to the Crown on intestacy with absence of issue and held, notwithstanding a Legitimation Act, later (through lawful wedlock of the parents) removed the bar, so that the child for all purposes should be treated as legitimate, his estate, having in fact reverted to the Crown, its right to retain it was not affected by the Act, because His Majesty was not named therein. Similarly he submitted the words "shall be deemed to have continued in existence as if it had not been struck off," no matter how construed, cannot restore this personal property to the company. The distinction is, that, unlike the case at Bar, the intestate's estate did not pass to the Crown by

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virtue of a statute or a step taken under a statute containing a provision that, on its proper construction, the right to retain the estate might be terminated.

However, assuming that the Crown has some rights (as it had for a time at least) in and to the fund or that it is under an obligation (as I think it is) to restore it to the company on revival, it does not follow that because it is not named in the Act it may decline to perform its obligation. In *The Attorney-General* v. *Donaldson* (1842), 10 M. & W. 117 at 123-4 Baron Alderson said:

> It is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there be words to that effect; for it is inferred *prima facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown.

This view, often repeated, correctly states the law. It is apparent, however, from the use of the words "generally speaking" and *"prima facie"* that it was not intended to lay down a rigid rule to be applied without regard to words of a statute indicating a contrary intention. It means that the property rights, privileges and prerogatives of the Crown may not be affected nor may obligations be imposed upon it unless the intention of the Lords and Commons to permit it is made known and as primarily legislation "is made for subjects and not for the Crown" such intention cannot be manifested unless the Crown is named. It does not follow, however, that in every statute it is necessary to name the Crown whenever any obligation is imposed upon it. Mr. *Gordon* referred to the Land Registry Act where, although the Crown is not named, it is obliged in some instances to pay registration fees; so too in our Court of Appeal Act rights are exercised thereunder by the Crown and obligations assumed, although the Crown is not named. The intent is so obvious that special words designating all parties affected are not necessary.

The true view is expressed in *Roberts* v. *Ahern* (1904), 1 C.L.R. 406, 417, *viz.*, that the Executive Government of the Commonwealth or of a State is not bound by a statute "unless it appears on the face of the statute that it was intended the Crown should be bound by it." That was the intent in the Act

under review herein. Where it is reasonably clear that the intention was that the Crown, as well as subjects, should, *e.g.*, pay a fee for certain services, *viz.*, the use of registration facilities or should assist in carrying out the purposes of an Act to make it workable (in this case restore the fund) it is not necessary that the Crown should be named. It is not depriving the Crown of any property or prerogative rights in the broad sense contemplated by the rule nor appreciably imposing obligations upon it. The purpose of the rule requiring the Crown to be named is to make the intention clear. When therefore it is not named as in the sections of the Act under review one should look at the mischief to be remedied, the relief provided, coupled with the language employed, to ascertain whether or not the Crown, although not mentioned, was in fact within the contemplation of the Legislature. The principle is again stated by Lord Alverstone, C.J., in *Hornsey Urban Council* v. *Hennell*, [1902] 2 K.B. 73 at p. 80, *viz.*:

> That Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is, in our opinion, still applicable to such a case.

And on the same page:

> We are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown even though the Crown may not be specially named.

And again:

> The intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments.

I think it is clear from the words in sections 199 and 200 of the Companies Act that, by necessary implication the nature of the enactment and the language employed, it was clearly intended that the Crown should restore this money to the revived company. In *Cooper* v. *Hawkins*, [1904] 2 K.B. 164 it is I think apparent from the terms of the Act considered that it was not contemplated the Crown should be bound. The same observations apply to *Gorton Local Board* v. *Prison Commissioners* (1887), reported in a foot-note at p. 165 *et seq.* Day, J., after considering the Act in question, said at p. 167:

> There is certainly no necessary implication that the Crown itself is to be bound.

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That cannot be said of the Act we are considering. The implication from the words quoted in section 199 is that the money should be restored to the company and as the Crown is the custodian it is obliged to do so. Clearly therefore where, as here, the Crown receives a fund because of a step taken under a statute it, by necessary implication, is bound not by part of the Act only, but by all its relevant sections.

A further submission was based on the fact that under the authority of section 200, subsection (2) the following clause was inserted in the order restoring the company to the register, *viz.*, that it should be restored

"without prejudice however to the rights of any parties which may have been acquired prior to the date on which the company is restored to the register."

It was proper to insert this clause in the formal order but the further clause found therein, *viz.*, "shall be deemed to have continued in existence as if its name had never been struck off" should not have been inserted. The Court orders restoration generally or in a limited way with directions (if necessary or advisable) permitted by section 200 but the statutory result flowing therefrom should not, with deference, be included in the formal order. It was urged that because of this "without prejudice" clause the Crown's right (to permanently retain the fund) cannot be invaded. The error in this is of course in assuming that the Crown has that right. That has been dealt with. If the word "parties" includes the Crown (I assume it without deciding it) its right to retain the fund between the period of the dissolution of the company and of the restoration cannot be challenged. It is of course difficult to conceive of any good reason for inserting such a clause in the Act or in the order if this is all that is meant but one cannot give a higher right or a more permanent title to the Crown in and to this fund than is given by the Act itself simply to give better point and meaning to the "without prejudice" clause. Draftsmen *ex majore cautela* sometimes insert provisoes of this sort in statutes, with vague ideas as to what specific rights should be protected. Other points were raised but do not require discussion. I would not give costs to the respondent bank as requested: it should not have retained the fund after the dissolution of the company.

I would dismiss the appeal.

McQUARRIE, J.A.: I agree with my learned brother M. A. MACDONALD that this appeal should be dismissed.

So far as I can see the judgment is not affected by the decision mentioned on one of the later hearings of this appeal—*Russian and English Bank (In Liquidation)* v. *Baring Brothers and Co., Limited* (1936), 52 T.L.R. 393. In fact that case rather strengthens the respondent's position. Lord Atkin in his judgment stated in part at p. 398, as follows:

> On the assumption I prefer to adopt the Crown acquired a defeasible title, defeated on the making of a winding-up order.

Applying that language to the present case, although the property in question, being money in the bank, became the property of the Crown *bona vacantia* on the existence of the company being ended by virtue of the provisions of the Act, the Crown acquired a defeasible title to the said property defeated when the restoration order was made. At common law the doctrine of *bona vacantia* only applies where there is no other owner—see *Dyke* v. *Walford* (1846), 5 Moore, P.C. 434 at 470, where *bona vacantia* is clearly defined.

*Appeal dismissed as against Island Amusement Co. Ltd., Martin, J.A. dissenting.*

Solicitor for appellant: *H. Alan Maclean.*
Solicitors for respondent bank: *Crease & Crease.*

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Dec. 10, 11, 31.

## SANFORD v. HEMPHILL DIESEL ENGINEERING SCHOOLS LIMITED.

*Negligence—Contract by defendant to supply plaintiff with instruction in Diesel engineering including acetylene welding—During term instruction in acetylene welding transferred by defendant to another company —Dangerous operation — Explosion during instruction — Injury to plaintiff—Liability of defendant.*

The defendant entered into a contract with the plaintiff to provide him with practical and theoretical instruction in its Diesel Engineering Course, which included instruction in acetylene welding. The consideration was $240, which was paid by the plaintiff to the defendant. The plaintiff received instruction in engineering, but in the course of his instruction the defendant abandoned teaching acetylene welding on its own premises and arranged with the New Method Company on adjacent premises to provide the plaintiff with instruction in acetylene welding, for which the defendant paid the New Method Company $25. When the plaintiff was engaged as part of his instruction in watching one Smith, a partner in the New Method Company, recharging an acetylene-gas generator, another student was engaged at a distance of six or eight feet in arc welding, which operation resulted in the engendering of sparks. An explosion which followed was found to be the result of a spark from the arc welding operation having come into contact with gas escaping from the generator. As a result of the explosion the plaintiff lost an eye and sued the defendant for damages so suffered.

*Held*, that whether or not the New Method Company is to be considered the servant of the defendant or an independent contractor under contract with the defendant to provide instruction to the defendant's student, the defendant in law must be held liable for the negligence which caused the plaintiff's injuries.

A term of the contract was in the following words: "I clearly understand that I use the School tools and equipment entirely at my own risk and that no claim can be made against the Hemphill Schools in event of an accident to me while I am in training."

*Held*, that the words are those of the defendant and do not provide a defence in case of negligence.

ACTION for damages for personal injuries occasioned to him by the negligence of the defendant, its servants or agents, on the 17th of April, 1936. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 10th and 11th of December, 1936.

[*Remnant*, for plaintiff, referred to *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640; *Scott* v. *London & St.*

*Katherine Docks Co.* (1865), 3 H. & C. 596 at p. 601; *Bower* v. *Peate* (1876), 1 Q.B.D. 321 at p. 326; *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; *Penney* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; *Holliday* v. *National Telephone Company*, [1899] 2 Q.B. 392; *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730; *Brooke* v. *Bool*, [1928] 2 K.B. 578; *Honeywill and Stein, Ld.* v. *Larkin Brothers, Ld.*, [1934] 1 K.B. 191; *Northwestern Utilities, Ld.* v. *London Guarantee and Accident Co.*, [1936] A.C. 108; *The City of St. John* v. *Donald*, [1926] S.C.R. 371; *Hamilton* v. *Hudson's Bay Co. and Irving and Briggs* (1884), 1 B.C. (Pt. 2) 176; *Pyman Steamship Company* v. *Hull and Barnsley Railway*, [1914] 2 K.B. 788; *Price & Co.* v. *Union Lighterage Company*, [1904] 1 K.B. 412; *Smith* v. *Baker & Sons*, [1891] A.C. 325; *Cowley* v. *Mayor, &c., of Sunderland* (1861), 6 H. & N. 565; *Osborne* v. *London and North Western Railway Co.* (1888), 21 Q.B.D. 220 at p. 223; *Yarmouth* v. *France* (1887), 19 Q.B.D. 647 at p. 657; *Williams* v. *Birmingham Battery and Metal Company*, [1899] 2 Q.B. 338 at p. 345; *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725; *Love* v. *Fairview* (1904), 10 B.C. 330; *McClemont* v. *Kilgour Mfg. Co.* (1912), 27 O.L.R. 305 at p. 309; *Danis* v. *Hudson Bay Mines Limited* (1914), 32 O.L.R. 335 at p. 343; *Grand Trunk Pacific Railway Co.* v. *Brulott* (1911), 46 S.C.R. 629 at p. 630.

[*Killam* (*Oliver*, with him), for defendant, referred to *Higgins* v. *Comox Logging & Ry. Co.*, [1927] S.C.R. 359; *Reedie* v. *London and North Western Ry. Co.* (1849), 4 Ex. 244; *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Balcovske* v. *Stanley Theatre Co. Ltd.* (1934), 48 B.C. 433; *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93; *Bowles* v. *Winnipeg*, [1919] 1 W.W.R. 198; *Kemp* v. *Baerselman*, [1906] 2 K.B. 604 at p. 610; *Mason* v. *Scott*, [1935] 2 D.L.R. 641; *Polson* v. *Wulffsohn* (1890), 2 B.C. 39; *Hoag* v. *Kloepfer* (1918), 26 B.C. 181; *Potter* v. *Faulkner* (1861), 31 L.J.Q.B. 30; *Thacker Singh* v. *Canadian Pacific Ry. Co.* (1914), 19 B.C. 575; *Bears* v. *Central Garage* (1912), 2 W.W.R. 283.]

*Remnant*, replied.

*Cur. adv. vult.*

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SANFORD v. HEMPHILL DIESEL ENGINEERING SCHOOLS LTD.

31st December, 1936.

McDONALD, J.: On the 23rd of August, 1935, plaintiff entered into a contract in writing with the defendant whereby in consideration of $240 paid by the plaintiff to defendant the latter agreed to provide the plaintiff with practical and theoretical instruction in its Diesel Engineering Course No. 1, such course to include instruction in acetylene welding. On the 2nd of January, 1936, plaintiff entered the defendant's school and received instruction in engineering and some little time later defendant abandoned its teaching of acetylene welding upon its own premises, but having received payment from plaintiff for such instruction was of course bound to provide same and undertook to do so, such instruction to be provided by the New Method Company upon premises almost adjacent to those of the defendant. Of the sum paid by the plaintiff for his full instruction $50 was charged for the course in acetylene welding and the defendant, no doubt acting within its rights, agreed to pay to the New Method Company $25 as a consideration for providing such instruction to the plaintiff on the latter company's premises. Some effort has been made to twist the facts to bear some other construction but in my opinion such effort completely fails and I have no doubt at all that the above statement is a correct enunciation of the facts.

On the 17th of April, 1936, the third day after plaintiff had begun his studies at the New Method Company, he was engaged, as part of his instruction, in watching one Smith who with one Bell was a partner in the New Method Company, while Smith was recharging an acetylene gas generator. This gas is very very highly inflammable, a fact well known to the officials of the New Method Company and I have no doubt also well known to the officials of the defendant company though there is no evidence whatever upon which I can conclude that the plaintiff was aware of the highly dangerous character of this gas. As Smith was pouring water into the generator from which the cap had been removed one Moody, another student of New Method Company, was engaged at a distance of some six or eight feet in arc welding which operation resulted in the engendering of sparks. While it is impossible to produce direct

evidence upon the fact I have no difficulty whatever in reaching a firm conclusion that the explosion which immediately followed was the result of a spark from the arc welding operation having come into contact with gas escaping from the generator. In fact what happened was just what one might expect to have happened in this highly dangerous situation. As a result of the explosion the plaintiff lost an eye and sues the defendant for damages so suffered. In my opinion he is entitled to recover.

Whether or not the New Method Company is to be considered the servant of the defendant or as an independent contractor under contract with the defendant to provide instruction to the defendant's student I think the defendant in law must be held liable for the negligence which caused the plaintiff's injuries. The principle to be applied is I think that laid down in the well-known case of *Pickard* v. *Smith* (1861), 10 C.B. (N.S.) 470. I can see no good purpose to be gained by citing the various cases in which the principle has been applied and to which counsel have referred. They are well collected in *Honeywill and Stein, Ld.* v. *Larkin Brothers, Ld.*, [1934] 1 K.B. 191 and the principle involved is stated by Anglin, C.J.C. in *The City St. John* v. *Donald*, [1926] S.C.R. 371.

The defendant relies upon the doctrine of *Volenti non fit injuria* but there is no evidence whatever here upon which I could find that the plaintiff with a full comprehension of the danger undertook the risk involved.

Defendant also relies upon a term of its contract in the following words:

> I clearly understand that I use the School tools and equipment entirely at my own risk and that no claim can be made against the Hemphill Schools in event of an accident to me while I am in training.

I gravely doubt that this defence is open to the defendant upon the pleadings but assuming that it is open it is not in my opinion a defence to this action. The words are those of the defendant and do not I think provide a defence in case of negligence. On the whole case I think, as stated, the plaintiff is entitled to recover. The special damages are proven at $303.35 and I assess his general damages at $4,000.

*Judgment for plaintiff.*

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Sept. 28, 29; Nov. 4.

## REX v. MACCHIONE.

*Criminal law — Murder — Circumstantial evidence—Judge's charge—Trial heard on Ascension Day—Dies non juridicus—Evidence of child.*

The accused was convicted on a charge of murder. The evidence was circumstantial with the exception of that of deceased's wife who, when standing beside the automobile in which the accused was sitting on the evening of the alleged killing, heard him mutter "I killed him." The main ground of appeal raised was that the learned judge failed to caution the jury that before they could find the prisoner guilty on circumstantial evidence they must be satisfied not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person, or words to that effect. The further ground of appeal was raised that the trial was a nullity as it was commenced on the 21st of May (Ascension Day), which is a holiday.

*Held*, on appeal, MACDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting, that there should be a new trial.

*Per* MARTIN and MACDONALD, JJ.A.: The trial judge in part of his address, when dealing with the question of "reasonable doubt" said: "That is, convinced beyond reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence." If this extract had been included in that part of the charge where he dealt with circumstantial evidence, no difficulty would arise. This sentence used in relation to reasonable doubt might not convey to the jury the thought that it should also be applied to circumstantial evidence. The two subject-matters should be dealt with separately, otherwise the jury may not have all the assistance to which they are entitled and there should be a new trial.

*Per* MCPHILLIPS, J.A.: The trial took place on Ascension Day, a holiday. Ascension Day is a *dies non juridicus*. There was no jurisdiction in the learned trial judge in this case in sitting as he did on Ascension Day, and there should be a new trial.

APPEAL by accused from his conviction on a charge of murder at Cranbrook, B.C., on the 22nd of May, 1936. On Monday, the 10th of February, 1936, the body of one Mike Hudock was found on the side of a road about four miles west of Fernie, the result of a gun-shot wound fired at close range. Hudock, his wife and three children lived at Michel, B.C., about ten miles east of Fernie. The accused, an employee of the C.P.R., lived at Galloway, about ten miles from Michel. He had been a

friend of the Hudock family for about two years and Mrs. Hudock was his mistress. On February 8th, 1936, the accused took Mr. and Mrs. Hudock with two children in his car to Fernie and they returned to Michel the same night. On the following day he again took them to Fernie, where they arrived at 3.35 in the afternoon and stopped at the Northern Hotel. Accused gave Mr. and Mrs. Hudock some money and they both went to the Royal Hotel, where Mrs. Hudock remained. She saw Hudock going up the street and then she saw accused following him. She did not see her husband again. At about 5.30 accused came to the hotel and accused, Mrs. Hudock and the two boys had supper. She enquired for her husband but he did not appear, and later they started for home in accused's car without the husband. On the way home they stopped at Hosmer where Mrs. Hudock's father-in-law lived. She got out of the car, went to her father-in-law's home, and when she returned to the car she heard accused say "I killed him." They then proceeded home to Michel. One of the boys in the car gave evidence of seeing an overcoat in the car at Fernie that had some shells in one of the pockets.

The appeal was argued at Victoria on the 28th and 29th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*Nicholson,* for appellant: Deceased was killed by a gun-shot wound. The gun was never found. The evidence is entirely circumstantial and must be acted upon with the greatest caution.

The jury should have been warned that they should not convict unless fully convinced of the accused's guilt: see *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136; *Rex* v. *Natanson* (1927), 48 Can. C.C. 158; *Rex* v. *Francis & Barber* (1929), 51 Can. C.C. 343 at p. 351; *Rex* v. *Sankey* (1927), 38 B.C. 361; *Rex* v. *Petrisor* (1931), 56 Can. C.C. 389; *McLean* v. *Regem*, [1933] S.C.R. 688 at p. 690. The trial was held on Ascension Day. This is a holiday and the trial is a nullity. Ascension Day is a religious holiday and *"dies non,"* a non-judicial day: see *Osborne* v. *Taylor* (1819), 1 Chit. 400; *Rex* v. *Sawchuk*, [1923] 2 W.W.R. 824; *Foster* v. *Toronto R.W. Co.* (1899), 31 Ont. 1; *Swann* v. *Broome* (1764), 3 Burr. 1595;

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97 E.R. 999. The boy Benny should have been sworn. The judge did not exercise his discretion upon reasonable grounds: see *Sankey* v. *Regem*, [1927] S.C.R. 436 at pp. 438-9; *Rex* v. *Fitzpatrick* (1929), 40 B.C. 478.

*Macfarlane, K.C.*, for the Crown: As to whether the jury was properly charged on the question of circumstantial evidence, the charge must be read as a whole and is sufficient. In relation to Ascension Day, the Code is silent as to what days are to be looked upon as holidays in the Criminal Courts. The Code being silent, we must look to the English law on the subject. In 1858 Ascension Day was not a holiday in England. The commencement of a trial is the day of the trial: see *Whitaker* v. *Wisbey* (1852), 12 C.B. 44. There was a satisfactory examination of the boy Benny Evans by the judge: see *Sankey* v. *Regem*, [1927] S.C.R. 436.

[*Nicholson*, in reply, referred to *Osborne* v. *Taylor* (1819), 1 Chit. 400; and *Ball* v. *United States* (1891), 140 U.S. 118.]

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: This is an appeal by Vincent Macchione from his conviction at the City of Fernie on the 21st of May, 1936, Ascension Day. He was then sentenced to be hanged. The question is very largely a question of fact. There was a small piece of direct evidence given by the wife of the deceased. She said that standing beside the automobile in which was accused at the wheel she heard him mutter "I killed him." This evidence was not broken down by the defence and the learned judge charged the jury that it was good evidence against the appellant if they were satisfied that it referred to the killing of her husband Michael Hudock.

There was circumstantial evidence which in my opinion was of itself sufficient to establish the crime. There were, however, several objections to the conduct of the trial. The first was that the judge did not charge the jury in the words of Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 228. The judge did, however, charge the jury that they could not bring in a verdict of guilty, unless they were satisfied beyond a reasonable doubt

that he was guilty. He did not refer to the formula of Baron Alderson but in my opinion it was unnecessary to do so. The instructions upon the necessity to found their verdict upon evidence with respect to which they had no reasonable doubt was very fully pressed upon them by the judge. Nevertheless it was contended before us that he should not only have done this but he should have put the formula of Baron Alderson to them as well. I think it was unnecessary to add anything to the charge to the jury that they should find their verdict without any reasonable doubt of the guilt of the prisoner.

The matter, I think, is concluded by *McLean* v. *Regem*, [1933] S.C.R. 688 at p. 690, a unanimous decision of the Supreme Court of Canada from which I extract these words:

> But there is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

He adopted here the equivalent that they must find the accused guilty if at all only when they are without any reasonable doubt as to his guilt. This is now the usual charge adopted in criminal cases.

There is another question involved in this case which was taken by the defence and that is that the day the case was tried and disposed of was Ascension Day, and that Ascension Day was a *dies non juridicus*. I have read the very exhaustive judgment of Mr. Justice Dysart in *Rex* v. *Sawchuk*, [1923] 2 W.W.R. 824. In that case the learned judge cited the authorities from an early date down to the date of the judgment and held that New Year's Day was a *dies non juridicus*.

The Interpretation Act, Cap. 1, Sec. 37, Subsec. (11), R.S.C. 1927, declares certain days, including Ascension Day, to be public holidays, but does not declare them to be *dies non juridici*. I do not question the right of the Dominion to declare what days shall be holidays but the Dominion has not declared what days should be *dies non juridici*. The Legislature of this Province has I think always fixed the days of the sittings of the Courts. That I think is part of their duty and that they would have no power to fix an unjuridical day as one for the sitting unless they have it under the British North America Act. They fixed the day in question as the day for the sitting of the Court

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Macdonald, C.J.B.C.

and I do not think that that is an interference with the right of the Dominion, nor the right to fix non-juridical days, but holidays were never as such declared to be *dies non juridici;* nor does it interfere with the procedure under which the Court shall conduct its business. It may be that the Dominion has the right to fix holidays but that is not the same as making them non-juridical days, and one would imagine in a matter of such grave importance the Dominion Parliament, if they saw fit, would have declared Ascension Day a non-juridical day had they had the power. I say nothing about the *status* of Sunday, which is discussed by Chancellor Boyd in *Foster* v. *Toronto R.W. Co.* (1899), 31 Ont. 1 at p. 3, where he distinguishes Sunday from several days mentioned as holidays. He cites Freeman on Judgments, 4th Ed., Vol. 1, sec. 138, and says (p. 5) "Holidays other than Sundays are not non-judicial days unless expressly made so by statute."

If I am right in thinking that the *status* of any holiday is the matter dealt with in section 91 of the British North America Act, or falls within "civil rights" in said section, then I can pass over section 37, subsection (11) of the Interpretation Act. In any case we have no legislation in British Columbia dealing with the section, nor was the English law dealing with the subject introduced into our laws.

Another question which arises in this case was the admission of evidence of a witness Benny Evans, 7 years old, without administering the oath to him. The learned judge made a very careful examination of this boy and decided that he ought not to be sworn. Amongst the questions asked him was "Do you know what is meant by taking an oath?" His answer was "No." Considering the care with which the learned judge examined him and that the responsibility was primarily upon him, I think he was right in taking his evidence without oath. It was corroborated in the evidence of other witnesses at the trial.

On the whole case I think the verdict and the sentence were right and that the appeal ought to be dismissed.

MARTIN, J.A.: This appeal should, in my opinion, be allowed and a new trial directed for the reasons given by my learned brother M. A. MACDONALD.

McPHILLIPS, J.A.: The trial in this case took place on Ascension Day, a holiday. The question of what days are holidays is essentially a Dominion matter in that the Criminal Code, a Dominion statute, is the statute under which the appellant was indicted and tried; no Provincial statute can be looked at to determine the question. It would be revolutionary to admit of a Province legislating in any matter which would have the effect of compelling subjects of the King to, for instance, serve as jurors or be compellable to attend Court as witnesses when as a matter of conscience the day is one of obligation and requiring attendance at church. This guarantee is in effect statutory and it is only necessary to turn to the Interpretation Act, Cap. 1, Sec. 37, Subsec. (11), R.S.C. 1927, where we see that Ascension Day is placed in the same category as Sunday. I would not further elaborate this point—that Ascension Day is a *dies non juridicus*—as I am in complete accord with the very illuminative judgment of Mr. Justice Dysart in *Rex* v. *Sawchuk*, [1923] 2 W.W.R. 824. There it was New Year's Day, one of the days named in the Dominion legislation. The learned judge was dealing with and held as I think properly that New Year's Day was a *dies non juridicus*, and would support my view that Ascension Day is a *dies non juridicus*. If that be so there was no jurisdiction in the learned trial judge in this case in sitting as he did on Ascension Day. However, I am in a minority in this view it would appear and as my learned brothers MARTIN and MACDONALD, JJ.A. have come to the conclusion that a new trial be directed I am agreeing in that. I would though say this further that in my opinion—and with great respect—the learned trial judge erred in admitting the evidence of Benny Evans, 7 years old, without having him sworn, which is an additional ground for directing a new trial. In this connection I would think it is only necessary to refer to *Sankey* v. *Regem*, [1927] S.C.R. 436, Anglin, C.J.C. 436 at pp. 439-40.

I would therefore think that the proper judgment in view of all the circumstances would be to allow the appeal and that a new trial be directed.

MACDONALD, J.A.: Direct and circumstantial evidence, chiefly the latter, was offered by the Crown and based upon it

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the jury found the appellant guilty and he was sentenced to death. It was essential with so large a body of circumstantial evidence that the classic rule, laid down by Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 227 (168 E.R. 1136 at 1137) and discussed in *McLean* v. *Regem*, [1933] S.C.R. 688, should be observed, *viz.*, that the jury should be told directly or in words of similar import that not only

> those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

The trial judge in one part of his address to the jury when dealing with the question of reasonable doubt, did refer to this principle. He said:

> It is an established principle of our criminal law that the crime charged has got to be established by the prosecution beyond a reasonable doubt. That is, convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence.

If the last sentence in this extract (although in my opinion it should, with deference, have been further elaborated and explained) had been included in or transposed to that part of the charge where his Lordship dealt with circumstantial evidence no difficulty would arise. No reference however was made to this principle in that part of the charge where circumstantial evidence, as an independent subject-matter, was dealt with by the learned trial judge.

It was properly submitted by Mr. *Macfarlane* that the charge should be read as a whole and that in so reading it a full direction will be found on all points although the best of order may not have been observed. I cannot agree that this eliminates the objection. We should not expect that a jury would (or in fact did) take the sentence in italics from its own setting and transpose it to form an integral part, as an addition thereto, of another part of the charge dealing exclusively with circumstantial evidence or that they would, without this addition, have prominently before them the proper method of approach in dealing with evidence of that character. This sentence used in relation to reasonable doubt at least might not convey to the jury the thought that it should also be applied to circumstantial evidence. It would not be wise on so important a point to depart from a reasonably strict adherence to the well-known rule.

I do not overlook the fact that in *McLean* v. *Regem*, [1933] S.C.R. 688 at pp. 690 and 691 the part of the charge under consideration by the Supreme Court of Canada bears some slight similarity to the charge under review herein. It will be observed however that the trial judge in that instance covered in detail all the essentials of the rule laid down by Baron Alderson whereas in the case at Bar one sentence only is devoted to it. That sentence, too, as already pointed out, is found in that part of the instructions dealing, not with the question of circumstantial evidence but of reasonable doubt. That of course may also be true on the facts in *McLean* v. *Regem*. The whole charge is not in the report. In any event the rule was stated in more detail. I think it more desirable that the two subject-matters should be dealt with separately but if combined care should be taken to see that the rule is fully explained: otherwise the jury may not have all the assistance to which they are entitled. I would allow the appeal and direct a new trial.

McQUARRIE, J.A.: This appeal is confined to questions of law.

Counsel for the appellant at the commencement of his argument before us stated that there was no direct evidence to prove the "killing" but there was a chain of circumstances on which the conviction might be supported and that he did not intend to press the application on the facts. The points of law stressed by him may be summed up as follows: (1) No proper charge on circumstantial evidence. (2) Trial held on a public holiday. (3) Wrongful admission of evidence of Benny Evans.

(1) As to the first point, I am of opinion that this case comes clearly within the decision of the Supreme Court of Canada, in *McLean* v. *Regem*, [1933] S.C.R. 688. I quote from the judgment at pp. 690-1: [His Lordship quoted from the top of p. 690 down to the words "under this head" on p. 691 and continued].

I also quote from the charge in the case before us: [After quoting the charge at length his Lordship continued].

With all due deference to contrary opinion I am "satisfied that the accused has no substantial ground for complaint under this head."

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As to the second point: Without adopting all his reasons I agree with the learned Chief Justice that the 21st day of May, 1936, being one of the days on which the trial herein was held was not a *dies non juridicus* in the Province of British Columbia. In coming to this conclusion I have considered *Reg.* v. *Cavelier* (1896), 1 Can. C.C. 134; *Ex parte Cormier* (1907), 12 Can. C.C. 339, and note at the end thereof (p. 343); *Foster* v. *Toronto R.W. Co.* (1899), 31 Ont. 1; section 961 of the Criminal Code and section 37 (11) of the Interpretation Act. I have also read the interesting and instructive judgment of Dysart, J., in *Rex* v. *Sawchuk*, [1923] 2 W.W.R. 824.

I am of opinion, therefore, that the second point should be decided against the appellant.

As to the third point, I am of the opinion that the discretion of the learned trial judge was properly exercised.

*New trial ordered, Macdonald, C.J.B.C. and McQuarrie, J.A. dissenting.*

Solicitors for appellant: *Herchmer & Mitchell.*

Solicitor for respondent: *G. J. Spreull.*

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S. C.
1936

Dec. 21.
1937
Jan. 16.

## CUDMORE v. THE CORPORATION OF THE DISTRICT OF SALMON ARM.

*Municipal law — Corporation — Taxes — Assessor and collector — Officers de facto not de jure—Assessment and collector's roll—Validity—R.S.B.C. 1924, Cap. 179, Secs. 184, 185 and 451 (1)—B.C. Stats. 1936 (Second Session), Cap. 36, Sec. 4.*

The plaintiff's claim was for a declaration (a) That neither assessor nor collector were validly appointed by the defendant municipality for the years 1930 to 1936 inclusive; (b) that no valid assessment was made and no valid assessment roll was prepared by said municipality for the years 1930 to 1936 inclusive, and no valid collector's roll was prepared for said municipality for said years; (c) that the plaintiff was not and is not liable under any purported assessment made by the defendant against the lands of the plaintiff during the said years, or for taxes

allegedly imposed by the said defendant during said years; (d) for repayment of $601.97 had and received by the defendant to and for the use of the plaintiff. The Municipal Act requires that such appointments shall be made by by-law, and it was conceded by the defendant that they were not so made, but in each of said years a certain person did in fact act as assessor of the municipality, having been appointed as such by resolutions of the council of the corporation, and in each of said years a certain person did act as collector of the municipality, having been appointed as such by resolution of the said council. The defendant relied on what is known as "the *de facto* rule" laid down in *O'Neil* v. *Attorney-General of Canada* (1896), 26 S.C.R. 122 at p. 130, as follows: "The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding."

*Held*, that the offices were filled *de facto* though not *de jure*, and that the *de facto* doctrine applies, and the acts of the persons who acted as the assessor and the collector respectively were therefore as against the plaintiff legal and binding and such as to furnish a sufficient foundation for the proceedings which resulted in the assessment and the rolls which the plaintiff sought to have avoided. Said assessment and rolls were good and the plaintiff could not have succeeded even if the action had been disposed of prior to the passing of the Municipal Councils and Municipal Officers Validation Act, B.C. Stats. 1936, Cap. 36.

*Held*, further, that although the assessor and collector were not validly appointed as contended for by the plaintiff in his claim (a) [*supra*], subsection (1) of section 451 of the Municipal Act affords a good defence in respect to this claim.

ACTION for a declaration as to the validity of the taxation of the plaintiff's lands by the defendant corporation for the years 1930 to 1936 inclusive. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 21st of December, 1936.

*McCrossan, K.C.*, for plaintiff.
*Maitland, K.C.*, for defendant.

*Cur. adv. vult.*

16th January, 1937.

FISHER, J.: Although I have only to dispose of the question of costs in this matter it is apparent that I have to reach a conclusion as to how the matter would have stood if the Municipal Councils and Municipal Officers Validation Act had not been passed in November, 1936. This involves consideration of the

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plaintiff's claim apart from said Act. The plaintiff issued his writ on the 25th of July, 1936, and in his statement of claim he asks, in part, as follows:

(a) A declaration that no assessor was validly appointed and no collector was validly appointed by or for the defendant for the years 1930, 1931, 1932, 1933, 1934, 1935 and 1936; (b) that no valid assessment was made and no valid assessment roll was prepared by or for the said municipality for the years 1930 to 1936 inclusive and no valid collector's roll was prepared for the said municipality for the said years; (c) that the plaintiff was not and is not liable under any purported assessment made by the defendant against the lands of the plaintiff during the said years or for taxes allegedly imposed by the said defendant during the said years; (d) for the repayment of the sum of $601.97 had and received by the defendant to and for the use of the plaintiff.

Up until the trial the whole of the plaintiff's claim was apparently contested by the defendant but at the trial it was admitted that no assessor was validly appointed and no collector was validly appointed by or for the defendant municipality for the said years. The Municipal Act requires that such appointments shall be made by by-law and it is conceded that they were not so made. The position taken by the defendant at the trial was that in each of the said years a certain person did in fact act as assessor of the defendant municipality having been appointed as such by resolutions of the council of the defendant corporation and that in each of the said years a certain person did in fact act as collector of the defendant municipality having been appointed as such by resolution of the said council. Counsel for the defendant then relied on the rule of law laid down in *O'Neil* v. *The Attorney-General of Canada* (1896), 26 S.C.R. 122, where at 130, Sir Henry Strong, C.J., said:

The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding.

*Gunter* v. *Prince William School District Trustees*, [1934] 3 D.L.R. 439 and cases referred to therein are also relied upon by counsel for the defendant. In reply it is submitted by counsel for the plaintiff that such cases are all distinguishable as cases where there really were validly-elected officers who had failed in some legal way to qualify whereas in the present case it is contended on behalf of the plaintiff that there were no validly-elected or validly-appointed officers. It is argued by

counsel for the plaintiff, if I understand him aright, that, as the assessor or collector had to be appointed by by-law, both the resolutions which purported to make the appointments and the appointments were null and void and therefore the *de facto* rule as above set out does not apply. In *Lowe* v. *Cawston Irrigation District,* [1933] 3 W.W.R. 151 I had occasion to consider the *de facto* rule, and I would refer again to the authorities therein cited. It would appear that in the *Lowe* case and in some of the other cases, where the rule of law as laid down by Sir Henry Strong, C.J. in the *O'Neil* case, *supra,* has been applied, the *de facto* officers had been legally elected but were not *de jure* officers by reason of the absence of some prerequisite other than that of election. It is also apparent however from the passages which I set out in the *Lowe* case from the statement of Riddell, J. in *Rex ex rel. Morton* v. *Roberts* (1912), 26 O.L.R. 263 at 268 and from what the Court said in the case of *Re Vandyke and Corporation of Grimsby* (1906), 12 O.L.R. 211 at 212-13 that the said rule of law applies even in cases where it is the absence of a valid election that prevents the office from being filled *de jure.* I cannot see any distinction between such cases and a case where they are not validly appointed. In my view the argument that the *de facto* doctrine does not apply in the present case on the ground that the appointments were nullities is not a sound one and ignores the ground of the doctrine. In the *Gunter* case above at p. 442 the Court said:

> It seems unnecessary to elaborate upon the *de facto* doctrine. Its value is recognized and its application is very general. Many authorities were cited by counsel for defendants. I need refer to only a few.
>
> "The *de facto* doctrine is a rule or principle of law which . . . imparts validity to the official acts of persons who, under colour of right or authority . . . exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage. The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coercion, submit to, acknowledge, or invoke the authority assumed by . . . officers, above mentioned": Constantineau on the De Facto Doctrine, 1910, pp. 3-4.

In the case of *In re Vandyke and Grimsby, supra,* at p. 213 the Court said:

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In *Scadding* v. *Lorant* (1851), 3 H.L. Cas. 418, it was held that a rate for the relief of the poor which was legally made in other respects was not rendered invalid by the circumstance that some of the vestrymen who concurred in making it were vestrymen *de facto* and not *de jure*. At p. 447 the Lord Chancellor observes, "With regard to the competency of the vestrymen, who were vestrymen *de facto*, not vestrymen *de jure*, to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts when in such office depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most disastrous kind."

In *Parker* v. *Kett* (1701), 1 Ld. Raym. 658, Holt, C.J., apparently pronouncing the opinion of the whole Court, said in part as follows (pp. 660-1):

They held, that admitting that the authority originally was defective, yet they were sufficient stewards *de facto*, and the surrender for that reason good. Doubtless a steward *de facto* may take a surrender. Then such steward is no other than he who has the reputation of being steward, and yet is not a good steward in point of law. Now here Clerke was a good deputy. Now suppose, that he had made Thacker and Ballaston deputies absolutely, which would have been void; yet it would have given Thacker and Ballaston the reputation of being good stewards; and a surrender to them, and a presentment afterwards in Court, and admittance made accordingly, would be good. The case of *Knowles* v. *Luce* [(1580)], Moore, 109, 110, is a case strong in point. The case there was; there were two joint stewards, one of them held a Court, and took a surrender, and it was held good; now one of them could not act alone, but yet being named in the patent, it gave a colour and reputation to the thing; there Manwood delivered the opinion of the Court, and said that there was a difference between a copyhold granted by a steward who has a colour and no right to hold a Court, and a steward who has neither colour nor right; for if a colourable steward assembles the tenants, and they do their service, the acts are good that he does, as an under steward after the death of the chief steward, or the clerk of the lord of the manor who holds Court without the contradiction or disturbance of the lord, though he has no patent, nor any express authority to be steward; and the reason is this, because the tenants are not obliged to examine the authority of the steward whether it be lawful or not, nor is he compellable to give account of it to them.

In the *O'Neill* case, *supra*, it was held that the warrant, issued by the police magistrate under a section of the Criminal Code allowing such to be issued upon the report of a deputy high constable, would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*. In such case, at pp. 130-1, Sir Henry Strong, C.J., referring to the *de facto* rule, also said in part:

Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. . . I must hold that Louis Seraphin Bissonnette's acts were, even if those of an officer *de facto* only, such as to furnish a sufficient foundation for the proceedings which resulted in the judgment of forfeiture now sought to be avoided.

Reverting now to the circumstances of the present case, I would say that it is or must be admitted that there were certain lawfully existing offices under the Municipal Act, there being no suggestion that said Act was *ultra vires* and certain persons, having been appointed by resolutions of the Municipal Council, exercised such offices. I agree that the resolutions and the appointments were illegal and invalid but do not agree that they were nullities, if by that is meant that they were so wholly void that the persons acting under them could not be given the reputation of being good officers and so become officers *de facto* for it is or must be admitted that they were thereby given such reputation and did what they did under colour of right or authority. I pause here to point out that in the *Vancouver Waterfront Ltd.* v. *City of Vancouver,* [1936] 1 W.W.R. 248 relied upon by counsel for the plaintiff I was not dealing with a case where it was contended that the assessor had not been validly appointed but with a case where the plaintiff's contention was that the assessor in assessing had contravened section 40 of the Vancouver Incorporation Act. In the present case everything done after the appointments as aforesaid was done undoubtedly under and in strict accordance with the provisions of an admittedly valid statute. Under the circumstances, as I find them here, I would hold, following the authorities as aforesaid, that the offices were filled *de facto* though not *de jure* and that the *de facto* doctrine applies. The acts of the persons who acted as the assessor and the collector respectively were therefore as against the plaintiff legal and binding and such as to furnish a sufficient foundation for the proceedings which resulted in the assessment and the rolls which the plaintiff sought to have avoided. In my view therefore said assessment and rolls were good and the plaintiff could not have succeeded on this phase of his action even if the action had been disposed of prior to the passing of the Act of 1936 as aforesaid. As already intimated however the plaintiff would have been entitled to succeed on his claim (a)

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for a declaration that no assessor was validly appointed and no collector was validly appointed by or for the defendant for the years 1930, 1931, 1932, 1933, 1934, 1935 and 1936

unless certain sections of the Municipal Act relied upon by counsel for the defendant would have disentitled him. In the first place sections 184 and 185 are relied upon. As to said sections, I have only to say that I do not think either of them applied to this action so far as same is for such a declaratory judgment as is asked for in claim (a) as aforesaid. See *Traves* v. *City of Nelson* (1899), 7 B.C. 48, 51-2. Section 451 is further relied upon and I have come to the conclusion that subsection (1) of that section would have afforded a good defence to the action, that is upon the assumption which I am making that all the aforesaid appointments in question herein were made more than six months before the issue of the writ on the 25th of July, 1936. If I am wrong in this assumption the matter may be spoken to again. Counsel for the paintiff relies especially upon *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533 at 547; [1921] 2 A.C. 384; 3 W.W.R. 214 at 226, but upon my view of the application of the *de facto* rule, as already indicated, I do not think that the plaintiff could ignore the resolutions and appointments as "absolute nullities." Said section 451 deals with actions brought against a municipality for the unlawful doing of a thing which the municipality might have lawfully done. I think the present action, with respect to the claim for such a declaratory judgment as aforesaid for the year 1936 is of that character and therefore the plaintiff could not have succeeded on his claim (a) as aforesaid even apart from said Act of November, 1936.

I now come to deal directly with the question of costs. Upon my conclusions as above set out I would hold the plaintiff's action would have been dismissed even if the said Act of 1936 had not been passed. The plaintiff would have succeeded however on his claim (a) if said section 451 of the Municipal Act had not been available to the defendant. As I have already pointed out the defendant thought fit to dispute this claim right up until the trial and disputed it not only on the ground that the action thereon was barred by said section 451 but also on the ground that the said appointments had been validly made. Under such

circumstances I would allow the defendant only a proportion of its costs, and I direct taxation of the whole costs of the defendant except those already disposed of and payment of three-fifths thereof by the plaintiff to the defendant. No costs to the plaintiff except those already allowed. Order accordingly.

*Order accordingly.*

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## HOMFRAY *ET AL.* v. HOMFRAY.



*Will—Settled Estates Act—Tenant for life—Remaindermen—Cost of repairs—Capital and income—Costs—R.S.B.C. 1924, Cap. 228.*

The will of one G. W. Jones, made on the 3rd of September, 1889, after making certain pecuniary bequests, devised the residue of his estate in equal shares to his three daughters for their respective lives, and after their death to their children in equal shares. Part of the estate consisted of five lots in the City of Kamloops on which stood certain buildings known as the Central Hotel. The hotel was destroyed by fire on the 3rd of September, 1931. On the 12th of November, 1932. the only surviving beneficiaries under the will were two daughters, Mary Charlotte Pearce and the plaintiff, Alice Kathleen Homfray, and their children, the two daughters being the trustees of the estate. All the beneficiaries then entered into an indenture in writing whereby the estate then remaining unadministered was divided between Mary Charlotte Pearce and her children and Alice Kathleen Homfray and her children, and Mrs. Homfray and her children took as their share of the estate the lands and premises known as the Central Hotel, subject to the trusts declared in the will, and Mrs. Homfray and her daughter, the defendant Rosabel Emily Homfray, were by said indenture appointed trustees. Following the indenture of November 12th, 1932, it was agreed between all members of the Homfray family that the hotel should be rebuilt, the ultimate cost of which approximated $15,000. Attempts to raise the necessary funds by mortgage were made by the defendant but these being unsuccessful, $7,259.44 was provided by the plaintiff Mrs. Homfray, $3,000 was advanced by the contractors, Miller & Lewis, who were secured by a mortgage on the premises, and the hotel was rebuilt. On completion of the hotel on June 1st, 1933, it was leased to one, Alice Bral, for five years. The defendant, Rosabel E. Homfray, who lived in Kamloops, looked after the building generally and collected the rents and out of the same paid

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the remaining expenses of rebuilding the hotel and refused until these were liquidated to pay Mrs. Homfray any but small amounts of the rents and profits of the premises. Disputes having arisen between Mrs. Homfray and the defendant as to the former's rights as tenant for life, the plaintiff commenced this action for a declaration that the property in question is a settled estate within the meaning of the Settled Estates Act and that she as tenant for life is entitled to possession of the property and to its management with power to lease the same, and for further declarations that she is entitled to a charge on the premises for all moneys actually advanced by her as well as for all sums paid out of the rents and profits on account of repairs, alterations and improvements or on account of the principal of the Miller & Lewis mortgage and generally to have her rights as tenant for life declared.

*Held*, that the hotel property is a settled estate within the meaning of the Settled Estates Act and Mrs. Homfray is entitled as tenant for life to receive the net rents and profits of said property, but she is not entitled as of right to possession and management as it is a discretionary matter with the Court, and in the circumstances of this case the powers of management or leasing should be left with the trustees, and that the life tenant should not be let into possession of the property.

*In re Bagot's Settlement. Bagot* v. *Kittoe* (1893), 63 L.J. Ch. 515 followed.

*Held*, further, that Mrs. Homfray is entitled to the declaration asked for with respect to both the moneys actually advanced by her and the moneys paid out of the rents on account of repairs, alterations or improvements, or on account of the principal of the Miller & Lewis mortgage, and such moneys will, therefore, be a charge on the property. Such charge will also include the expenses of and incidental to the repairs, alterations and improvements. She is entitled to the net income of the property but she must pay or keep down the interest. Sale ordered unless plaintiff's charge satisfied within four months.

*Held*, further, with regard to any further insurance, that the trustees ought not to keep the property insured out of the rents and profits therefrom but as to whether the trustees ought to insure the premises at the expense of the estate generally no order will be made.

*Re McEacharn; Gambles* v. *McEacharn* (1911), 103 L.T. 900 followed.

*Held*, on the counterclaim, that the defendant is entitled to remuneration at five per cent. on the gross amount of rents collected since the completion of the building on June 1st, 1933.

*Held*, further, that the defendant trustee, having acted unreasonably in opposing the plaintiffs' claim with respect to the charge but having succeeded on the issue as to possession and management, the defendant was ordered to pay her own costs personally and half the taxed costs of the plaintiffs.

ACTION for a declaration that under the will of one George W. Jones, deceased, dated the 3rd of September, 1889, and an indenture of November 12th, 1932, five certain lots in the City

of Kamloops upon which is situate the Central Hotel, are a settled estate within the meaning of the Settled Estates Act; for a declaration that the plaintiff Mrs. Homfray is the tenant for life of the said lands and empowered to exercise all the powers of a tenant for life in respect of said lands under said Act; for a declaration that Mrs. Homfray as tenant for life is entitled to possession thereof subject to any lease thereof and is entitled to receive the rents, profits and moneys thereof, or for an order that the defendant as one of the trustees of said settlement do pay or concur with Mrs. Homfray the other trustee in payment to Mrs. Homfray as life tenant the rents and profits of said lands as received; for a declaration that Mrs. Homfray, as tenant for life of said lands, is under no obligation to insure the buildings, and the trustees have no power or authority to pay the premiums for any insurance on said buildings; and for a declaration that Mrs. Homfray is entitled to a first charge upon said property for the sum of $7,259.44 loaned to the trustees for reconstruction of the hotel and expenses incidental thereto, and for an inquiry. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 5th to the 8th of May, 1936.

*Maitland, K.C.*, and *Remnant*, for plaintiffs.
*Fulton, K.C.*, and *Clyne*, for defendant.

*Cur. adv. vult.*

11th July, 1936.

FISHER, J.: In this matter counsel for the parties agree that the hotel property in question herein is a settled estate within the meaning of the Settled Estates Act, R.S.B.C. 1924, Cap. 228 but they disagree as to the claim of the plaintiffs for a declaration that one of them, *viz.*, Alice Kathleen Homfray, as tenant for life, is entitled to possession of the said property and to its management and the power to lease the property. It is, or must be admitted, that, though the said Alice Kathleen Homfray is entitled to receive the net rents and profits of the said property she is not entitled as of right to the declaration asked for but it is a discretionary matter with the Court. In the case

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of *In re Bagot's Settlement* (1893), 68 L.J. Ch. 515, Chitty, J. says in part as follows at pp. 517 and 518:

> Now the application is addressed to the judicial discretion of the Court; and this discretion has to be exercised on reasonable grounds, the Court looking to the convenience of the parties, to the question of expense—which falls, of course, on the tenant for life—and to other circumstances of a like kind. It is clear that Mrs. Bagot has no right to claim to be let into possession, and she can only claim to be let into possession through the exercise of the Court's judicial discretion.
>
> It seems to me that it is convenient and proper under the circumstances of the case to allow her, as I do, to exercise all the powers of the tenant for life, with the exception of the power of sale and exchange.

In the *Bagot* case reference was made by Chitty, J. to the Settled Lands Acts as affording an additional ground for exercising the discretion favourably to a tenant for life under these Acts but it must be noted that such Acts are not in force in this Province. In *Taylor* v. *Taylor* (1876), 3 Ch. D. 145 on an appeal from an order of the Master of the Rolls (see (1875), L.R. 20 Eq. 297) refusing to grant, under the Settled Estates Acts, a lease dispensing with the concurrence of a person who was a trustee and had a beneficial interest James, L.J. said, in part, as follows at pp. 146-7:

> The Master of the Rolls has not decided anything on the general construction of the Act, but he has decided that, having regard to the very peculiar construction of this will and to the peculiar mode in which the rents and profits of part of the property are to be applied in repairing the whole, it is in this case impossible to authorize leases. . . .
>
> Having regard to the other points, I should have required more time to consider the construction of the Acts of Parliament if I thought that the decision of the Master of the Rolls could be considered as a decision that a tenant for life who is to receive the rents and profits during her life through the hands of a trustee, is not the tenant for life within the meaning of the Acts, but I take the decision of the Master of the Rolls to be based on the very peculiar provisions of this will, the mode in which the property was divided into two parts, and the mode in which the rents of one part, which were his own, are devoted to the repair of the whole, and the provisions compelling the trustees to repair, and so on; and there is a strong indication of intention on the part of the testator that the management should not be taken out of the trustees by an application under the Act or otherwise, except by the Court itself appointing a receiver. I am of opinion the Master of the Rolls' decision should be affirmed, and the appeal dismissed with costs.

I think it is apparent from the above mentioned cases that though the life tenant may be entitled under ordinary circumstances to the declaration now asked for there may be cases where

the circumstances are such that the discretion should not be so exercised in favour of the life tenant. In the present case I have come to the conclusion that the powers of management or leasing should be left with the trustees and that the life tenant should not be let into possession of the property in view of the following circumstances:

(1) The will of the late George William Jones, who died on or about the 8th of October, 1889, reads in part as follows:

AND I EMPOWER my said trustees to postpone the sale of my said real estate for such time as they shall deem expedient and during such postponement to let the same from month to month or from year to year or for any term of years subject to such conditions and rents as they shall think fit AND further to continue my business until they can conveniently sell or wind up the same and for that purpose to employ managers servants workmen and buy all goods usually used in like businesses without being responsible for any loss occasioned thereby And I declare that my said trustees shall be entitled to the same remuneration as if they had been appointed administrators by some Court of competent jurisdiction in this Province and the amount of such remuneration shall be fixed in like manner. . . .

(2) The trustees have exercised such power of management and leasing for over 40 years, that is until recently when the said plaintiff claimed the right to exercise such power. (3) The life tenant and the defendant are the present trustees. (4) The defendant, in my opinion, has shown considerable business ability in the part she has so far taken as one of the trustees and, as one of the remaindermen, she is greatly interested in the property not being allowed to deteriorate. (5) The life tenant is a woman of over 60 years of age, living at some distance from the property. (6) The life tenant, though the mother of the defendant, is apparently more in sympathy with, and might be unduly influenced by, the views of the other plaintiff daughters who are also interested in the reversion but might have different plans as to the management of the property from those of their sister.

The parties also disagree as to the adjustment of burdens as between capital and income. I will deal first with the issue on the cost of the reconstruction or repairs commenced in or about the month of February, 1933, and made necessary by the fire of September, 1931. Counsel seem to disagree as to whether the proper term to be used is "reconstruction" or "repair" but I might say that upon my view of the issue I do not think the

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terminology is material. However, as the parties apparently agreed at the time of the consent order made the 7th of April, 1933 (Exhibit 35), that the proposed work could be properly described as "repairs, alterations and improvements" I do not think that either party should now be heard to object to the work being treated as such and I deal with the matter on that basis. In any event the issue must be determined only after taking into consideration the circumstances and bearing in mind the equitable rules laid down by the authorities. As many of the circumstances are quite apparent from some parts of the examination for discovery of the defendant I would like to set out here a substantial portion of same, reading as follows: [After setting it out his Lordship continued.]

Reference might also be made to the fact that by the Court order (Exhibit 26), made the 25th of November, 1929, apparently with the consent of all parties, it was ordered that Mary Charlotte Pearce and Alice Kathleen Homfray, as trustees of the estate of George William Jones, deceased,

be at liberty to make such repairs, alterations and improvements to the buildings on lots 7, 8, 9 and 10, block 31, map 193, Kamloops as may be necessary and further that they be at liberty to borrow up to the sum of $8,000 from themselves personally and from the said Edith Susie Pemberton Young and Rosabel Emily Homfray for the purpose of paying for such repairs, alterations and improvements and further that they the said Mary Charlotte Pearce and Alice Kathleen Homfray as trustees aforesaid be at liberty to execute a mortgage on the said lands in favour of themselves personally and in favour of the said Edith Susie Pemberton Young and the said Rosabel Emily Homfray to secure the said sum of $8,000 together with interest at the rate of 8 per cent. per annum payable half-yearly on the amount of the principal sum for the time being remaining unpaid such principal sum to be repaid in sums of not less than $600 annually, such principal and interest to be paid out of the rents of the said lands after payment out of the said rents of all taxes and other necessary outgoings.

On the other hand it must be noted that a somewhat similar Court order (Exhibit 35) made the 7th of April, 1933, apparently also with the consent of all parties, does not include a clause providing that the principal and interest should be paid out of the rents. The relevant portions of such order read as follows:

IT IS ORDERED that the said Alice Kathleen Homfray and Rosabel Emily Homfray as trustees of part of the estate of George William Jones deceased be at liberty to make such repairs, alterations and improvements to the buildings on lots 7, 8, 9 and 10, block 31, map 193, Kamloops as may be necessary and further that they be at liberty to borrow up to the sum of

$8,000 for the purpose of paying for such repairs, and further that they the said Alice Kathleen Homfray and Rosabel Emily Homfray as trustees aforesaid be at liberty to execute a mortgage on the said lands in favour of such person or persons, firm or corporation as may advance the moneys to secure the said payment of the moneys so advanced together with interest at the rate of eight per cent. (8%) per annum payable half-yearly on the amount of the principal sum for the time being remaining unpaid.

It is, or might be, argued by counsel on behalf of the defendant that the earlier order of the 25th of November, 1929 (Exhibit 26), created a precedent and that the defendant would be justified in thinking that the money borrowed under the later order of April 7th, 1933 (Exhibit 35), though obviously intended to be a charge against the property by way of mortgage, would be paid out of the rents. This argument however cannot be sustained as it is quite apparent from the evidence, including the correspondence filed (see Exhibits 3 and 4) that the defendant now agrees that the life tenant is entitled to a first charge for all moneys advanced by her to the trustees. The real dispute is as to whether or not the life tenant is entitled to a first charge for all moneys paid out of the rents on account of the repairs, alterations and improvements. On this issue I think it is worthy of note that the parties did not know exactly how much such repairs, alterations and improvements would cost and that the defendant tried, unsuccessfully, to get a loan from other parties for $15,000. The result was that approximately $8,000 was advanced by the life tenant and the defendant (who were then the trustees), approximately $3,000 by the contractors, Miller & Lewis, on a mortgage and the balance required was paid out of the rents from time to time. I think it is quite apparent however and I find that it was the intention of the parties to renew the efforts to obtain from other parties all the money required so soon as the building was completed. If the moneys were so obtained undoubtedly a mortgage would have to be given. In this connection reference might be made to a letter written by the defendant to her mother, the life tenant, dated March 25th, 1933 (Exhibit 36) reading, in part, as follows:

I am enclosing you a note to sign on the Monarch Life Assurance Co., in case we need to take out a loan on your life assurance for the Central Hotel. It would only be a temporary loan, for as soon as the hotel is completed we are told it will be much easier to get a mortgage on it and we hope to be able to get a mortgage for the full amount of the repairs which would

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be ever so much more satisfactory having only one mortgage, instead of 1st and 2nd mortgages. Miller & Lewis can still put up their $3,000 but the man we were depending on for the balance we needed, has fallen down badly on us, and says he doesn't think he can find the money now. . . .

I am satisfied and find, therefore, that it was intended to give a mortgage later on to other parties if the money should be obtained from them. Under such circumstances the question arises as to what are the rights of the parties now. Is the life tenant entitled to a first charge upon the property for moneys paid out of the rents? Obviously the property has been greatly increased in value by the work which was done and which no doubt had to be paid for before the money could be raised by a mortgage. The income however has also been greatly increased. Thus the work has been for the benefit of both the remaindermen and the life tenant. My first impression was that the Court might have some discretion to adjust the burden between capital and income in proportion to the benefits received from the work and expenditure. I have come to the conclusion however that upon the facts of this case, as I find them, and the law applicable I have no such discretion. As already intimated I find the parties never intended that the rents should be used for the repairs as aforesaid at the expense of the life tenant and with no attempt made to reimburse her. I find the interim arrangements were intended to be temporary only but unfortunately the parties did not foresee a time when, as the defendant suggests in one of her later letters (Exhibit 16) the whole matter would have to be dealt with "on a strictly business basis" without any sentiment.

In the case of *In re Hotchkys* (1886), 32 Ch. D. 408 Lindley, L.J. says at p. 420:

> As regards the substantial question, that of the repairs, it appears to me there is no avoiding the application to this case of the rule laid down by Lord Hatherley in *Powys* v. *Blagrave* [(1854)], Kay 495. The tenant for life is equitable tenant for life and the remainderman is not entitled to throw upon her the burthen of keeping the property in repair.

In the case of *In re Freman,* [1898] 1 Ch. 28, North, J. said at pp. 32-3, in part, as follows:

> *Powys* v. *Blagrave* [(1854)], 4 De G. M. & G. 448, and the subsequent case *In re Cartwright* [(1889)], 41 Ch. D. 532, before Kay, J., make it perfectly clear that the tenant for life is under no obligation to keep the property in repair. That is so as to lands settled by the will. . . .

I can see no distinction in principle in this respect between a tenant for life of land purchased under a direction in the will and the tenant for life of land devised by the will itself. I do not think I am in any way extending the principle of *Powys* v. *Blagrave* and *In re Cartwright* by saying that it applies to this case.

Then there is the question, What is to be done about the repairs? What was pointed out in *In re Hotchkys* [(1886)], 32 Ch. D. 408 as the right thing to be done is the right thing to be done here. The property ought to be kept in repair. As was pointed out there, it must be done by an equitable arrangement between the tenant for life and remainderman. I think the right thing to do in this case is this—that the money required for the repairs should be borne by capital; but of course the tenant for life will have to keep down the interest upon that capital.

In neither the *Hotchkys* nor the *Freman* case did the Court have to deal with a case where the repairs had actually been made without the Court having ordered how they were to be paid for as between capital and income. In the present matter I have to deal with such a case but the circumstances being as I have found them I think the ordinary rule of law laid down in the above mentioned cases must be applied and that the application of such rule of law to the condition of circumstances existing obliges me to hold, as I do, that the plaintiff Alice Kathleen Homfray is entitled to the declaration asked for with respect to both the moneys actually advanced by her and the moneys paid out of the rents on account of the repairs, alterations or improvements or on account of the principal of the Miller & Lewis mortgage, and such moneys will, therefore, be a charge on the property. Such charge will also include the expenses of and incidental to the repairs, alterations and improvements as claimed by the plaintiff in paragraph 12 of the statement of claim with the exception at present of the items of November 26th, 1932, May 9th, 1933, August 11th, 1933, September 7th, 1933, and October 25th, 1934, which may be further spoken to. If any further inquiry is necessary to determine the exact amount of the charge there will be a reference. The said plaintiff, as life tenant, will be entitled to receive from the trustees the net income of the property but she must pay or keep down the interest. See *Freman* case, *supra*.

Dealing further with the adjustments of burdens as between capital and income, I will next deal with the question of insur-

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ance. Section 9 (1) of the Trustee Act, Cap. 262, R.S.B.C. 1924, reads as follows:

> 9. (1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

Counsel for the plaintiffs relies especially upon *Re McEacharn; Gambles* v. *McEacharn* (1911), 103 L.T. 900 where the Court dealt with section 18 (1) of the Trustee Act 1893 which is similar to our said section 9 (1). In order to show just exactly what the circumstances and decision in that case were I think I should here set out a considerable portion from the judgment of Eve, J. at pp. 901-2:

> During the testator's lifetime and at the date of his death the mansion-house and other insurable parts of the premises comprised in this devise were insured against fire in amounts falling far short of their respective values, and the question now raised is whether the devisees in trust ought to increase the subsisting insurances to adequate amounts—that is, to amounts not exceeding three fourth parts of the value of the premises insured—and to pay the annual premiums in respect of such insurances out of the rents and profits of the estate. The tenant for life, who is one of the devisees in trust, objects to any increase being made in the insurances at her expense; those entitled in remainder urge that the insurances ought to be substantially increased, and that the annual premiums ought to be borne by the income. . . . At p. 702 of Lewin on Trusts (11th edition) the position prior to the Trustee Act 1893 is thus stated: "The duty of a trustee in reference to insuring the property was until recently not very clearly defined; it was conceived that under special circumstances and in due course of management he would be justified in insuring, but that where there was a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent." The learned editor then proceeds to draw attention to sect. 18 of the Trustee Act 1893, but he does not suggest, nor can I hold, that this section imposes on the trustee a statutory obligation to insure and on the tenant for life a statutory liability to pay the cost of such insurance. The section appears to me to confer powers not to impose obligations on trustees, and, inasmuch as the trustees are not unanimous in this case as to the exercise of the powers so conferred upon them, I think I ought to answer the question put to me by saying that "the devisees in trust of Galloway House and buildings ought not to keep such house and buildings insured against fire out of the rents and profits arising therefrom and from the other property devised therewith up to three equal fourth parts of the value of such house and buildings." In so answering the question, I answer it as it is put, and I say nothing as to whether the trustees ought to insure the premises at the expense of the

estate generally, because the only point which has been argued on this part of the summons is that such insurance ought to be maintained at the expense of the tenant for life, and, as I have already said I do not think that this has been established either under the trusts of the testator's will or under the statute.

From the passages as above set out it would appear that the Court in the *McEacharn* case decided that the trustees were not obliged to insure and charge the premiums to the life tenant but it did not decide that they could not do so. In the case now before me the trustees have actually done so and said section 9 (1) authorizes, though it does not oblige, them to do so.

As to insurance, therefore, on the said property already effected by the trustees or either of them I refuse to make any declaration that the trustees had or have no power or authority to pay the premiums for such insurance out of income arising from the property but with regard to any further insurance, in case the trustees are not unanimous as to the exercise of the powers so conferred upon them, I will make a declaration similar to that made in the *McEacharn* case, *viz.*, that the trustees ought not to keep the property insured out of the rents and profits arising therefrom and I will also state, as was stated by the Court in the said case, that I say nothing as to whether the trustees ought to insure the premises at the expense of the estate generally. I express the hope that the trustees will be able to agree upon some equitable division of the cost of adequate insurance.

I come now to deal with the counterclaim. As to the claim of the defendant in paragraph (a) in the alternative to be allowed a charge upon the said property for $941.92 with equal priority to any charge that may be allowed to the plaintiff Alice Kathleen Homfray against the same the plaintiffs admit the said claim and it will be allowed accordingly. As to the claim of the defendant in paragraph (b) I have to say that, so far as such claim is for remuneration for services as agent for the trustees of the settlement prior to November 12th, 1932, I do not find it necessary to express any opinion as to whether such claim was well founded or not as against the former trustees, of whom the said plaintiff Alice Kathleen Homfray was one, because in any event I would disallow it, as I do, as a "stale"

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claim now against the said plaintiff. So far as such claim is for remuneration for services as one of the trustees since November 12th, 1932, I have to say that, having in mind the wording of the will as above set out and the provisions of our Trustee Act, R.S.B.C. 1924, Cap. 262, Sec. 80, I hold that the defendant is entitled to remuneration which I fix at five per cent. on the gross amount of the rents collected since the completion of the building on or about the 1st of June, 1933.

I disallow the claim of the defendant in paragraph (c) as on the evidence before me I can see no basis on which such claim can be allowed either against the said plaintiff or the estate.

There will be judgment on the claim and counterclaim in accordance with my conclusions as above set out and in case I have failed to deal with any of the many issues raised on the pleadings the matter may be further spoken to. Counsel may also speak to the question of a sale or mortgage of the property in order to satisfy the charges.

*Order accordingly.*

After argument on settlement of the decree on 28th October, 1936, oral reasons for judgment were given.

FISHER, J.: In this matter the plaintiffs asked for certain declarations and also for the sale of the lands and premises in satisfaction of any charge that might be found.

I have considered the Settled Estates Act, and especially sections 16 and 20 referred to, and I do not think that those sections specifically anticipate such a situation as I have here. It seems to me that I have the jurisdiction to direct a sale, but that I should take all the different aspects of the matter that I have before me into consideration and recall the evidence with regard to the nature of the property and the conditions under which the moneys were advanced, for which I have found there is a charge. I recall something in one of the exhibits referred to by counsel on behalf of the plaintiffs, where it was said that the loan would only be a temporary one. The parties apparently had in mind that it would be only a temporary loan. Then they might have agreed upon the terms of a mortgage, and what they

might have agreed to might be very hard to say at the present time. I think I have the jurisdiction to order a sale to satisfy the charge which I have found to be in existence. In doing so, I think I should have in mind what I have said and the interests of the parties who are interested in this property as life tenant or remainderman, and seek to do justice to them all; but I have found that there is a charge, that the plaintiff Alice Kathleen Homfray is entitled to a charge, and in my view she is entitled to realize on that charge, but that it should be subject to certain conditions, and after giving the matter my best consideration I would say that those conditions should be that a period of four months should be allowed within which time the charge may be satisfied. If it is found that it can be satisfied by putting a mortgage upon the property, then the said Alice Kathleen Homfray must join in putting on such mortgage. If it is found that the money cannot be raised by mortgage, and the charge is not otherwise satisfied, there will be an order that the plaintiffs may sell the property to satisfy the said charge after an expiry of four months from this date.

With regard to the interest, I note that the counterclaim says the defendant claims to be reimbursed out of the income of the estate the sum of $941.92, or in the alternative to be allowed a charge upon said lands and premises, with equal priority to any charge that may be allowed to the said plaintiff Alice Kathleen Homfray; and in my reasons for judgment I say: [His Lordship quoted from "I come now to deal with the counterclaim" down to "allowed accordingly," *ante*, p. 297, and continued].

The claim admitted and allowed, according to my finding there, was for $941.92 only, with no reference to interest at all, and it stands as it was, the charge being for $941.92 and to be allowed in the same way as the other charge, with equal priority, and the defendant is therefore entitled to be allowed, and is allowed, the charge upon the said property for $941.92, with equal priority to the charge I have found in favour of the plaintiff Alice Kathleen Homfray.

With regard to the costs, no question was raised at all from the beginning to the end until this morning, so far as I can see, with regard to the action not having been properly framed.

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There were certain issues undoubtedly between the plaintiff Alice Kathleen Homfray and the other plaintiffs on the one side and the defendant on the other. In order that the plaintiffs might obtain relief, it seems to be conceded, or perhaps is conceded by way of extra precaution, that the amendment asked for by the plaintiffs should be made, and it has been made. Under all the circumstances, the point not having been raised throughout until this morning, I do not think that should affect the costs at all, and that is my view in that matter. What I do consider is the fact that on certain issues the plaintiffs have succeeded and on certain issues they have failed. I could deal with the matter with regard to the claim and consider, as I have considered as a matter of fact, on what issues the plaintiffs have succeeded or failed; then I could come to the counterclaim and consider, as I have considered, on what issues the plaintiffs by counterclaim have succeeded against the defendants by counterclaim. Then I might divide the costs in a certain way by applying marginal rule 977 and deal with the matter of the claim and the matter of the counterclaim separately. I prefer, however, to deal with the costs of the whole action, including both claim and counterclaim, having in mind that on certain issues in the claim the plaintiffs have succeeded and in others failed, and that in certain issues in the counterclaim the defendant succeeded, and failed in others.

I do not consider that the defendant acted reasonably in opposing the claim of the plaintiffs with respect to the charge, though on some matters, such as the matter of possession, which I consider of considerable importance, I have held her opposition was justified. I direct taxation of the whole costs of this action, including both claim and counterclaim, and payment of one-half thereof by the defendant personally to the plaintiffs, and the defendant should pay her own costs of the action.

*Order accordingly.*

## DYMOND v. WILSON.

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*Negligence—Damages—Defective railing on stairway—Invitee injured—Liability of owner—Action dismissed—Death of plaintiff before setting down of appeal—Administration Act—B.C. Stats. 1934, Cap. 2, Sec. 2.*

The defendant acquired a two-story building in 1918 that was erected in 1892. The upper story, containing a large number of rooms, was leased to the plaintiff's brother in 1930, who kept it as a rooming-house, a term of the lease being that the landlord was to receive a percentage of the earnings as rental. 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 half way down the side of the wall of the building to a platform and then turned at right angles from the wall, going to the courtyard below. At the side of the platform was a railing extending at right angles from the wall to a post at the top of the lower steps, 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 this railing she leaned against it, and it gave way, precipitating her to the courtyard below, and she sustained injuries. The lease of the upper story 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 swept it from time to time. An action for damages for negligence was dismissed.

*Held*, on appeal, reversing the decision of ROBERTSON, J., that the plaintiff was ordered by the tenant to keep the rooms clean and she was working at the time of her injuries in doing this. Both the tenant and the landlord were interested in this work by reason of the terms of the lease and the fact that the landlord received 25 per cent. of the earnings as rental. The landlord is liable.

*Held*, further, that as the plaintiff Sophia Dymond died before this appeal was set down for hearing, her executor may continue the appeal under section 2 (2) of the 1930 amendment to the Administration Act, and recover judgment for the amount claimed in the appeal.

APPEAL by plaintiff from the decision of ROBERTSON, J. (reported, 50 B.C. 458) of the 25th of April, 1936, in an action for damages for injuries sustained in falling from a stairway. The plaintiff leaned against a railing on the stairway that broke from its fastening, and losing her balance she fell to the ground below, sustaining injuries. The facts are sufficiently set out in the head-note and reasons for judgment.

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The appeal was argued at Victoria on the 13th and 14th of October, 1936, before MACDONALD, C.J.B.C., MCPHILLIPS and MCQUARRIE, JJ.A.

*Whittaker,* for appellant: As the original plaintiff died before the appeal was set down, the executor by virtue of the Administration Act can only claim the special damages set out in the statement of claim. We submit the plaintiff was an invitee or licensee with an interest and the defendant owed her a duty to take care to have the premises reasonably safe. He should have known of the defective railing and kept it in repair. The plaintiff who was hired by the tenant helped to earn money for the defendant, who obtained a percentage of the profits, and it is essential to the defendant's interest that servants be employed by the tenant: see *Sutcliffe* v. *Clients Investment Co.,* [1924] 2 K.B. 746. The landlord is responsible for a defect in a stairway not demised to the tenant in the case of injury to an invitee: see *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74 at p. 85; *Fraser* v. *Pearce* (1928), 39 B.C. 338; *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 at p. 285. Assuming the plaintiff was on the stairway by the implied invitation of the owner, his duty is to use reasonable care to prevent damage from unusual danger which he knows or ought to have known: see *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 at pp. 364-5; *Norman* v. *Great Western Railway,* [1915] 1 K.B. 584 at p. 592. The accident could have been avoided by proper inspection: see *McPherson* v. *Credit Foncier Franco Canadien,* [1929] 3 W.W.R. 348; *Hauser* v. *McGuinness* (1934), 49 B.C. 289. The defendant had agents for the property who should have known of the defect: see *Mersey Docks Trustees* v. *Gibbs and Others* (1866), 11 H.L. Cas. 686 at p. 726.

*F. C. Elliott,* for respondent: The lease must be read as a whole to get the intention of the parties: see *Heide* v. *Brisco* (1935), 50 B.C. 161 at p. 165; *Liddiard* v. *Waldron,* [1933] 2 K.B. 319 at p. 325; *Ross* v. *Henderson* (1901), 8 B.C. 5.

She was familiar with the premises and a cautious person would try the railing before leaning against it. She was guilty of negligence: see *Erickson* v. *Canadian Pacific Railway,* [1928] 3 W.W.R. 694; *Terainshi* v. *Canadian Pacific Ry. Co.* (1918), 25 B.C. 497. This was an ordinary defect that could be easily remedied and does not give rise to an action for damages: see *Kelpon* v. *Stewart* (1928), 40 B.C. 369; *Manchester Bonding Warehouse Co.* v. *Carr* (1880), 49 L.J.C.P. 809; *Hart* v. *Windsor* (1843), 12 M. & W. 68 at p. 86. There was no contractual relationship between the plaintiff and defendant: see *Cavalier* v. *Pope,* [1906] A.C. 428; *Bentley* v. *Vancouver Exhibition Association* (1936), 50 B.C. 343 at p. 346; *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430; *Hayward* v. *Drury Lane Theatre, Lim.,* [1917] 2 K.B. 899; *Coleshill* v. *Manchester Corporation,* [1928] 1 K.B. 776 at p. 792. The Administration Act does not give the right of recovery unless the death is the result of the accident. Both doctors say they do not know whether death was due to the accident or not: see Salmond on Torts, 9th Ed., 453.

*Whittaker*, in reply: The action is based on tort. There need not be any contract at all: see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, and on appeal (1867), L.R. 2 C.P. 311.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: This is an appeal by the executor of the deceased plaintiff. The action was tried and found against her before her decease, but this appeal is carried on under an order of revivor. The tenant of the defendant employed the plaintiff as housekeeper of an apartment block, on the upper stories. There were also tenants on the lower story and a staircase and balcony existed at the back of the premises. That stairway and balcony remained in the possession and control of the defendant, it not having been let to any of the tenants. The tenants in the lower part were bound by their lease to keep their chimneys clean and in order to do that they would have to ascend this balcony and staircase to get to the roof. The plaintiff went out upon this balcony to shake a curtain and leaning against the

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railing it gave way and she received serious injuries. The railing was in bad repair but not visibly so to an observer and the contention of the plaintiff is that she was entitled to use the balcony and stairway and that the defendant was bound to keep it in repair although not mentioned in the lease. It was the defendant's property and the plaintiff presumably had the right of user of it. By the statutes of 1934, an amendment to the Administration Act, Cap. 2, Sec. 2, Subsec. (2), is as follows:

(2.) The executor or administrator of any deceased person may bring and maintain an action for all torts or injuries to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action shall form part of the personal estate of the deceased.

If she is entitled to recover at all she is entitled to the rights and remedies she would have been entitled to if living subject to said exception.

There is no dispute about the defect in the railing. She leaned lightly against it when shaking the curtain and it gave way. Nor is there any dispute about the *quantum* of damages if she be entitled to recover. The real question is who was the owner of this balcony and railing and was the plaintiff entitled to use it? It was contended that there was no privity of contract between the plaintiff and the defendant: that that contract was between the tenant and the landlord and the plaintiff was a mere servant of the tenant. The only answer that I find is this. The lease provides that the tenant was to keep the premises in good condition, that is to say the premises being a rooming-house that they must be kept clean and in good condition and the plaintiff was ordered to keep them clean and in good condition for roomers. The landlord was paid 25 per cent. of the earnings of the rooms by way of rent and therefore it was contended that the plaintiff was bound to carry out the landlord's agreement when ordered to do so to keep the rooms clean and that therefore there was privity of contract between the tenant and the landlord and a duty upon the housekeeper to carry out the tenant's contract. That of course is a rather fine distinction as against

the ordinary case of contract between parties. It was argued that where the contractor is bound to do some act for the benefit of another and sends his servant to do it that the case comes within *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, a judgment of the Court of Common Pleas. Willes, J., delivering the judgment of the Court, at p. 285, said:

> We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission.

The plaintiff was a gas-fitter employed by a person having a contract with the defendant just as the plaintiff here was the housekeeper of the lessee from the defendant. She was ordered by her employer to keep the rooms clean and she was working at the time of her injury in doing this. Moreover both the tenant and the landlord were interested in this work by reason of the terms of the lease and the fact that the tenant paid his rent by a part of the earnings. The landlord was to receive 25 per cent. of these earnings.

Judgment for amount claimed in the appeal.

MCPHILLIPS, J.A.: I agree in the reasons for judgment of my learned brother the Chief Justice and that the appeal should be allowed.

MCQUARRIE, J.A.: I agree that this appeal should be allowed and judgment be entered for the appellant for the amount claimed.

*Appeal allowed.*

Solicitors for appellant: *Whittaker & McIlree.*
Solicitors for respondent: *Courtney & Elliott.*

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*Jan.* 5.

## HIRST v. INGLETT.

*Divorce—Nullity of marriage—Maintenance for wife—Length of marriage and degree of fault to be considered—Divorce Rule 65.*

The parties were married on July 22nd, 1935. Prior thereto the wife obtained an order of the Court allowing her to assume the death of her husband. After living together for five weeks the wife commenced proceedings against her husband under the Deserted Wives' Maintenance Act, and as a result the husband made enquiries and found that his wife's first husband was still living. On petition the husband then obtained a decree of nullity of the marriage between the parties on the 5th of November, 1936. On respondent's petition for maintenance under Divorce Rule 65:—

*Held*, that the Court should take into consideration the length of time since the marriage and whether the decree of nullity was the result of some fault on the part of the husband. In this case the parties lived together a short time and there was no fault on the part of the husband. The petition is dismissed.

*Gardiner* v. *Gardiner* (1920), 36 T.L.R. 294 applied.

PETITION by a wife for maintenance under Divorce Rule 65. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 23rd of December, 1936.

*Beckwith*, for respondent, applicant.
*Maclean, K.C., contra.*

*Cur. adv. vult.*

5th January, 1937.

ROBERTSON, J.: The parties were married on the 22nd of July, 1935. Prior to this the respondent had obtained an order of this Court allowing her to presume the death of her husband. The parties lived together for about five weeks As a result of proceedings taken by the respondent against the petitioner, under the Deserted Wives' Maintenance Act, the petitioner caused enquiries to be made when it was ascertained that the respondent's husband was living. A petition was then presented and the petitioner on the 5th of November, 1936, obtained a decree of nullity of the marriage between the parties. The respondent petitions for maintenance, under Divorce Rule 65.

It is objected that the rule is *ultra vires*. Mr. Justice MURPHY in *Langford* v. *Langford* (1933), 50 B.C. 303, held the rule *intra vires*.

In *Gardiner* v. *Gardiner* (1920), 36 T.L.R. 294, the petitioner was the wife who obtained a decree of nullity on the ground of the incapacity of the respondent and then applied for permanent maintenance. The parties had lived together for seven and a half years. The registrar had made his report in which he provided that the petitioner should have an income of £900 per year. The petitioner applied to the Court for an increase which was refused under the circumstances. Sir Henry Duke, P. said at p. 295:

> Every case of this kind must be decided on its own facts, and an appeal for permanent maintenance after a decree of nullity is not an appeal to a set of fixed principles, but one to the sense of propriety and moral justice of the Court.

This case was followed in *Clifton* v. *Clifton,* [1936] 2 All E.R. 886, by Mr. Justice Bucknill. Again the wife was the petitioner and she obtained a decree *nisi* thirteen months after the ceremony. Mr. Justice Bucknill after referring to what had been said by Sir Henry Duke in the *Gardiner* case, said at p. 889:

> Is there any reason why the wife in this case should receive maintenance at the hands of her husband? The parties were only married for a year and the marriage has been annulled on the ground of the incapacity of the husband. The case seems to me to be entirely different from the case of divorce where there is fault on the part of the husband. The cases to which I was referred by Mr. Middleton are all cases in which quite a substantial period of time had elapsed between the marriage and the decree of nullity. In *Nepean's* case, [1925] P. 97, I see it was eight years, and in *Gullan's* case, [1913] P. 160, it was ten years, and in *Gardiner's* case (1920), 36 T.L.R. 294, I see it was eight years.

It will be seen therefore that the Court should take into consideration the length of time since the marriage and whether or not the divorce was caused as a result of some fault on the part of the husband. In this case the parties only lived together a short time: there was no fault on the part of the husband.

The petitioner has a husband whose duty it is to support her. Applying then the principle laid down by Sir Henry Duke I am of the opinion that the "sense of propriety and moral justice of the Court" in this case should be against granting the petitioner any maintenance.

The petition is dismissed with costs.

*Petition dismissed.*

S. C.
In Chambers
1937
Jan. 14, 28.

## HODGSON AND TAIT v. TURNER.

*Practice—Action for forfeiture of lease—Right of examination for discovery—Precedent—Rule 370c.*

In an action for forfeiture of a lease the party against whom forfeiture is sought cannot be forced to submit to examination for discovery.

*Seddon* v. *Commercial Salt Co.*, [1925] Ch. 187 followed.

In regard to precedent, a decision is valueless as a guide unless it discloses some principle.

*G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited*, [1914] A.C. 25 applied.

APPLICATION that the defendant either attend for examination or that he be placed in the same position as if he had not defended. The action was to have it declared that a lease given by the plaintiffs to the defendant had been forfeited. The defendant was served with a *subpœna* and appointment for his examination for discovery pursuant to rule 370c. He refused to be examined on the ground that the action being one for forfeiture the plaintiff had no right to examine him. Heard by ROBERTSON, J. in Chambers at Victoria on the 14th of January, 1937.

*D. S. Tait*, for plaintiffs.

*A. D. Crease*, for defendant.

*Cur. adv. vult.*

28th January, 1937.

ROBERTSON, J.: This is an action to have it declared that a lease given by the plaintiffs to the defendant has been forfeited. The defendant, having been duly served with a *subpœna* and appointment for his examination for discovery, pursuant to rule 370c, refused to be examined on the ground that the action being one for forfeiture, the plaintiffs had no right to examine him. The rule does not contain any exception.

The plaintiffs now apply that the defendant either attend for examination or he be placed in the same position as if he had not defended. The plaintiffs cite as a precedent an order for examination for discovery which was made by a judge of this Court on the 27th of April, 1931, in *Gibbs* v. *Cann*. In that case it appeared that the defendant had won money on a lottery

ticket. The plaintiff claimed that she was entitled to one-half interest in the money by reason of a contract with the defendant; alternatively, that she was entitled to a forfeiture of the money under subsection 3 of section 236 of the Criminal Code as it then stood.

The usual procedure was taken for the examination for discovery of one of the defendants who refused to attend. An application was then made to strike out his defence because of such refusal. At the conclusion of the argument, an order was made "that the defendant should attend for discovery *viva voce* upon oath touching his knowledge upon all of the issues raised in the statement of claim herein." No reasons for judgment were ever handed down. I am therefore not advised as to the principle upon which the learned judge proceeded.

It is clear law that a decision is valueless as a guide unless it discloses some principle. See *Macaulay Brothers* v. *V.Y.T. Co.* (1902), 9 B.C. 136, at pp. 143-4; *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited,* [1914] A.C. 25 at 40, and *Grand Trunk Pacific Coast Steamship Co.* v. *Simpson* (1922), 63 S.C.R. 361 at 379.

In England it has been held repeatedly that in an action for forfeiture the party against whom forfeiture is sought cannot be forced to make discovery of documents or be examined by interrogatories. The English Rules are absolute as to the right to discovery of documents and examination by interrogatories, just as our rule 370c is absolute, but the Courts have universally held that there was no right to discovery in a case where forfeiture was sought—see *Seddon* v. *Commercial Salt Co.*, [1925] Ch. 187, following *Mexborough (Earl of)* v. *Whitwood Urban District Council,* [1897] 2 Q.B. 111.

In the Province of Ontario where the rules as to examination for discovery are practically the same as ours it was held that, in like circumstances, there could be no examination for discovery. See *Rose* v. *Croden* (1902), 3 O.L.R. 383.

The application is dismissed. Under the circumstances, the costs will be the defendant's costs in the cause.

*Application dismissed.*

C. A.
1936
Dec. 1, 2.

## REX v. CRAMER.

*Intoxicating liquors—Government Liquor Act—Conviction for unlawfully keeping liquor for sale—Premises owned by accused's husband—Evidence of one sale by accused—Costs—R.S.B.C. 1924, Cap. 146, Secs. 86, 91 and 92—B.C. Stats. 1930, Cap. 34, Sec. 24.*

The accused, who lived with her husband in a house that belonged to the husband, was charged with the offence of unlawfully keeping intoxicating liquor for sale in contravention of the Government Liquor Act. She was convicted on the evidence of one sale of intoxicating liquor made by her on said premises.

*Held*, on appeal, reversing the decision of LENNOX, Co.J., that the evidence disclosed the husband was the owner of the premises and there was no evidence of accused keeping intoxicating liquor for sale. The case is not affected by section 24 of the 1930 amendment of the Government Liquor Act, and the appeal should be allowed.

*Rex* v. *Hand* (1931), 66 O.L.R. 570, followed.

APPEAL by accused from the decision of LENNOX, Co. J. of the 18th of September, 1936, dismissing an appeal from her conviction by deputy police magistrate Mackenzie Matheson, in Vancouver, on the charge that between the 28th of September, 1935, and the 17th of November, 1935, she unlawfully kept intoxicating liquor for sale.

The appeal was argued at Vancouver on the 1st and 2nd of December, 1936, before MACDONALD, C.J.B.C., MARTIN and MACDONALD, JJ.A.

*C. L. McAlpine*, for appellants: The charge is for keeping intoxicating liquor for sale. She made one sale of liquor but the premises belonged to her husband and she did not keep the liquor for sale. The learned judge below said she was keeping it for sale by taking it from where it was stored and serving it to a customer, and section 24 of the amending Act of 1930 established the charge for keeping for sale. We submit there must be at least two sales to establish the charge of keeping. Under section 28 of the Government Liquor Act keeping must be a continuous offence: see *Jayes* v. *Harris* (1908), 72 J.P. 364; *Rex* v. *Hand* (1931), 66 O.L.R. 570. The Ontario Act is the same as ours.

*Dickie,* for the Crown: The burden of proof is put upon the accused by sections 91 and 92 of the Government Liquor Act. *Rex* v. *Hand* can be distinguished, as section 24 of the 1930 amendment makes the difference, making one sale sufficient to establish the charge: see *Rex* v. *Nat Bell Liquors, Ltd.,* 16 Alta. L.R. 149; [1921] 1 W.W.R. 136 at p. 155, and on appeal at p. 563.

MACDONALD, C.J.B.C.: I would allow the appeal. I think it is perfectly indisputable that this conviction is wrong. She should have been either charged with selling, or she might have been charged on two counts: one for selling, and one for keeping for sale; and if the learned judge could not find her guilty of the first, he might find her guilty of the second—if the evidence permitted. In this case, the evidence does not permit it. It was proved that the keeper for sale was the husband. He was the man who kept for sale, and not the wife. And perhaps that was the reason why the case went to the magistrate on the one question instead of two. Now, the section in 1930, of course, only does the one thing, which I pointed out some time ago; it makes one sale equivalent to a continuance of sales, and nothing more. There is no other inference to be drawn from it. A man who is accused of a crime, must have his crime stated, and not merely stated upon inference. It must be clearly stated what he is accused of so that he may meet it. I think the appeal should be allowed.

MARTIN, J.A.: The Ontario case that has been cited to us—*Rex* v. *Hand*—would, I think, of itself, by virtue of its reasoning and almost complete similarity of facts, be sufficient warrant to us to uphold the submission of this appellant. I note that in one respect this case is stronger than *Hand's* case because in that there was a question as to who was the tenant, and it was a matter of "fair presumption" only that the husband was. Now in this case we have proof that the husband was more than the tenant, he was the owner of the premises, as found by the learned judge. But some difficulty rises from section 24 (2) of Cap. 34, 1930, as follows:

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(2) In any proceeding under this Act, proof of one unlawful sale of liquor shall suffice to establish the intent or purpose of unlawfully keeping liquor for sale in violation of this Act.

After considering this unusual provision very closely I am of opinion, despite Mr. *Dickie's* very clear presentation of his case (which shows he has properly given very careful attention to the question), that the subsection does not go so far as he invites us to go. It is a very peculiar one because it does not say that the proof of one sale shall of itself constitute the commission of the offence of keeping but merely that it will "establish the intent or purpose" of committing it, thus leaving something to be done to implement the intent and convert it into the prohibited act of keeping. To put it briefly, the subsection only covers the bare intent or purpose to keep unlawfully, but as that intent is not an offence under this Act the wife's present conviction for keeping (not for selling, which was established but not charged) cannot on the evidence be supported, and therefore the appeal should be allowed.

MACDONALD, J.A.: I adhere to the views expressed during the argument. The decision in *Rex* v. *Hand* (1931), 66 O.L.R. 570, is sound, and ought to be followed. It is not affected by the amendment in the 1930 Act (B.C. Stats. 1930, Cap. 34, Sec. 24). Whatever subsection (2) of section 24 may mean—and I am not going to express an opinion on that point—it does not mean that proof of one unlawful sale of liquor by one who is not a "keeper" brings him under that category.

I would allow the appeal.

*McAlpine*: I ask for costs in this case—in this Court and the Court below. The informant is not an officer of the Crown; he is the Vancouver police-court clerk.

MARTIN, J.A.: Who was the informant?

*McAlpine*: Mr. Crompton, the police-court clerk of the City of Vancouver.

MACDONALD, J.A.: You want to get costs against the poor clerk?

*McAlpine*: The City of Vancouver pays it.

*Dickie*: I do not think this is a proper case where costs should

be allowed. If it was a second case, where we had a decision of a Court in this Province—but here is a novel point; it has come before this Court, and there has been no decision in this Province on this statute, and I submit the costs should not be allowed.

MACDONALD, C.J.B.C.: I do not think we should deal with the costs.

*McAlpine*: I ask for costs.

MACDONALD, C.J.B.C.: We cannot give you the costs.

*McAlpine*: Yes, my learned friend—

MACDONALD, C.J.B.C.: I would not give you the costs; I do not think this woman should be taxed with it.

*McAlpine*: The woman is asking for her costs, against the City of Vancouver. The City of Vancouver will pay, if your Lordship awards them.

MARTIN, J.A.: I think costs should follow the event.

MACDONALD, J.A.: I would say costs should follow the event.

*Appeal allowed.*

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## REX v. CAMERON.



*Criminal law—Preliminary inquiry—Evidence in longhand—Reading of evidence to accused—Mandatory—Criminal Code, Secs. 359 (a), 684 and 1120.*

On a preliminary inquiry the evidence was taken down in longhand by the magistrate and after the evidence for the prosecution was completed the magistrate did not ask the accused whether he wished the depositions to be read over, nor were they read, but he proceeded to address the accused pursuant to section 684, subsection 2 of the Criminal Code and committed him for trial. After the charge was read to the accused on the trial, but before he pleaded, counsel for accused moved to quash the commitment on the ground that the magistrate had not asked the accused whether he wished the depositions to be read over again as required by section 684, subsection 1 of the Criminal Code.

*Held*, that the provision in said section 684, subsection 1 is imperative and the warrant of commitment was quashed.

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TRIAL of accused on a charge of theft under section 359 (*a*) of the Criminal Code by LENNOX, Co. J. at Vancouver on the 17th, 18th and 19th of December, 1936. On accused being committed for trial he elected for speedy trial. After the charge was read but before accused pleaded, counsel for accused moved to quash the warrant of commitment on the ground that after the evidence for the prosecution was completed the magistrate did not ask the accused whether he wished the depositions to be read again as required by section 684, subsection 1 of the Criminal Code.

*Owen,* for the Crown.

*Washington,* for accused.

LENNOX, Co. J.: I do not know whether the point has been raised before where the Courts have quashed committal orders in such like circumstances. It seems evident also that section 1120 has not been brought forward or acted upon for some reason or other, in any of such cases as far as counsel or I know. Most of the cases dealing with this subject-matter have been Quebec cases; but the case of *Rex* v. *MacDonald,* [1920] 2 W.W.R. 176, was heard before the appellate division of the Supreme Court of the Province of Alberta, and in that case the Court was equally divided. There was there no question of remitting back, but it was on refusal of Mr. Justice Walsh to quash an order committing the accused. In that case the whole matter turned on whether it should have been quashed, a shorthand writer having been used. That case reviews the history of these two sections, or rather three sections, 682, 683 and 684 of the Criminal Code, and brings it up to 1920, so that I need not go into that history here. But I think it was in 1922 or thereabouts—at all events after 1920—that section 684 was amended, which altered the whole phase of the matter. It would yet be a moot question whether evidence taken in shorthand had to be read over to the accused. The amendment however is very precise, and changes the words "shall ask him if he wishes the depositions to be read again," to "shall ask him if the evidence has not been taken in shorthand, whether he wishes

the depositions to be read again." It seems to me that clears up the whole situation so far as the history of the cases goes, on the question of whether there is a proper committal under the present circumstances of the case at Bar, where the evidence was not taken in shorthand. On that phase of it I have come to the conclusion there has not been a proper committal.

Now Mr. *Owen,* for the Crown, asks, in view of that, that I should invoke section 1120 to remit this matter back to the magistrate to have the provisions of section 684 complied with. I repeat that as far as I know there are no cases on the point, so it devolves upon me, without extraneous help, to state what, in my opinion, the Court should do in the circumstances. I can conceive of many cases where it would be the proper thing to remit back to have some matters attended to which were not attended to; but it seems to me that should be more in a question of formal matters, and not where they may—I do not say would—but may inflict some injustice on the accused. After all, it is not our province to use our imagination to decide as to whether there may or may not be in fact some injustice done to the accused, but if there is a possibility of injustice being done to the accused, through the action being taken, then the accused is always to have the benefit of the doubt. If, on the other hand, it is perfectly apparent no injustice could be done, then I think section 1120 should be invoked, that is to say, where it is a mere technicality, then I think section 1120 certainly ought to be used, because I think the intention of the Legislature was that section 1120 was to be utilized where there was some trifling omission which could have no effect at all upon the accused. But Mr. *Washington* points out—and I think correctly—that when the evidence having been just taken is fresh in the minds of every person present, if the deposition is read to the accused, then it is quite possible he may ask for the insertion or deletion of words which the magistrate would be perfectly justified in doing and would subscribe to, but that three weeks afterwards that state of affairs might not exist and he might be prejudiced through that omission. It is true, of course, that the accused could have taken some proceeding immediately after, to have the warrant of

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commitment quashed on that ground. But there again, although every person is supposed to know the law, if the accused has not got counsel, or counsel overlooks it, I do not know that that should be held against him—that he did not immediately bring the matter up. There is a point there, but I do not think it should be held against him. His rights are to be adjudicated upon when he is brought before the Court, and I might say I agree with Mr. *Owen* when he points out that even if the warrant of commitment is quashed it does not end the matter necessarily as far as bringing the accused to trial is concerned. However, whether that be so or whether it be not so, I must come to the conclusion that the point is well taken and that the accused might be damaged by it through the provision of the Code not having been carried out in that particular. I quash the warrant of commitment.

*Warrant of commitment quashed.*

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## *IN RE* RATTENBURY ESTATE AND TRUSTEE ACT.

S. C.
In Chambers
1935
*Nov.* 21;
*Dec.* 20.

*Land—Devised by will to executor and trustee—Caveat—Originating summons—Declaration as to power to sell—R.S.B.C. 1924, Cap. 262, Sec. 6.*

F. M. Rattenbury by his will appointed The Royal Trust Company executor and trustee and devised and bequeathed to it all his estate upon certain trusts with power to sell. He directed his trustees to pay his wife, Alma V. Rattenbury, $350 per month and upon her death to hold the capital and income for his two children by her. Alma V. Rattenbury by her will appointed The Royal Trust Company her trustee and devised and bequeathed to it all her estate upon trust to pay and transfer to her husband all her estate, and if he should predecease her to sell and convert into money all her estate, to invest the proceeds and pay the income to her two children. F. M. Rattenbury died in March, 1935, and Alma V. Rattenbury died in June, 1935, probate of her will being granted to The Royal Trust Company as executor. In June, 1929, F. M. Rattenbury conveyed a certain Oak Bay property to his wife, Alma V. Rattenbury, and on November 10th, 1929, Mrs. Rattenbury agreed to lease said property to The St. George and The Dragon Hotel Company Ltd. with option to purchase for $85,000. On the 17th of December, 1929, the two Rattenburys and The Royal Trust Company entered into an agreement by which Mrs. Rattenbury should on request convey the Oak Bay property to The Royal Trust Company to the uses

and trusts therein mentioned. Mrs. Rattenbury then conveyed the property to The Royal Trust Company subject to the agreement of the 10th of November, 1929, and also assigned to it all her rights in the agreement of the 10th of November, 1929. In April, 1930, The Royal Trust Company entered into a like agreement with The St. George and The Dragon Hotel Company, whereby the lands in question were leased to the company with option to purchase for $85,000. The option was never exercised and by mutual arrangement the parties released all claims by reason of the agreement. On the 15th of June, 1935, The Royal Trust Company as executor and trustee agreed to sell said lands to one Ian Simpson for $17,000, upon deferred payments. On June 12th, 1935, Mary Burton, a daughter of F. M. Rattenbury by his first wife, filed a *caveat* in the Registry office against said lands "as one of the next of kin and heirs at law of F. M. Rattenbury." On originating summons under Order LIVA taken out by The Royal Trust Company for a declaration that it was vested with power to sell the land, Mary Burton submitted that she was entitled to make a claim under the Testator's Family Maintenance Act against the estate of her father.

*Held*, that under the deed of the 17th of December, 1929, The Royal Trust Company had no power to sell the land, but said company was the legal owner thereof and was expressly empowered to sell by both wills, and therefore was entitled to sell said land.

ORIGINATING SUMMONS under Order LIVA taken out by The Royal Trust Company, executor and trustee of the estate of F. M. Rattenbury, deceased, and Alma V. Rattenbury, deceased, for an order declaring that an indenture dated the 17th of December, 1929, and made between Alma Victoria Rattenbury of the first part, Francis Mawson Rattenbury of the second part and The Royal Trust Company of the third part, vested in The Royal Trust Company lot "A" of section 69, Victoria District, plan 396 (except that part lying within plan 106 B.L.) with power of sale and a power of rescinding and reselling under section 6 of the Trustee Act, and declaring that for the determining of the question of construction arising under said indenture of the 17th of December, 1929, by reason of a *caveat* lodged on behalf of Mary Burton (a daughter of Francis M. Rattenbury by his first wife) against the title to said lot, that the only trust remaining under said indenture is a trust for the use and benefit of the two children of Francis M. Rattenbury and Alma V. Rattenbury. The further necessary facts are set out in the judgment of the trial judge. Heard by ROBERTSON, J. in Chambers at Victoria on the 21st of November, 1935.

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*Maclean, K.C.*, for estate of F. M. Rattenbury, deceased.
*Heisterman*, for estate of Alma V. Rattenbury, deceased.
*Langley*, for Mrs. Burton.
*C. G. White*, for Christopher Rattenbury.

*Cur. adv. vult.*

20th December, 1935.

ROBERTSON, J.: F. M. Rattenbury died on the 28th of March, 1935, leaving a will which was duly proved in England and resealed here. He appointed The Royal Trust Company executor and trustee, and devised and bequeathed to it all his estate upon certain trusts with power to sell and convert into money his entire estate with the exception of certain personal chattels which were specifically bequeathed.

He directed his trustee to pay to his wife Alma Victoria Rattenbury $350 per month and upon her death to hold the capital and income in trust for his two children Christopher Compton Packenham Rattenbury and John Rattenbury. Alma Victoria Rattenbury died on the 5th of June, 1935. Her will is dated 18th December, 1929. She appointed The Royal Trust Company her trustee and devised and bequeathed to it all her estate upon trust to "pay and transfer" to her husband F. M. Rattenbury all her estate and property and if he should predecease her to sell, call in and convert into money all such part of her estate as should not consist of money, to invest the proceeds and to pay the income thereof to her children, etc. Probate of this will was granted to The Royal Trust Company "as executor according to the tenor of the will." As her husband had predeceased her the trustee was empowered to sell her estate.

It appears that on the 12th of June, 1929, F. M. Rattenbury conveyed absolutely to Alma Victoria Rattenbury certain Oak Bay lands the consideration mentioned in the deed being $3,000. On the 10th of November, 1929, Mrs. Rattenbury agreed to give a lease of the Oak Bay lands to The St. George and The Dragon Hotel Company Ltd., and an option to purchase the lands for $85,000, upon certain conditions being fulfilled. On the 17th of December, 1929, the Rattenburys and The Royal Trust Company entered into an agreement in which it was recited that when Rattenbury conveyed the lands to Mrs. Ratten-

bury it was agreed between them that she should on request grant and convey the lands in fee simple to The Royal Trust Company "to the uses and trusts therein stated." In this agreement Mrs. Rattenbury conveyed the lands to The Royal Trust Company subject to the agreement of the 10th of November, 1929. She also transferred and assigned to it all her rights in the agreement of the 10th of November, 1929, upon certain trust therein mentioned, *viz.*, to carry out all her obligations under the agreement of the 10th of November, 1929; to pay and divide the rentals equally between her and her husband and upon the death of one of them to pay to the survivor, and in the event of the company purchasing to invest the purchase-money and to pay the income to the Rattenburys in equal shares and upon the death of one of them to pay it to the survivor, and after the death of the survivor of them to hold the capital and income in trust for the two children.

On the 4th of April, 1930, The Royal Trust Company and The St. George and The Dragon Hotel Company Ltd., entered into an agreement whereby the lands in question were leased to the company and it was given an option of purchase at $85,000. The hotel company did not exercise its option.

On the 13th of May, 1931, the company released all its claims by reason of the agreement, and, in turn, was released by The Royal Trust Company from all obligations.

On the 15th of June, 1935, The Royal Trust Company as trustee and executor of the estate of F. M. Rattenbury and of the estate of Mrs. Rattenbury agreed to sell the lands to Ian Simpson for the sum of $17,500, upon deferred terms of payment. Rattenbury had been married prior to his marriage to Alma Victoria Rattenbury and by his first wife had two children one of whom is now Mary Burton. On the 12th of June, 1935, a *caveat* was filed in the Land Registry office on her behalf "as one of the next of kin and heirs at law of F. M. Rattenbury."

An originating summons under Order LIVA was taken out and the only question to be decided is as to whether The Royal Trust Company had a right to sell the lands.

The Royal Trust Company submits that as trustee and executor of the estates of the Rattenburys that it was entitled to

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enter into the Simpson agreement and, alternatively, that it had this power under section 6 of the Trustee Act.

The Royal Trust Company submits there was no resulting trust.

Counsel for Mrs. Burton submits that his client is entitled to make a claim under the Testator's Family Maintenance Act against the estate of her father; that The Royal Trust Company could only sell either as executor of the wills or as trustee under the deed of the 17th of December, 1929; that it could not have sold as executor because the property in question was not included as an asset of the estate of the Rattenburys in the affidavit of value and relationship made under the Succession Duty Act; that therefore it must have sold in its capacity as trustee under the deed. It was further submitted that that deed gave no power to sell; that The Royal Trust Company was a bare trustee; and that Mrs. Burton is vitally interested in the price.

In my opinion, in the events which happened, the children of Rattenbury and Alma Victoria Rattenbury did not take any interest under the deed of 17th December, 1929, because the hotel company did not purchase. Under that deed the trustee had no power, either expressly or implied, to sell the lands. Further, I think that from the execution of the release agreement of the 13th of May, 1931, The Royal Trust Company held the lands as a bare trustee either for the two Rattenburys or one of them. They or one of them would have been entitled at any time to call upon it for a conveyance. I mention this because it was submitted by counsel for Mrs. Rattenbury's estate that upon the execution of the agreement of the 13th of May, 1931, Mrs. Rattenbury only would have been entitled to call for a conveyance of the lands. It is not necessary to, and I do not decide, any question as to any rights between the estates of the Rattenburys. Whatever the right is, it would devolve on their personal representatives or the personal representative of one of them. As The Royal Trust Company was already the legal owner there was no necessity for a conveyance.

As The Royal Trust Company was expressly empowered to sell by both wills, I am of the opinion that it was entitled to sell the lands.

*Order accordingly.*

## *IN RE* RATTENBURY ESTATE AND TESTATOR'S FAMILY MAINTENANCE ACT. (No. 2).

S. C. 1936

*June* 4, 30.

*Testator's Family Maintenance Act—Testator domiciled outside Province—Applicability of Act—Son and daughter of former marriage—Adequate provision for—Testator's interest in certain lands in doubt—R.S.B.C. 1924, Cap. 256.*

The testator's domicil of origin was English. He came to British Columbia in 1890 and acquired a domicil of choice in British Columbia. By his first wife he had a son and a daughter. By his second wife (who had had a son by a previous marriage) he had one son. He remained in British Columbia until December, 1929, when he took his wife, youngest son and stepson to England where he remained until his death on March 28th, 1935. By his will he left his estate in trust to pay his wife $350 per month, and at her death in trust to his youngest son and stepson. His wife died on June 5th, 1935. The net value of testator's estate for succession duty purposes was $28,124. The estate consisted of three pieces of land in Coast District in British Columbia of the value of $2,750, and most of the balance of the estate was personal estate situate in this Province. Just before leaving for England testator conveyed his dwelling in Victoria, B.C., to his wife, who then conveyed the property to The Royal Trust Company upon certain trusts, and by her will left all her estate in trust for her two children. On the application of testator's two children by his first wife under the Testator's Family Maintenance Act:—

*Held*, that the testator abandoned his domicil of choice in British Columbia and reverted to his domicil of origin, and the Testator's Family Maintenance Act applies to land in British Columbia belonging to a testator domiciled outside the Province but not to movables.

*Held*, further, that the testator did not make adequate provision for the proper maintenance of the son and daughter of his first marriage, but it being uncertain whether certain lands and a dwelling in British Columbia belonged to the testator or to his second wife, until that question was decided by the Courts the present application must be disposed of on the basis that only the other lands of the testator in British Columbia were in question. An order for monthly payments for one year, with leave to the applicants to apply to extend the period, was made, the payments to be a charge on the last mentioned lands and dwelling if they should be held to belong to the testator's estate.

PETITION by Francis Rattenbury and Mary Burton, children of F. M. Rattenbury, deceased, by his first wife, for relief under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Vancouver on the 4th of June, 1936.

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IN RE RATTENBURY ESTATE AND TESTATOR'S FAMILY MAINTENANCE ACT

*A. deB. McPhillips,* for the petition.
*D. J. McAlpine,* for official administrator.
*Maclean, K.C.,* for executor.
*Langley,* for Mrs. Burton.

*Cur. adv. vult.*

30th June, 1936.

ROBERTSON, J.: F. M. Rattenbury died on March 28th, 1935. He had been twice married. By his first wife he had a son, Francis, born January 14th, 1899, and a daughter Mary, born May 10th, 1904. By his second wife, who had had a son, Christopher, by a previous marriage, he had one son John. Mrs. Rattenbury died on June 5th, 1935. Francis Rattenbury is married, has a child seven years of age and is on relief. Mary is married and has a daughter three years of age. Her husband makes about $100 a month and they live in their own home which is valued at $2,200.

By his will, Rattenbury left his estate in trust to pay his wife $350 per month and at her death in trust "for my two children Christopher and John" and any future children of the marriage in equal shares with a provision that the trustee in his discretion need not give to any child its share until it reached the age of 30 years. The will also empowered the trustee after the death of Mrs. Rattenbury to spend $1,500 per annum for maintenance, education and advancement of any minor child during its minority; any amount spent to be deducted from the share which such child would ultimately take. The net value of Rattenbury's estate was sworn for succession duty purposes at $28,124. It is doubtful if it will realize that amount. It consists in part of three pieces of land in Coast District in the Province of British Columbia of the value of $2,750. Most of the balance of Rattenbury's estate is personal estate situate in this Province. Francis and Mary apply under the Testator's Family Maintenance Act, R.S.B.C. 1924, Cap. 256. It is submitted that Rattenbury's domicil at the time of his death was English and therefore no order can be made under the Act. It is common ground that his domicil of origin was English and that he acquired a domicil of choice in British Columbia which continued up to December 18th, 1929, when, it is submitted,

he abandoned it and his domicil of origin revived. The facts are that Rattenbury was born in England and came to live in British Columbia in 1890 and where he remained until December 18th, 1929, and, as I have said, admittedly obtained a domicil of choice in this Province. On December 18th, 1929, he took his wife, son and stepson to England where they remained until his death. On December 13th, 1929, Rattenbury conveyed his dwelling to his wife and she conveyed it on December 17th, 1929, to The Royal Trust Company (subject to a lease to an hotel company) upon certain trusts and the next day they all left for England.

Rattenbury had been a member of the Union Club of Victoria, B.C., for many years. On January 21st, 1935, shortly before his death, he wrote a letter to Winslow, the manager of The Royal Trust Company at Victoria, B.C., enclosing an account from the Union Club and requested Winslow to pay it. He also enclosed a letter of resignation as an absentee member, addressed to the secretary of the club, and Winslow duly forwarded this resignation to the secretary. The letter further said:

> Without thinking there was any real possibility I suggested selling these northern agreements of sale and accrued interest at 75 cents on the dollar —and the $12,500 Melrose shares for $8,000.00. Outside of maybe a flying visit I don't expect to come to Victoria again and naturally would like to clean up.

I judge Rattenbury was then 65 years of age for I suppose he must have been 21 at least when, as the material shows, he was an architect by profession and came to live in British Columbia. He and his wife and son and stepson had been living in England ever since December, 1929. I think these facts are sufficient to show an abandonment of his domicil of choice and I so hold. In *Fleming* v. *Horniman (Fleming intervening)* (1928), 138 L.T. 669; 44 T.L.R. 315, Hill, J. was dealing with the question of whether or not there had been an abandonment of a domicil of choice. At p. 670 he says there are two questions to be determined, the second of which is, did the testator in that case abandon his domicil of choice before his death and, if he did, has he reverted to his domicil of origin?

> On the second question the law is thus stated in Dicey's Conflict of Laws, 4th edit., at p. 110, under rule 8: "A domicile of choice is retained until both residence (*factum*), and intention to reside (*animus*) are in fact given

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up, but when once both these conditions have ceased to exist, it is abandoned as well in law as in fact." A mere intention is not enough so long as the person continues to remain within the territory of his domicile of choice: (see *Goods of Raffenel* (1863), 8 L.T. 211). A leaving that territory is not enough, so long as the person continues his intention to reside permanently in the country of his domicile of choice: (*Re Steer* (1858), 28 L.J. Ex. 22). But when the intention is formed and the residence is brought to an end, or the residence having been brought to an end, the intention is formed, then there is a complete abandonment of the domicile of choice. The intention here meant is a formed intention to leave the country of the domicile of choice for good.

Again he says at p. 670:

If a man intends to give up his domicile of choice, and in fact gives up his residence there, it is not inconsistent with an abandonment that he has it in mind that he may or will pay a temporary visit to that country at some future time. For instance, a man with a domicile of origin in England acquires by residence and intention a domicile of choice in France. He then leaves France with the intention to give up permanent residence there but has it in mind that he will make his home in England but occasionally will go to the French Riviera for a holiday. *Udny* v. *Udny* [(1869)], L.R. 1 H.L. Sc. 441 settled the point that a domicile of choice may be abandoned though no intention has been formed to choose another domicile in any particular country. In such a case upon the abandonment there is an intended reversion to the domicile of origin.

It is quite clear that when a domicil of choice is abandoned, the domicil of origin revives, special intention to revert to it being unnecessary: *Udny* v. *Udny, supra.* It is quite clear also that in considering the question, as to whether or not there has been a change of domicil, declarations of intention may be considered. Lord Buckmaster said in his speech in the House of Lords in *Ross* v. *Ross,* [1930] A.C. 1, at 6-7; 98 L.J.P.C. 163:

Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

Our Act came from New Zealand and appears to be very similar to it. In *Re Butchart, Butchart* v. *Butchart,* [1932] N.Z.L.R. 125, the Court of Appeal there held that their Act applied to land in New Zealand belonging to the testator who was domiciled out of New Zealand but said with regard to movables of such a testator that the Act did not apply. Kennedy, J., who delivered the judgment of the Court, said at p. 131:

The Family Protection Act, 1908, applies to any person who dies leaving a will making insufficient provision therein for the maintenance of certain

persons. The words of the section include a testator domiciled in New Zealand and are wide enough in terms to cover any testator dying domiciled outside New Zealand. The Act, however, will not enable relief to be granted in respect of movables where a testator is domiciled outside of New Zealand, because, by virtue of the municipal law of this country, which is not abrogated by statute, the material validity of a will of movables will be referred by New Zealand law to the law of testator's domicil at the time of his death—*Stanley* v. *Bernes* (1831), 3 Hag. Ecc. 373, and *In re Trufort; Trafford* v. *Blanc* (1887), 36 Ch. D. 600, and that will not, in the case now being considered, include the provisions embodied in the Family Protection Act, 1908. Indeed, where a testator dies domiciled in a foreign country, the New Zealand personal representative may hand over the distributable surplus to the foreign personal representative in the country of the domicil for distribution by himself.

The result is that I have to consider whether an order should be made which will in the first instance only bind the lands valued at $2,750 belonging to the testator. First I must again revert to the conveyance on December 17th, 1929, from Mrs. Rattenbury to The Royal Trust Company. The lease to the hotel company was surrendered. On June 15th, 1935, the trust company sold the dwelling and lands for $17,500, of which $5,000 was paid on the execution of the agreement and the balance is to be paid by 12 annual instalments.

The Royal Trust Company is the executor of both Rattenbury estates and has placed no value upon this asset in either estate, it being uncertain whether or not these lands belonged to Mrs. Rattenbury or to Rattenbury. Mrs. Rattenbury by her will in the events which happened, left her estate in trust for the maintenance and education of her children (there are only two, Christopher and John) until the youngest attains the age of 30 years when her estate is to be divided equally between them. Her assets, apart from any possible interest in the proceeds of the sale of dwelling and lands, are $1,050 and her liabilities $1,975 so, unless she is entitled to the proceeds of the dwelling and lands, her estate is insolvent.

Counsel for Francis and Mary take the position that Mrs. Rattenbury was entitled to the dwelling and lands and that therefore Christopher and John were provided for to that extent and that this should be taken into consideration on the application of Francis and Mary. It is only necessary to state these facts to show that I could not possibly consider giving effect to

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this view. The matter will have to be decided in the Courts. But in any event should it be held that the dwelling and lands belonged beneficially to Rattenbury then his estate will be increased in value by $17,500; and, as at Rattenbury's death the dwelling and lands were unsold, these would be lands in the Province of British Columbia and would be subject to an order under the Act. In any event, however, Christopher and John will benefit as they divide equally the estate of the two Rattenburys. Until this question is determined, however, I shall have to decide on the basis that only the Coast District lands are in question and their value, as I have said, is $2,750. Now there is no doubt that Christopher has a claim against the estate apart from what he takes under the will. See *In re Estate of W. S. Pedlar, Deceased,* 46 B.C. 481; [1933] 1 W.W.R. 267.

I have to consider the position at the time of the application. See *In re Jones, Deceased,* 49 B.C. 216 at 222; [1934] 3 W.W.R. 726. It appears now that, in any event, no matter to which estate the proceeds of the sale of the dwelling and lands are finally held to belong there should be for division between Christopher and John at least $35,000 assets of the two estates. Mary's husband's average earnings are less than $100 per month; Francis is on relief. I think, under these circumstances, Rattenbury failed to make adequate provision for the proper maintenance and support of Francis and Mary. In view of what was said in *Walker* v. *McDermott,* [1931] S.C.R. 94, at 96, I think an order that he be paid $125 a month and she be paid $25 per month for one year is adequate, just and equitable in the circumstances, with liberty to him and to her to apply to extend the period; the others have the right under section 15 of the Act to apply to discharge, vary or suspend the order. Such payments are to be a charge on the real estate in British Columbia and on the proceeds of the sale of the dwelling and lands should it be held they belong to the Rattenbury estate. Francis and Mary are entitled to their costs, but not out of the estate. They will be a charge upon the said lands and said proceeds, if any. The Royal Trust Company and Christopher and John are to have their costs out of the estate.

*Order accordingly.*

## DALLAS v. HINTON AND HOME OIL DISTRIBUTORS LIMITED.

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*Dec.* 1, 3, 4, 9, 17.

*Negligence—Damages—Master and servant—Salesman driving car—On his way home—Pedestrian run down—In course of employment—Liability of employer.*

The defendant H. was a salesman of the defendant company whose head office is in the City of Vancouver. H. had no special hours for work but had a roving commission to sell the company's products in and about New Westminster. He was on salary, used his own car but the cost of its operation was borne by the company whether used for the company or for private purposes. His employment included lectures at the company's head office. He had his home in New Westminster where he had no office of his own, but by arrangement had his customers telephone or mail orders to a gas-station in New Westminster where he picked them up. He attended the head office for salesmen's meetings, salesmen's lectures and to receive instructions from the sales manager. While driving to his home in New Westminster after attending an evening lecture for salesmen at the company's head office, he ran into and severely injured the female plaintiff. In an action for damages:—

*Held*, that the accident was due to H.'s negligence, that his home in New Westminster was his business headquarters and the company's sales headquarters in that district, and under the terms of his employment the accident occurred in the course of his employment.

ACTION for damages resulting from the negligent driving of a motor-car. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 1st, 3rd, 4th and 9th of December, 1936.

*C. L. McAlpine,* and *W. H. Campbell,* for plaintiffs.
*Bull, K.C.*, for defendant Hinton.
*Nicholson,* for defendant Home Oil Distributors Ltd.

*Cur. adv. vult.*

17th December, 1936.

MANSON, J.: The defendant Hinton was a salesman of the defendant company. On the evening of May 30th, 1935, Hinton, while driving home from a company lecture for salesmen held at the company's office on Burrard Street, Vancouver, B.C., struck the plaintiff, Mrs. Dallas. She sustained serious injuries.

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At the close of the trial I found as a fact that the accident arose directly as a result of the negligence of Hinton. I allowed the special damages as claimed except Dr. Turnbull's bill in the sum of $100. I was not satisfied that the operation performed and services rendered by Dr. Turnbull were necessitated by the accident and for the same reason I disallow the plaintiff's claim for the hospital bill to the extent that the same may have been increased owing to the hospitalization of Mrs. Dallas for the purpose of the said operation. I reserved the question of general damages, the claim of the plaintiff Herbert Dallas, except as above, and the question of the company's liability.

Hinton worked for the defendant company as a salaried salesman of its products in the New Westminster district, and resided in the City of New Westminster, not as a result of any contractual requirement, but, doubtless, as a matter of business convenience. He was required under the arrangement with his employer to supply a car for the better performance of his duties as a salesman. The company supplied the car licence, gas, oil and repairs. The arrangement in the latter respect was a loose one in that the company left Hinton without check on the amount he should charge for gas, oil, etc. The company paid all Hinton's bills of this character even when upon his private business except when he went on a "long" trip of his own. In the case of such a trip he would not, as a matter of honesty, charge on his expense account for gas, oil, etc. I infer that this arrangement was made for the company's advantage in order that the salesman might have greater freedom of movement and come in contact with a greater number of customers or potential customers.

Hinton had no specified hours of work. His work was normally over at 5 o'clock in the afternoon but he could work longer if he chose and he did on occasions choose to do so. I infer that in the very nature of his contract he was on the look-out for business for his principal at all hours. It was his duty to produce as great a volume of business as he could. He was an outdoor salesman with a roving commission both as to hours and as to place in his district. His success would depend upon his knowledge of the qualities of his company's products, his

activity and to a large extent upon his ability to win a clientele by his personality. Clientele is won by frequency of contacts to some extent and sometimes by entertainment. This doubtless explains the arrangement as between the employer and its salesman both as to expense account in connection with the car and as to hours of work. The terms of contract as between an employer and a salesman are very different from the terms of contract between an employer and its mechanic.

Hinton had no office in his district but worked from his home and by arrangement had his customers telephone or mail orders to a gas-station in the City of New Westminster or where he picked them up. In his evidence Hinton referred to this gas-station as a headquarters but I do not understand him to have meant more than that he used the gas-station for the purposes mentioned above. A common-sense inference from the evidence is that his home was his headquarters. That was the point from which he commenced his labours and the point at which he ended his labours. If he was going to Cloverdale or Burquitlam in his district he would doubtless go from his home and not from the garage. He came to the head office of the company to salesmen's meetings on Tuesday morning at 8 o'clock—sometimes on Saturday mornings—and he telephoned the company's office a couple of times a day. He had a letter-box or pigeon-hole at the company's office where he received memos of instructions, etc., from the sales manager. He was from time to time instructed by the company to do certain specific things. He considered it to be part of his duty to attend salesmen's lectures or what are commonly known as "pep" meetings at the company's office. He received notice in writing (Exhibit 7) of one of these meetings for the evening of May 30th. The notice said he was "expected" to attend and Hinton says he treated the notice as an order and attended. Had it not been for the fact that Hinton's evidence on this point stands uncontradicted I would have had some considerable doubt as to whether he was obliged to attend this meeting—in other words, considerable doubt as to whether it could be fairly said that he was in the course of his employment when attending the meeting. The meeting was over shortly before 9 p.m. and he was on his way home in his car (a tem-

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porarily borrowed one—but I think nothing turns on that fact) when the accident occurred. There is no suggestion that he was taking other than the direct route home.

Let me here observe that the facts in a very large number of the cases cited by counsel on both sides are not at all analogous to the facts in the case at Bar and the utmost caution is to be exercised in applying the tests therein laid down, valuable as they are, to facts quite different from those in the cases where the tests were enunciated.

The question arises: Was Hinton at the time of the accident in the course of his employment? That the trip upon which the accident occurred arose out of his employment seems amply clear. He was not upon any frolic of his own. It appears clear also from the uncontradicted evidence of Hinton that his attendance at this particular meeting was in the course of duty—a duty, I think, distinguishable from that of keeping in fit physical condition by eating meals or from that of equipping himself properly for his work by purchasing stout boots. (*Vide Consolidated Mining & Smelting Co. of Canada* v. *Murdoch,* [1929] S.C.R. 141, at 146.) It is to be noted that not only did Hinton regard attendance as a duty but his attendance was for the obvious advantage of the employer and not, except in an indirect and more remote way, for his advantage, for he was a salaried employee and the "pepping" up of his salesmanship had no bearing on his salary unless it might be said that, if his salesmanship improved, a probability would arise of an increase in salary. A subsidiary question arises: Was there any difference in his "going to" and his "coming from" the meeting? Can his attendance at this special (special only as to the hour) meeting upon summons be distinguished from his "going from" his home in New Westminster to Cloverdale to interview a prospective customer for the company products? It could scarcely be contended that Hinton would not be in the course of his employment in making such a trip to Cloverdale and I am of opinion that both in going to Cloverdale and in returning to his home in the City of New Westminster he would be in the course of his employment. It could not be fairly said that his employment ended on the completion of his interview with the customer. A repair

man in railway yards, instructed first to repair car 76439 and then car 95478, could not be said to be out of the course of his employment while walking 300 yards from the first to the second car. It seems to me a fair analogy to say that the workyard of Hinton (as determined by the contract between the parties) was the New Westminster district and the highway from that specific district to the office of the company in the City of Vancouver. The New Westminster district and the connecting highway between the district and the company's office were the "premises" of the company as between the parties. In *Gilbert* v. *Owners of Steam Trawler Nizam,* [1910] 2 K.B. 555, at 558; 79 L.J.K.B. 1172, Farwell, L.J. observed that, in the particular facts of that case, it was "no part of his [the servant's] contract of employment that he should go home or eat or drink or sleep at home or anywhere else." That was a case of an engineer returning from dinner to his ship at the dry dock. The ship was the engineer's workyard. That is not this case and it is well to bear in mind the canon referred to by Lord Shaw of Dunfermline in *St. Helens Colliery Co., Lim.* v. *Hewitson* (1923), 93 L.J.K.B. 177; [1924] A.C. 59, at 81, namely, when cases depend upon fact, then a variation in fact deprives the alleged precedent of value.

Summing up the situation in this case it seems to me to be this: We have a salaried salesman with a roving commission to sell the products of his employer within a wide area tributary to the City of New Westminster using his own car, the operation of which was paid for by the employer whether upon private or company use. He was obliged under his contract not only to sell company products within his district but to attend upon business, including salesmen's lectures, at the head office of his employer in the City of Vancouver. He had no office within his district, using the term "office" in its ordinary meaning. The head office of the company was not his headquarters or his working office though he attended there as above set out. The salesman must have had some starting point in the natural course of things. It was clearly not the Vancouver office of the company and upon the evidence it was equally clearly not the garage at New Westminster where he picked up telephone orders or mes-

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sages. The irrefutable inference, upon the evidence, is that his home was his business headquarters and this regardless of its location—the place where he takes his car and the place where he starts upon his work and to which he returns. Concluding, as I do, that his home was his headquarters it follows that his home was the local sales headquarters in his district of his employer. It follows further that at the time of the accident Hinton was not only on his way home but was on his way to his district headquarters from which he would commence his labours again in the morning or for that matter under the terms of his employment perhaps again that very night. It was his duty to solicit orders from any customers on his road home. He might on his arrival home go out again that evening to Port Coquitlam or to South Westminster to solicit business. I am not unmindful of Farwell, L.J.'s observation in *Gilbert* v. *Owners of Steam Trawler Nizam, supra,* at p. 558:

> The necessity for food no more arises out of his employment than the necessity for sleep.

Hinton may have been returning for sleep but he was doing more, he was returning to the headquarters from whence he came to resume his salesmanship as occasion might necessitate that evening or on the morrow. The *Consolidated Mining & Smelting Co. of Canada* v. *Murdoch* case, *supra,* is not analogous in the matter of the terms of the employment of the service. Without discussing the detail of difference suffice it is to say that the terms of employment of prospectors is of necessity very different from the terms of employment of a district salesman of company products. Lamont, J. does quote, at pp. 144-5, tests laid down by Lord Atkinson and Lord Wrenbury in the *St. Helens Colliery* case, *supra*—again a very different case from the one at Bar—tests which in my view when applied determine that Hinton on his journey at the time of the accident was "in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service." The company would beyond all doubt be entitled to give Hinton "at the moment of the accident an order and the man would have owed the duty to obey it," *e.g.,* an order to go and solicit an order from a garage in Burnaby. It might be argued that the company could not in reason do so, but I have no manner of doubt that if the sales manager of the

company learned of a likely and substantial order in the New Westminster district on the evening of May 30th after Hinton had left the meeting he would get in touch with Hinton as quickly as possible and as best he could and Hinton would under the terms of his employment have been obliged to solicit the order. *Higbid* v. *R. C. Hammett, Limited* (1932), 49 T.L.R. 104, was cited. There the servant with the master's consent used the master's bicycle to go for lunch. It was held that the servant was upon his own and not upon his master's business during the luncheon hour when the accident occurred. The facts readily distinguish the case. For the same reason *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece,* 50 B.C. 494; [1936] 3 W.W.R. 241, has no applicability—this too was a luncheon case. The *Gilbert* v. *Owners of Steam Trawler Nizam* case, *supra,* and *Alderman* v. *Great Western Ry. Co.,* [1936] 2 K.B. 90; 105 L.J.K.B. 580, were also cited by counsel for the defendant company but in both these cases the facts were not analogous to the facts in the case at Bar. On the other hand the facts in *Jarvis* v. *Southard Motors Ltd.,* 45 B.C. 144; [1932] 2 W.W.R. 221, are analogous—very much so, and the reasons given by McPHILLIPS and MACDONALD, JJ.A. in that case are entirely pertinent in the consideration of the issues here.

In the circumstances of this case I am constrained to hold that the accident occurred at a time when Hinton was in the course of his employment and that therefore the company is jointly liable with its servant.

Damages: The plaintiff Mrs. Dallas was beyond doubt very seriously injured and at least partially incapacitated for life. She can no longer discharge her full duties either as wife or as mother for eight minor children. There is loss of memory and general mental deterioration and there was of course appreciable pain and suffering following the injuries. Her damages are assessed at $7,500.

The husband has lost the services and society of his wife completely over a considerable period, and partially for the rest of her life. His damages will be assessed, apart from the special damages above dealt with, at $2,500—one-half for *consortium* and one-half for *servitium.*

*Judgment for plaintiffs.*

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## *RE* THE ROYAL TRUST COMPANY AND FRANCIS BURGOYNE RATTENBURY *ET AL.* (No. 3).

Dec. 8, 23.

*Trust deed—Real property—Failure of trust—Bare trustee—Interest in property—Rule 765 (g).*

On the 12th of January, 1928, one Rattenbury, in consideration of $1, conveyed part of a property in Victoria to his wife. On the 12th of June, 1929, he conveyed another part to her for $3,000, and a small strip remaining he conveyed to her on the 13th of December, 1929. On the 10th of November, 1929, Mrs. Rattenbury agreed to lease the property to the St. George and The Dragon Hotel Company Ltd. with option to purchase for $85,000. On the 17th of December, 1929, the Rattenburys and The Royal Trust Company entered into an agreement which recited: "Whereas the husband granted and conveyed to the wife the lands and premises hereinafter described and at that time it was agreed between the husband and wife that the wife would on request grant and convey the said lands and premises in fee simple to the trustee to the uses and upon the trusts hereinafter stated." By the agreement Mrs. Rattenbury conveyed the property to The Royal Trust Company, subject to the agreement of the 10th of November, 1929, and assigned to it all her rights in the agreement of the 10th of November, 1929, upon certain trusts, namely, to divide the rentals equally between her and her husband and upon the death of one to pay to the survivor and after the death of the survivor to hold the capital and income in trust for their two children. On April 4th, 1930, The Royal Trust Company leased the lands to the St. George and The Dragon Hotel Company, with option to purchase for $85,000. On the 13th of May, 1931, the company released all its rights under the agreement and was released by The Royal Trust Company from all obligations.

*Held*, that the trust lapsed and The Royal Trust Company held the property as bare trustee. The trust having failed The Royal Trust Company held the property in trust for Mrs. Rattenbury's estate. The F. M. Rattenbury estate has no interest in the lands.

ORIGINATING SUMMONS to determine whether certain property in Victoria belongs to the estate of Francis Mawson Rattenbury, deceased. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 8th of December, 1936.

*Maclean, K.C.*, for The Royal Trust Company.
*Manzer*, for Alma V. Rattenbury.
*A. deB. McPhillips*, for Francis B. Rattenbury.
*Langley*, for Mary Burton.

*Cur. adv. vult.*

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RE THE ROYAL TRUST COMPANY AND RATTENBURY

ROBERTSON, J.: This is an originating summons under rule 765 (*g*) to determine whether certain property belongs to the estate of the late Francis Mawson Rattenbury. Although I stated that without a special inquiry there appeared to be no jurisdiction to decide this question on an application of this sort because, unless it was determined that the property belonged to Rattenbury's estate, there was no question "arising in the administration of the estate"—see *Re Collins* (1927), 61 O.L.R. 225; and that, if heard by consent, there would be no appeal from my decision—see *In re Carlyon* (1886), 56 L.J. Ch. 219 at 220, and *In re William Davies. Davies* v. *Davies* (1888), 38 Ch. D. 210—all parties requested me to decide the question on the merits. Apparently, there is jurisdiction upon an application of this sort, to direct a special inquiry and then if the person against whom the inquiry is directed submits to the jurisdiction and is willing to have the question tried under the inquiry as if an action had been brought against him, the matter may be proceeded with in that way. See *In re Royle* (1889), 43 Ch. D. 18.

Apparently the practice has been, on these applications, to deal with questions of this sort by consent. See *In re Royle* and *In re Carlyon, supra.*

The facts are that on the 12th of January, 1928, Rattenbury in consideration of $1 conveyed part of the property to his wife. On the 12th of June, 1929, he conveyed to her another part for the consideration of $3,000. These conveyances covered the property in question except a small strip of land which Rattenbury conveyed to her on the 13th of December, 1929. On the 10th of November, 1929, Mrs. Rattenbury entered into an agreement with the St. George and The Dragon Hotel Company Ltd., in which she agreed to give it a lease of the property and an option to purchase for $85,000 on certain conditions being fulfilled. On the 17th of December, 1929, the Rattenburys and The Royal Trust Company entered into an agreement in which it is recited:

Whereas the husband granted and conveyed to the wife the lands and premises hereinafter described and at that time it was agreed between the husband and wife that the wife would on request grant and convey the said

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lands and premises in fee simple to the trustee to the uses and upon the trusts hereinafter stated. . . .

By the agreement Mrs. Rattenbury conveyed the property to The Royal Trust Company, subject to the agreement of the 10th of November, 1929, and assigned to it all her rights in the agreement of the 10th of November, 1929, upon certain trusts therein mentioned, *viz.*, to carry out all her obligations under the agreement of the 10th of November, 1929; to pay and divide the rentals equally between her and her husband and upon the death of one of them to pay to the survivor, and in the event of the company purchasing, to invest the purchase-money, and to pay the income to the Rattenburys in equal shares, and upon the death of one of them, to pay it to the survivor, and after the death of the survivor of them, to hold the capital and income in trust for the two children.

On the 4th of April, 1930, The Royal Trust Company and the St. George and The Dragon Hotel Company Ltd., entered into an agreement whereby the lands in question were leased to the company and it was given an option of purchase at $85,000. The hotel company did not pay any rent or exercise its option.

On the 13th of May, 1931, the company released all its rights under the agreement, and, in turn, was released by The Royal Trust Company from all obligations. I have already held that the trusts lapsed and The Royal Trust Company held the property as bare trustee. It is submitted there was a resulting trust in favour of F. M. Rattenbury because of the recital in the deed. In *Poirier* v. *Brule* (1891), 20 S.C.R. 97, Strong, J., said, at p. 102:

> But it is clear beyond doubt that when property is conveyed to a trustee upon trusts which fail the trustee does not himself acquire the beneficial interests but holds the property thenceforth as a trustee for the settlor in whose favour the law raises a resulting trust.

*Prima facie* a voluntary gift by Rattenbury to his wife would be deemed to be an advancement, and, in the absence of any other evidence to rebut the presumption, she would enjoy an absolute right to the property. In this case, however, $3,000 was paid for a considerable portion of the property. It will be noticed there is no condition subsequent in the agreement of the 17th of December, 1929. Mrs. Rattenbury did all she was required

to do by the recital. Having done this, and the trust having failed, in my opinion, The Royal Trust Company held the property in trust for her estate. I am unable to distinguish the principle of this case from that of *Powell* v. *City of Vancouver* (1912), 17 B.C. 379. In that case the plaintiff conveyed certain lots to the defendant absolutely. The conveyance contained the following recital:

> And whereas the said Corporation have agreed to build the city hall and offices and maintain the same for City purposes on the lots hereinafter by this indenture granted on condition that the said Israel Wood Powell should grant the said lots to the Corporation free of expense.
>
> And whereas the said Israel Wood Powell has consented to grant the said lots to the said Corporation in consideration of the foregoing agreement.

The defendant "duly erected the contemplated buildings, and used and maintained the same as a city hall . . . for some eleven years, . . , when, acting upon reasons and motives that were in no way attacked as insufficient or improper," the defendant built a new city hall on other property. The plaintiff claimed a reconveyance of the land, submitting there was a resulting trust and failure of consideration. The learned trial judge held there was no condition subsequent to be deduced from the language of the conveyance and he referred with approval to Dillon on Municipal Corporations, 5th Ed., Vol. 3, paragraph 979, on the question of construction, as follows:

> A grantor, in conveying real property to a municipal corporation for a specific public purpose, may, by the use of apt terms, subject the title to liability to forfeiture for breach of a condition expressed in the deed; and upon the failure of the municipality to comply with the condition, the title will revert to the grantor, as in the case of a similar grant to an individual. The question whether a deed is to be construed as containing a condition subsequent in the case of grants to a city or other municipality, is to be determined upon the same principles as in the case of other grants. If the deed merely specifies the use or purpose for which the land is granted to the city, *e.g.*, "for a public street" or "for the erection thereon of a city hall" or "for school purposes," the purpose expressed does not qualify the estate taken, but simply regulates and defines the use for which the land granted shall be held. The specification of the purpose is not construed as a condition subsequent, and the property does not revert to the grantor or his heirs upon a discontinuance of the use.

At p. 382, he said:

> There was to a substantial degree a performance of the agreement, the expressed consideration for the grant.

An appeal from his judgment was dismissed. The Chief Justice

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agreed entirely with the trial judge. IRVING, J.A., said, at pp. 383-4:

> I am unable to see anything in this deed except a conveyance in fee to the Corporation in consideration of something to be done by the Corporation; that something, in my opinion, has been done. If it was intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument: *Smith* v. *Cooke*, [1891] A.C. 297 at p. 299.

MARTIN, J.A., agreed that the plaintiff ought not to obtain any relief from the Court in the form of action in that case and he further held it was difficult to distinguish the case at Bar, in principle, from the decision of Mr. Justice Brewer in the United States Circuit Court in *Berkley* v. *Union Pacific Ry. Co.* (1888), 33 Fed. 794. In that case lands had been conveyed by a railroad company upon consideration that they were to locate, erect and maintain upon the land a "depot," and in pursuance of the conveyance a depot was erected and maintained for eleven years and then removed. It was argued that there had been a failure of consideration. The learned judge held that although there might be a partial failure of consideration there was no reversion. In the case at Bar the consideration for the grant to Mrs. Rattenbury was, in the one case $1, and, in the other, $3,000. The agreement to transfer on request was a collateral agreement.

I am of the opinion that as Mrs. Rattenbury did all she was called upon to do under the agreement set out in the recital and that, the trusts thereby provided for have lapsed, the F. M. Rattenbury estate has no interest in the lands. As was agreed there will be no costs.

*Order accordingly.*

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## BARNES v. BRADSHAW.

*Negligence — Motor-vehicles — Intersection — Collision between automobile and motor-cycle—Motor-cycle attempting to pass in front of car—Liability.*

At about 2.30 p.m. on the 2nd of June, 1935, the defendant was driving his car south on Nicol Street in the City of Nanaimo and approaching Grace Street on which he intended to turn east. One Summers, driving a motor-cycle with the plaintiff Lily Barnes sitting behind him, was just behind the defendant and going in the same direction. He tried to pass the defendant's car on its left-hand side as they reached the

intersection of Grace Street, but as the defendant turned to go east on Grace Street his car struck the rear wheel of the motor-cycle, knocked it over and shoved it along with the two occupants for about fifteen feet and up against the curb of the sidewalk at the south-east corner of the intersection. The defendant was going at about fifteen miles an hour and held out his hand as he made the turn. The plaintiff's action for damages was dismissed.

*Held*, on appeal, affirming the decision of MURPHY, J., that the appellant's chief complaint based on defendant's failure to stop immediately after the impact which would have materially lessened the injuries sustained, was properly rejected by the trial judge, as stopping his car within a space of fifteen feet was a reasonable distance within which to do so, having regard to surrounding circumstances.

APPEAL by plaintiff from the decision of MURPHY, J. of the 3rd of June, 1936, dismissing the plaintiff's action for damages resulting from a collision between the defendant's motor-car and a motor-cycle driven by one Summers, and upon which the plaintiff was riding as a passenger. The collision took place on the 2nd of June, 1935, near the corner of Nicol and Grace Streets in the City of Nanaimo. Both vehicles were going south on Nicol Street and the motor-cycle was about to pass the car on its left as they reached Grace Street and continue south on Nicol Street, when the defendant, intending to go east on Grace Street, turned to his left and struck the rear wheel of the motor-cycle, knocking the motor-cycle in front of the car and jamming the cycle against the sidewalk at the south-east corner of the two streets. The plaintiff was severely injured and incapacitated. It was found on the trial that the accident was due to Summers attempting to pass the motor-car before it turned into Grace Street, and that there was no negligence on the part of the defendant.

The appeal was argued at Vancouver on the 3rd to the 5th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*C. L. Harrison*, for appellant: After the defendant's car hit the motor-cycle he continued on, jamming the motor-cycle and the plaintiffs against the south-east curb of the sidewalk at the corner of the two streets. If he had stopped after hitting the motor-cycle the damage would have been avoided to a large extent. He could have stopped and there was ultimate negligence

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in his not doing so. The plaintiff's witnesses were discredited. When this is done reasons must be given for so doing: see *Rex* v. *Gun Ying,* [1930] 3 D.L.R. 925 at p. 926. On the duty of the Court of Appeal in respect of conflicting evidence see *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 24 at pp. 28-9; *Dominion Trust Co.* v. *New York Insurance Co.* (1918), 88 L.J.P.C. 30; *Jones* v. *Hough* (1879), 5 Ex. D. 115 at p. 122; *Voigt* v. *Groves* (1906), 12 B.C. 170; *Irvine* v. *Mussallem* (1935), 50 B.C. 72 at p. 76; *Pipe* v. *Holiday* (1930), 42 B.C. 230.

*C. L. McAlpine,* for respondent: On the question of upsetting the trial judge on questions of fact see *Nemetz* v. *Telford* (1930), 43 B.C. 281; *Chisholm* v. *Aird* (1930), *ib.* 354; *Zellinsky* v. *Rant* (1926), 37 B.C. 119 at p. 121; *Harding* v. *Edwards & Tatisich,* [1929] 4 D.L.R. 598; [1931] S.C.R. 167.

*Harrison,* replied.

*Cur. adv. vult.*

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MACDONALD, C.J.B.C.: The plaintiff is an infant suing by her next friend her father. The defendant is a minor and resides at Nanaimo. The infant plaintiff at the time of the accident was riding on a motor-cycle driven by one Jack Summers which collided with the defendant's automobile on Nicol Street in Nanaimo at an intersection. The defendant's car and its brakes were in good condition and was driven at a very moderate speed, namely, at about fifteen miles per hour. Summers riding up to the automobile from behind attempted to turn in front of it but did not allow himself sufficient leeway and caught his wheel in the end of the front bumper of the automobile and was thrown down and dragged with the girl on it for some distance before the automobile was brought to a stop. The girl was seriously injured. Counsel for the plaintiff admitted that his only cause of action was based on defendant's alleged failure to stop his car as quickly as he might had he been skilful and careful.

The evidence is conflicting and the trial judge states in his judgment that

with regard to the witnesses Paulson, Patterson and Summers, they made a distinctly unfavourable impression on me as to their veracity in giving evidence, and where there is any conflict between their evidence or the

evidence of any one of them and evidence led by the defence I accept the latter evidence as true.

This may be too severe, but I should adopt it.

The principal point of dispute in the case is as to where the impact took place and as to this there is a wide difference between the evidence of the respective witnesses for the parties. Those on behalf of the plaintiff say it was about 20 feet from the point of impact to where the automobile was brought to a stop, at a curb ahead of them. Those on behalf of the defendant put the point of impact at least double that distance from the point of stoppage, this is the curb above. It was submitted that making due allowance for the defendant's surprise the defendant's evidence that he stopped as soon as he could ought to prevail and the decision of the learned trial judge should be sustained.

I would dismiss the appeal.

MARTIN, J.A.: This case is one of fact exclusively and despite the able presentation of the appeal by Mr. *Harrison,* I find myself, after a careful review of it, unable to say that the learned judge has reached a conclusion which is clearly wrong, and therefore we would not be justified in interfering with it.

MCPHILLIPS, J.A.: After full consideration of all the facts of this case I am not able to disagree with the judgment of MURPHY, J. It is evident that the motor-cycle driver took a chance—a most improper one—in attempting to pass in front of the motor-car—a reckless thing to do and unfortunately this action resulted in most serious injuries to the infant plaintiff.

I cannot find that the defendant was guilty of any act of negligence. When the defendant was faced with this reckless act of the motor-cycle driver, who had the infant plaintiff seated behind him, he did all that was possible under the circumstances to stop his motor-car and would appear to have brought it to a stop at the earliest possible moment. It is a graphic case of recklessness and particularly noticeable upon the part of motor-cyclists. Owing to the frequency of such happenings it might well be considered by the proper authorities that motor-cyclists should be prohibited from carrying passengers on their motor-cycles. The present case is a sad example of a promising young

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woman being rendered a cripple for life owing to the recklessness of the motor-cyclist.

MACDONALD, J.A.: Mr. *Harrison* submitted that, notwithstanding appellant's negligent act in attempting to pass at the intersection in the manner disclosed by the evidence, the respondent was ultimately negligent in not stopping his car as soon as reasonably possible after the impact, and because of his failure to do so the injuries were sustained. If he had not taken at least fifteen feet to stop his car the appellant, it was submitted, would not have been injured.

The trial judge properly rejected this submission: at all events we cannot say that in doing so he was clearly wrong. Respondent stopped his car within the space of fifteen feet, a reasonable distance having regard to surrounding circumstances. The trial judge said:

> What he [the respondent] could do and what he should do was as soon as he realized what was happening was to jam on his brakes and stop. He says he did that; and I believe him.

The reasons for judgment disclose that the distance traversed before respondent, acting reasonably, could stop his car would depend upon several factors. It would depend, in part, on his reaction upon seeing this careless motor-cycle driver suddenly appearing in front of him travelling on the wrong side of the street. A fraction of a second too would pass before the brakes could be applied (pressed down) and in that period, travelling at fifteen miles an hour, six or seven feet at least would be covered. We should not therefore reverse the finding of the trial judge, *viz.*, that it was not, under the circumstances, a negligent act to take fifteen feet to stop the car. I may add that no evidence was offered to show in what distance respondent's car could be stopped.

Further the respondent was placed in the agony of collision when this motor-cycle suddenly appeared before him. One motor-cyclist, by good fortune, safely passed in front of him. He would hardly expect that another one, at even greater risk (as respondent was moving on and closing the gap) would repeat the attempt. When therefore the driver of the second motor-cycle by grossly negligent conduct placed the respondent in a

position of peril I would not say that the trial judge was wrong in acquitting him of negligence.

I would dismiss the appeal.

MCQUARRIE, J.A.: I consider the learned trial judge took a correct view of the evidence and I would not interfere with his findings. Counsel for the appellant admitted that up to the point of impact the driver of the motor-cycle on which the appellant was riding was negligent and admitted that the speed of the said motor-cycle was excessive, that the speed of the respondent's motor was reasonable, that the respondent gave the proper signal before attempting to make the turn at the intersection; all as found by the learned trial judge. The contention of counsel for the appellant that the respondent after the collision stopped his automobile and then started up again thereby pushing the appellant against the curb causing her injuries, was properly not believed by the learned trial judge and I think was purely imaginary. I agree with the learned trial judge that the respondent did "all he could do" in the situation caused by the reckless driving of Summers who was operating the said motor-cycle and was apparently endeavouring to catch up with the other motor-cycle the riders of which had been on an expedition of some sort with the appellant and her escort which motor-cycle had cut in ahead of the respondent's motor-car at a high rate of speed and succeeded in getting by although driven contrary to the rules of the road and in breach of traffic regulations.

I would therefore dismiss the appeal.

*Appeal dismissed.*

Solicitor for appellant: *C. L. Harrison.*
Solicitors for respondent: *McAlpine & McAlpine.*

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## BRODT v. WEARMOUTH AND PYLE.

*Mining law—Lease of mineral claims—Non-compliance with terms—Action to set aside—Reference as to damages—Scope of—Report of registrar set aside—Appeal.*

In an action in which the plaintiff succeeded, the lease of a mining property given by the plaintiff to the defendant was declared forfeited, the defendant was ordered to give up possession of the premises and was restrained from removing any equipment, and that any equipment removed be replaced upon the property. The judgment then ordered "that an inquiry be made by the registrar of this Court at Ashcroft, British Columbia, to ascertain what, if any, damages were caused to the plaintiff by the removal of equipment and improvements from the aforementioned premises by the defendants, their agents or servants, and that judgment be entered against the defendants for the damages certified to by the said registrar." A reference was had and the registrar decided that the plaintiffs, if they had had the equipment, could have taken out $44,680 worth of gold, and he allowed the plaintiff damages for 2½ per cent. of that sum, *i.e.*, $280. Upon both parties moving to vary the report it was held that under the judgment it was not intended that damages should be awarded beyond the cost of replacing the equipment back upon the mine, and the damages awarded by the registrar were struck out.

*Held*, on appeal, reversing the decision of CALDER, Co.J. (MCQUARRIE, J.A. dissenting), that the inquiry made by the registrar was within the scope of the judgment and the learned judge was without power to interfere with it on the ground that the registrar had exceeded his authority. The certificate of the registrar should be restored.

APPEAL by plaintiff from the order of CALDER, Co.J. of the 12th of May, 1936. The plaintiff recovered judgment in the action on the 17th of July, 1935, when it was ordered that an inquiry be made by the registrar at Ashcroft to ascertain what, if any, damages were caused to the plaintiff by the removal of equipment and improvements from the premises known as Placer Mining Lease Number 263 of the Ashcroft Mining Division, by the defendants. The registrar made his report on the 14th of February, 1936, and allowed the plaintiff damages at $280, being interest at the rate of 2½ per cent. per annum on the estimated profits had he had the machinery between the 15th of June 1935, and the 29th of December, 1935, when the machinery was off the leased premises. On motion by both

parties to vary the report, it was held by the trial judge that the plaintiff was not entitled to any damages.

The appeal was argued at Vancouver on the 5th and 6th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*C. L. McAlpine,* for appellants: The registrar's report on anticipated profits, particularly where they are of a speculative nature, should not be disturbed: see *Clausen* v. *Canada Timber and Lands Ltd.* (1925), 35 B.C. 461; *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150; *Beatty* v. *Bauer* (1913), 18 B.C. 161.

*Lucas,* for respondent: The reference was not to determine the loss of profits, it applied merely to the removal and replacement of the machinery. The evidence shows that the mine never paid operating expenses since 1925, and the learned judge was right in finding that the possibility of working the mine at a profit was a mere dream. There is no right to recover interest on speculative profits. That the registrar acted on a wrong principle see *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499.

[*McAlpine,* in reply, referred to *William Hamilton Manufacturing Co.* v. *Victoria Lumber Co.* (1895), 4 B.C. 101 at pp. 116 and 119, and on appeal (1896), 26 S.C.R. 96; *Hamilton Manufacturing Co.* v. *Knight Bros.* (1897), 5 B.C. 391; Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 82 and 98; *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670; *In re Polemis and Furness, Withy & Co.,* [1921] 3 K.B. 560 at p. 572.]

*Cur. adv. vult.*

12th January, 1937.

MACDONALD, C.J.B.C.: This appeal was heard by the Court in Vancouver. The case is a peculiar one and there was a misunderstanding as to what the parties were to contend about. It was tried by the County Court Judge at Ashcroft and at the close of the trial he gave his judgment as follows:

He declared that a certain mining lease No. 263 of the Ashcroft Mining Division in this Province given by the plaintiff

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John Brodt as lessor to the defendant be forfeited and cancelled and delivered up to the plantiff; also that the registration of the lease in the Ashcroft Mining Division should be cancelled; also that the defendants deliver up possession of the premises covered by the lease to the plantiff; also that the defendants be and they are hereby restrained from removing any equipment employed on the said lease which belonged to the plaintiff and that the equipment removed by the defendants from the said lands covered by the lease be delivered up to the plaintiff and replaced upon the said lands forthwith and further (and this is the important term of the judgment):

AND THIS COURT DOTH ORDER AND ADJUDGE that an inquiry be made by the registrar of this Court at Ashcroft, British Columbia, to ascertain what, if any, damages were caused to the plaintiff by the removal of equipment and improvements from the aforesaid-mentioned premises by the defendants, their agents or servants, and that judgment be entered against the defendants for the damages certified to by the said registrar and for the costs of and incidental to such inquiry to be paid forthwith after taxation.

The judgment further provided that the plaintiff recover from the defendants $44.05. I do not know what this amount relates to. And it also was further adjudged that all other matters arising out of this action (which are not specified) be reserved until after the reference herein has been taken and had, and further that the plaintiff do recover from the defendant his costs of the action payable forthwith after taxation.

The parties settled between themselves by replacing the equipment which had been carried off by the defendants. That appears by a letter written by the plaintiff's solicitor to the defendants' solicitor dated the 28th of December, 1935, in which the plaintiff's solicitor admitted as follows:

I beg to acknowledge your letter of 27th enclosing a cheque for $85.75 and an order on the C.N.R. agent at Spences Bridge and one on Louie Antoine. This cheque is accepted as a compliance with the order to return the equipment on to the property, and is without prejudice to the plaintiff's claim for damages for the removal thereof.

I infer that that removal means detention.

A reference was had to the registrar of the County Court which the parties apparently understood to be a reference to ascertain damages suffered by the plaintiff during the period between the taking away of the equipment and its return and the registrar after hearing both parties and their witnesses

decided that the plaintiffs if they had had the equipment could have taken out $44,680 worth of gold, but as the gold was not taken out, but remained there, he allowed their damages at 2½ per cent. of that sum, amounting to $280. The plaintiff moved before the County Court for an order varying the report of the registrar and complaining he should have allowed 5 per cent. interest, the legal rate fixed by the Revised Statutes of Canada, 1927. The contention is not well founded. It is a case of damages not interest. The plaintiff moved to vary the report of the registrar and defendants also moved against the report. These two motions came before the learned trial judge when he said:

In my reasons for judgment the language I used to cover this part of my judgment were for "damages for removal of equipment to stand pending private arrangements between parties." The scope of these words was not intended by me at that time to award damages beyond the cost of replacing the equipment back upon the mine. This I am made to understand has been settled and paid long ago. [See letter, *supra*.]

He then said:

The expanded sense, therefore, of the reference was a surprise to me, for it amounted as I thought to a retrial, in substance of an issue settled by my original judgment, namely, on the claim for arrears of rent, which I disallowed, because upon the evidence before me at the trial, I concluded that the mine itself was a hopeless proposition.

He then refers to the payment of the sums required for the return and reinstatement of the equipment. Then he proceeds:

Now unless my functions as judge reviewing this award are purely perfunctory, the evidence adduced before the registrar must be subjected to strict analysis, and that in the light of the evidence given at the trial.

He then proceeds to refer to the evidence given at the trial which convinced him that the claims were a "hopeless proposition." In other words he used the evidence given on the trial before him in his review of the registrar's report and finally decided that there could be no damages, and therefore struck them out of the registrar's report. Notwithstanding he had ordered a reference to ascertain the damages aforesaid he then proceeds to review the report in view of both the evidence before the registrar and the evidence at the trial. He finally wound up in this way:

Would such a claim as the plaintiff now makes be considered as the "natural and probable result of the acts complained of" I, at least, think not—and so find—[after quoting Halsbury's Laws of England, Vol. 10, secs. 628 and 548] Registrar's report varied accordingly.

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The reference therefore would appear to have been irregularly proceeded with according to the learned judge's interpretation of his judgment. If the parties had any doubt about the meaning of his judgment they should have applied to him to clarify it, but instead of that they proceeded and carried through the reference. It was contended before the trial judge and the referee that the damages awarded could not be recovered at law and I have further to consider any law with regard thereto.

The question of law is whether or not the damages were too remote. In *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, at p. 503, the question was involved as to whether a Court could grant damages for delayed delivery of the part of a mill which was essential to the working of the mill and the damages claimed were for loss of profits which could have been made had the parts not been delayed. BOVILL, C.J., at p. 503, said:

"I think the construction which Mr. Coleridge seeks to put upon the case of *Hadley* v. *Baxendale* [(1854)] 9 Ex. 341; 23 L.J. Ex. 179 is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with the most mischievous consequences; because this would follow, that, whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer." To limit the plaintiff's damages to the cost of replacing the missing articles would be gross injustice.

He held that as the fact that the mill could not be operated without these delayed parts of which the buyer was not made aware of their use at the time of the contract, the damages caused by the party of the undelivery of part of the mill were disallowed by the Court. The reason ascribed by BOVILL, C.J., was that the shipper of the machinery had not been made aware of the consequences of the delay of the part of the machinery. This was considered by the Court of Appeal in *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560. BANKES, L.J., said at p. 569 (quoting Channell, B. in *Smith* v. *London and South Western Railway Co.* (1870), L.R. 6 C.P. 14 at p. 21:

Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . ; but

when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

And at p. 571, he said:

What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances.

And at p. 572:

Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipation of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

WARRINGTON, L.J., in a considered judgment comes to the same conclusion. SCRUTTON, L.J., also comes to the same conclusion. He says (pp. 575-6):

That as the arbitrators have found that as it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim. In my opinion both these grounds of defence fail.

And at pp. 577-8, he further says:

The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

The first case cited deals with whether the defendant could have reasonably anticipated the result of the negligent act. This latter case decides that the true principle is what negligence has been proved. It does not matter whether it was anticipated or not. That, I think, is the case which I can apply here. It is therefore clear to me that the damages caused to the plaintiff by the removal and retention for a time of the equipment of these mines is at law recoverable. I think also that when reading a clause of the judgment directing the reference that the parties were under no mistake as to its meaning. The judgment was submitted to the learned judge and he initialled it before issuance. I think it is too late for him to say when the report came before him that his judgment did not direct the registrar to decide the amount of the damage by reason of the absence of the equipment from the claims. Moreover, in his judgment on the motion to vary the report he reviewed the evidence taken

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before the registrar and applied to it the evidence taken before himself on the trial and says this:

> Now, the question for me to answer is whether it can be justly assumed that the plaintiff could have made the profits he claims or any profit whatsoever, and secondly whether in case profits could be assumed to have been lost, should such profits or interest thereon be awarded as damages against the defendants.

Further, he deals with the question decided by the Court of Appeal in *In re Polemis and Furness, Withy & Co., supra,* which he need not have done if his conception of the case was accurate. I therefore think he is in error in his dismissal of the report from the record of this action. I think in these circumstances the report should have been affirmed by the judge below.

MARTIN, J.A.: This is an appeal from an order of CALDER, Co.J., varying a certificate of the registrar (given under Order XIV., r. 27, form 183) which awarded $280 damages to the plaintiff, and the learned judge in so doing gives as his reason that the judgment he pronounced in the action was "not intended to award damages beyond the cost of replacing the equipment back upon the mine." But in his judgment as entered there is this adjudication: [Already set out in the judgment of MACDONALD, C.J.B.C.]

No appeal was taken from this judgment, nor was any application made to correct it in an appropriate way, and so it stands in full operation and effect, and therefore it was not open to the learned judge to curtail its scope or operation by placing a construction upon it other than that which it clearly bore.

The "inquiry" made by the registrar was unquestionably within the scope of the judgment, and consequently the learned judge was without power to interfere with it on the ground that the registrar had exceeded his authority by "expanding the sense of the reference" to include damages beyond mere replacement of equipment.

With respect to the amount of the damages, the plaintiff seeks to increase them because the registrar has made an error in calculating the interest, which the plaintiff asks us to rectify in his favour. We, however, are entitled, indeed it is

our duty, to look to the amount awarded irrespective of errors in applying principles of assessment, and if it appears that it can be justified under all the circumstances, even if inconsistently or mistakenly arrived at, we may allow it to stand, which in my opinion is the course that ought to be adopted in this case, and therefore the appeal should be allowed to this extent and the certificate of the registrar restored.

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

MACDONALD, J.A.: Respondent submitted that under the formal order of reference it was never intended by the trial judge that the registrar should inquire into losses, if any, sustained by the appellant (plaintiff in the action) by reason of the removal of the equipment. The reference, it was submitted, was of a more restricted character.

In his reasons for judgment setting aside the registrar's award His Honour said:

> In my reasons for judgment the language I used to cover this part of my judgment were for "damages for removal of equipment to stand pending private arrangements between parties." The scope of these words was not intended by me at that time to award damages beyond the cost of replacing the equipment back upon the mine.

Unfortunately the formal judgment directing the reference, approved by the trial judge, in specific terms provided for an inquiry into damages suffered by the plaintiff naturally flowing from the removal of the equipment. On that basis the registrar proceeded with the inquiry as directed and awarded to the plaintiff damages in the sum of $280. That award made pursuant to the terms of a judgment approved by the Court cannot, with respect, be set aside for the reasons given by the trial judge, nor on any other grounds disclosed in the proceedings.

We were asked to increase the damages to $558.50 on the ground of miscalculation, on the registrar's part. I would not do so. There has been, I fear, a misadventure and in the effort to at least approximate a just conclusion I would simply allow the appeal without interfering with the amount found by the registrar.

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McQUARRIE, J.A.: The remarks of the learned trial judge on the review by him of the award by the registrar clearly indicate that the judgment set out at the beginning of the appeal book, although initialled by him, did not carry out his intention which was that no damages should be awarded "beyond the cost of replacing the equipment back upon the mine." It is most unfortunate that another muddle appears to have occurred in connection with this mining venture but in view of the statement mentioned the certificate of the registrar should be varied as indicated by the learned trial judge.

The appeal should be dismissed.

In any event there appears to be an error in the said certificate in the calculation of damages fixed by the registrar at 2½ per cent. on $44,670, for the period mentioned in the certificate, incorrectly calculated by the said registrar at $280.

*Appeal allowed, McQuarrie, J.A. dissenting.*

Solicitor for appellant: *C. H. Pitts.*
Solicitors for respondents: *Lucas & Ellis.*

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## ROMANO v. MAGGIORA. (No. 4).

*Foreign judgment—Action on—Service of process in foreign action—Burden of proof—Validity.*

The plaintiff brought action on a judgment obtained by her against the defendant in the Superior Court in the State of Washington, U.S.A. on the 20th of October, 1934, on a promissory note for $3,000, and she sues alternatively on the note. The defendant swears he was not served with process in the Washington action. In his evidence he swears that on September 28th, 1934, one Hanna handed him an envelope saying that the plaintiff had given it to him to give to the defendant. He put the letter down and continued his work, and later in the day he could not get the letter because the plant where he was working was closed. He noticed the plaintiff's attorney's name was on the envelope but never got the letter afterwards. The plaintiff swore she gave the letter to Hanna to serve on the plaintiff on the above-mentioned date, and in this she is corroborated by a lady who saw the plaintiff hand it to Hanna at the company's plant and saw

him go through the door which the defendant had recently gone through and return shortly after without the papers.

*Held*, that the *onus* is on the defendant and he has not discharged the *onus* that is upon him of displacing the *prima facie* case that he was served. The service on the defendant did not offend against natural justice and the plaintiff is entitled to judgment on the Washington judgment.

*Held*, further, that if the plaintiff is not entitled to succeed on the judgment as held, she is entitled on the merits.

ACTION on a judgment obtained in the State of Washington on a promissory note. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria on the 16th and 17th of December, 1936.

*H. W. R. Moore*, for plaintiff.
*Maitland, K.C.*, for defendant.

*Cur. adv. vult.*

28th January, 1937.

ROBERTSON, J.: The plaintiff sues on a judgment, obtained by her, against the defendant in the Superior Court in the State of Washington, one of the United States of America, on the 20th of October, 1934, on a promissory note for $3,000 dated 12th June, 1934, and, alternatively, on the note. The defence to the judgment, is that the defendant was not at any time a subject of, or owed any allegiance, to the United States of America; was not resident or present or domiciled in the United States and was not, therefore, subject to the jurisdiction of the Superior Court; that he was not served with any papers and had no notice that an action had been commenced.

I find that the defendant was resident in the City of Seattle, State of Washington, practically continuously from the end of 1933 until 12 p.m. on the 28th of September, 1934. During that time he was in the employ of the National Wine Company Inc., a Washington corporation, which carried on its business in Seattle. He was also a large shareholder in, and secretary and an employee, of that company.

In the judgment it was stated:

The Court finds that the defendant John Maggiora was duly and personally served with the summons and a copy of the complaint.

This statement is, at least, *prima facie* evidence that the proper formalities were observed—see 2 Sm. L.C., 13th Ed., 711. In

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*Molony, Esquire* v. *Gibbons* (1810), 2 Camp. 502, the facts were that the plaintiff sued on a Jamaica judgment (by default) in which, after the declaration, there was an "entry" that "the defendant by J. Ferrier his attorney" had defended the action. It was objected that the plaintiff ought to prove that the attorney was properly constituted. Lord Ellenborough said, at p. 503:

> I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege; and I must presume in the present case, that the Court saw Ferrier properly constituted attorney for the defendant.

*Cowan* v. *Braidwood* (1840), 1 Man. & G. 882, was an action of assumpsit, in England, on a judgment obtained in Scotland. Tindal, C.J., said at p. 892:

> The declaration sets out a decree in the Court of Session in Scotland; and we must suppose it to be free from objection, the form being that which has obtained from the earliest times.

*Russell* v. *Smyth* (1842), 9 M. & W. 810, was also an action of assumpsit, in England, on a decree obtained in the Court of Session in Scotland. Lord Abinger said at p. 817:

> I think we must assume the process and decree to have been perfectly regular.

See also *Reynolds* v. *Fenton* (1846), 16 L.J.C.P. 15, at p. 16, where Tindal, C.J., said:

> *Prima facie* it must be taken that the proceedings of the Belgian Court were regular; and, therefore, it was the duty of the defendant to negative every state of facts on which we could support it.

As Maule, J., said, in *Cowan* v. *Braidwood, supra,* at p. 892,—

> it is not necessary for the plaintiff in his declaration to show the correctness of the proceedings; it is for you to set forth their incorrectness in your plea.

See, also, Tindal, C.J., in *Reynolds* v. *Fenton, supra,* and *Crawley* v. *Isaacs* (1867), 16 L.T. 529, at 531, where Channell, B., said:

> It is too late now to contend that an action on an Irish judgment may not be impeached like an ordinary foreign judgment, but I dissent entirely from the doctrine that a judgment of a foreign Court is not to carry with it the fullest effect, unless the deft. shows most clearly and distinctly something that conclusively and altogether impeaches its authority, as being contrary to "natural justice," a phrase perhaps as appropriate as could be found in reference to this subject.

In other words the *onus* is on the defendant.

The defendant's evidence is that on the afternoon of the 28th of September, 1934, one Hanna handed him an envelope saying the plaintiff had given it to him to give to the defendant;

that as he did not have his spectacles he put the letter down and continued his work; later in the day he was unable to get the letter because the plant was locked. He says he did not at any time get the letter. He noticed the plaintiff's attorney's name on the envelope. On the other hand the plaintiff swears that on the 28th of September, 1934, she handed the "suit paper" to Hanna, in the presence of Miss Haynes, for service on the defendant. Miss Haynes says that on the 28th of September, 1934, she saw the plaintiff hand some papers to Hanna at the company's plant, and, saw him, with those papers in his hand, go through the door, which the defendant had recently gone through, and return shortly after, without the papers. Neither the plaintiff, nor Miss Haynes was cross-examined as to whether or not the papers were in an envelope. The proceedings had been commenced that day. The plaintiff knew that the defendant was leaving, so it it altogether likely that an attempt would be made to serve him that day.

As Martin had commenced the action that day, it was not at all likely that he would be writing to the defendant. Neither would it be necessary for the plaintiff to write the defendant as the matter was in her lawyer's hands. It is most probable that the papers that the plaintiff handed to Hanna were suit papers.

In view of all the circumstances I do not think the defendant has discharged the *onus* on him of displacing the *prima facie* case that he was served.

There is no evidence to show the practice in the Washington Courts as to service. This Court is not entitled to presume, in the absence of evidence, that their practice is the same as ours. The rule is otherwise, of course, as to the general law. So far as I know, handing the plaint and complaint to the defendant even in an envelope, might be perfectly good service in Washington State. In the circumstances of this case one would have expected the plaintiff to open the envelope and thus be apprised of the action. Even where a defendant, when served, is not resident in the jurisdiction where a judgment is obtained, service, in accordance with the law of the foreign country, may be good, under certain circumstances. For instance, in *Feyerick*

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v. *Hubbard* (1902), 86 L.T. 829, the plaintiff had obtained judgment against the defendant in Belgium and then sued on this judgment, in England. The Belgian proceedings were served on him in the way required by Belgian law, *viz.*, by letter posted in Belgium addressed to the defendant in England. The defendant denied its receipt. In that case the plaintiff and defendant had entered into a contract and by one of its terms it was agreed to submit all disputes under the contract to the Belgian jurisdiction. The defendant was not resident in, or a subject of, Belgium. Walton, J., did not find it necessary to decide whether or not the defendant had been served. He said at p. 832:

> Inasmuch as the proceedings in the Belgian Court were perfectly regular, and the service required by the Belgian law was sufficient, I do not think it is open to him even to raise the question that by some accident or mistake the summons did not really reach him in England. It cannot be said, and certainly I cannot and I do not find, that there is anything in the nature of the Belgian proceedings or in their law of procedure, with regard to service, which is contrary to natural justice.

But where a defendant is resident in the foreign jurisdiction, when served, different considerations apply.

In *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155, an action on a foreign judgment, Blackburn, J., delivering the judgment of the Court, said at p. 161:

> Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

In Dicey's Conflict of Laws, 5th Ed., 457, it is said:

> The objection, moreover, that a defendant did not receive due notice of action can be taken (it is submitted) only where the defendant at the commencement of the action is not resident in the country where it is brought. If he is, any notice, it is conceived, is sufficient which is in accordance with the law of the foreign country.

See also *Emanuel* v. *Symon*, [1908] 1 K.B. 302, at p. 309, where Buckley, L.J., said that a foreign judgment could be enforced where the defendant was resident in the foreign country when the action began. That is, he was subject to its jurisdiction. The Earl of Selborne in delivering the judgment of the

Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, said at p. 683:

> All jurisdiction is properly territorial, and "*extra territorium jus dicenti, impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; . . .

In my opinion the service on the defendant did not offend against natural justice. The plaintiff is entitled to judgment on the Washington judgment.

I think it advisable that I should also deal with the alternative cause of action. Originally a note was given by the defendant to the plaintiff for $3,000. The note was unpaid at maturity, and Martin then demanded payment and finally it was arranged that the defendant should pay up the interest on the note and give a new note. The defendant did pay the interest and gave the renewal note, sued on. It was urged first of all that the defendant did not receive the money. I find that he did. He went with the plaintiff and DePaolis to plaintiff's bank and the money was there obtained. He says it was not handed to him and he does not know what was done with it. The plaintiff says, and she is corroborated by DePaolis, that the money was handed to the defendant and was then returned by him to DePaolis who deposited it in the bank to the credit of the National Wine Company Inc. The defendant obtained shares for this money. The defendant acted as secretary for the company for a number of months. He was instrumental in getting other people to come into the company and was quite active in its affairs. If he did not get the money I cannot conceive why he went to the bank or why he gave the note or renewed it.

Next it is urged that the note was given on the understanding that it was to be paid out of the proceeds of the sale of wine by the company. I find against this. Further, this defence was not pleaded. Even if pleaded, evidence would not have been admissible to prove this agreement as it would have contradicted the written document. See Falconbridge's Banking and Bills of Exchange, 5th Ed., 819 and 820.

In my opinion there was no evidence of fraud, conspiracy or undue influence or that the transaction was illegal in the State of Washington.

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At the time the promissory note was given the defendant deposited with the plaintiff as collateral security 2,500 shares of the National Wine Company Inc. The exemplification shows that these shares were duly sold under execution by the sheriff to the plaintiff's husband for $50. The defendant says, in any event, the plaintiff cannot recover against him as she is not in a position to return to him these shares. Had I found that the plaintiff could not recover on the Washington judgment, the only result would be that the judgment could not be enforced in this Court. The judgment would still stand in the State of Washington until reversed and anything legally done under it there would be recognized in these Courts, as the defendant was subject to its jurisdiction. The facts in *Clydesdale Bank, Limited* v. *Schroder & Co.*, [1913] 2 K.B. 1, were the plaintiff had been sued in Chile by the defendant and had paid the defendant a sum of money under protest. Afterwards he sued in England to recover this. The Court held that they were not entitled to recover. Bray, J., said at p. 5:

> I have no right to assume that legal proceedings in the Courts of a foreign country will not be properly conducted or that an improper result will be arrived at.

See also *Cottington's Case* (1678), 2 Swanst. 326, n., where it is said:

> It is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.

Vaughan Williams, L.J., said at pp. 796-7, in *Pemberton* v. *Hughes*, [1899] 1 Ch. 781:

> Here it is alleged that 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: . . .

The conclusion I come to, then, is that I must regard the sale

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under the Seattle judgment as perfectly valid. If the plaintiff is not entitled to succeed on the judgment, as I have held she is, she is entitled on the merits.

There will be judgment for the plaintiff on the foreign judgment. As there is no evidence as to what was done with the $50, or what expenses were incurred in connection with the sale credit must be given on the judgment for the $50.

*Judgment for plaintiff.*

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## *RE* MARY JEAN CROFT ESTATE.

S. C.
In Chambers
1937
*Jan.* 27;
*Feb.* 3.

*Executors and administrators—Will—Probate—Renunciation of probate—Passing of accounts—R.S.B.C. 1924, Cap. 5, Secs. 33 to 38.*

On the presentation of a petition by Mrs. Chaplin and Edward P. Johnston, an order for probate of the will of Mary Jean Croft, deceased, was made by MURPHY, J. on the 10th of September, 1928. On the 4th of December, 1936, Mrs. Chaplin signed a renunciation of probate and moved the Court that the order of MURPHY, J. be discharged in so far as it ordered that letters probate be granted to herself and that it be ordered that letters probate be granted to said Edward P. Johnston in the place of herself and the said Johnston. The affidavit in support showed that Mrs. Chaplin took no active part in the administration of the estate, but only conferred with her co-executor on two or three occasions to ascertain how the affairs of the estate were progressing. All persons interested in the will consented to the order.

*Held*, that the Court has no power to order that Mrs. Chaplin be "forthwith discharged as executrix of the said will." Section 36 of the Administration Act sets out what the applicant must do and the powers of the Court. Pursuant thereto she must pass her accounts in the manner provided and further consideration of the motion be adjourned until after the accounts have been passed.

MOTION by Henrietta M. Chaplin, one of the executors of the estate of Mary Jean Croft, deceased, that the order for probate of MURPHY, J. of the 10th of September, 1928, be discharged in so far as it is thereby ordered that the said letters probate be granted to the said Mrs. Chaplin and that it be ordered that the said letters probate be granted to the said Edward P. Johnston in the place of the said Mrs. Chaplin and

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the said Johnston, and that the said Mrs. Chaplin be forthwith discharged as executrix of the will of the said Mary Jean Croft, deceased. Heard by ROBERTSON, J. in Chambers at Victoria on the 27th of January, 1937.

*Langley,* for Mrs. Chaplin.
*Maclean, K.C.,* for executors and Jessie Allen.
*Macfarlane, K.C.,* for Helen H. Edwards.

*Cur. adv. vult.*

3rd February, 1937.

ROBERTSON, J.: The late Mary Jean Croft appointed three executors of her will. One of these renounced. In September, 1928, the remaining two, Henrietta Maud Chaplin and Edward Purcell Johnston, presented a petition, and filed the "oath of executor" in accordance with the forms set out, respectively, in Forms 1 and 3 of the Schedule to the Probate Rules. An order for probate was made, by Mr. Justice MURPHY, on the 10th of September, 1928. On the 4th of December, 1936, Mrs. Chaplin signed a renunciation of probate in which she declared that she had not intermeddled in the estate of the deceased, save to the extent I have already mentioned. She now moves the Court asking that Mr. Justice MURPHY's order

be varied or discharged in so far as it is thereby ordered that the said letters probate be granted to the said Henrietta Maud Chaplin and that it be ordered that the said letters probate be granted to the said Edward Purcell Johnston in the place of the said Henrietta Maud Chaplin and the said Edward Purcell Johnston and that the said Henrietta Maud Chaplin be forthwith discharged as executrix of the said will.

The affidavit, in support of the motion, shows Mrs. Chaplin did not take an active part in the administration of the estate, as she only conferred with her co-executor, two or three times, for the purpose of ascertaining how the affairs of the estate were progressing.

Mr. Justice MURPHY has consented to my dealing with the application.

In my opinion Mrs. Chaplin clearly accepted the office of executrix. See Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 170, sec. 261; *Long and Fearur* v. *Symes and Hannam* (1832), 3 Hag. Ecc. 771.

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Under these circumstances, in my opinion, sections 33 to 38 of the Administration Act apply. Section 33 authorizes applications to the Court, by a personal representative "to be discharged from his office." Section 34 provides that the application may be made "either before or after a grant of letters probate" . . . , and

whether the personal representative has dealt or partially dealt with the estate or any portion thereof or not, or has to any extent acted in the exercise of any of the trusts or powers conferred upon or vested in him or not.

Mr. Justice MURPHY's order should not be disturbed. Notwithstanding the fact that all persons interested in the will consent, I do not think that the Court has the power to order that Mrs. Chaplin be "forthwith discharged as executrix of the said will"—section 36 sets out what the applicant must do and the powers of the Court. Pursuant to that section I direct that she pass her accounts in the manner provided; and that further consideration of the motion be adjourned until after the accounts have been passed.

*Order accordingly.*

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## REX v. POTTER.
## REX v. VAN OUDENOL.

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*Sept.* 15, 16, 17; *Nov.* 4.

*Criminal law—Theft—Money delivered accused for specific purpose in connection with an undertaking—Money used for other payments in connection with same undertaking—Liability—Form of information.*

At the instance of the two accused one Desford, a steam engineer, took over the management of a sawmill that required work and expenditure to put it in running order, and the accused undertook to raise money for this purpose. Desford and one Handley, another steam engineer, then took possession of the mill and spent money of their own in the way of additions and repairs. When so engaged they found that they could not start operations until the balance of a chattel mortgage put upon the machinery by a former manager was paid. Desford then endorsed a promissory note for $400 made by Handley to the Bank of Montreal, for which Handley was to receive an interest in the mill. The bank then gave Desford a cheque for $400, payable to one *Tait*, solicitor for accused. Desford and Handley then went to the office of accused, where they explained to them that this money was for the purpose of paying

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off the chattel mortgage. The accused Van Oudenol then said "*Tait* is in Court. I will take it to him." The cheque was then given to Van Oudenol who took it to *Tait*, who deposited the cheque and then gave the two accused the $400. Desford eventually paid off the promissory note. The balance due on the chattel mortgage was not paid. On an information by Desford against the two accused for stealing $400, the defence was that the money was used in paying other accounts with relation to the mill. It was found by the trial judge that the accused were guilty of stealing from Handley.

*Held*, on appeal, reversing the decision of LAMPMAN, Co. J. (MARTIN, J.A. dissenting), that the appeal should be allowed.

*Per* MACDONALD, C.J.B.C.: The money was Desford's. The note was given for the accommodation of Desford with the stated terms that Handley should be paid out of shares in the mill company by Desford. The learned judge found the appellants guilty of stealing the money from Handley and not Desford. In this he was in error and the appeal must be allowed and the accused discharged.

*Per* MCPHILLIPS, J.A.: No sufficient information was laid here upon which any conviction could have been found. The information omitted to state that the appellants fraudulently converted the sum of $400 to their own use or fraudulently omitted to account for or pay the same. The omission was fatal to the charge. Further, the evidence disclosed no crime.

APPEAL by accused from their conviction by LAMPMAN, Co. J. of the 15th of June, 1936, on a charge of stealing $400 from one Desford. Early in February, 1936, Potter and Van Oudenol negotiated with Desford, who was a steam engineer, with a view to his taking charge of a sawmill at Sooke Harbour, owned by the Sooke Harbour Lumber Company. Potter and Van Oudenol undertook to raise money for financing the mill, to find a buyer of the lumber when cut, and to find Chinamen who would supply logs. The former manager, one Butt, met Potter, Desford and one Handley (a steam engineer who was a friend of Desford's) at *C. H. Tait's* law office, *Tait* being Potter and Van Oudenol's solicitor, where, after arranging for the transfer of the management of the mill to Desford, Butt turned over to Desford a certificate for his shares in the Sooke Company. Desford and Handley then proceeded to get the mill in shape for operation and spent moneys of their own in this work. Shortly after Potter advised Desford that he and Van Oudenol required money for entertaining expenses in negotiating for finances, and during February and March following Desford

supplied them with money on different occasions for this purpose, but Potter and Van Oudenol did not succeed in getting any money for financing. About the middle of April Desford found that when Butt was in charge he borrowed $600 from one Creighton to whom he gave a chattel mortgage as security on the machinery in the mill, and $366 was still owing on the mortgage. Desford and Handley then went to the Bank of Montreal, where Desford backed Handley's note for $450, and of this sum a bank cheque for $400, payable to *C. H. Tait,* was given to Desford. Desford was to give this cheque to *Tait* for paying off the balance of the mortgage, but on the way to *Tait's* office he went to Van Oudenol's office and told him that they had a cheque for paying off the mortgage. Van Oudenol then took the cheque and told Desford he would take it to *Tait,* as *Tait* was busy in Court at the time. Later *Tait* received the cheque and handed the proceeds over to Potter and Van Oudenol, who were to pay off the mortgage. Later Desford found that the balance due on the chattel mortgage had not been paid. He then laid an information against them for theft as aforesaid. The defence was that accused used the money in payment for other requirements in getting the mill into shape for operating.

The appeal was argued at Victoria on the 15th, 16th and 17th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*R. O. D. Harvey* (*Bainbridge,* with him), for appellants: Desford spent some $1,600 on the mill and Potter and Van Oudenol were to raise money to put the mill in operation. The $400 in question was raised by Desford and Handley and given to Potter and Van Oudenol. They opened a trust account and the money was paid out largely for machinery for the mill. They contend the money was utilized for the purposes of the undertaking. They must show some certain amount was stolen: see *Reg.* v. *Jones* (1838), 8 Car. & P. 288; *Rex* v. *Cassils* (1932), 57 Can. C.C. 366 at p. 370; *Rex* v. *Murray,* [1906] 2 K.B. 385 at p. 388; *Rex* v. *Bell* (1929), 41 B.C. 166; *Rex* v. *Carswell* (1916), 29 D.L.R. 589. The Crown failed to prove ownership in Handley: see *Rex* v. *Lexier* (1933), 59 Can. C.C.

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343; *Regina* v. *McDowell* (1839), 1 Craw. & D. 97; *Rex* v. *Penny* (1925), 35 B.C. 414 at p. 415; *Reg.* v. *Watson* (1857), 27 L.J.M.C. 18; *Irvine* v. *Watson* (1879), 5 Q.B.D. 102 at p. 105. Promoters are entitled to profit: see Wegenast's Canadian Companies, 741. The learned judge had a doubt but did not give accused the benefit of it: see *Rex* v. *Krafchenko* (1914), 22 Can. C.C. 277 at p. 296; *Rex* v. *Hayes* (1923), 38 Can. C.C. 348; *Rex* v. *O'Neil* (1916), 25 Can. C.C. 323; *Clark* v. *Regem* (1921), 61 S.C.R. 608 at p. 621; *Rex* v. *Payette* (1925), 35 B.C. 81 at pp. 89-90; *Rex* v. *Bowen* (1930), 43 B.C. 507 at p. 516; *Rex* v. *M.* (1926), 46 Can. C.C. 80 at pp. 83 and 85; *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491; *Ostrom* v. *The Miyako* (1924) 34 B.C. 4 at p. 6. It must be proved that the accused not only did not use the sums received by him according to instructions, but in addition that they had converted the money fraudulently to their own use: see Crankshaw's Criminal Code, 6th Ed., 434; *Rex* v. *C.D.*, 38 Rev. Leg. 306; *Clark* v. *Regem* (1931), 50 Que. K.B. 503 at p. 511.

*Macfarlane, K.C.*, for respondent: Handley released possession of the $400 in the form of a cheque to *Tait*. Van Oudenol got the cheque. The main object was to get the mill going and the mortgage had to be paid off before they could start. The cheque was for payment of the mortgage. Potter and Van Oudenol took the cheque impressed with payment of the mortgage and they did not pay it.

*Harvey*, in reply: The colour of right is always open and nothing has been said as to that.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: The appellants were charged with having stolen $400 from Charles Desford and also in a separate count for having stolen the same sum from one O. S. Handley. The principal evidence at the trial was directed to the stealing of the money from Desford and at the conclusion of the trial the learned County Court Judge found the appellants guilty of stealing from Handley and sentenced them to three years imprisonment with hard labour. I regret to say that I cannot

sustain the conviction and sentence. The money, I think, was Desford's. The arrangement between him and Handley was that Handley should give a promissory note in his favour and that he should receive the equivalent value of shares in the company. It was really a note given for the accommodation of Desford with the stated terms that Handley should be paid out of shares in the mill company by Desford. The note was deposited in the Bank of Montreal and a cheque drawn in favour of *C. H. Tait,* solicitor for Desford in negotiations leading to the discharge of a mortgage on the Sooke Mill. Desford and Handley on the way to *Tait's* office called on appellants who were interested in the mill and told them that the cheque was to be handed to *Tait* to pay off the mortgage. Van Oudenol said "*Tait* is in Court. I will take it to him," whereupon the cheque was given to him to take to *Tait* for the purpose of paying off the mortgage. Now had the cheque been delivered to *Tait* as was intended no doubt the theft would have been from *Tait* who received it, but as far as the evidence shows *Tait* had no knowledge of the purpose for which the cheque was handed to him, although appellants knew this but got the proceeds of the cheque from him for their own purposes. Now the learned judge found the appellants guilty of stealing the money from Handley not from Desford or *Tait* and in doing this I think he was in error. Therefore, I think the appeal must be allowed and the appellants discharged.

I do this with regret because I think it was a deliberate swindle on the part of the appellants. They appear to have used the money for their own purposes; very little of it went to the said company.

Desford paid the note as he stated in his evidence. There is no doubt on the evidence that both of the defendants were aware of the purpose for which the cheque was handed to Van Oudenol and there is no doubt that the mortgage was never paid.

MARTIN, J.A.: After careful consideration of this appeal in all its aspects no valid ground has, in my opinion, been shown to justify our interference with the conviction of the appellant and therefore his appeal should be dismissed.

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McPHILLIPS, J.A.: The appeal in the case of *Rex* v. *Potter* was the appeal in which the argument took place, it being understood that the case of *Rex* v. *Van Oudenol* would be left to the determination and result in the case of *Rex* v. *Potter,* that is, have the same result. I agree that both appeals should be allowed. I am not of the opinion that the element of crime at all appears in the evidence. The money in question in my view was used in carrying out the purposes of the undertaking, namely, the bringing about of the operation of a lumber mill. If it was that the money advanced was to be devoted to paying off a mortgage, that course was not pursued to the knowledge of all concerned. It is patent that the paramount idea was to re-establish the mill and be prepared to enter upon the production of lumber in commercial quantities and both the appellants busied themselves in that direction to the knowledge of the promoters the complainants and it is an idle contention to advance any other view. That the appellants were successful in their efforts it is only necessary to refer to the letter to *C. H. Tait* from H. R. MacMillan Export Co. Ltd., dated 6th March, 1936:

*re Sooke Harbour Mills.*

We understand that this mill at Sooke Harbour will be operating in the near future. We are very interested in purchasing the lumber produced by this mill. We are selling all grades and all sizes of lumber to foreign markets and we will be able to move the complete output of this mill at current market prices. We are selling the complete output of numerous sawmills which do not have access to local markets, and no difficulty is experienced in disposing of all the lumber produced.

The H. R. MacMillan Export Co. Ltd., is a company of undoubted standing and the obtainance of this letter assured Desford and Handley of a business certainty, and when this had been obtained by the efforts of the appellants for some unexplained reason the active operation of the lumber mill was abandoned and criminal proceedings were entered into. Had the mill operation been entered upon it is fair to assume that all obligations inclusive of payment off of the mortgage would have been easy of liquidation, and further the mortgaged property in any case enhanced in value. What was alleged here was theft. In my opinion upon the facts as developed here show the money was deposited in a trust account and was known to have been so deposited and the moneys were used in forward-

ing the interests of the complainants and there was no direction in writing as called for by section 357 of the Criminal Code:

Every one commits theft who, having received, either solely or jointly with any other person, any money or valuable security or any power of attorney for the sale of any property, real or personal, with a direction that such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.

2. When the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply, unless such direction is in writing.

I would also refer to Daly's Canadian Criminal Procedure and Practice, 3rd Ed., 732. It is there seen that the charge under section 357—theft—is to be as I think properly in the terms there set forth:

C-357.—"A., on.....at.....having received from B., the sum of $ (.....) with a direction in writing to pay the same to C., did, in violation of good faith, and contrary to the terms of the said direction, unlawfully, and fraudulently misappropriated the same and thereby steal the said sum of $ (.....), the property of B., contrary, etc."

It is, therefore, seen that in any case no sufficient information was laid here upon which any conviction could have been found. I would also refer to *Clark* v. *Regem* (1931), 50 Que. K.B. 503, Guerin J., at p. 511, where that learned judge said:

The information which became the indictment omitted to state that the appellant fraudulently converted the amount of $22,471 to his own use, or fraudulently omitted the account for or to pay the same or any part thereof, or to account for or pay such proceeds or any part thereof.

The omission to mention that the appellant fraudulently converted the amount or fraudulently omitted to account or pay the same, is fatal to the indictment upon which the appellant pleaded guilty and was sentenced.

The same defect took place in this case. It is evident that apart from all other considerations no sufficient information or charge in law was laid in this case and further in my opinion the evidence disclosed no crime.

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

*Appeal allowed, Martin, J.A. dissenting.*

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*Sept.* 30;
*Oct.* 1, 2, 5;
*Nov.* 4.

# *RE* MAX LEISER, DECEASED AND THE SUCCESSION DUTY ACT.
# FORMAN AND FOWKES v. MINISTER OF FINANCE OF THE PROVINCE OF BRITISH COLUMBIA.

*Taxation—Succession duties—Real property—Affidavit of value and relationship—Assessor's claim of undervaluation—Petition by executors—"Fair market value"—Meaning of—B.C. Stats. 1934, Cap. 61, Secs. 16, 17 and 40.*

The executors of the estate of Max Leiser, deceased, filed affidavits of value of six parcels of land. Five of the parcels were of small value but the sixth upon which was situate the Cecil Hotel in Victoria was valued at $32,800. The Provincial Assessor claimed all the properties were undervalued and fixed the value of the Cecil Hotel property at $33,800. On petition by the executors under section 40 of the Succession Duty Act, the executors claimed they were mistaken in fixing the value of the Cecil Hotel property at $32,800, which was its assessed value, as they found on further inquiry that the hotel building of four stories had no elevator and the heating system was not efficient, and submitted that the "fair market value" was far less than the assessed value of the property. It was *held* that the value given by the executors with relation to the five parcels should be accepted as the "fair market value" at the time of deceased's death, but the value of the Cecil Hotel property should be reduced to $15,000.

*Held*, on appeal, affirming the decision of ROBERTSON, J., on an equal division of the Court, that there was evidence upon which he could find as he did and his valuations should be accepted.

*Per* MACDONALD, C.J.B.C.: That the valuations made by the executors with relation to the five parcels should be affirmed, but the Cecil Hotel property should be valued at $30,000.

*Per* MARTIN, J.A.: That the "determination" of the learned judge as to five of the parcels should not be disturbed but the value of the Cecil Hotel property should be increased to $32,800, the assessed value.

*Per* MARTIN, J.A.: Under said section 40 the judge should determine both the value of the property and the amount of duty payable thereupon. Only the former of these entirely distinct duties has been performed, although the petitioner asked that both be determined. Both these subject-matters having been taken out of the jurisdiction of the Minister by the executors when they invoked the exclusive jurisdiction of the special tribunal of "a Judge of the Supreme Court" created by said section 40, can only be determined by that same tribunal. This may be rectified by bringing the petition again before the learned judge for further consideration.

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APPEAL by the Minister of Finance from the decision of ROBERTSON, J. of the 22nd of April, 1936 (reported, 50 B.C. 452) on a petition by the executors of the estate of the late Max Leiser, who died on the 5th of April, 1935, to have determined the amount of duty payable in respect of certain lands in the City of Victoria belonging to the estate. The facts are sufficiently set out in the reasons for judgment of the trial judge.

The appeal was argued at Victoria on the 30th of September and the 1st, 2nd and 5th of October, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*Jackson, K.C.*, for appellant: There was error in merely fixing the value of the respective lands and not determining the amount of duty payable as required by section 40 of the Succession Duty Act. He must give the amount of duty payable. The "value" may be found where there is a market, but "value" should not be determined under forced sale conditions: see *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264; *Victoria City* v. *Bishop of Vancouver Island*, [1921] 2 A.C. 384; 3 W.W.R. 214; *In re Charleson Assessment* (1915), 21 B.C. 281; *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia* (1928), 39 B.C. 533; *Collins et al.* v. *The Toronto General Trusts Corporation* (1935), 50 B.C. 122; [1936] S.C.R. 37. The word "market" has little control over the "fair value" of a property: see *Montreal Island Power Co.* v. *The Town of Laval des Rapides*, [1935] S.C.R. 304 at p. 306; [1936] 1 D.L.R. 621; *Re Nairn Estate*, [1918] 2 W.W.R. 278; *In re Estate of W. H. Clark, Deceased* (1916), 34 W.L.R. 404; *Dreifus* v. *Royds* (1920), 61 S.C.R. 326; Quigg's Succession Duties in Canada, 172. Costs were awarded the respondents. The learned judge below did not exercise his discretion as required under section 44 of the Succession Duty Act. All statutes that give costs are to be taken strictly as in the nature of a penalty: see *Cone* v. *Bowles* (1690), 1 Salk. 205; 91 E.R. 182.

*A. D. Crease*, for respondent: As to the first objection that the learned judge should have determined the duty, there was no dispute as to this. Courts are constituted to decide disagree-

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ments, and with regard to items over which there is no contest they should be eliminated. [He referred to *Belton* v. *The London County Council* (1893), 68 L.T. 411; *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648]. There was a rational interpretation of the statute: see *Andrews* v. *Elliott* (1856), 6 El. & Bl. 338; *Wong Soon* v. *Gareb* (1935), 49 B.C. 456; *Burgess* v. *Morton,* [1896] A.C. 136 at p. 138; *Earl of Bandon* v. *Becher* (1835), 3 Cl. & F. 479 at p. 510; Quigg's Succession Duties in Canada, 173; *Re Marshall* (1909), 20 O.L.R. 116 at p. 121; *Withers* v. *Spicer* (1934), 51 T.L.R. 89 at p. 94; *Blackman* v. *The King,* [1924] S.C.R. 406.

*Jackson,* replied.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: The petitioners are the executors of the will of the late Max Leiser who died on the 5th of April, 1935. The petitioners have filed an affidavit of value and relationship in which they valued certain of the deceased's real estate as follows: Said lot 107 at $32,800; said lot 816 at $1,500; said lot 819 at $2,500; lots 1, 3, 4 and 5, block F, map 1212, Oak Bay, at $1,000; half interest in lot 2, group 1, Oak Bay District, nil; lot 10, map 1050, Victoria District, at $1,000. The Provincial Assessor claimed that said properties were thereby undervalued and that they should respectively be valued as follows: Said lot 107 at $33,800; said lot 816 at $3,600; said lot 819 at $6,300; lots 1, 3, 4 and 5 aforesaid at $2,330; half interest in lot 2, $500; lot 10 aforesaid, $1,800. The petitioners, therefore, prayed in their petition that the Court, pursuant to the Succession Duty Act and Probate Duty Act, should determine the probate and succession duties payable and the value of the said property for the purposes of assessment dues. The petition came before ROBERTSON, J., and after hearing certain affidavits and evidence in the case *pro* and *con.* he decided that the said lots other than lot 107 should be valued as in the said affidavit of value and relationship but that the said lot 107 should be valued at $15,000. On appeal to this Court MCPHILLIPS and MCQUARRIE, JJ.A., decided that the said lots were properly valued by the learned judge and would

dismiss the appeal. MARTIN, J.A., decided that the appeal should be allowed in part and that the case should be referred back to dispose of certain matters which were supposed to have been submitted to him. I decided that with the exception of lot 107 the valuations made by the executors in their affidavit of value and relationship should be affirmed and that lot 107 should be valued at $30,000. The Court being equally divided the decision of MCPHILLIPS and MCQUARRIE, JJ.A. is the decision of the Court and the appeal must therefore be dismissed.

MARTIN, J.A.: This is an appeal from an order made by Mr. Justice ROBERTSON on a petition presented by certain executors and trustees under section 40, Cap. 61, of the Succession Duty Act, B.C. Stats. 1934, which provides that:

> Except where the property subject to duty, or the transmission in respect of which duty is payable, or the amount of the duty has been previously determined by a Commissioner pursuant to the provisions of section 16 or by the Minister on receipt of the report of a Commissioner pursuant to section 17, a judge of the Supreme Court shall have jurisdiction, upon motion or petition, to determine what property is subject to duty and the transmissions in respect of which duty is payable under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by section 16 are conferred upon a Commissioner.

Pursuant to section 12 of said Act the executors filed affidavits of value of the six parcels of land in question but the valuation was not satisfactory to the Minister of Finance who, by his departmental officer *ad hoc,* the Assessor of Probate and Succession Duties, "determined," under sections 14 and 17, that the parcels were of a higher value, but this "determination" the executors disputed and then invoked by petition the special jurisdiction of a judge of the Supreme Court conferred by said section 40 to "determine the amount of probate and succession duty payable and the value of the said property for the purpose of assessing duty," as the petition prays.

It is here to be observed that this special proceeding to review the "determination" of the Minister was only open to the present petitioners (respondents) because there had been no "previous determination" by a commissioner appointed by the Lieutenant-Governor in Council under section 16, and consequently there was no "report" under section 17, from which, be it noted, an

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appeal lies direct to this Court under subsection (4) of section 16.

Upon the hearing of the petition the learned judge varied the "determination" of the Minister (*per* his said assessor) by reducing his valuation substantially in the case of each of said parcels, and from that reduction the Minister appeals to us to restore his valuation.

An unusual fact in this case is that the executors in their original affidavit fixed the value of the principal parcel, *i.e.*, Victoria City lot 107, block 3, consisting of the Cecil Hotel property, at $32,800, the assessed value, but by their said petition they sought to reduce it on the allegation that they "find on further inquiry that they were mistaken in adopting" it because the hotel building of four stories had no elevator and the heating system was not efficient, and submitted that the "market value . . . is far less than the assessed value."

Affidavits were filed in support of and in reply to said petition and some of the deponents were cross-examined thereupon and as the result of the hearing the learned judge reduced the executors' original valuation of the Cecil Hotel by less than one-half, to $15,000, and accepted their valuation as being the "fair market value . . . as at the date of the death of the deceased" (section 3 (1)) of the remaining five parcels.

It is seldom an easy thing to determine to complete satisfaction the value of real property and it is a very difficult thing to do in times of stagnation in the "market" as the result of general or local depression, or otherwise. This Court has been called upon to do so in several cases, the leading ones being *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264, wherein the language was "actual value"; and *In re Charleson Assessment* (1915), 21 B.C. 281, wherein the "actual cash value" of land in Vancouver was in question after a "boom" had collapsed to such an extent (pp. 284, 290, 294) that the land was "practically unsaleable" and "there was no market" (p. 286) but we held nevertheless (I dissenting) that an assessment increasing the preceding year's assessment should be affirmed, the Chief Justice saying, p. 285:

> What the land would fetch at the moment at a forced sale is not the test. I think the assessor should look to the past the present, and into the future.

And again, p. 286:

Is, then, the assessor to shut his eyes to the past and the future and to fix the value on the axiom that a thing is worth just what you can get for it? When these lands had a fictitious selling value of $4,000 per foot, the assessor, if he believed the value to be fictitious, could not honestly and in compliance with section 38, assess them at that figure. It is not the speculative value but the actual cash value which must rule, and that, in my opinion, is what the assessor honestly believed to be its worth in cash under normal conditions. Conversely, if the conditions are abnormal in the opposite direction, that is to say, where there is no market, he must no less than in the first example endeavour to fix the value on a normal footing. Mr. *Martin* contends that rentals are the most trustworthy criterion of value and that applying that test his client's land is overassessed. But this contention does not advance us any. The conditions which affect the selling market also affect rentals. This is made plain in the evidence in which it is conceded that rentals have dropped to about one-half of their former level.

In *The Bishop of Victoria's* case, *supra,* we adopted, p. 280, the language of Mr. Justice Idington in *Pearce* v. *Calgary* (1915), 9 W.W.R. 668, at 673:

I take it that the "fair actual value" meant by the statute quoted above is, when no present market is in sight and no such ordinary means available of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands.

And Mr. Justice, now Chief Justice Duff, said, pp. 674-5:

I do not think it necessary to attempt an exact definition of the phrase "fair actual value" as used in the statute before us. The words must be construed in accordance with the common understanding of them. It is sufficient for the purposes of this appeal to say that the "value" of a non-productive subject of taxation for the purposes of taxation (in the common language of men), is the exchange value. "Fair actual value" does not mean a value measured by future prospects of sale or development, but the purchasing or acquisitive capacity of the various elements of value including those prospects. That is a difficult thing to measure; and it frequently happens that there is no standard of measurement available which can enable us to arrive at anything like accuracy in the result. I agree with the way my brother Idington has dealt with this case.

For practical purposes in attempting this "difficult thing to measure" there is, to my mind, really very little substantial difference, if any, in applying to present conditions the varying expressions that we find in different statutes, such as, *e.g.*, "cash value," "actual cash value," "actual value," "fair actual value," "fair market value," etc., etc, because since it must be conceded, as the result of the above decisions (*cf.* the *Bishop's* case, pp. 273, 278) that the value is not to be ascertained by a forced sale

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the only other way under present conditions by which a sale can be effected is by negotiation with a prospective purchaser, and such a sale must therefore inevitably be the foundation of the "measure" of the "fair market value" that the statute in question contemplates, despite the fact that, as Chief Justice Duff aptly says, "it frequently happens that there is no standard of measurement which can enable us to arrive at anything like accuracy in the result." This view is, at least, in accord with the decision on this very section of the Supreme Court of Canada in *Untermyer Estate* v. *Attorney-General for British Columbia,* [1929] S.C.R. 84, wherein it said, *per* Mignault, J., at p. 91:

> 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 comes, to my mind, to this that under present circumstances and conditions at least the controlling word is "value," and if this be not the correct view, then no value at all can be fixed under the expression "fair market value" where, as herein, there is no "market" in the ordinary commercial sense for real property, and the disastrous result will be that no duty at all can be collected, and the reasonable intention of the true meaning of the statute would be frustrated. But no one would take such an extreme position, and it has not been taken here; on the contrary, the appellant invited this Court, and below, to determine the value despite the absence of a market, and the learned judge below properly took that view saying (50 B.C. 452 at p. 455):

> 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.

This view is confirmed by Chief Justice Duff in *Montreal Island Power Co.* v. *The Town of Laval des Rapides,* [1935] S.C.R. 304, at p. 306, saying:

> Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other *indicia* may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of

such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

And on the same page the same learned judge adopts the decision of the Supreme Court of the United States in *Cummings* v. *National Bank* (1879), [101 U.S. 153 at p. 162] 25 L. 903, at 906, that:

> The phrases, "saleable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing.

In the most recent reported case on the question, *Corkings* v. *Collins,* [1936] S.C.R. 37, an appeal from this Court on the "net value" of an estate under the Administration Act Amendment Act, 1925, Cap. 2, Sec. 4, Subsec. 114 (4), the same learned judge after considering *Untermyer's* case, *supra,* said, p. 39:

> What the Courts below had to ascertain was the real value of the shares at the pertinent time. The price at which the shares were selling on the stock market might be regarded as *prima facie* evidence, but the British Columbia Courts were quite right in declining to accept that as conclusive; and examining all the factors entering into the real value of the shares, there is no ground upon which concurrent findings of the Courts could properly be disturbed.

In view of the use of the expression "open market" by the learned judge below herein, and other judges, it is well to note that in *Inland Revenue Commissioners* v. *Clay,* [1914] 3 K.B. 466, it was held by Cozens-Hardy, M.R., pp. 471-2, to

> include a sale by auction, but it is not confined to that. It would include property publicly announced in the usual way by insertion in the lists of house-agents.

And Pickford, L.J., p. 478, said:

> I think that "sold in the open market" means sold in such a way that any one wishing to purchase was able to do so, *e.g.*, by auction or by putting the house into the hands of an agent to sell, . . .

Swinfen Eady, L.J., at p. 475 took the same view and rejected as "unsound" the submission

> that a reference to open market showed that the statute referred to a current market price of land, a price which one or more valuers might determine to be the market value of the land.

This decision was adopted by the Scottish Court of Session in *Glass* v. *Inland Revenue,* [1915] S.C. 449, Lord Johnston saying, p. 456:

> A sale takes place in open market if the subject is put on the market and the best offer taken, however made.

And Lord Cullen said, p. 460:

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RE MAX LEISER, DECEASED, AND THE SUCCESSION DUTY ACT.

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Martin, J.A.

An estimate of the price obtainable for lands in the open market must proceed on the footing of people acting in the way which is in accordance with their interests.

Guided by the foregoing decisions I have carefully considered the evidence before us of the "fair market value" of these parcels "at the date of the death of the deceased" with the result that we should not, in my opinion, disturb the "determination" of the learned judge as to five of the parcels, but as to the first and principal one, the said Cecil Hotel, the determination of $15,000 should be increased to $32,800, the assessed value, and that which was originally placed upon it by the executors as aforesaid. The *onus* is upon them to justify a departure from their original sworn valuation and they have not in my opinion satisfactorily discharged it: in *Re Marshall* (1909), 20 O.L.R. 116, the Ontario Court of Appeal allowed an appeal from a Surrogate Judge reducing the valuation of an executor, and restored it, saying, *per* Osler, J.A., p. 122:

> The executor valued the property, as I have said, at $20,000. It is true that this was only an estimate, and that he was not estopped from showing that it was wrong, but that, considering that it was his sworn valuation, would have to be very clearly made out, and in my opinion, it has not been done. The appeal must, therefore, be allowed, and the learned Surrogate's valuation set aside, and that of the executor restored.

This language is entirely applicable to this case, and there is nothing in *Blackman* v. *The King*, [1924] S.C.R. 406 (an appeal from this Court under the former Act), when fully understood, to detract from it: that case, on the present point, goes no further than Mignault, J., says at pp. 416-7:

> The Act, as I read it, does not make the affidavit of value and relationship and the accompanying inventories conclusive as to the amount or value of the estate.

Now it was not submitted here that their original affidavit of value is conclusive against the petitioning executors, but it is submitted that the grounds advanced in the petition for seeking to depart from it have not been supported by evidence and that they are so obviously unsatisfactory (in that, *e.g.*, the executors go to the length of saying that they had failed even to notice that there was no elevator in the building) that it would not be safe to countenance their subsequent change of front, and, under the circumstances, that submission has, in my opinion, after reading all the evidence, been sustained.

It should be added that this Court has always given great weight to the value fixed by the assessor when he has acted honestly and without any mistake in principle or law—*In re Mackenzie, Mann & Co. Assessment* (1915), 22 B.C. 15, applied by Murphy, J., in *Re Vancouver Incorporation Act and C.P.R.*, [1930] 4 D.L.R. 80—and here we also have the benefit of an affidavit from the assessor, Mr. G. A. Okell, and the additional information afforded by his cross-examination thereupon, which have been of much assistance to me in reaching a conclusion that is as satisfactory, I think, as can be hoped for under present conditions.

It follows that in my opinion the appeal should be allowed in its principal part, and I understand that the Chief Justice takes the same view, though he would fix the value of the said hotel at $30,000, but as the two other members of the Court would wholly sustain the learned judge, the appeal will have to be dismissed on this equal division.

It remains to be noted for future guidance that though it was conceded by counsel that under said section 40, the judge should determine both the value of the property that is subject to duty, and the amount of the duty that is payable thereupon, yet by some oversight of all concerned only the former of these two entirely distinct duties has been performed, though, as has been mentioned, the petition properly asked that both should be determined. It is clear beyond question that both these separate subject-matters having been taken out of the jurisdiction of the Minister by the executors when they invoked the exclusive jurisdiction of the special tribunal of "a judge of the Supreme Court" created by section 40, can only be determined by that same tribunal, and it is unfortunate that the necessity for this additional adjudication was overlooked (until now, as properly pointed out by the appellant) and that this appeal comes before us on an adjudication (by the order of the 22nd of April, 1936) made on the determination of the value alone, the order made on the hearing declaring only that

> It is ordered that for the purposes of assessment or probate and succession duty the fair market values of the following properties of the above-named deceased as at the 5th April, 1935, the date of the death of the said deceased, be and the same are hereby determined as follows: [The values follow].

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Martin, J.A.

This oversight might well lead to an awkward *impasse* were it not that it may happily, in my opinion, still be remedied because there is nothing, to my mind as at present advised, to prevent the petitioners from rectifying their omission to get both determinations at one hearing by bringing the petition again before the learned judge for further consideration, since there has been no attempt to adjudicate at all on that second and distinct subject-matter which the statute requires shall be "determined" by him alone.

In this connexion it should also be noted that we held, in overruling the petitioners' (respondents) preliminary objection, that this first adjudication now alone before us is a final and not an interlocutory order; and it is also one entirely distinct from the second and likewise final adjudication which, as has been seen, still awaits consideration by the same special tribunal, whose proceedings are subject to review by this Court alone under section 43, and by section 44 the costs "in favour of or against the Crown" are specially committed to our discretion, though we have not exercised it herein.

MCPHILLIPS, J.A.: I would affirm the decision of ROBERTSON, J., who had before him evidence upon which he could well find as he did. It is to be well borne in mind that the valuation must be based upon the properties as of the date of the death, and it is to be the market value. Unfortunately all real-estate owners for some time past have seen their real-estate holdings depreciate in value, *i.e.*, market value, consequent upon the severe depression existing since the year 1929, and whilst there are now signs of some revival in values, it has come only in recent months, and cannot be said to be in any way substantial as yet. The date of the death of the testator here was the 5th of April, 1935, some twenty months ago. The principal property here to be considered is an hotel on Blanshard Street. The building is a very substantial one, but owing to its construction and general layout, consequent upon the existent liquor control laws, the hotel cannot be carried on as it could be some years ago: no bar can now be operated, and great expenditure upon the building has become useless and unprofitable and the earnings therefrom are negligible after the payment of taxes and up-keep are met. This condition

of things was carefully canvassed in all the evidence adduced before the learned judge and the learned judge placed the valuation of this particular property, lot 107, with the hotel thereon at $15,000, and the Provincial Assessor contended for no less a valuation than $33,800. In my opinion the learned judge quite properly rejected that valuation as well as the other valuation contended for by the Provincial Assessor which were far in excess of the valuations arrived at by the learned judge. It follows that in my opinion the appeal should be dismissed.

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

It appears to be common ground that the learned trial judge directed his attention to the only matters which were argued before him, all other items having been satisfactorily arranged between the parties. So far as the amount of duty payable is concerned there was no dispute between the parties and after the disputed valuations were fixed it would be simply a matter of arithmetic for the department to calculate the duty payable. As to costs, I would not interfere with the order.

*The Court being equally divided, the appeal was dismissed.*

Solicitor for appellant: *M. B. Jackson.*
Solicitors for respondents: *Crease & Crease.*

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## PIPER v. UNVERZAGT.



*Agreement—Construction—Ambiguity—Independent advice—Accounting.*

The plaintiff and her husband had from time to time been borrowing money from the defendant until the 6th of September, 1932, when the defendant, wanting certain shares held by the plaintiff in the London-Vancouver Mines Investment Ltd. for voting purposes, a written agreement was entered into between the defendant and the plaintiff which was signed by the plaintiff and her husband whereby the defendant handed over to the plaintiff seven Receivers' Debentures of the Lightning Creek Gold Mines Ltd. as collateral security in various matters, and the plaintiff transferred to the defendant 501 shares in the London-Vancouver Mines

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Investment Ltd., and it was agreed that if the seven Receivers' Debentures were not returned to the defendant within six months, the 501 shares in London-Vancouver Mines were subject to whatever disposition the defendant chose to make, and that said shares should also be security for any moneys advanced to the plaintiff or her husband. There was no redelivery of the debentures at the end of six months so the defendant exchanged the 501 shares in London-Vancouver Mines for 8,968 shares of Consolidated Gold Alluvials of B. C. Ltd. in accordance with the arrangement between the two companies. He then sold 7,000 shares in Consolidated Gold Alluvials and applied the proceeds to the loans to the plaintiff and her husband. In an action for the return of the shares in Consolidated Gold Alluvials and for an accounting, the plaintiff's claims were disallowed except for an accounting and an accounting was directed to ascertain the balance due the defendant, and it was declared that he was entitled to hold as collateral security for this balance due the remaining shares in Consolidated Gold Alluvials.

*Held*, on appeal, *per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A., that the appeal should be dismissed.

*Per* MARTIN, J.A.: That the appeal should be allowed to the extent of restricting the liability of the plaintiff to moneys advanced before the 6th of September, 1932.

*Per* MCPHILLIPS, J.A.: That the defendant throughout dealt with the plaintiff's husband and the plaintiff should have received independent advice, moreover the accounting as to any moneys in the whole chargeable as against the plaintiff should not be in an amount greater than $1,800.

The Court being equally divided the appeal was dismissed.

APPEAL by plaintiff from the decision of FISHER, J. of the 10th of August, 1936, dismissing the plaintiff's action for an order directing delivery of 8,968 shares of Consolidated Gold Alluvials of B.C. Limited (N.P.L.) by the defendant to the plaintiff, or in the alternative damages to the amount of the value of said shares on the 5th of October, 1934; for an accounting in respect of the sale of said shares and for damages for wrongful sale of said shares and for an injunction restraining the defendant from selling the shares. A company had been formed in England known as the Lightning Creek Mine Trust, for investigating gold alluvial claims on Lightning Creek, and the plaintiff's husband, a mining engineer, was sent out to investigate the properties. He formed a company in British Columbia known as London-Vancouver Mines Investments Limited. This company acquired proprietary rights in respect to the Lightning Creek claims and the shareholders in the English company obtained an equal number of shares in the

London-Vancouver company. The plaintiff owned shares in the English company and then became the owner of shares in the London-Vancouver company. The London-Vancouver company was a private company and was in fact a syndicate company formed for the purpose of organizing a public company which was subsequently formed and called the Consolidated Gold Alluvials Company. The London-Vancouver company was then wound up. The shareholders in the London-Vancouver company then became entitled to vendors' shares in the Consolidated Gold Alluvials Company. Mrs. Piper had 501 shares in the London-Vancouver company. The defendant throughout had been largely instrumental in bringing the whole organization into being. He had been friendly with the plaintiff and her husband and had made certain loans to them. In September, 1932, the defendant wanted the 501 shares in the London-Vancouver company that were in Mrs. Piper's name for voting at a meeting of the company, so on September 6th, 1932, he entered into a written agreement with the plaintiff, signed by the plaintiff and her husband, whereby the plaintiff acknowledged receipt of seven Receivers' Debentures of the Lightning Creek Gold Mines Limited as collateral security, and it was understood that if these certificates were not returned to the defendant within six months a certain certificate given the defendant by Mrs. Piper as collateral security for the return of the seven certificates, being the certificate of 501 shares in the London-Vancouver Mines Investments Limited shall be subject to whatever disposition the defendant chooses to make, and that said certificate shall be security for moneys advanced to Mr. Piper or the plaintiff. The seven certificates of the Lightning Creek Company were never returned, and the defendant advanced certain sums from time to time to the plaintiff and her husband. In 1934 the defendant was authorized by the plaintiff and her husband to convert the 501 shares in the London-Vancouver company into 8,968 shares of Consolidated Gold Alluvials, and in pursuance of the agreement between the parties the defendant sold 7,500 shares of Consolidated Gold Alluvials between the 20th of September, 1934, and the 14th of March, 1935, receiving therefor $3,750. The defendant claims that after crediting

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the plaintiff and her husband with this sum they still owed him $538.

The appeal was argued at Vancouver on the 10th to the 13th and the 16th and 17th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*Bray,* for appellant: The plaintiff could speak very little English and was not told of the true state of affairs. Her husband's debts were included and she should have received independent advice before signing the agreement of September 6th, 1932: see *Turnbull & Co.* v. *Duval,* [1902] A.C. 429; *Bischoff's Trustee* v. *Frank* (1903), 89 L.T. 188; *Chaplin & Co. Limited* v. *Brammall,* [1908] 1 K.B. 233; *Howes* v. *Bishop,* [1909] 2 K.B. 390; *Bank of Montreal* v. *Stuart,* [1911] A.C. 120; *Cox* v. *Adams* (1904), 35 S.C.R. 393. Even if liable under the agreement she is only liable for advances made prior to the agreement. On the interpretation of the agreement see Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 265 and 274, sec. 343; *Allnutt* v. *Ashenden* (1843), 12 L.J.C.P. 124; Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 52, sec. 45; *Faber* v. *Earl of Lathom* (1897), 77 L.T. 168. He did not complete his part of the contract, he did not deliver the debentures in pursuance of the contract.

*H. I. Bird,* for respondent: This is an equitable mortgage: see *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273 at p. 282. An action for detinue cannot be maintained. It is a suit for redemption. The Piper family were hard up. Piper lost his position in the company and he was continually borrowing from Unverzagt. She waits for three years before starting action, and it was on the defence to the counterclaim that she first brought up the question of independent advice: see *Howes* v. *Bishop,* [1909] 2 K.B. 390; *Hutchinson* v. *Standard Bank of Canada* (1917), 36 D.L.R. 378. There were two children in the Piper family and the loans by Unverzagt were made to support the family for three years. She was not a truthful witness and the Court below so found. That the contract included future advances see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 137-8; *Hoad* v. *Grace* (1861), 7 H. & N. 494.

There is still $584 owing the defendant by the Pipers. Piper acted throughout for himself and his wife: see *Bradley* v. *Imperial Bank,* [1926] 3 D.L.R. 38 at p. 52.

[*Bray,* in reply, referred to Barron & O'Brien on Chattel Mortgages and Bills of Sale, 3rd Ed., 128 and *Hoad* v. *Grace* (1861), 31 L.J. Ex. 98.]

*Cur. adv. vult.*

12th January, 1937.

MACDONALD, C.J.B.C.: G. S. Piper, the plaintiff's husband, had borrowed from time to time a sum of money aggregating with interest $699.10, which moneys were advanced largely for the support of Piper's family, the plaintiff and one child. Piper applied for further loans which defendant felt he could not make. It was therefore arranged between Piper, his wife, and defendant that the plaintiff should deposit share No. 43 in the London-Vancouver Mines Investments Limited on the terms of the agreement mentioned below, *viz.*:

Vancouver, B.C.,
September 6th, 1932.

Total Face Value of seven Receivers' Debentures is $2,000.

Received of Charles H. Unverzagt, seven (7) various certificates known as Receivers' Debentures of the Lightning Creek Gold Mines Limited which it is understood we are to use as collateral security in various matters not necessary to mention here.

It is likewise understood that if these certificates are not returned to the said Unverzagt on or within six (6) months from this date a certain certificate given to Mr. Unverzagt by Mrs. Elizabeth Piper as collateral security for the return of this said various certificates, which certificate of 501 shares, No. 43, is in the London-Vancouver Mines Investments Limited, shall be subject to whatever disposition by Mr. Unverzagt he chooses to make and that this certificate shall also be security for any moneys advanced to Mr. G. S. Piper or Mrs. Elizabeth Piper. But that on the return as stated of said Receivers' Debentures to Mr. C. H. Unverzagt or his representative then in such case the said London-Vancouver shares shall be returned to Mrs. Piper.

In the meantime the said Unverzagt is hereby authorized to transfer the said shares in his own or any other name for the purpose of voting the same at any meeting of the said London-Vancouver Company as if he were the original owner of the same.

Signed: Elizabeth Piper
G. S. Piper.

which was carried out by the delivery to Piper of said certificate No. 43, and by the delivery by defendant of 7 certificates

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known as Receivers' Debentures of the Lightning Creek Gold Mines which were as I take it to be used by the Pipers as collateral security in a way not specified but in reality for supplying Piper with money to support his family—in other words it was a loan which defendant could not make in cash to Piper. It is to be noticed that in the first paragraph of the above-mentioned document that "We are to use as collateral security in various matters not necessary to mention here."

This document was prepared by the defendant and Piper and agreed to by plaintiff. The transaction was to terminate on the redelivery of the shares by the respective parties within six months of the 6th of September, 1932.

The plaintiff demanded delivery of the said Receivers' Debentures within a day or two of the 6th of September, but the defendant was then absent from town and she was told by his stenographer that the shares had been delivered to her husband and she left it at that until shortly before the commencement of this action in which the husband was not joined.

At the end of the six months nothing was done about the redelivery of shares by either party and defendant exchanged said certificate No. 43 for 8,968 shares of the Consolidated Gold Alluvials of B.C. Limited, to be held on the same terms as under paragraph 4 of the statement of defence and the defendant sold certain of these shares and applied the proceeds to his said loans. No real objection was taken to the sale of these shares and the plaintiff's counsel admitted at the trial that they were unobjectionable. They were known to plaintiff or her husband and since the said six months had expired the defendant was at liberty to do this.

The evidence satisfied me that the plaintiff knew that she and her family were living off the proceeds of the said Receivers' Debentures during the period since the 6th of September aforesaid, and considering the not unhappy condition in which this couple were living and how difficult it was to keep off relief during that depressed period she must have known of her husband's needy condition and that the money which supported the family before and after the 6th of September, 1932, was got through the generosity of the defendant and that her certificate

No. 43 was given as security therefor. The language used in said agreement is subject to some ambiguity, reading, after the introductory words, that plaintiff's shares "shall be subject to whatever disposition by Mr. Unverzagt he chooses to make and that this certificate shall also be security for any moneys advanced to Mr. G. S. Piper or Mrs. Elizabeth Piper": one can see the inconsistency of the plaintiff's claims in this action.

Remembering that Piper applied for further advances and was told that defendant had no money with which to make them, I think it was understood that defendant or Piper should use the Receivers' Debentures for raising the money and in that way the request of Piper should be complied with.

Now the plaintiff's counsel strongly contended that if not given for the future and past borrowings that the agreement by its terms must be construed to apply only to the then debt of $699.10.

This submission would ignore the principal object for which it was made, *viz.*, Piper's need of immediate funds for the support of his family which, in my opinion, permits me to construe the word "advanced" as not necessarily confined to past debts but as well to future borrowings. In equity we must construe the word in accordance with the intention of the parties as disclosed by the context.

A principal clause of complaint by plaintiff's counsel was founded on the fact that the Receivers' Debentures were not delivered to her but when it is remembered that she was told that they were delivered to her husband she acquiesced for three years during which she and her husband were practically living off the proceeds of said debentures for that long and trying time. I am not disposed to regard the non-delivery of the debentures to her as a decisive factor in this case. Any other interest which the plaintiff has in the premises have been sufficiently safeguarded by the judgment of the trial judge.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should in my opinion be allowed to the extent of restricting the liability of the plaintiff to moneys advanced before the 6th day of September, 1932, as set out in

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the receipt of that date, and the judgment entered below should be varied in favour of the plaintiff (appellant) to that extent.

McPHILLIPS, J.A.: In my opinion the appeal should succeed in part, upon the evidence as I read it, and, taking into consideration all the facts adduced at the trial, it is a case where the principle of the decision of *Bank of Montreal* v. *Stuart,* [1911] A.C. 120 should be held to apply. The appellant had no independent advice and throughout the respondent dealt with the husband of the appellant ignoring and paying no attention to the appellant in all the transactions relative to the securities of the appellant, the sole property of the appellant. Counsel for the appellant in his argument only admitted as being due to the respondent some $199, but later on whilst not really admitting any further sum stated that at most if some payments made to the appellant's husband could be said to be properly made to her in the accounting, at most these could not be more than in respect to the $700 item and $1,100 item but that would be all, that is to say $1,800 in all. After full consideration of the matter it would seem to me that is the fullest extent of possible allowance in the accounting as between the appellant and respondent. The respondent, in my opinion, upon the whole of the evidence was at all times aware that the securities which he became possessed of and in my opinion wrongly retained and failed to account for were the property of the appellant, not the property of the husband. I do not fail to give consideration to the finding of the learned trial judge that he did not consider the appellant a credible witness but as to that—whilst not agreeing with it as documentary evidence would seem to me to in a large measure rebut it—the questions in issue here all turn, in my opinion, upon questions of law alone. When one becomes possessed of securities of another or possessed of them under an agreement of any kind there must be a due accounting therefor. Now upon the facts as disclosed in this case the respondent did not proceed in conformity with the understood arrangement made with the appellant but proceeded to deal with the securities as if they were his own and not impressed with any trust. It is true the respondent attempts to justify all that he has done by citing his dealings therewith with the knowledge of the husband

of the appellant. In law this cannot be accepted as compliance with his legal obligation. The accounting must be to the appellant; his justification in respect to his dealings with the securities must be founded upon the instructions of the appellant not the instructions or assent of the husband. It is not to be lost sight of too that the appellant is a foreigner by birth and education and really unable to read the English language with any facility much less to comprehend the same and know its legal import—this was well known to the respondent. That is, there is evidence which would appear to go a long way in establishing that the appellant was imposed upon and taken advantage of and now it is put forward that she was an assenting party to all that was done (*Chaplin & Co. Limited* v. *Brammall,* [1908] 1 K.B. 233; *Cox* v. *Adams* (1904), 35 S.C.R. 393; *Turnbull & Co.* v. *Duval,* [1902] A.C. 429).

The learned trial judge directed an accounting. With this I agree but in my opinion the accounting as to any moneys in the whole chargeable as against the appellant should not be in an amount greater than $1,800. It would also follow that the respondent do properly account for the securities held and any moneys received in respect of any sale thereof and judgment to go for the party who upon the due accounting may be shown to be the debtor as between the appellant and the respondent.

McQUARRIE, J.A.: I agree with the learned Chief Justice that this appeal should be dismissed.

*The Court being equally divided the appeal was dismissed.*

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *H. I. Bird.*

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## FUJIWARA *ET AL.* v. OSAWA.

*Negligence—Motor-vehicles—Sharp cutting in when passing a car—Disconcerting to driver—Error of driver as a result—Damages—Liability.*

The plaintiff with his wife, two sons and another lady, was driving his car eastward on St. John Road in Port Moody on a Sunday morning at from 20 to 25 miles an hour, when the defendant, with three passengers in his car, driving in the same direction, overtook the plaintiff, and in passing he cut in so sharply in front that his car caught the front end of the plaintiff's car. The plaintiff then attempted to step on the foot-brake, but instead stepped on the accelerator and swerved to the south, running over a small bush, over the sidewalk, part way up on a terrace, over the edge of some steps, into the side of an electric-light pole and on further into collision with a second pole. The occupants suffered injuries.

*Held*, notwithstanding the error of the plaintiff in stepping on the accelerator and driving as he did in the emergency the defendant was solely responsible for the accident.

ACTION for damages resulting from the negligence of the defendant when driving his car, in cutting in in front of the plaintiff's car when passing him on the road. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 16th of January, 1937.

*Nicholson*, and *Yule*, for plaintiffs.
*Bull, K.C.*, and *Ray*, for defendant.

*Cur. adv. vult.*

23rd January, 1937.

MANSON, J.: This action arises out of an automobile accident which occurred on Sunday morning, November 10th, 1935, at Port Moody in this Province. The plaintiff Dr. Fujiwara and his wife, two sons and a lady passenger were travelling in the doctor's car eastward at 20 to 25 miles per hour on St. John's Road. The roadway has a hard-surfaced centre strip 18 feet wide and a gravel strip on each side 10 feet 6 inches wide. The defendant with three passengers in his car overtook and passed the doctor's car on a straightaway stretch of the highway. There were no on-coming westbound cars and the passing could have been accomplished without difficulty or danger.

I accept the evidence of the doctor and the witnesses for the plaintiffs that the defendant cut in sharply in front of the doctor's car immediately he passed it. It was alleged that, as the defendant passed, his car caught the front end of the doctor's car. It is not particularly material whether it did so or not (I think it did) because I have no manner of doubt that he cut in altogether too sharply, without excuse—and negligently. The doctor was upset, as he says, by the bump of the defendant's car, or in any event by imminence of a collision as a result of the defendant's negligence. He attempted to step on the foot-brake but instead, seemingly, stepped on the accelerator and swerved to the south running over a small bush, over the side-walk, part way up on a terrace, over the edge of some steps, into the side of an electric-light pole and on farther into collision with a second pole. He thought his brakes must have failed him and pulled on the hand-brake (when it does not appear) but too late to save the situation. The plaintiff's wife was partially thrown from the car and sustained serious head injuries and other injuries. The plaintiff Miss Sato sustained face cuts—one serious enough to leave a nasty scar for life. The plaintiff Alan Fujiwara sustained a fractured collar-bone. The plaintiff Wesley Fujiwara also sustained some injuries but of a less serious character.

It was urged by counsel for the defendant: (1) That the defendant was not negligent. I find he was. (2) Alternatively, that while the defendant's negligence may have been the *causa sine qua non* it was not the proximate cause or direct cause of the accident—that the proximate cause was the doctor's own negligent driving.

The doctor travelled after he swerved some 180 feet. His car was a 1933 Chevrolet sedan with a high-speed motor and a quick pick-up. The question to be determined is, should the doctor have recovered his mental equilibrium after the first disturbance and not pursued the course he did—should he as a driver of a motor-car (he was a driver of 10 years' experience) have immediately sensed that his foot was on the accelerator and not on the brake? Had he realized that his foot was on the accelerator he would, of course, have removed it and put it on

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the brake and the accident and its consequences would have been avoided. While the maintenance of his foot upon the accelerator for some 180 feet or for three or four seconds does seem extraordinary and while it seems somewhat harsh to charge the defendant with the damage that ensued as a result of the doctor's error, nevertheless, one or two facts must be borne clearly in mind. A sharp cut in by a passing car on a highway is one of the most disconcerting experiences which even an experienced driver can encounter and such an experience is even more disconcerting when one has the responsibility of a car full of passengers. An experienced driver instantly senses the danger of such a manœuvre on the part of a passing car and very few drivers can maintain equanimity in such circumstances. One asks how long a defendant is to be held liable for incorrect driving by the driver whom he has upset? In this particular case should the doctor not have recovered his equilibrium in time to avoid, if not the first collision with a pole, at least the second one? Other drivers might have done so but very many drivers might not have done so. What he did was extraordinary and yet I think it unfair to say that it was not understandable and excusable in the circumstances. It can hardly be said of Dr. Fujiwara that he had time to think—the bush, the steps and the first pole all loomed in front of him one after another, giving him no time to regain his poise. The language of Mr. Justice Middleton is apt at p. 108 in *Harding* v. *Edwards and Tatisich* (1929), 64 O.L.R. 98 (sustained by the Supreme Court of Canada, [1931] S.C.R. 167). The learned judge used this language:

> The case emphasizes the necessity of charity in judging the conduct of one who is not, it is true, in the actual agony of collision, but upon whom, in the language I have already quoted, "the hand of the original wrongdoer was still heavy," before his conduct can be regarded as the act of a conscious intervening agent. If in truth such a one is "acting on the impulse of personal peril" he may yet be "only a link in a chain of causation extending from the initial negligence to the subsequent injury," to quote again the words of Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258.

As was said by Lord Dunedin in *United States Shipping Board* v. *Laird Line, Lim.* (1923), 93 L.J.P.C. 123; [1924] A.C. 286, at 291:

It is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.

I hold the defendant liable.

I assess damages as follows: Special damages to plaintiff Asa J. Fujiwara, $1,098; special damages to plaintiff Shotaro Sato, $35; general damages to plaintiff Tsuru Fujiwara, $3,000; general damages to plaintiff Wesley Fujiwara, $25; general damages to plaintiff Alan Fujiwara, $150; general damages to plaintiff Asa J. Fujiwara for loss *servitium*, $500; general damages to plaintiff Asa J. Fujiwara for loss *consortium*, $500. Costs to follow event.

*Judgment for plaintiffs.*

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## SHOWLER v. MACINNES.



*Libel and slander—Radio addresses on labour and industrial situation—Privilege.*

The defendant, a radio speaker, at the request of the Citizens' League of Vancouver, an organization of company employers of the city, delivered a series of radio addresses over a Vancouver radio station upon the labour and industrial situation. The plaintiff, a labour union secretary, claimed damages for an alleged libel and slander contained in the radio addresses. The defendant considered it in the public interest that the public should be made aware of threats of action contrary to the public interest, and he regarded the language which he believed the plaintiff had used, and which he embodied in his address, as language carrying a threat inimical to the public interest.

*Held*, that the occasion of the address of the defendant was privileged.

ACTION for libel and slander. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 22nd of January, 1937.

*Lucas*, for plaintiff.

*J. A. MacInnes*, for defendant.

*Cur. adv. vult.*

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29th January, 1937.

MANSON, J.: The plaintiff claims against the defendant in damages for alleged libel and slander. Certain facts were established at the trial.

The plaintiff was at the time of the alleged defamation a labour secretary in the City of Vancouver. He had been actively and officially connected with labour unions in that city for many years. The defendant, a radio speaker, at the request of the Citizens' League of Vancouver, an organization of company employers of the city (or of some of them) delivered in 1935 a series of radio addresses over a Vancouver radio station upon the labour and industrial situation. The Citizens' League was alarmed over the activities of "professional agitators, American and Canadian" and feared a dangerous situation would develop in Vancouver. The organization regarded the situation as "highly explosive." On November 5th, 1936, the defendant handed the manuscript of a proposed radio address to the manager of the Radio Station C.K.F.C., one Rutland. The manuscript contained the words complained of as defamatory. Rutland read the manuscript and filed it. He did not know the plaintiff (who was referred to in the manuscript) and says in evidence "the name meant nothing to me." The defendant obtained the information upon which the manuscript was based from a source which he believed reliable and from which he had received information on previous occasions. The information received by him from the source mentioned on previous occasions had proved reliable and the defendant did not doubt the reliability on this occasion. The defendant believed that a serious situation did exist in the City of Vancouver by reason of the activities and propaganda of revolutionary-minded individuals and presumably the League for which he was speaking believed it in the public interest that the public should be made aware of threats of action contrary to the public interest. He regarded the language which he believed the plaintiff had used, and which he embodied in his address, as language carrying a threat inimical to the public interest. He pleads privilege and justifies the address complained of as having been made to the public upon a matter of important public interest. The defendant did not

prove at the trial that the plaintiff had uttered the words ascribed to him on the occasion referred to in the address or at any time, and the plaintiff denied the words and the incident in its entirety.

The plaintiff alleges that the words bore an innuendo as follows: That the plaintiff was engaged in communist and revolutionary activities, plots and plans, and was a racketeering labour leader. He says that he was thereby greatly injured in his credit and reputation and in his calling and business as the secretary of various labour unions.

Statements published on an occasion of qualified privilege "are protected for the common convenience and welfare of society": *per* Parke, B. in *Toogood* v. *Spyring* (1834), 1 C.M. & R. 181, at 193; 3 L.J. Ex. 347; 149 E.R. 1044.

It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in protection of some common interest:

*per* Bankes, C.J. in *Gerhold* v. *Baker,* [1918] W.N. 368, at p. 369; 63 Sol. Jo. 135.

In such cases, no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged, because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury:

*per* Willes, J. in *Huntley* v. *Ward* (1859), 6 C.B. (N.S.) 514, at 517; 141 E.R. 557.

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

*per* Lord Sands in *Dunnet* v. *Nelson,* [1926] S.C. 764, at 769.

It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. But the freedom of communication which it is desirous to protect is honest and kindly freedom. It is not expedient that liberty should be made the cloke of maliciousness:

*per* Lord Coleridge, C.J. in *Bowen* v. *Hall* (1881), 6 Q.B.D. 333, at 343; 50 L.J.Q.B. 305.

The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion

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arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive:

*per* Lopes, L.J. in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson,* [1892] 1 Q.B. 431, at 454; 61 L.J.Q.B. 409.

As Gatley says in his text (2nd Ed., 214):

> The law rightly makes the motive of the defendant in making the communication the true test of liability.
>
> The principle upon which the law of qualified privilege rests is, . . . , this: that where the words are published which are both false and defamatory the law presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and in an action for libel or slander founded on a publication upon a privileged occasion the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression, and conveys in a single word a correct idea of what has really happened, namely, that although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason for this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes and it becomes immaterial that the publication was on a privileged occasion:

*per* Bankes, J. in *Smith* v. *Streatfeild,* [1913] 3 K.B. 764, at 769-70; 82 L.J.K.B. 1237.

In *Toogood* v. *Spyring, supra,* at p. 193, Parke, B., laid down the law as follows:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another . . . , and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

*Vide* also *Adam* v. *Ward,* [1917] A.C. 309; 86 L.J.K.B. 849, where the relevant law is fully discussed.

As to what may be regarded as "the common convenience and welfare of society" or as a moral or social duty in cases of this kind Lindley, L.J. in *Stuart* v. *Bell,* [1891] 2 Q.B. 341, at 350; 60 L.J.Q.B. 577, said:

I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal . . . , the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to [make the communication].

Lamont, J.A. said in *Sapiro* v. *Leader Publishing Co. Ltd.*, [1926] 2 W.W.R. 268, at 271; 20 Sask. L.R. 449:

If, . . . , the great majority of right-minded men in the position of the defendant would have considered it a duty to communicate the criminatory matter to those to whom it was published, the occasion may well be held to be privileged.

The whole citizenhood of Vancouver has and had at the time of the address in question a vital concern in the matter of industrial relations in the community and in knowing under what circumstances strikes might be called. The occasion of the address of the defendant was privileged.

I cannot find that the defendant in doing what he did acted recklessly or without reasonable enquiry. There is nothing in the evidence to suggest malice on his part at the time of the deliverance of the address. He did not know the plaintiff and no question of personal animosity towards the plaintiff or towards the trades and labour union movement arises. He did say at the trial that he still believed that the plaintiff had uttered the words ascribed to him. He was not cross-examined as to his reasons for so believing. While upon some occasions a statement by a defendant that he still believed in the truth of the words complained of might be evidence of malice I cannot conclude that there was malice on the part of the defendant here. I think that rightly or wrongly the defendant honestly still believes that the plaintiff uttered the words with which he was credited.

It is not necessary to consider the other points raised and so ably argued by counsel. The action will be dismissed. Ordinarily the costs would follow the event. I think, however, that having regard to all the circumstances there is good cause within Order LXV., r. 1, for making no order as to costs.

*Action dismissed.*

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*Nov.* 6, 9.
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*Jan.* 12.

## DES BRISAY AND BULWER v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADAN NATIONAL STEAMSHIP COMPANY LIMITED.

*Practice—Amendment of statement of claim—Whether raising new cause of action—Statute of Limitations.*

On the 8th of August, 1930, the plaintiffs delivered to the defendants at their wharf, known as Canadian National Dock, in Vancouver, 1,588 cases of canned salmon for storing and carriage. The wharf and the goods thereon were destroyed by fire on the 10th of August, 1930. The plaintiffs brought action to recover the value of the goods on the 30th of June, 1932, and by their statement of claim, delivered on the 29th of September, 1932, claimed it was the duty and an express or implied term of the said delivery and acceptance that the defendants should safely store and carry and deliver the said canned salmon to the order of the plaintiffs for reward as a common carrier. The statement of defence was delivered on the 3rd of January, 1933. On the 14th of September, 1936, the plaintiff moved to amend the statement of claim by adding a plea that the fire by-laws of the city were not complied with and three alternative claims: (a) "That the fire . . . spread to and consumed or destroyed the said goods by reason of the negligence and want of care of the defendants"; (b) "that the defendants were bailees for reward of the said goods and that the defendants failed to carry out and perform their duties as such"; (c) "that the defendants were bailees for reward of the said goods by them to be safely kept and taken care of and that the defendants did not safely keep or take proper care of said goods and were guilty of negligence." The order to amend was granted.

*Held*, on appeal, affirming the order of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that there is no substantial departure in the amendments from the original cause of action but a reaverment thereof in a more artistic and precise form.

APPEAL by defendants from the order of MORRISON, C.J.S.C. of the 24th of October, 1936, granting the plaintiffs' application to amend their statement of claim. The action was brought on the 30th of June, 1932, to recover $13,406.10, being the value of 1,588 cases of canned salmon destroyed by fire on the 10th of August, 1930, alleged to have occurred by the negligence and breach of duty of the defendants in the custody, carriage, storage, warehousing or handling of the said goods. The statement of claim was issued on the 29th of September, 1932, and the statement of defence on the 3rd of January, 1933. The next step in

the action was an application by the plaintiff to amend the statement of claim on the 14th of September, 1936.

The appeal was argued at Vancouver on the 6th and 9th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*A. Alexander*, for appellants: An amendment of the statement of claim was allowed more than six years after the cause of action arose. The goods in question were stored on the pier in Vancouver, and on the 10th of August, 1930, the pier was destroyed by fire with all the goods that were upon it. There was no power to make the order, as the amendments thereby allowed set up new and distinct causes of action which, if now sued on, would be statute-barred: see *Weldon* v. *Neal* (1887), 19 Q.B.D. 394 at p. 395; *Reynolds* v. *McPhalen* (1908), 7 W.L.R. 380; *Hudson* v. *Fernyhough* (1889), 61 L.T. 722; *Tannas* v. *Mosser*, [1930] 1 W.W.R. 738; *Shtitz* v. *C.N.R.*, [1927] 1 W.W.R. 193 at p. 197. In certain cases amendments are made merely by restating a cause of action already alleged, but goes no further: see *Nocton* v. *Ashburton (Lord)*, [1914] A.C. 932 at p. 937; *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 159; *Lancaster* v. *Moss* (1899), 15 T.L.R. 476; *Mabro* v. *Eagle, Star and British Dominions Insurance Co.*, [1932] 1 K.B. 485. In the case of *Lieb* v. *Deacon*, [1927] 2 W.W.R. 173, the amendment was allowed because a mistake had been made in the statement of claim. See also *Mercer* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 465; *Drake* v. *Carter* (1920), 28 B.C. 119. In this case he is in fact setting up a new cause of action: see *The Lake Erie and Detroit River Railway Company* v. *Sales* (1896), 26 S.C.R. 663. We are not liable as carriers, we only stored the goods as warehousemen and there was no lack of care on our part: *Marshall* v. *London Passenger Transport Board*, [1936] 3 All E.R. 83; *Chapman* v. *Great Western Railway Co.* (1880), 5 Q.B.D. 278 at p. 280. As to the distinction between "common carrier" and "bailee" see *Milloy* v. *Grand Trunk R.W. Co.* (1893), 23 Ont. 454, and on appeal (1894), 21 A.R. 404; *Clark* v. *Wray* (1885), 31 Ch. D. 68.

*Bourne*, for respondents: The plea that they were embar-

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rassed by the delay and amendment is not supported by any evidence at all. We pleaded first that they were "common carriers." By the amendment we pleaded that they were "warehousemen" and that they were "bailees for reward." There is nothing in the amendment that can be called a new cause of action: see *Mercer* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 465; *Drake* v. *Carter* (1920), 28 B.C. 119; *Russell* v. *Diplock-Wright Lumber Co.* (1910), 15 B.C. 66; *Giovinazzo* v. *Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 325; *Cargill* v. *Bower* (1878), 10 Ch. D. 502 at p. 508; *Lewis and Lewis* v. *Durnford* (1907), 24 T.L.R. 64; *Pelley* v. *Bascombe* (1865), 11 L.T. 722; *Shtitz* v. *C.N.R.*, [1927] 1 W.W.R. 193 at pp. 194 and 197.

*Alexander,* replied.

*Cur. adv. vult.*

12th January, 1937.

MACDONALD, C.J.B.C.: This is an appeal from an order of MORRISON, C.J.S.C., permitting an amendment to the statement of claim. The point involved is this—the Statute of Limitations would bar the allegations made in the statement of claim and the amendments I think were made for the purpose of defeating that bar. The action concerns a number of cases of canned salmon destroyed by fire on or about August 10th, 1930. The plaintiffs claimed damages from the defendants for the loss of the said cases. The statement of claim sets out, paragraph 8, that the wharf or dock on which the said goods were placed was unfit for the storage, warehousing, shipment or carriage of the goods in question. Then a number of particulars are given followed by another sub-paragraph, 2, with reference to the protection provided against fire. A large number of subsections and paragraphs are set out in the statement of claim and damages are claimed for $13,406.10. The statement of claim was delivered on the 29th of September, 1932, and the statement of defence on the 3rd of January, 1933. The Chamber summons praying amendment is dated 14th September, 1936, and the order amending the statement of claim the 24th of October, 1936. Looking at the amendments ordered with the exception of four hereinafter referred to, I see no possible excuse for the amend-

ments except that they were made apparently on the expectation that they would prevent the application of the Statute of Limitations. With regard to the matters deferred the first one is that the amendment pleads that the fire by-laws of the City of Vancouver, where the wharves of the defendants were, were not complied with, and sections 9, 10 and 11 are alternative claims by which apparently the pleader endeavoured to set up new causes of action. Accepting then the declared intention to set up these matters as new causes of action, I find the authorities against it. Since even if those allegations have been referred to in the particulars above mentioned in the original statement of claim they are put forward as new causes of action by the use of the word alternatively and it is clear on the authorities that new causes of action may not be set up after the period of limitation has been passed.

There has been over six years' delay in this case, and this is an element which might affect the decision of the Court in allowing the amendments. Bacon, V.C., in *Clark* v. *Wray* (1885), 31 Ch. D. 68, referring to delay, said at p. 71:

> Then, some months afterwards, when the action had been set down for trial, it occurs to the defendant that he should like to present a totally distinct, new, and inconsistent case. In my opinion the practice upon this subject is clear; the rule is clear that unless the Court thinks it reasonable no such leave as is here asked for ought to be given. I think it is in the highest degree unreasonable, having regard not only to the issues between the parties, but also to the length of time that has elapsed, that this application should be granted.

In that case only some months had elapsed. In this case, six years. I therefore think it unreasonable to take away the defendants' rights by granting leave to any of these amendments. This would be an interference with vested rights.

I would therefore allow the appeal and strike out the amendments.

MARTIN, J.A.: This appeal from the order of Chief Justice MORRISON allowing an amendment to the statement of claim raises a question of considerable difficulty largely arising out of the form of the pleadings which were unavoidably, in view of the nature of the case, of a complicated character. This necessitated a careful review of them in the light of the many

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authorities cited by counsel, and others, but suffice it to say that after such review I find myself, despite the able submission of Mr. *Alexander* to the contrary, unable to say that the learned judge erred in allowing the amendment. There is, in my opinion, no substantial departure in it from the original cause of action, but a reaverment thereof in a more artistic and precise form.

MCPHILLIPS, J.A.: I cannot see that the amendments really amount to the setting up of any new cause of action and it was not so argued by counsel for the respondent. That being my opinion I would dismiss the appeal. At the same time I would say this—that if at the trial it should turn out that there is an attempt to set up and prove any cause of action which may be barred by the Statute of Limitations then, I think, it would be a proper case for the trial judge to grant leave to the defendants to plead the Statute of Limitations, if not already pleaded.

MCQUARRIE, J.A.: I would dismiss the appeal. In my opinion the amendments allowed by the learned Chief Justice of the Supreme Court of British Columbia do not raise any new cause of action.

*Appeal dismissed, Macdonald, C.J.B.C. dissenting.*

Solicitor for appellants: *A. R. MacLeod.*
Solicitors for respondents: *Bourne & Des Brisay.*

## McDERMID v. BOWEN.

S. C.
In Chambers
1937
*Feb.* 26;
*March* 1.

*Insurance, automobile—Practice—Application by insurance company to be added as a third party in an action arising out of an accident—Form of order adding insurance company as third party—B.C. Stats. 1935, Cap. 38, Sec. 48.*

APPLICATION by The General Accident Assurance Company of Canada to be added as a third party pursuant to B.C. Stats. 1935, Cap. 38, Sec. 48, heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 26th of February, 1937. The company had insured the defendant, and after the writ had been issued and statement of claim delivered, repudiated liability under the policy and withdrew from the defence of the action. Counsel for the insurance company referred to the order made by Middleton, J.A. in *Marshall* v. *Adamson,* [1936] 3 I.L.R. 159, whereby it was ordered that the fact that the insurance company was a party to the action should not be disclosed to the jury. MORRISON, C.J.S.C. refused to include a similar term in this instance, stating that under the practice in the Supreme Court of British Columbia no such provision was necessary on the ground that the well-recognized rule that the fact that an insurance company is a party to an action must not be disclosed to a jury applied to this case as well as to a case where an insurance company was defending an action in the name of the assured.

*Bull, K.C.,* and *Housser,* for the application.
*Denis Murphy,* for plaintiff.
*L. St. M. Du Moulin,* for defendant.

On the 1st of March, 1937, the following order was made by MORRISON, C.J.S.C.: IT IS ORDERED that The General Accident Assurance Company of Canada be added as a third party in this action under the provisions of the Insurance Act of the Province of British Columbia being B.C. Stats. 1925, Cap. 20, as amended by B.C. Stats. 1935, Cap. 38, Sec. 48, and be bound by the findings between the plaintiff and the defendant at the trial of this action.

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AND IT IS FURTHER ORDERED that pleadings shall be delivered as between the third party and the plaintiff, and the defendant and the third party, as hereinafter provided, and that the question of the liability of the said The General Accident Assurance Company of Canada to indemnify the defendant against the damages and costs, if any, awarded to the plaintiff in this action and against his costs of defending this action, be tried and disposed of in such manner as may be directed by the trial judge or by a judge in Chambers upon application after the final disposition of the issues between the plaintiff and the defendant.

AND IT IS FURTHER ORDERED that the plaintiff do serve the third party within five (5) days from the entry of this order with a copy of the statement of claim herein, and that the third party do within ten (10) days from the date of such service deliver a statement of defence to the plaintiff's claim against the defendant; and that the plaintiff do deliver her reply thereto, if any, within five (5) days after the service of such statement of defence.

AND IT IS FURTHER ORDERED that the defendant do within ten (10) days from the date of service of this order deliver a statement of claim as against the third party setting out the grounds on which he claims indemnity from the third party.

AND IT IS FURTHER ORDERED that the third party do within ten (10) days from the service of such statement of claim, deliver a statement of defence to the claim of the defendant against it.

AND IT IS FURTHER ORDERED that the said defendant do deliver his reply thereto, if any, within five (5) days after the service of such statement of defence.

AND IT IS FURTHER ORDERED that as between the plaintiff and the third party, and the defendant and the third party all necessary proceedings be taken for the discovery and production of documents, and that the third party may examine the plaintiff and the defendant for discovery, and that the plaintiff and defendant may examine the third party for discovery pursuant to the Rules of Court in that behalf.

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AND IT IS FURTHER ORDERED that the said third party be at liberty to appear by counsel and to defend this action as it may be advised.

AND IT IS FURTHER ORDERED that the third party shall be at liberty to apply for trial of this action by a jury should it be so advised.

AND IT IS FURTHER ORDERED that the costs of this motion shall be costs in the cause to the plaintiff, and as between the defendant and the third party they shall be disposed of by the judge presiding at the trial or other final disposition of the issues raised between the defendant and the third party.

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## REX v. KADIN.

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1937
*Jan.* 18;
*March* 2.

*Criminal law—Attempting to defeat hearing of case under Summary Convictions Act—Whether constituting offence of attempting to defeat the course of justice—Criminal Code, Sec. 180.*

Accused's wife was charged with an offence under the Female Minimum Wage Act. Two days before the hearing accused drove his wife and two children to the American border, intending to cross into the United States, but the American immigration authorities refused to allow the wife and children to enter so they turned back. The wife did not appear at the hearing of the charge against her. A charge against the accused that he unlawfully and wilfully attempted to defeat the course of justice by attempting to transport his wife out of the jurisdiction of the Provincial police court at Kimberley, and so attempted to cause her to absent herself from her trial at Kimberley contrary to section 180 of the Criminal Code, was dismissed.

*Held*, that the appeal should be dismissed because the facts in evidence fail to support the charge.

*Per* MARTIN and MACDONALD, JJ.A.: If the real reason for her "default" was that her husband had, for example, attempted to take her out of Canada, or had assisted or induced her to leave Canada in order to enable her to evade her legal trial, then it is clear that his conduct would constitute an attempt to "obstruct, pervert or defeat the course of justice" within the meaning of subsection (*d*) of section 180 of the Criminal Code, because her attendance at her own trial was obviously essential to the due "course of justice."

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APPEAL by the Crown from the decision of THOMPSON, Co. J. in the County Court Judge's Criminal Court at Cranbrook on the 2nd of November, 1936, dismissing a charge against the accused of having wilfully attempted to obstruct, pervert or defeat the course of justice by attempting to transport Mrs. John Kadin, his wife, out of the jurisdiction of the Provincial police court at Kimberley and so attempted to cause her to absent herself from her trial on September 25th, 1936, at the Provincial police court at Kimberley, contrary to section 180 of the Criminal Code.

The appeal was argued at Victoria on the 18th of January, 1937, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*Coulter,* for the Crown: There was a charge against Mrs. Kadin under the Minimum Wage Act and she appeared before the magistrate at Kimberley on the 18th of September, 1936, when she asked for a week's adjournment to obtain legal advice. She was again served with summons to appear before the magistrate on the 25th of September, but she failed to appear. On the 23rd of September the accused borrowed his brother's car and took his wife and two children to Kingsgate intending to go across the border into the United States, but the American immigration authorities refused to allow the wife and children to enter the United States. The family then drove back to Kimberley. This was an attempt to defeat the hearing of the case against Mrs. Kadin on the 25th of September, and constituted the offence of attempting to defeat the course of justice under the Criminal Code: see *Rex* v. *Lake* (1906), 11 Can. C.C. 37; *Rex* v. *Rosen* (1916), 27 Can. C.C. 259; Russell on Crimes, 9th Ed., 241.

Respondent, did not appear.

*Cur. adv. vult.*

2nd March, 1937.

MACDONALD, C.J.B.C.: The accused in this case spirited his wife away from home and took her across the line into the United States of America, evidently with the intention of preventing her from being submitted to examination. The charge

against her was under the Female Minimum Wage Act. The trial had not actually commenced and on this ground the learned County Court judge held that the accused had committed no offence since his wife had committed no offence in failing to attend the trial. I would not interfere with the judge's decision and would dismiss the appeal which was an appeal by the Crown.

MARTIN, J.A.: This appeal should in my opinion be dismissed because the facts in evidence fail to support the charge. But in reaching this conclusion I am unable, with all due respect, to adopt the view expressed by the learned judge below that the wife of the accused was "not in default" after she failed to appear before the magistrate on the 25th of September, 1936, on the adjourned hearing of the charge against her (under the Minimum Wage Act) which had been called on for hearing on the 17th of that month and she appeared thereat and made the request for a week's adjournment which was granted, but failed to appear on that date: anyone who fails to answer a summons valid *ex facie* when duly served, as herein, is "in default" and also *in periculo*. If the real reason for her "default" was that her husband had, for example, attempted to take her out of Canada, or had assisted or induced her to leave Canada in order to enable her to evade her legal trial, then it is clear that his conduct would constitute an attempt to "obstruct, pervert or defeat the course of justice" within the meaning of subsection (*d*) of section 180, because her attendance at her own trial was obviously essential to the due "course of justice": the question as to what remedies the Crown might have against her because of her default has no application to the charge against her husband for his part in the transaction. The difficulty that arises herein is that the proof of the husband's "attempt" has not been established with that reasonable certainty that the law requires in that his conduct, though in some respects equivocal, is not upon the whole inconsistent with a lawful purpose and therefore he is entitled to the benefit of the doubt.

MCPHILLIPS, J.A.: I agree that the appeal should be dismissed.

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

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

*Appeal dismissed.*

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*Sept.* 18,21, 22; *Nov.* 4.

## HARRIS AND KAUFFMAN v. BANKERS & TRADERS INSURANCE COMPANY LIMITED.

*Negligence—Automobile—Application for coverage—Signed by insurance salesman—Handed to agents of defendant company—Agent strikes out "Passenger hazard" and endorses application "Cover—to inspect"—Accident to passenger—Liability.*

H., an infant, purchased a motor-truck and on applying for a permit as a minor to operate the truck, his mother, K., joined by taking the statutory declaration with respect to her liability for negligence of the son in driving the truck. 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. The son was present when P. took the application without reading it over to K. or bringing 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 & Co., insurance agents, who stamped their name over that of P. on the application and forwarded it to Hobson, Christie & Co. Limited, 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 printed forms and had a running account with him. Hobson received the application on the 8th of March, when he marked out "passenger hazard" and wrote on it "Cover—to inspect." On the 10th of March he telephoned Mardon advising him of this and that 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. On the 14th of March there was an accident while the son was driving the car and a passenger, one Fraser, was badly injured. Fraser recovered judgment in an action for damages against the present plaintiffs. In an action against the insurance company the plaintiff recovered judgment.

*Held*, on appeal, reversing the decision of MANSON, J. (MCPHILLIPS, J.A. dissenting), that P. was not the agent of the defendant company or Mardon & Co. and Mardon & Co. acted simply as brokers forwarding the application to the defendant company. Hobson, Christie & Co. Limited did not include any liability in the covering note or otherwise for passenger hazard, they notified Mardon that they had rejected passenger hazard, and the mere fact that they did not notify P. and K. would not affect the question. P. was in fact the agent of the applicant K. This is a sufficient defence to the action, and the appeal is allowed.

APPEAL by defendants from the decision of MANSON, J. of the 13th of March, 1936 (reported, 50 B.C. 412), in an action for $1,992.05 owing by the defendant to the plaintiffs under an agreement whereby the defendant indemnified the plaintiffs against loss and damage arising out of the negligent operation of a motor-truck by the plaintiff Harris. Harris purchased a motor-truck in November, 1934, and in February, 1935, when he was 19 years old, applied for a driver's licence, when he was advised that his mother, Fanny Kauffman, was required to attend with him and undertake civil responsibility for his operation of the truck. She signed a statutory declaration covering her responsibility for damage arising out of Harris's negligence. She desired to insure against any liability arising out of her undertaking and interviewed an insurance agent named Peters on the 7th of March, 1935. After telling Peters what she wanted Peters filled out an application for insurance covering the risks of public liability, property damage and passenger hazard, on a printed form of the British Colonial Fire Insurance Company in which the words "British Colonial" were struck out and the words "Bankers & Traders" were written in their place. Fanny Kauffman then signed the application without reading it (she could not read) and paid $5 on account of the premium. Peters then told the plaintiffs they were covered for the three risks and the policy would be delivered on the following Saturday. On the 14th of March, while Harris was driving with one Fraser

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as a passenger, an accident occurred and Fraser was injured. On the same day but before the accident one Hobson, a clerk of Hobson, Christie & Co. Limited, who were authorized agents of the defendant company, called at plaintiff Harris's store to inspect the truck but the truck was away and he did not see it. Peters, after receiving the application from the plaintiff Kauffman, took it to E. P. Mardon & Co., insurance brokers, and they mailed it to Hobson, Christie & Co. Limited. Peters was not an agent of the defendant company. After receiving the application from E. P. Mardon & Co., Hobson telephoned Mardon and, after discussion, said he would not insure for passenger hazard but he would cover for the other two risks until he inspected the truck. He then put his pencil through "passenger hazard" and wrote on it "Cover—to inspect."

The appeal was argued at Victoria on the 18th, 21st and 22nd of September, 1936, before MACDONALD, C.J.B.C., MARTIN and MCPHILLIPS, JJ.A.

*Bull, K.C.*, for appellant: Peters told Mrs. Kauffman she was covered for "passenger hazard." Peters was not an agent for the defendant company. Peters gave the application to E. P. Mardon & Co. who forwarded it on to Hobson, Christie & Co. Limited. Mardon & Co. were not agents of Hobson, Christie & Co., and when the application was sent by Mardon & Co. to Hobson, Christie & Co. there was no covering letter. On the following day Hobson telephoned Mardon he would only insure for public liability and property damage and he traced out "passenger hazard" on the application and wrote at the top "Cover—to inspect." It is clear that on the 8th of March "passenger hazard" was cut out. The accident was on the 14th of March. There is a difference between a "broker" and an "agent": see *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356. Neither Mardon nor Peters were Hobson's agents: see Welford's Accident Insurance, 2nd Ed., 84; *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company*, [1892] 2 Q.B. 534 at p. 539; *The Canadian Fire Ins. Company* v. *Robinson* (1901), 31 S.C.R. 488; *Dominion Fire Ins. Co.* v. *Nakata* (1915), 52 S.C.R. 294 at pp. 299 and 305. No policy was issued.

*Denis Murphy* (*David Freeman*, with him), for respondents: We first learned they repudiated "passenger hazard" thirteen days after the accident. Notice to Peters and Mardon is not notice to us. They were in fact agents of the insurance company. The judge's findings are correct and the corrections were not made until after the accident. The application says she is the owner of the truck. This is not correct but she cannot read and it does not affect the insurance company. See Anson on Contracts, 17th Ed., 152. We apply to amend the statement of claim by pleading estoppel: see Annual Practice, 1936, p. 465; *Baron* v. *Drewry* (1911), 16 W.L.R. 717; *Copthall Stores* v. *Willoughby's Consolidated Co.* (1915), 85 L.J.P.C. 92; *Lever* v. *Land Securities Co.* (1893), 70 L.T. 323. We rely on *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company*, [1892] 2 Q.B. 534. This decision has however been questioned: see Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 420, note (*t*), and *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356. The Canadian cases with relation to the *Bawden* case are *The Norwich Union Fire Insurance Company* v. *LeBell* (1899), 29 S.C.R. 470; *The Commercial Bank of Windsor* v. *Morrison* (1902), 32 S.C.R. 98; *Manitoba Assurance Co.* v. *Whitla* (1903), 34 S.C.R. 191; *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (1913), 48 S.C.R. 546; *Laforest* v. *Factories Insurance Co.* (1916), 53 S.C.R. 296; *W. Malcolm Mackay Co.* v. *British America Assurance Co.*, [1923] S.C.R 335 at p. 349; *The Continental Casualty Company* v. *Casey*, [1934] S.C.R. 54 at p. 63. On the untrue statement in the application as to ownership see *Evans* v. *Employers Mutual Insurance Association, Ld.*, [1936] 1 K.B. 505; *Bastedo* v. *British Empire Insurance Co.* (1913), 18 B.C. 377; *Carlin* v. *Railway Passengers Assurance Co.* (1913), *ib.* 477. *Whitney* v. *Great Northern Ins. Co.* (1917), 32 D.L.R. 756 is a case that cites the *Bawden* case. That Peters was an agent of the insurance company see *The Guardian Ins. Co.* v. *Connely* (1892), 20 S.C.R. 208.

*Bull*, in reply: That the amendment should not be allowed as it is not a question of law only see *Warren* v. *Grinnell Co. of Canada Ltd. and Leggatt* (1936), 50 B.C. 512; *Tai Sing Co.* v.

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*Chim Cam* (1916), 23 B.C. 8. All we have to show is that there might be prejudice: see *Royal Bank of Canada* v. *McLeod* (1919), 27 B.C. 376. He must first establish there was a contract. The "cover" was a contract but not for "passenger hazard." A cause of action can never be founded on estoppel.

*Cur. adv. vult.*

4th November, 1936.

MACDONALD, C.J.B.C.: This is an appeal by the Bankers & Traders Insurance Company Limited against judgment in favour of Mrs. Kauffman, mother of the respondent Harris, who made application to the appellant for indemnity against her liability for an accident which occurred to one Fraser by Harris's motor-truck. The application was made out by one Peters, an insurance salesman who made out the application for indemnity against liability for accident caused by her son's negligence in operating his said motor-truck. The application was for insurance against her liability for public liability and property damage. It also contained a request for insurance against passenger hazard. Peters took the application to a firm of brokers, E. P. Mardon & Co. They forwarded it to Hobson, Christie & Co. Limited, on the 8th of March, 1936, without a covering letter. Hobson, Christie & Co. had given up the business of insurance for personal hazard and therefore struck that out of the application and informed Mardon that they would consider the insurance of the other two branches of the application upon inspection of the truck. Mardon then asked them for a covering note until the inspection should take place which was granted but it did not include personal hazard. This covering note was a parol one. There was no notification to Mrs. Kauffman in respect to these matters but Peters was notified but did not communicate the notice to her. An accident occurred before the inspection was made and the arrangements fell to the ground. The person injured sued Harris and Mrs. Kauffman and obtained judgment for $1,992.05 and costs. Hobson, Christie & Co. refused the application and are defending this action and this appeal on the ground that they never considered accepting the risk of personal hazard. Respond-

ents in this case took the position that Peters was the agent for the company and that the company is liable for his preparation of the application.

I am of the opinion that Peters was not the agent of the company or of Mardon & Co. and that Mardon & Co. acted simply as brokers forwarding the application to the company. The learned judge has found fraud on the part of Hobson, Christie & Co., and Mardon & Co., but I do not think there is any evidence of fraud and in any case if Hobson, Christie & Co. did not include any liability in the covering note or otherwise for passenger hazard then that on the fact of fraud even were it sustained does not affect the issue in this case except as to personal hazard and I think if they notified Mardon that they had rejected passenger hazard the mere fact that they did not notify Peters or the respondent Mrs. Kauffman would not affect the question. In my opinion Peters was the agent of Mrs. Kauffman. The appellant had never had anything to do with him. They did not know him and Mardon & Co. acted simply as insurance brokers and not as agent for anyone except Peters and Mrs. Kauffman. I rely in coming to that conclusion on the *Canadian Fire Ins. Co.* v. *Robinson* (1901), 31 S.C.R. 488; and *Dominion Fire Ins. Co.* v. *Nakata* (1915), 52 S.C.R. 294 at 299, but the case which I think is the best authority upon my conclusion is *Newsholme's* case, [1929] 2 K.B. 356.

Other defences are raised by the appellant such as there was no real trial of the issue in the Court below but a consent judgment on the question of negligence but I think that the fact that Peters was the agent of the applicant and not of the company was sufficient defence to the appellant's claims.

I would allow the appeal.

MARTIN, J.A.: Several grounds were advanced in support of this appeal, but the first that requires consideration is the submission that the evidence fails to disclose any contract of insurance because, primarily, the relationship of principal and agent between the defendant and Peters and Mardon & Co., or either of them, has not been established. After a full and careful consideration of all the evidence, which in essentials is not in conflict, I can only reach the conclusion that, with every respect

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to the learned judge below, this submission is well grounded and that the case of *Bawden* v. *London, Edinburgh, and Glasgow Assurance Company,* [1892] 2 Q.B. 534, which he largely relied upon, is based on certain facts which are lacking here; and also I am unable to share the view that Hobson, Christie & Co. Limited, failed to discharge any duty that they owed to anyone concerned in this transaction.

MCPHILLIPS, J.A.: In my opinion the learned trial judge, MANSON, J., arrived at a proper conclusion both upon the facts and the law. Here there was an application for insurance in writing and passenger hazard was asked for in the application. What was done was the striking out of "passenger hazard" upon the application without any notice to the applicant. The application was in writing and there was written on the application a covering note subject to inspection. Without any communication to the respondent of the limitation of the risk the learned judge rightly held that there was existing insurance as respects passenger hazard. The accident that took place was "passenger hazard"—a passenger in the motor-truck meeting with injuries. Insurance companies anxious apparently to do business, it would seem, almost at all hazards—at least some companies would appear to pursue this course—accept applications from agents who go about and solicit insurance supplied with the literature of the companies, notably forms of application in which the names of the companies appear and these applications getting to the principal agents of the company are considered and acted upon and a covering note is given or as in this case is written on the application form signed by the respondent.

It is true the principal agents of the company without notice to the applicant as above stated undertook to strike out the "passenger hazard." What right was there to do this? It was an unlawful act. The applicant was not consulted and without notice to the applicant (the respondent) the covering note must, in my opinion, be held to constitute a complete contract to cover passenger hazard. The authorities upon the point sustain this conclusion in law. If insurance companies choose to do their business in this reckless manner, they must accept the risk that ensues. I have had occasion in the long years of my judicial

work to remark upon this matter, and speaking generally I have found that in the main in the insurance world the record of the companies has been admirable and there has been no attempt to shirk liability even where, perhaps, they could escape liability. I regret that this case does not exhibit that commendable action. Here the applicant could have secured coverage with another company had she been advised that the risk was not undertaken. I would consider that the following case well illustrates the liability that falls upon insurance companies, upon the facts there under review, and in principle they well indicate that legal liability cannot be evaded by contentions put forward upon this or that ground when the applicant has been lulled to sleep, and no refusal of coverage is established. I would refer to *Queen Insurance Co. of America* v. *British Traders Insurance Co.* (1927), 38 B.C. 161, affirmed by the Supreme Court of Canada, [1928] S.C.R. 9.

The judgment of the learned trial judge should, in my opinion be affirmed and the appeal dismissed.

*Appeal allowed, McPhillips, J.A. dissenting.*

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

Solicitors for respondents: *Murphy & Freeman.*

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## JOHNSON v. ANDERSON AND ANDERSON.

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*Oct.* 8, 9; *Dec.* 2.

*Water and watercourses—Riparian rights—Right of user—Conditional water licence—Diversion of course of stream—Effect of Water Act—R.S.B.C. 1924, Cap. 271, Secs. 4 and 5—B.C. Stats. 1925, Cap. 61.*

Anderson Creek flowed through farm lands owned by the plaintiff, who had been using and relying on the use of the water for domestic and stock-watering purposes. The defendants occupied and worked lands on the same stream but lower down. The defendants were the holders of a conditional water licence, but do not claim that they were entitled under the licence to divert the course and flow of the stream. In May, 1936, the defendants diverted the stream from above so as to interfere with the natural flow of the stream through the plaintiff's lands, and during the same year, when the water was flowing undiminished

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through his land, the plaintiff interfered with the natural course of the stream by constructing a dam on the stream in front of his buildings. The plaintiff brought action for an order that the defendants demolish the works diverting the natural flow of the stream and allow the stream to resume its natural course through his property, and for an order perpetually enjoining the defendants from interfering with the natural flow of the water, and the defendants counterclaimed for an order that the plaintiff demolish all dams and obstructions made by him obstructing the natural flow of the water.

*Held*, that until records or licences have been granted for all water flowing by or through the plaintiff's land (which is not the case here) the plaintiff still has the right to use the water flowing by or through his land, subject to any rights granted. The defendants acquired no right to divert water, and what they did was a wrongful invasion of the right of the plaintiff, and the plaintiff's remedy should be by way of orders such as are asked for.

*Held*, further, that the defendants are entitled to an order that the plaintiff demolish all dams and obstructions made by him obstructing the natural flow of the stream.

ACTION for damages and for an order that the defendants demolish the works diverting the natural course of Anderson Creek and allow the said creek to resume its natural course through the plaintiff's property, and for an order perpetually enjoining and restraining the defendants from interfering with or diverting the natural course of the said creek. The defendants counterclaim for an order that the plaintiff demolish all dams and obstructions made by the plaintiff obstructing the natural flow of the said stream and allow the said stream to flow without obstruction. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Prince George on the 8th and 9th of October, 1936.

*J. O. Wilson*, for plaintiff.
*Avison, and McNeill*, for defendants.

2nd December, 1936.

FISHER, J.: The plaintiff occupies and works farm lands described in paragraph 2 of the amended statement of claim herein, being the owner of an undivided half interest in the said lands and being entitled as to the other half interest to the beneficial enjoyment thereof as set out in said paragraph 2. He has no water record or water licence with respect to the stream in question herein.

The defendants own, occupy and work lands which may be described as being in the same neighbourhood and on the same stream known as "Anderson Creek" but lower down. The defendants were the holders of Conditional Water Licence No. 12495 with respect to said stream (see Exhibit 9), but do not claim that they were entitled under said licence to divert the course and flow of the said stream. The defendants contend that they did not divert the flow at all but only cleaned out what they call the west branch of said stream in order to allow the water to run more freely. It must be noted however that it is admitted that the defendants posted at or near the alleged point of diversion a notice of an application to divert 1800 gallons of water at such point (see Exhibit 5). I find that in or about the month of May, 1936, the defendants did wrongfully and unlawfully divert the course and flow of the said stream, the natural course of which, as I find, flowed through the said farm lands occupied by the plaintiff and owned to the extent as aforesaid by plaintiff who had been using and relying on the use of the water for at least domestic and stock-watering purposes. I would also hold that under such circumstances the plaintiff had the riparian rights if any and this brings me to the consideration of what such rights are.

It is submitted by counsel on behalf of the defendants that in any event the legislation of this Province has taken away the right which at common law and apart from such legislation a riparian owner would appear to have had to the continuance of the undiminished flow of the water which in its natural course would flow by or through his land. In support of this submission counsel relies first upon *Spruce Creek Power Co.* v. *Muirhead* (1904), 11 B.C. 68 at 73-4 and especially *Cook* v. *Vancouver Corporation,* [1914] A.C. 1077 at 1082; 28 W.L.R. 801 at 804 where Lord Moulton delivering the judgment of the Board says as follows:

Their Lordships pronounce no opinion as to the right of a riparian proprietor to make use of the water flowing by his land in a way which does not interfere with recorded water rights of other parties. Riparian rights under English law are of two kinds. First, there is the right to make use in certain specified ways of the water flowing by the land, and, secondly, there is the right to the continuance of that flow undiminished. The second of these classes of rights is clearly taken away by the legislation of British

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Columbia, but this case does not raise the question whether rights of the first class still remain, and their Lordships do not desire to express any opinion thereon.

With reference to this passage I have to say in the first place that the *Cook* case was a case where the defendant municipality relied upon rights acquired by record pursuant to the Water Clauses Consolidation Act, 1897, and amending Acts and it was held by the trial judge that such statute made such riparian rights as exist in British Columbia subject to rights acquired by record pursuant to its provisions. It is clear also that the judgment of the trial judge dismissing the action was ratified throughout and I think therefore that what was said by the Courts below as well as by the Judicial Committee of the Privy Council should be noted. When the case was before our Court of Appeal, IRVING, J.A. said (see *Cook* v. *City of Vancouver* (1912), 17 B.C. 477 at p. 480):

> It seems impossible to suppose that the Legislature in 1897, when it, after reciting the provisions of the Act of 1892, passed the provisions it did, relating to the acquiring of water and the making of water power available to the fullest possible extent in aid of industrial development as well as of the agricultural and mineral resources of the Province, did not intend to break in upon the rights which at common law would belong to the plaintiff.

At pp. 482-6, MARTIN, J.A. says in part as follows:

> With respect to his riparian rights, I may, for the purposes of this case, adopt the general definition of their nature as given by DUFF, J. in *Esquimalt Waterworks Company* v. *City of Victoria* (1907), 12 B.C. 302 at p. 322, 2 M.M.C. 480 at p. 496, as follows:
>
> "The right of a riparian proprietor is not a mere privilege, but a right incident to his ownership of the land, 'parcel of the inheritance,' as it is commonly put by the text writers on the subject."
>
> And speaking of one effect of the Water Clauses Consolidation Act of 1897, which is that which was in force when the defendants' record was obtained, he said, p. 323:
>
> "As regards the Act of 1897, it cannot, I think, be maintained, that it does not, indirectly, interfere in a most substantial way with pre-existing riparian rights; but it is not, I think, necessary to conclude that that Act, any more than the Act of 1892, abrogates those rights. It makes provision by which persons complying with the conditions prescribed by it may acquire rights to divert water in circumstances under which such diversion, apart from the provisions of the Act, would be a wrongful invasion of the rights of riparian proprietors. But because to that extent the Act is retrospective in its operation, one is not bound to give—indeed, one is bound not to give—to it any further retrospective operation, unless that be necessary in order to give effect to its provisions. See *Reid* v. *Reid* (1886), 31 Ch. D. 402, *per* Bowen, L.J. at p. 408."

Sections 4 and 5 of said Act of 1897 are as follows:

"4. The right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the Province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake or stream vested in the Crown, and to which there is access by a public road or reserve.

"5. No right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

Section 4 is not very happily worded, but its meaning becomes plain, or plainer, when its construction is partly reframed so as to give what I am satisfied is its true meaning, thus: ". . . vested in the Crown in the right of the Province, and no person shall divert or appropriate any water from any river . . . etc. (save in the exercise of any legal right existing at the time of such diversion or appropriation), unless (except) he does so under the provisions of this or some other Act . . ." etc.

Read thus, it is clear to me that since the right to the use of unrecorded water is formally "vested in the Crown" (wherein it must remain till it is as formally divested therefrom), a riparian owner must "exercise" any legal rights to divert or appropriate such water before a valid application for record of it is made by another, and if he does not so preserve his riparian rights, he is prevented from exercising them as regards the water covered by the record granted on such application during the duration of that record, as hereinafter noticed. To give an example: I have no doubt that a riparian owner who was duly "exercising" his existing legal right to use the water of a stream to run machinery to supply, say, electric light and power for his house and farm purposes, would retain that right as against an applicant for a record thereof. And such water would also be water which was "appropriated," "occupied," and "used for a beneficial purpose," within the meaning of the exception in the interpretation given to "unrecorded water" in section 2, thus:

" 'Unrecorded water' shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by Public or Private Act, and shall include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose."

This section has been considered in some aspects by the Privy Council in the *Esquimalt Waterworks Company* v. *City of Victoria Corporation*, [1907] A.C. 499 at pp. 528-9, and it is clear that the right to the use of all water which cannot be excluded from that definition, or which is not within the saving clause of exceptions contained in section 4, is "vested in the Crown" by that section. . . . .

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In the *Esquimalt Waterworks Company* case, *supra*, their Lordships of the Privy Council drew attention to the acts done which led them to reach the conclusion that the water in controversy there had been "appropriated" (p. 527), and also that it was water held under a private Act and therefore not "unrecorded water" (pp. 528-9); see also the remarks of DUFF, J. in the Court below, p. 494. But, as the same learned judge pointed out, p. 322: "The fact that these [riparian] rights were subject to curtailment by reason of grants of water records under existing legislation did not, in the absence of such records, affect the validity or scope of the rights," and he goes on to point out that riparian owners have a "remedy . . . . against a wholly wrongful and unauthorized diversion of the stream."

In short, it comes to this, that though riparian rights may be curtailed or suspended, they are not abrogated. In the case at Bar, for example, if there were a mean flow of 30 cubic inches past the plaintiff's property and a record of 15 cubic inches were granted to a third party, the plaintiff would, until an application for a record for the remaining 15 inches, preserve all his riparian rights therein, and if he chose to "exercise" them as above mentioned, he could forestall any applicant and preserve them intact. See what DUFF, J. says at p. 323:

"No records have been granted in respect to any of the waters in question, and the rights to these waters incident to the ownership of the lands purchased by the Company remained in the owners of these lands, unimpaired, as acquired by virtue of the original grants from the Crown at the time these rights were appropriated by the Company. Does the Act of 1897, then, authorize any interference with these rights? To my mind, it does not." . . . .

With respect to section 5 (which first appeared substantially in its present form in the Water Privileges Act, 1892, British Columbia statutes, 1892, chapter 47, section 3), I read it as a precautionary enactment providing that in no circumstances shall any one, whether a riparian owner or not, "acquire . . . the right to the permanent diversion or the exclusive use of the water," etc., unless by the Act, the intention being, so far as riparian rights are concerned, not, for one thing, to allow the owner to acquire such rights by any combination of circumstances, *e.g.*, such as are pointed out by DUFF, J. in the *Esquimalt Waterworks Company* case, *supra*. Even so early as 1870 he had been denied the "exclusive right to the use of . . . water . . . flowing naturally through or over his land, except such record shall have been made," by section 30 of the Land Ordinance of 1870, referred to in *Martley* v. *Carson*, *supra*, at p. 674.

So far I have been considering the plaintiff's rights under the Act of 1897, under which the records complained of were granted. I now turn to the existing Act of 1911, Revised Statutes of British Columbia, chapter 239. Section 4 is as follows:

"Saving the right of every riparian proprietor to the use of water for domestic purposes, the right to the use of the unrecorded water in any stream is hereby declared to be vested in the Crown in the right of the Province; and save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water except under the provisions of this or some former Act, or except

in the exercise of the general right of all persons to use for domestic purposes water to which there is lawful public or private access."

It will be noticed that this section has in one place a narrower, and in another a wider definition of water than the old section 4, *viz.*: in line 3 the expression is "water in any stream"—not water "in any river, lake, or stream," while in the sixth line it is "any water," without limitation. How this might affect the decision in *In re Milsted* (1908), 13 B.C. 364, it is unnecessary to consider. Otherwise, and beyond the fact that it specifically recognizes the right of "every riparian proprietor to the use of water for domestic purposes," the section has, for the purposes of this case, the same effect as old section 4; and save as regards the expressions "any water" and "by licence," the same remark applies to section 5.

I have set out a considerable portion of the judgment of MARTIN, J.A. in the *Cook* case because it deals with riparian rights under both the Act of 1897 and the Act of 1911, R.S.B.C. Cap. 239, and also because it quotes passages from the judgment of DUFF, J. (now Chief Justice of Canada) in the *Esquimalt* case relied upon by counsel for the plaintiff. Reverting now to the consideration of the passage above set out from the judgment of the Judicial Committee of the Privy Council in the *Cook* case, I have to say that, in view of what was said in the Courts below and the fact that the judgment of the trial judge was ratified throughout, I am forced to the conclusion that the passage means no more than that the legislation up to that time had taken away the right of the riparian owner to the continuance of the undiminished flow of the water flowing by his land as against the recorded water rights of other parties, that is only in the sense or to the extent that a right to divert or appropriate might be granted to other parties.

Counsel for the defendant however relies also upon the existing Water Act as amended by the Act of 1925. Section 5 is not changed by the amending Act but section 4 now reads as follows:

4. The property in and the right to the use of all the water at any time in any stream in the Province is for all purposes vested in the Crown in the right of the Province, except only in so far as private rights therein have been established under special Acts or under licences issued in pursuance of this or some former Act relating to the use of water. It shall not, however, be an offence for any person to use for domestic purpose any unrecorded water to which there is lawful public or private access.

Section 6 has also been changed, but I cannot see that the change materially affects the meaning of the legislation bearing upon the rights of riparian proprietors.

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It is apparent that by section 4 as it now stands the "property in" as well as the "right to the use" of all the water in any stream in the Province is vested in the Crown and that the section no longer expressly saves in the same words the "right of every riparian proprietor" to the use of water for domestic purposes or the "general right of all persons" to use for such purposes water to which there is lawful public or private access.

Counsel for the defendants relies especially upon the changes thus made. With respect to the property in the water itself however it may be said that there is nothing new in the legislation as the view that none can have any property in the water itself was clearly stated by Parke, B. in *Embrey* v. *Owen* (1851), 6 Ex. 353 where at p. 369 he uses this language:

> The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

With respect to the absence of the saving clause as aforesaid I have to say that I do not think it is a fair inference from such absence that the pre-existing riparian right is taken away. It is quite apparent that in the *Cook* case their Lordships of the Privy Council expressly declared that they pronounced no opinion as to the right of a riparian owner to make use of the water flowing by his land in a way which does not interfere with recorded water rights of other parties. Under the circumstances I would hold in view of the opinions expressed by the judges, who have dealt with such matters in the cases hereinbefore referred to, that the riparian owner still has the right so to make use of such water and still has a remedy against a wholly wrongful and unauthorized diversion of the stream which deprives him of such right unless the legislation, as it now stands, clearly takes away such right and remedy. I do not think that the changes already referred to carry the legislation that far. Reference must now be made however to the fact that

section 4 now expressly states that "it shall not however be an offence for any person to use for domestic purposes any unrecorded water to which there is lawful public or private access." It is or may be argued on behalf of the defendants that this express statement means that the right of the riparian owner to such user at present exists only on sufferance. In reply to this argument reference might first be made to the interpretation given to "unrecorded water" in the Act and the remarks of MARTIN, J.A., *supra,* as to the probability of a riparian owner, who was duly "exercising" his existing legal right to use the water for farm purposes, retaining that right intact as against an applicant for a record. In the present case I have found that before the diversion in question herein the water had been "used for a beneficial purpose" by the plaintiff and it might be that he would be able to retain such right as against an applicant for another record. I express no opinion on this phase of the matter however but hold that unless and until records or licences have been granted for all the water flowing by or through the plaintiff's land, which I find is not the case here, the plaintiff still has the right to use the water flowing by or through his land subject, of course, to any rights granted. Though the defendants had a water licence as aforesaid, I find that it did not cover all the flow there would have been if there had been no diversion. It is admitted that under their licence the defendants had acquired no right to divert and in my opinion therefore what they did was a wrongful invasion of the right of the plaintiff as aforesaid. I think that what was said by DUFF, J. in the *Esquimalt* case, *supra,* with respect to the Act of 1897 interfering with but not abrogating pre-existing riparian rights may also be said with respect to the Water Act as it now stands but in any event I hold that the present Act does not abrogate such rights to such an extent that the riparian owner has no remedy against a wholly wrongful and unauthorized diversion which deprives him of the opportunity which he would otherwise have to use water for domestic purposes without committing any offence. I am satisfied that if the defendants had not diverted the stream the plaintiff could have rightfully made use of the water flowing by or through his land in a way which did not

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interfere with the water rights of the defendants. I find, therefore, that the acts of the defendants caused loss to the plaintiff and that the latter had, and has as matters now stand, the right to be protected against such loss. Though damages have been asked for, the plaintiff really desires according to his claim (1) an order that the defendants demolish the works diverting the natural course of Anderson Creek and allow the said creek to resume its natural course through his property and (2) an order perpetually enjoining and restraining the defendants from interfering with or diverting the natural course of the said creek. I think the remedy should be by way of orders such as are asked for rather than by way of damages—see Coulson & Forbes's Law of Waters, 4th Ed., 682. There will therefore be orders accordingly but the order perpetually enjoining will be subject to any licence that may hereafter be granted to the defendants under the provisions of the Water Act and there will be liberty to all parties to apply to the Court.

I now come to the counterclaim of the defendants. I find as a fact that the plaintiff during the time of the year 1936 when the said stream was flowing by or through his land undiminished interfered with the natural course and flow of the said stream by constructing or maintaining a dam on the stream in front of and adjacent to his buildings. In my view this was going beyond the right of user which I have found he had as it interfered as I find with the water rights of the defendants under their licence. The acts of the plaintiff caused loss to the defendants and the latter had, and have as matters now stand, the right to be protected against such loss. The defendants desire an order that the plaintiff demolish all dams and obstructions made by him obstructing the natural flow of the said stream and allow the said stream to flow without obstruction. There will be an order accordingly with liberty to apply as aforesaid.

The defendants also claimed that the plaintiff polluted the stream but, though I find the water in the stream was polluted, I cannot find on the evidence before me that it was polluted by the plaintiff. This part of the counterclaim is therefore disallowed.

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The plaintiff will have his costs of the claim against the defendants and the defendants the costs of the counterclaim against the plaintiff with right of set-off.

*Judgment accordingly.*

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*Feb.* 11, 12;
*March* 30.

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*Payment — British Columbia Lower Mainland Dairy Products Board— Charge in respect of milk marketing scheme—Natural Products Marketing Act—Act subsequently declared "ultra vires"—Action to recover— Mistake of law—Can. Stats. 1934, Cap. 57—B.C. Stats. 1934, Cap. 38— R.S.B.C. 1924, Cap. 48—B.C. Stats. 1926-27, Cap. 42.*

The first-mentioned defendant Board was constituted under the "Milk Marketing Scheme of the Lower Mainland of British Columbia," a scheme approved by the Governor in Council under The Natural Products Marketing Act, 1934 (Dominion). The second defendant Board was constituted under a like marketing scheme approved by order in council under the Natural Products Marketing (British Columbia) Act. The *personnel* of the two Boards was the same, with common staff and office, and the whole field with respect to the marketing of natural products was under the operation of the two statutes. Under both schemes "agency" meant "a group of producers joined in corporate form for the purpose of marketing milk" and both schemes had power "to designate the agency or agencies through which the regulated product should be marketed." The plaintiff association, composed of about 300 members, requested that the association be designated an "agency" under the marketing scheme, and on the 22nd of January, 1935, the said association with two others were so designated. On the 25th of January, 1935, the Board (Dominion) passed an order imposing a charge or toll in respect of the marketing of all milk produced within the area as defined in the marketing scheme, the toll being fixed at one cent for every pound of butterfat content of the milk marketed. The toll was varied by subsequent orders. The plaintiff voluntarily paid the tolls for the period between the 1st of February, 1935, and the 15th of June, 1935, paying in all $3,954.26. The plaintiffs then made no further payments owing to an intimation from the defendants that they were about to put into effect a pooling scheme provided for in both marketing

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schemes, and cancel existing agencies. On the 17th of June, 1936, the Supreme Court of Canada advised that the Dominion Act was *ultra vires* (*Reference re The Natural Products Marketing Act, 1934, and its Amending Act, 1935*, [1936] S.C.R. 398, affirmed by the Privy Council, [1937] W.N. 57; 1 W.W.R. 328). Upon the plaintiff's action claiming the return of $3,954.26 received by the defendants to the use of the plaintiff:—

*Held*, that no question of coercion, duress or fraud arises here. The moneys were paid voluntarily with full knowledge of the facts under a mistake of law and cannot be recovered.

ACTION claiming the return of $3,954.26, being the sum paid by the plaintiff to the defendant the B.C. Lower Mainland Dairy Products Board, between the 1st of February, 1935, and the 15th of June, 1935, under an order of the British Columbia Lower Mainland Dairy Products Board passed on the 25th of January, 1935, imposing a charge or toll

in respect of the marketing of all milk produced within the area as defined in a scheme approved by the Governor in Council on the 31st of December, 1934, under The Natural Products Marketing Act, 1934, Can. Stats. 1934, Cap. 57, from dairy farms classed as Grade "A" or Grade "B" under the provisions of the Milk Act and the regulations thereunder, including all milk so produced and which is marketed under the direction of the B.C. Lower Mainland Dairy Products Board.

The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 11th and 12th of February, 1937.

*Hossie, K.C.* (*J. E. T. McMullen*, with him), for plaintiff.

*Maitland, K.C.* (*Hutcheson*, with him), for defendants.

*Cur. adv. vult.*

30th March, 1937.

MANSON, J.: The plaintiff is a Co-operative Association incorporated under the Co-operative Associations Act, R.S.B.C. 1924, Cap. 48. The defendant the British Columbia Lower Mainland Dairy Products Board was a Local Board constituted under the "Milk Marketing Scheme of the Lower Mainland of British Columbia," a scheme approved by the Governor in Council on the 31st of December, 1934, under The Natural Products Marketing Act, 1934 (24 & 25 Geo. V.), Cap. 57. The defendant the B.C. Lower Mainland Dairy Products Board was

the Marketing Board constituted under the "Milk Marketing Scheme of the Lower Mainland of British Columbia," a scheme approved by order in council on the 21st of November, 1934, under the Natural Products Marketing (British Columbia) Act, B.C. Stats. 1934, Cap. 38. The latter defendant was known under the Dominion scheme as the "Provincial Local Board" (*Sed vide* section 2 (1) (p) of the Dominion scheme which said:

"Provincial Local Board" means the British Columbia Lower Mainland Dairy Products Board organized under the Natural Products Marketing (British Columbia) Act, 1934.

This is neither the proper citation of the Provincial Act, nor is it the name given in the Provincial scheme to the "Marketing Board" established thereunder to administer the scheme).

The schemes, Dominion and Provincial, were both with respect to "the marketing of milk and products processed or manufactured wholly or chiefly from milk." They had application to the same area, roughly, the Lower Mainland, or Lower Fraser Valley, area of this Province. Under both schemes a "producer" was defined to mean "a person producing within the area milk for sale in fluid form or for manufacturing purposes" and under both "regulated product" was defined to mean "milk or manufactured products as defined" in the schemes and the phrase "manufactured products" was identically defined in both schemes. Under both schemes "agency" meant "a group of producers joined in corporate form for the purpose of marketing the milk or manufactured products of its members." Under the Dominion scheme the Local Board had power "to designate the agency or agencies through which the regulated product shall be marketed" and under the Provincial scheme the Provincial Local Board had not only that power but the additional power "to prohibit the marketing of the regulated product except through the agency or agencies designated."

The purpose and definition of the Dominion scheme was set out in section 3 thereof which reads as follows:

3. The purpose and definition of the scheme is

(a) to regulate the marketing in interprovincial and export trade of the regulated product produced in the area of the Province of British Columbia to which the scheme relates, and

(b) to supplement the British Columbia Lower Mainland Dairy Products scheme organized under the Natural Products Marketing (British Columbia)

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Act, 1934, in so far as it may be within the jurisdiction of the Parliament of Canada to do so, and

(c) to impose tolls and charges in respect of the marketing of the whole or any part of the regulated product to provide a fund to compensate any person who has marketed any of the regulated product in interprovincial or export trade, and for all the purposes of the Provincial Local Board or the Local Board.

The purpose of the Provincial scheme was set forth in section 4 thereof.

4. The purpose of the scheme is to regulate, subject to the supervision of the Provincial Board, the marketing of the milk or manufactured product produced in the area.

The "Dominion Marketing Board" was a Board established under section 3 of the Dominion Act. It had wide powers to regulate the marketing of natural products and, *inter alia,* the power

to co-operate with any board or agency established under the law of any province to regulate the marketing of any natural product of such province and to act conjointly with any such provincial board or agency:

section 4 (1) (i) and it had the power further to authorize a Local Board to exercise its powers so far "as may be necessary for the proper enforcement of the scheme of regulation, . . ." (section 4 (2)). It had power, whether exercising the powers conferred by the Dominion Act or by Provincial legislation, to establish a separate fund in connection with any scheme of regulation and for the purposes of such scheme to impose charges and tolls (section 4 (4)). It might authorize a Local Board to collect and disburse the charges or tolls imposed (section 4 (5)), and under section 4 (6) whenever the Board or a Local Board was co-operating or acting conjointly with any board or agency established under Provincial law it might similarly impose charges or tolls in respect of the marketing of the whole or part of the product marketed under the direction of such board or agency and it might authorize such board or agency to act as the agent of the Board in collecting and disbursing such charges or tolls. Under section 4 (7) a fund created by charges or tolls imposed in connection with a scheme of regulation might be utilized by the Board or by the Local Board if so authorized by the Board, for the purposes of such scheme including the creating of reserves, and in the case of charges or tolls imposed in respect of the marketing of any product under the direction of any

board or agency established under Provincial law to regulate the marketing of any natural product, the Board might direct that the charges or tolls be utilized by and for the purposes of such board or agency. The "British Columbia Marketing Board" (called the Provincial Board under the Dominion scheme—*vide* Scheme section 2 (1) (o)) was a board constituted under section 3 of the Provincial Act. Under section 4 of the Act the Provincial Board was to have like powers in relation to the marketing of natural products within Provincial jurisdiction as under the Dominion Act "are had and exercisable by the Dominion Board in relation to the marketing of natural products within Dominion jurisdiction," so far as the powers could be applied and subject to the definition of its powers by order in council. No order in council, so far as appears from the evidence, seems to have been passed. Under section 10 of the Dominion Act the Governor in Council might authorize any Provincial marketing board or agency to exercise the functions of a Local Board with reference to a Dominion scheme, if the scheme related to an area confined within the limits of a Province, and under section 11 the Board might exercise any power conferred upon it by or pursuant to Provincial legislation and might authorize a Local Board to exercise any such power. Under the Provincial Act a Provincial Board might co-operate with the Dominion Board and, further, might act conjointly with the Dominion Board (section 5). It might, under approval of an order in council, exercise powers conferred or imposed by the Dominion Act (section 6) and the Dominion Board was empowered, with the approval of the Lieutenant-Governor in Council to exercise any of its powers in any manner and under any circumstances within Provincial jurisdiction, to the like extent and with the like effect as those powers might be exercised by it pursuant to the Dominion Act (section 7). Under the Dominion scheme the Local Board was empowered,—

To establish a separate fund in connection with the scheme of regulation and for the purposes thereof, to impose charges and tolls in respect of the marketing of the whole or any part of the regulated product, including any such product marketed under the direction of the Provincial Local Board, and to determine by whom such charges and tolls shall be payable; provided that in the case of charges the tolls imposed in respect of any of the regulated product marketed under the direction of the Provincial Local Board,

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such Provincial Local Board shall be authorized to collect and disburse such charges and tolls.

And further empowered

To utilize the fund created by charges or tolls imposed in connection with the scheme of regulation for the purposes of the scheme; provided that in the case of charges or tolls imposed in respect of the regulated product marketed under the direction of the Provincial Local Board the Board shall direct that such charges and tolls be utilized by and for the purposes of the said Provincial Local Board.

Obviously it was intended that the two statutes referred to should be complementary. It was the intention of the Dominion Parliament and of the Legislature of this Province that the whole field with respect to the marketing of natural products should be occupied by the operation of the two statutes, but "the best laid schemes o' mice an' men gang aft a-gley." On the 17th of June, 1936, the Supreme Court of Canada, upon a reference, expressed the opinion that the Dominion Act was *ultra vires* [1936] S.C.R. 398. On the 28th of January, 1937, the Judicial Committee of the Privy Council affirmed the opinion of the Supreme Court of Canada, [1937] W.N. 57; 1 W.W.R. 328, and on the 2nd of February, 1937, in an action of *Vancouver Growers Limited* v. *B.C. Coast Vegetable Marketing Board* (not yet reported*) my brother FISHER of this Court held that the Dominion Act was *ultra vires*.

The *personnel* of the defendant Boards was the same. They had a common secretary, but a single minute book, a common staff, and a common office. There was but one bank account and it was in the name of the B.C. Lower Mainland Dairy Products Board. There was but one seal and it served both Boards.

On the 14th of January, 1935, Basil Gardom, president of the Independent Milk Producers Association (now the plaintiff) wrote to the defendant the B.C. Lower Mainland Dairy Products Board requesting that the Association "be designated as an 'agency' under the Milk Marketing Scheme of the Lower Mainland of British Columbia" (*vide* Exhibit 23). On the 22nd of January, 1935, the B.C. Mainland Dairy Products Board, "pursuant to the provisions of the Milk Marketing Scheme of the Lower Mainland of British Columbia and under section 14, subsection (b) thereof," designated the aforementioned association and two others as "Agencies" under the scheme.

* Since reported, *post*, p. 433.

On the 25th of January, 1935, the British Columbia Lower Mainland Dairy Products Board passed an order imposing a charge or toll

in respect of the marketing of all milk produced within the area as defined in the said scheme from dairy farms classed as Grade "A" or Grade "B" under the provisions of the "Milk Act" and the regulations thereunder, including all milk so produced and which is marketed under the direction of the B.C. Lower Mainland Dairy Products Board.

The toll was fixed at 1 cent for every pound of the butterfat content of the milk marketed (*vide* Exhibit 5). Subsequent orders varied the toll and added to the classifications of milk to which the toll applied. The plaintiff assumed that the Dominion Act was *intra vires* and, not only did it request its appointment as an agency (*vide* Exhibit 23), but it assured the defendant the B.C. Lower Mainland Dairy Products Board of its desire to uphold the Board. A letter from the plaintiff to the last-mentioned Board, under date of 11th March, 1935, closes with this paragraph: "Assuring you of our best efforts to uphold the orders of the Board" (*vide* Exhibit 12). This apparently was a voluntary assurance given by the plaintiff. Nothing in the evidence at the trial indicated that there were other than cordial relations between the plaintiff and the defendants until the middle of June, 1935, when the defendants set about putting into effect a pooling scheme as provided for in the schemes both Dominion and Provincial. The plaintiff then withdrew its support entirely. Up to that time it paid the tolls imposed without protest and so far as one can conclude from the evidence quite willingly, and, as pointed out, with the desire to give full support to the scheme. The plaintiff paid no tolls levied for a later period than that ending 15th June, 1935. Up to that time the plaintiff had paid to the defendant the B.C. Lower Mainland Dairy Products Board the gross sum of $3,954.26. On the day that the Supreme Court gave its answer to the reference, namely, the 17th of June, 1936, the plaintiff issued a specially endorsed writ claiming the return of the aforementioned sum "received by the defendants to the use of the plaintiff" and alleged by way of particulars "to amount of charges or tolls illegally demanded of and extorted from the plaintiff."

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Upon the evidence there was no extortion. On the contrary there was willing payment by the plaintiff of the tolls for the period 1st February, 1935, to 15th June, 1935. It was frankly admitted at the trial by the witness, Wm. A. Hayward, a director of the plaintiff association, that the paragraph quoted above from Exhibit 12 was a correct statement of the attitude of the plaintiff in the early stages of the operation of the schemes and that the change of attitude was induced by reason of the fact that a pooling scheme was mooted. That the defendants did have in mind such a pooling scheme is evidenced by the letter to the plaintiff under date of 3rd July, 1935, advising of the intent to cancel all existing agencies and replace them by one agency (*vide* Exhibit 24).

The last payment of levy was made by the plaintiff on 29th June, 1935 (*vide* Exhibit 7). The other designated agencies continued to pay for some months, one of them until 31st August, 1936 (*vide* Exhibit 39). In all the defendant the B.C. Lower Mainland Dairy Products Board collected levies totalling $55,835.55 and $134.48 bank interest, a total of $55,970.03 (*vide* Exhibit 39). Levies imposed totalled for the period ending 15th June, 1935, $30,727.87, the whole of which sum was paid in by the agencies. There had been paid in on account of levies as of 30th June, 1935, the sum of $21,213.22, and there had been disbursed up to that date the sum of $12,248.67 (*vide* Exhibit 25). Approximately $9,000 was then on hand. The disbursements were made for operating expenses including salaries of members of the Board and staff. No question is raised as to the propriety of the disbursements. A summary of operating expenditures up to the 15th of June, 1935, shows $10,857.44 expended up to that date (*vide* Exhibit 27). The operations of the defendants continued for months after the plaintiff ceased to pay, and, of course, the expenses. Expenses ran somewhat over $2,000 a month and there was expended by the end of November, 1935, a sum in excess of the approximate sum of $9,000 on hand at the end of June, 1935 (*vide* Exhibit 26).

There can be no doubt that it was the intention of the payor and of the payee of the levies that when payment was made the

moneys should cease to be the property of the payor. It was never intended that the defendants should stand trustees of the moneys paid in for the benefit of the payor. It was perfectly well understood that the defendants would, as occasion required, disburse the moneys collected for the purpose of carrying on their operations—operations intended to be for the benefit of the producers of the Lower Mainland, of whom some 300 were members of the plaintiff association, and believed, as I infer from the evidence, by the plaintiff to be for the benefit of its members. The well-recognized rule of law is that

> moneys drawn out on a banking account are to be applied to the earlier items on the opposite of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted:

*Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372 at 391, and it is said in the same case at p. 391 "They are the principles which govern all other accounts," *i.e.*, other than bank accounts. The reporter notes at the foot of p. 391:

> This principle is by no means limited to bankers, but is applicable to all accounts. See 1 Story Eq. Jur. sec. 459 *b*, and cases in note to this point.

*Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572, 604, involved the matter of a bank account but the reasoning of the Master of the Rolls in that case is applicable and pertinent in the case at Bar. The moneys paid in by the plaintiff were clearly not paid in to the use of the plaintiff and they were wholly expended months before the commencement of this action.

The plaintiff paid the tolls imposed under mistake of law. Counsel for the plaintiff submits that the British Columbia Lower Mainland Dairy Products Board was invalidly constituted and therefore without power either to demand or to receive any money from anyone and further that the question of estoppel could not arise since no conduct on the part of the plaintiff could have confirmed jurisdiction in the Board last mentioned to receive or retain any money, nor could acquiescence have any effect since jurisdiction could not be conferred by consent. It was contended that the rule that money paid voluntarily with a full knowledge of the facts is not, as a general rule, recoverable upon the ground that it was paid under a mistake as to the law or as to the legal effect of the circumstances under which it was paid, is not applicable when the receiving person was *ab initio* without authority to receive it. That contention is not borne out

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by the authorities. In *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265, the pertinent law is thoroughly discussed by that very able judge the late Mr. Justice Osler. There the municipal corporation passed a by-law to the effect that no butcher could without being duly licensed under the by-law sell any fresh meat in any part of the municipality. The plaintiff after some demur took out licences for two years. Upon a prosecution for failure to take out a licence for the third year the by-law was held invalid. Cushen subsequently brought action to recover the fees paid. It was held that the fees having been paid with full knowledge of the facts, under a claim of right, without fraud or imposition, and without actual interference with the business of the plaintiff, or compulsion exercised upon him, could not be recovered. To the same effect is the decision in *Colwood Park Association Limited* v. *Corporation of Oak Bay* (1928), 40 B.C. 233. No question of coercion or duress arises here—nor of fraud and I am unable to distinguish between a licence fee imposed under an invalid by-law and a toll imposed under an *ultra vires* statute. While it is clear that a Court of Equity might relieve in certain circumstances against the rule of law above cited, there is no circumstance that would warrant so doing here. I do not think it can be said that the plaintiff was on an unequal footing and forced into a position where it was compelled to pay.

Not only are the equities not in favour of the plaintiff but they are against it. As pointed out above the moneys paid in by the plaintiff were expended long before the commencement of this action together with the moneys of the other agencies paid in up to the 30th of June, 1935. The moneys now at the credit of this action and the moneys paid into Court under the Trustee Act (some $5,000 odd paid in after the affirmation by the Judicial Committee of the opinion of the Supreme Court) are not the moneys of the plaintiff in whole or in part. The plaintiff brought action the very day the opinion of the Judicial Committee was made known. It sought by quick action to get its hands upon moneys not paid in by it but by others. The equities are very definitely against any such manœuvre. A Court of Equity would not in the circumstances be astute to assist the plaintiff.

The action is dismissed. *Action dismissed.*

## VANCOUVER GROWERS LIMITED v. B.C. COAST VEGETABLE MARKETING BOARD *ET AL.*

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1935
*Nov.* 14, 15.
1936
*Sept.* 21.
1937
*Feb.* 2.

*Constitutional law—Natural Products Marketing Act, 1934 (Dominion)—Validity—Money received under ultra vires Act—Liability of persons receiving same—Colore officii—Mistake of law—Magistrates Act as defence—R.S.B.C. 1924, Cap. 150, Secs. 9 and 10—Can. Stats. 1934, Cap. 57; 1935, Cap. 64.*

The constitutionality of The Natural Products Marketing Act, 1934, having been raised, the opinion expressed in the answer given by the Supreme Court of Canada and affirmed by the Judicial Committee of the Privy Council on the *Reference re The Natural Products Marketing Act, 1934*, ([1937] 1 W.W.R. 328) must be considered as binding on this Court. The Natural Products Marketing Act, 1934, and its amending Act of 1935 must therefore be held to be *ultra vires* of the Parliament of Canada.

The three individual defendants purported to be and to act as a local Board under the provisions of said Act, regulating and controlling, *inter alia*, the interprovincial marketing of vegetables pursuant to Dominion orders in council passed under said Act and the scheme attached. The defendant G. H. Snow Limited purported to be and to act as the designated agency of the Board in such regulation and control, and in doing so received certain sums of money in respect of the interprovincial marketing of vegetables obtained from the plaintiff. The plaintiff's claim is for a certain amount as money had and received by them for the use of the plaintiff, and for a certain sum as balance for work done and materials supplied by the plaintiff in packing vegetables at the request of the defendants.

*Held*, that the evidence showed that the plaintiff had no choice but to market its product through the defendants, and the parties were not on equal terms and it abstained from and was interfered with in carrying on its business owing to the demands or orders of the defendants *colore officii*. The plaintiffs had sufficient possession of and interest in the goods in question to maintain this action and are entitled to judgment against all the defendants on both claims.

*Held*, further, that the defendants could not rely on sections 9 and 10 of the Magistrates Act as the Act under which they purported to act was *ultra vires* and there was neither a Board nor any lawfully existing office, consequently they were neither officers *de jure*, nor officers *de facto*.

*Held*, further, that as under the agreement between "the Board" and the defendant G. H. Snow Limited the defendants dealt with the money jointly, they were all liable.

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ACTION for an account of all moneys received by the defendants in respect of the marketing of the plaintiff's vegetables between the 27th of May and the 15th of July, 1935, inclusive, and an account of all levies or tolls purporting to be made by the defendants in respect of said vegetables, also for the balance due for work done and materials supplied by it in packing vegetables at defendants' request. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 14th and 15th of November, 1935, and the 21st of September, 1936.

*Higgins, K.C.*, for plaintiff.

*Maitland, K.C.*, and *J. G. A. Hutcheson*, for defendants other than G. H. Snow Limited.

*McPhee*, and *Bonnell*, for defendant G. H. Snow Limited.

*Pepler, D.A.-G.*, for the Attorney-General.

*Cur. adv. vult.*

2nd February, 1937.

FISHER, J.: In this matter I have first to say that, as the question of the constitutionality of The Natural Products Marketing Act, 1934, Can. Stats. 1934, Cap. 57, was raised herein and such question was also before the Judicial Committee of the Privy Council upon appeal from the Supreme Court of Canada, I thought it advisable to delay my judgment herein pending the final decision. Although I have not seen the full text of the judgment of their Lordships of the Privy Council I think there can be no doubt that they have affirmed the opinion of the Supreme Court of Canada ([1936] S.C.R. 398) and I do not think I should delay my judgment herein any longer. During the argument in the present case counsel for the plaintiff referred to what was said by Duff, J., now Chief Justice of Canada, in *In re Criminal Code* (1910), 43 S.C.R. 434, at 451-3; 16 Can. C.C. 459. It may be noted that at pp. 452-3 he said as follows:

With regard to questions submitted under the Dominion statute the course of the Judicial Committee has, I think, been very instructive. The authority conferred by the statute has been sometimes used for the submission of specific points in controversy between the Dominion and the Provinces upon the construction of the "British North America Act" which, as bearing

upon the validity of specific statutes, it was thought desirable to have determined; both sides to the controversy having accepted the issue and the tribunals having the benefit of the fullest argument upon it. Even in such cases the Board has usually refused to pass upon questions touching private interests not represented (the question relating to the rights of riparian proprietors for example, *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A.C. 700, at p. 717), or to answer questions the replies to which might properly be influenced by the circumstances in which the questions should arise for actual judicial decision. *Attorney-General for Ontario* v. *Hamilton Street Railway Co.*, [1903] A.C. 524, at page 529.

The questions submitted in this case relate to the construction of statutes governing criminal procedure and the answers to them could not well be affected by the circumstances of any particular case in which they might arise; and they are therefore not open to the same objections as may be taken to purely hypothetical questions.

Though it may be said in the present case that the question of the constitutionality of the said Act has arisen out of a particular or concrete case touching private interests, I think it may also be said that the answer to such questions relating as it does to the construction of the British North America Act, 1867, could not well be affected by the circumstances of this particular case. With respect therefore to such question arising before me for actual judicial decision I think that the opinion expressed in the answer, given by the Supreme Court of Canada and affirmed by the Judicial Committee of the Privy Council on the reference aforesaid, must be considered as binding upon me as a judicial decision in a concrete case. I accordingly hold that The Natural Products Marketing Act, 1934, and its amending Act, 1935, Cap. 64, are *ultra vires* of the Parliament of Canada. It follows also that the Dominion orders in council and scheme set up thereunder and questioned herein are invalid. There are other questions, however, arising in the present case and I will now proceed to deal with such upon the basis of the said Acts being *ultra vires*.

The defendants, A. W. McLenan, Leslie Gilmore and A. H. Peterson purported to be and to act as a local Board under the provisions of the said The Natural Products Marketing Act, 1934, regulating and controlling, *inter alia*, the interprovincial marketing of vegetables, grown in a certain area in British Columbia, pursuant to Dominion orders in council passed under said Act and the scheme thereto attached. Under the provisions

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of said Dominion Act the said local Board became a body corporate. The defendant G. H. Snow Limited purported to be and to act as the designated agency of the said Board in such regulation and control and in doing so received certain sums of money in respect of the interprovincial marketing of vegetables obtained from the plaintiff.

The plaintiff claims against the said defendants and the larger portion of its claim with which I will first deal is for a certain amount as money had and received by them for the use of the plaintiff. In the first place I have to say that I agree with the contention of counsel on behalf of the plaintiff that, as the said Dominion Act under which the defendants acted was *ultra vires,* there was no Dominion Board and therefore the said defendants A. W. McLenan, Leslie Gilmore, A. H. Peterson and G. H. Snow Limited took or must be held to have taken the goods from the plaintiff and received money for them, when marketed interprovincially, under colour of office (*colore officii*) illegally as neither the Board nor its designated agency ever legally existed as such. Counsel contends that where the plaintiff's goods have been thus wrongfully obtained by the said defendants and converted into money the plaintiff may waive the tort and sue for the proceeds as money received for its use—*Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216, and *Brocklebank Ltd.* v. *Regem,* [1925] 1 K.B. 52, especially at 67, are relied upon. On the other hand counsel for the defendants rely especially on *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265, which was followed in *Colwood Park Association Limited* v. *Corporation of Oak Bay* (1928), 40 B.C. 233, where it was held that the money having been paid voluntarily under a mistake of law could not be recovered back even if the by-law in question therein were *ultra vires.* In the *Cushen* case the head-note reads as follows:

> A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed by summary prosecution. The plaintiff, after some demur, took out licences for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:—
>
> *Held,* in an action brought by him to recover back the fees paid by him,

and by other butchers whose rights had been assigned to him, that the fees having been paid with full knowledge of the facts, under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

I think it is obvious from the head-note that in the *Cushen* case, *supra,* the Court found that there was no actual interference with the business of the butchers or compulsion exercised upon them and that if the Court had found otherwise the judgment would have been different. Reference, however, might be made to what is said by Osler, J.A. at pp. 266, 267 and 269:

In the case of some of these payments there was no evidence of the circumstances under which they were made; and as to others, it appeared that they were so paid to avoid a threatened prosecution for breach of the by-law. Two of the witnesses spoke of a statement made to them by the market inspector or other city official, that they could not be allowed to stand in the market unless a licence was taken out; but it is clear that there was neither power nor attempt to enforce such a threat, and the proper inference is that if made at all it was stated only as a result which would follow a prosecution and conviction for a breach of the by-law.

Under these circumstances, I am of opinion that the action does not lie. "The common principle is that if a man chooses to give away his money or take his chance whether he is doing so or not, he cannot afterwards change his mind. But it is open to him to shew that he supposed the facts to be otherwise, or that he really had no choice": Pollock on Contracts, 6th Ed., p. 579; *Brisbane* v. *Dacres* (1813), 5 Taunt. 143.

It is clear that the facts were all known to the plaintiff and the others of whose claims he has become the assignee. The question then is, whether these payments are to be regarded as voluntary payments or made under compulsion—made, that is, under circumstances which left the parties making them no choice. The latter alternative, as stated in the passage I have just quoted, is of course expressed in condensed language, comprising such cases as payments of extortionate demands by public officers; payments of illegal demands *colore officii;* payments made to obtain possession of property improperly detained, or to induce a person or company, *e.g.,* a public carrier, to do what the latter was bound to do without it: . . .

The case at Bar bears no analogy to any case of the classes I have mentioned. . . .

The right of the municipality to receive the licence fee and the obligation of the plaintiff and others to take out the licence depended upon the validity of the by-law, and were enforceable by means only of a legal proceeding. There was no power to enforce the by-law by distress or other interference with the plaintiff's business. The only consequence of his refusal to take out a licence and pay the fee, was that a summary prosecution before a magistrate might have been instituted in which the validity of the by-law might have been tested . . . For these reasons I am of opinion that the appeal should be allowed, and the action dismissed.

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On p. 270 Maclennan, J.A. says:

> I do not find that the evidence goes so far as to prove that the plaintiff abstained from or was interfered with at all in carrying on his business by the demands or threats of the inspector.

In one of the passages quoted from the *Cushen* case, *supra,* Osler, J.A. refers specifically to cases of payments of illegal demands *colore officii* as being comprised in the classes of cases of payments made under circumstances which left the party no choice and in another of the passages stated that "the case at Bar"—that is the *Cushen* case—"bears no analogy to any case of the classes I have mentioned."

This brings me to the circumstances of the present case. The evidence shows that by order Nos. 3 and 6 of B.C. Coast Vegetable Marketing Board (see Exhibits 3 and 7) the defendant G. H. Snow Limited was designated the agency through which the regulated product should be marketed and the marketing of the regulated product or any part thereof except through the said agency was prohibited. Obviously the plaintiff really had no choice and the parties were not on equal terms. I find that the evidence here goes so far as to prove that the plaintiff abstained from and was interfered with in carrying on its business by the illegal demands or orders of the defendants *colore officii.* The case is therefore in my view distinguishable from the *Cushen* case, *supra,* and the plaintiff is entitled to recover on its claim for money had and received as aforesaid unless the defendants can rely on other defences pleaded. See the *Lamine* v. *Dorrell* and *Brocklebank Ld.* v. *Regem* cases, *supra,* and the authorities referred to by Scrutton, L.J. in the *Brocklebank* case, especially at pp. 67-8.

I now come therefore to deal with the other defences and I will first deal with the submission of counsel on behalf of the defendants that in any event the plaintiff was not the owner of the goods but only selling agents for Mainland Growers Co-operative Association and therefore cannot maintain such an action for moneys had and received for its use. With reference to this submission I have to say that my view is that if the agreement (Exhibit 14) does not give the plaintiff company the ownership of the property it gives it sufficient possession and interest in the property as against third parties to enable it to maintain

such an action against the defendants under the circumstances here. Undoubtedly from time to time statements of account and cheques were sent to the plaintiff company by the said G. H. Snow Limited and the Mainland Growers Co-operative Association was not recognized as having any interest in the matter. See *Oughton* v. *Seppings* (1830), 1 B. & Ad. 241; *Hooper* v. *Mayor, &c. of Exeter* (1887), 56 L.J.Q.B. 457.

In further answer to the plaintiff's claim the defendants plead the provisions of the Magistrates Act, R.S.B.C. 1924, Cap. 150, and particularly the provisions of sections 9 and 10 thereof, reading as follows:

9. No action shall be brought against any Judge, Stipendiary or Police Magistrate, Justice of the Peace, or officer, for any act or thing by him done under the supposed authority of a Statute or statutory provision of the Province or of the Dominion which Statute or statutory provision was beyond the legislative jurisdiction of the Legislature of the Province or of the Parliament of Canada, as the case may be, provided such action would not lie against him if the said Statute or statutory provision had been within the legislative jurisdiction of the Parliament or Legislature which assumed to enact the same.

10. Where, notwithstanding the above provision, an action is sustainable against any Judge, Stipendiary or Police Magistrate, Justice of the Peace, or officer, for any act or thing by him done under the authority of a Statute or statutory provision, as in the above provision, the action shall only be sustainable subject to the like provisions as the action would be subject to if the Statute or statutory provision were valid: and the like damages, and no more, shall be recoverable in any such action as under the like circumstances could have been recovered if the Statute or statutory provision had been valid.

With reference to the defendants' plea based on these sections I have only to say that I do not think the defendants in the present case can rely upon such sections unless and until they have established that the defendants were officers and in my opinion they have not established this. As already intimated I agree with the contention of counsel for the plaintiff that the Dominion statute being *ultra vires* there was neither a Board nor any lawfully existing office and consequently the defendants were neither officers *de jure* nor officers *de facto* and so cannot be heard to say that they were entitled to rely on any provisions passed for the protection of an officer.

I now come to deal with the submission made by counsel on behalf of the said defendants other than G. H. Snow Limited

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that in any event they are not liable to the plaintiff even if the other defendant is. At the same time I will deal with the submission made on the other hand by counsel on behalf of the said G. H. Snow Limited that the said company is not liable to the plaintiff even if the other defendants are. I agree with the contention of counsel for the plaintiff that they are all liable to the plaintiff. It must be noted that paragraph numbered 8 of the agreement between "the Board" and G. H. Snow Limited reads as follows:

> 8. That all moneys received by the Agency from the sale of the regulated product will be forthwith deposited by the Agency in the Canadian Bank of Commerce, 698 West Hastings Street, in the City of Vancouver, Province of British Columbia, in an account to be known as the B.C. Coast Vegetable Marketing Trust Account, and from which, withdrawals shall only be made by cheque signed by the Agency and countersigned by the Board.

This paragraph seems to me to indicate the arrangement made between the defendants with respect to all moneys received and the arrangement being as indicated I think it is clear that the defendants dealt with the money jointly and are all liable. See *Neate* v. *Harding* (1851), 6 Ex. 349, and *Parker* v. *Bristol & Exeter Ry.* (1851), *ib.* 702. I might add that I have not overlooked the other paragraphs of the said agreement or the evidence as to how the moneys received were actually paid out but in my view all this makes no difference to the right of the plaintiff against the defendants who were receiving the goods of the plaintiff and dealing with and distributing the proceeds thereof as they saw fit subject always to the basic agreement between them as set out in said paragraph 8.

I now come to deal with the plaintiff's claim for a certain sum as balance for work done and materials supplied by the plaintiff in packing vegetables at the request of the defendants. I cannot see any difference in the liability of the said defendants as the said agreement between them (see Exhibit 11) provided for such services being rendered by the designated agency to the producers at a cost subject to the approval of the Board and under said agreement said services could have been paid for out of the trust account provided for in said paragraph 8.

I therefore hold that the plaintiff is entitled to judgment against the said defendants A. W. McLenan, Leslie Gilmore, A. H. Peterson and G. H. Snow Limited on its claim for money

had and received and also on its claim for a balance for work done and materials supplied. I understood that the parties were in agreement as to the exact amount of each claim in which case there will be judgment in favour of the plaintiff against the said defendants accordingly but, if the parties are not so agreed, the amounts for which there will be judgment against all of the said defendants, as I make no difference between them upon my conclusions as above set out, may be spoken to.

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*Judgment for plaintiff.*

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## BOWCOTT v. WESTWOOD.

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*March* 9, 16.

*Negligence—Accident resulting in death—Action against tortfeasor—Death of tortfeasor—Discontinuance of action—New action against executor—Administration Act Amendment Act, 1934, B.C. Stats. 1934, Cap. 2—Families' Compensation Act, R.S.B.C. 1924, Cap. 85.*

The Administration Act and amendments thereto apply to actions based upon the death of a person wrongfully or negligently caused by another and brought under the Families' Compensation Act as well as under the Administration Act and amendments thereto.

The Families' Compensation Act does not in itself give a right of action against the executor of the estate of a person who has wrongfully or negligently caused the death of another, but the said Act and the Administration Act and amendments thereto combined, do give such a right of action for the benefit of the relatives mentioned in the said first-named Act.

The Administration Act Amendment Act, 1934, does not effect any alteration in the law in respect to damages for shock, anxiety and mental suffering.

In this action the plaintiff sued as administratrix for the benefit of herself as wife of the deceased and for the benefit of his children, but did not claim damages for the benefit of the estate.

*Held*, that on the pleadings as they stand she could not recover for nursing, hospital or funeral expenses.

The plaintiff brought a similar action previously against the alleged tortfeasor himself. Upon the death of the tortfeasor the action was, pursuant to an order, discontinued.

*Held*, that notwithstanding section 5 of the Families' Compensation Act the present action does lie.

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HEARING pursuant to an order made herein that points of law raised by the defendant in certain paragraphs of her defence be set down for hearing and disposed of before the trial of the issues of fact. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 9th of March, 1937.

*McKenzie,* for plaintiff.
*Sigler,* for defendant.

*Cur. adv. vult.*

16th March, 1937.

FISHER, J.: This matter is before me pursuant to an order made herein that the points of law raised by the defendant in paragraphs 10, 11, 12, 13 and 14 of her defence should be set down for hearing and disposed of before the trial of the issues of fact.

The defendant is the executrix of the estate of the late Walter Gordon Westwood who died on November 13th, 1936. The plaintiff is the widow and administratrix of the late Alfred Joseph Bowcott who died on December 23rd, 1935. It would appear that the said Emily Jane Bowcott brought a previous action in this Court as wife of the said Alfred Joseph Bowcott, deceased, against the said Walter Gordon Westwood now deceased as defendant but discontinued said action on December 22nd, 1936, pursuant to an order made in such action on December 14th, 1936. The nature of the present action and the points of law raised by the defendant in said paragraphs are shown by certain paragraphs of the statement of claim and of the statement of defence reading as hereinafter set out.

Paragraphs 3, 4, 6 and 7 of the statement of claim read in part as follows:

3. The plaintiff sues herein under the Administration Act and amendments thereto, and Families' Compensation Act, as administratrix of the estate of Alfred Joseph Bowcott, deceased, for the benefit of herself as wife of the said deceased, as well as for the benefit of the children of the said deceased, namely: Reginald Bowcott, Mrs. R. Webb, Hector Bowcott, Gladys Bowcott, Mrs. Doris Murray and Ruth Bowcott; all of the City of Vancouver in the Province of British Columbia; for damages suffered from the negligence of one Walter Gordon Westwood, on the 23rd day of December, A.D. 1935, in driving a motor-vehicle which ran into and caused the death of the said Alfred Joseph Bowcott on or about the 23rd day of December, A.D. 1935 . . .

4. The plaintiff pleads the provisions of the Motor-vehicle Act, being chapter 50 of the Revised Statutes of British Columbia, 1935, and amending Acts and regulations issued thereunder, and the Street Traffic By-law No. 2234 of the City of Vancouver and amendments thereto, and the Highway Act, being chapter 103 of the Revised Statutes of British Columbia, 1924, and amending Acts; and the Administration Act and amendments thereto, and Families' Compensation Act, and, by virtue of section 71 of the Administration Act, being chapter 5 of the Revised Statutes of British Columbia, 1924, as enacted by section 2 of the Administration Act Amendment Act, 1934, being chapter 2 of the Statutes of British Columbia, 1934, the defendant is liable to the plaintiff for the claim herein, to the same extent as the said deceased, Walter Gordon Westwood would have been had he lived.

6. As a result of the injuries suffered by the said Alfred Joseph Bowcott, the plaintiff necessarily incurred expenses for his care prior to his death as follows:

| | |
|---|---|
| Doctor, nursing and hospital | $100.00 |
| Mount Pleasant Undertaking Co. | 231.00 |
| | $331.00 |

7. As a result of the death and injuries suffered by the said Alfred Joseph Bowcott, the plaintiff suffered severe shock, anxiety and mental suffering since his death which has resulted in impairment of her health and thereby suffered damage.

Said paragraphs 10, 11, 12, 13 and 14 of the defence read as follows:

10. The defendant will object that the Administration Act, and amendments thereto, does not apply to actions based upon the death of a person wrongfully or negligently caused by another and brought under the Families' Compensation Act.

11. The defendant will object that the Families' Compensation Act gives no right of action against the executor of the estate of a person who has wrongfully or negligently caused the death of another.

12. The defendant will object that this action does not lie by virtue of section 5 of the Families' Compensation Act, in that the plaintiff herein brought an action, No. B 904/1936, in this Honourable Court, as wife of the said Alfred Joseph Bowcott, deceased, against Walter Gordon Westwood (now deceased) as defendant, for and in respect of the same subject-matter of complaint herein, which said action, No. B 904/1936, the plaintiff therein discontinued on the 22nd day of December, A.D. 1936.

13. The defendant will object that the plaintiff is not entitled in law to recover the expenses claimed in paragraph 6 of the statement of claim herein.

14. The defendant will object that the plaintiff is not entitled in law to recover for the damage alleged in paragraph 7 of the statement of claim herein.

Counsel for the defendant relies upon the maxim *actio personalis moritur cum persona* and the rule in *Baker* v. *Bolton* (1808), 1 Camp. 493; and refers to an article upon "Recent

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Legislation on the English Law of Tort" in (1936), 14 Can. Bar Rev. 639-653. As this article discusses the said maxim and the said rule, and also refers to many of the cases relied upon by counsel for the defendant and to the said Fatal Accidents Act, 1846, which is similar to our said Families' Compensation Act, R.S.B.C. 1924, Cap. 85, I think it well to set out here a portion of the article which reads in part as follows (p. 644):

*Death as creating liability.* If one man wrongfully kills another, is that a tort? At Common Law, no. This is commonly stated as "the rule in *Baker* v. *Bolton*," where Lord Ellenborough ruled that "in a civil Court, the death of a human being could not be complained of as an injury." The plaintiff and his wife were passengers on the top of the defendants' stage-coach which was overturned by the negligence of the defendants "whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month thereafter." The plaintiff recovered £100 for his own bruises, and for the loss of his wife's society and services between the moment of the accident and her death; but nothing for the loss of her society and services after that event.

*Baker* v. *Bolton* was only a ruling at *nisi prius*, not a single authority was cited and the report is extremely brief; but for all that I think that it correctly represented the law at that time. The rule has two entirely different applications:

(a) The infliction of death is not, as such, a tort. This was law long before *Baker* v. *Bolton* and the historical reasons for it need not be repeated here. To put the matter shortly, if A killed B, nothing was recoverable against A by B's relatives for B's death.

(b) Loss resulting to third parties by the infliction of death is not a tort. Therefore, if A kills B, C, who had an interest in the continuance of B's life cannot at Common Law recover damages against A for the loss of B.

At p. 645:

I have said that *actio personalis moritur cum persona* had really very little effect on the history of death as an element in either destroying or in creating liability in tort and I must add here that, whatever may have been the iniquities of this maxim, it was not so much as mentioned in *Baker* v. *Bolton*, nor had it any real effect in producing the decisions which upheld that case.

At p. 646:

By statute, the first inroad on the rule was the Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (commonly known as Lord Campbell's Act). It was rendered imperative by the invention of railways, and the consequent increase in fatal accidents. As the law stood, if there was to be an accident at all, the more people who broke their necks instead of being merely injured, the better for the railway company; for while injured survivors could recover heavy damages, the relatives of those who were killed outright could recover nothing. The Act provided that whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would (if death had not ensued) have entitled the injured person to sue and

recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount to a felony. . . .

At pp. 647-8:

As to the creation of tortious liability by death, the Fatal Accidents Act, 1846, or rather its judicial interpretation, had done much to improve the law, but a yawning gap in it was revealed by the growth of motor traffic. It was principally this that led to the passing of the Act of 1934 just as, nearly a century ago, the growth of railway traffic led to the Act of 1846. But in 1934 the evil was worse, for where the railway slew its scores the motor vehicle killed its hundreds, and the especially hard case uncovered by the Act of 1846 was this. If a person were severely injured or killed by the negligence of a motor driver who himself was killed by the accident, nothing was recoverable by the survivor (or his representatives if he were killed) against the estate of the dead tortfeasor; and it often happened that the man injured or killed by this tortfeasor's negligence had not insured himself against injury or death. The Road Traffic Act, 1930, 20 & 21 Geo. V., c. 43, Part II. made it compulsory upon owners of cars to insure against "third party" risks and it was seen that if this provision was to be of any use to the third party injured or killed in a case like that above, provision must also be made that death of the wrongdoer should not affect his remedy. Another drawback in the Act of 1846 was inherent in it and had nothing to do with motor traffic. It was the niggardly restriction of the remedy to a small circle of near relatives.

Mr. Winfield in his article then goes on to summarize the reforms set up by The Law Reform (Miscellaneous Provisions) Act, 1934, and discusses the case of *Rose* v. *Ford,* [1936] 1 K.B. 90, which he says has been criticized as a decision which did not carry out the purpose of the Act of 1934. Such Act is admittedly quite different from our British Columbia Administration Act Amendment Act, 1934, Cap. 2, relied upon by the counsel for the plaintiff here but, as already indicated, the Fatal Accidents Act, 1846, is similar to our Families' Compensation Act. The present case therefore raises an important question on the construction of the said amendment Act of 1934, and requires consideration of whether or not such Act fills the "yawning gap" which may also be said to be in our Families' Compensation Act. Does our said amendment Act make it possible for the administrator of the estate of a person killed by the negligence of a motor driver to maintain an action against the estate of the tortfeasor in the event of his death either on behalf of the estate of which he is administrator or for the small circle of near relatives or for both?

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I pause here to point out that in the *Rose* v. *Ford* case, *supra,* the father of the girl, who had died as the result of injuries sustained in a motor-car collision a few days before her death, brought an action as her administrator and claimed damages, both under the Fatal Accidents Acts, 1846-1908, for her dependants and under The Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate. Liability for damages as regards the claim under the Fatal Accidents Act was admitted but the other claim was disputed and it was held by the majority of the Court of Appeal that the plaintiff as the administrator of the deceased was not entitled to recover damages for the diminution of her expectation of life inasmuch as that would be to complain in a civil Court of the death of a human being as an injury contrary to the rule in *Baker* v. *Bolton, supra.*

Counsel for the defendant calls attention to the use of the expression "torts or injuries" in said section 71 (2) and the expression "tort or injury" in section 71 (3) as enacted by section 2 of our said Administration Act Amendment Act, 1934, and relies upon the *Rose* v. *Ford* decision, *supra,* but I do not think that case can be relied on as an authority for the proposition that notwithstanding the Fatal Accidents Act the rule in *Baker* v. *Bolton, supra,* would have prevented the plaintiff administrator in the *Rose* case from recovering damages for the dependants as liability with respect to such was admitted. Reference is also made by counsel to *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59; 54 L.J.P. 9, approved of in *British Columbia Electric Railway Company Limited* v. *Gentile,* [1914] A.C. 1034; 83 L.J.P.C. 353; 6 W.W.R. 1342, which held that Lord Campbell's Act gives a new cause of action and does not merely regulate or enlarge an old one but undoubtedly, as pointed out in the article above referred to, an inroad was made upon the rule in *Baker* v. *Bolton* by the Fatal Accidents Act, 1846 (commonly known as Lord Campbell's Act) or the Families' Compensation Act as we have it and, in my opinion, the dependants were thereafter enabled to complain of the death of a human being as a "tort or injury" which the rule in *Baker* v. *Bolton* would otherwise have prevented. Thus whatever may be said of the right of an administratrix claiming on behalf of

the estate under the Administration Act Amendment Act, 1934, the right of the administratrix claiming on behalf of the relatives under such Act and the Families' Compensation Act in my view cannot be disputed. One must of course note the difference in the wording of our said amendment Act and the wording of the said Law Reform (Miscellaneous Provisions) Act, 1934, and especially the difference between section 71, subsection (6) of our said Administration Act and section 1 (5) of the said Law Reform (Miscellaneous Provisions) Act, 1934, which latter section reads as follows:

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

It might also be noted that subsection (3) of said section 71 of said Administration Act does not contain the words contained in subsection (2) of said section providing that the damages recovered in the action should form part of the personal estate of the deceased.

Though it might be said with all respect that our legislation might have been made more definite I think the intention of the legislation is clear that the rights conferred by the said Administration Act Amendment Act, 1934, are not only without prejudice to but in addition to the rights conferred on the dependants of deceased persons by the Families' Compensation Act and that so much of the said amendment Act as relates to causes of action against the estates of deceased persons should apply in relation to causes of action under our said Families' Compensation Act.

In the present case I think it is quite apparent that the plaintiff as administratrix of the estate of Alfred Joseph Bowcott has sued the defendant as executrix of the estate of Walter Gordon Westwood, deceased, for the benefit of herself as wife of the said deceased as well as for the benefit of the children of the said deceased as above set out and my view is that she can maintain such action. I cannot see, however, that the plaintiff as administratrix has in the present action claimed damages also

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for the benefit of the estate of the deceased as I have noted was done in the *Rose* v. *Ford* case above. Whatever rights the plaintiff might have, if such a claim had been made for the benefit of the estate, I do not think that on the pleadings as they stand the plaintiff would be entitled in law to recover the expenses claimed in paragraph 6 of the statement of claim. It must also be noted that the said Administration Act Amendment Act, 1934, does not contain anything similar to the express provisions of section 1, subsection (2) and section 2, subsection (3), of said Law Reform (Miscellaneous Provisions) Act, 1934, with respect to funeral expenses.

With reference to the damage alleged in paragraph 7 of the statement of claim I have to say that I do not think the plaintiff would have been entitled in law to recover for such damage in an action under the said Families' Compensation Act against the said Walter Gordon Westwood if he had lived—see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 695, and cases there referred to. I do not think the said Administration Act Amendment Act, 1934, effects any alteration in respect to the recovery of such damage.

I, therefore, dispose of the points of law raised by the defendant in above-mentioned paragraphs of her defence as follows:

(1) The Administration Act and amendments thereto apply to actions based upon the death of a person wrongfully or negligently caused by another and brought under the Families' Compensation Act as well as under said Administration Act and amendments thereto.

(2) The said Families' Compensation Act does not in itself give a right of action against the executor of the estate of a person who has wrongfully or negligently caused the death of another but the said Act and the Administration Act and amendments thereto combined do give such a right of action for the benefit of the relatives mentioned in the said first-named Act.

(3) Notwithstanding the provisions of section 5 of the Families' Compensation Act the present action does lie, the said action No. B 904/36 having been discontinued on December 22nd, 1936, pursuant to the order made therein.

(4) As the pleadings in the present action stand the plaintiff is not entitled in law to recover the expenses claimed in paragraph 6 of the statement of claim herein.

(5) The plaintiff is not entitled in law to recover herein for the damage alleged in paragraph 7 of the statement of claim herein.

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## SHEPPARD v. THE TORONTO GENERAL TRUSTS CORPORATION *ET AL.*



*Evidence—Gift of shares—Death of donor—Alleged gift back—Claim against estate—Corroboration—R.S.B.C. 1924, Cap. 82, Sec. 11.*

The defendant was the executor of S. who died in June, 1936. In June, 1931, S. gave the plaintiff 5,000 shares of Pioneer Gold Mines. She became the registered owner and two certificates for 2,500 shares each were issued to her. In November, 1933, prior to her going on a trip, she endorsed one of the certificates in blank, delivered it to S. and asked him to sell the shares. In this she is corroborated by her son, 22 years of age, who was present when the plaintiff asked S. to sell the shares while she was away, and he saw her endorse the certificate. Upon her return S. told her he had not sold the shares and she asked him to keep the certificate for her. The shares remained registered in her name and all dividend cheques were issued to her. In 1934 S. opened a trust account in the Bank of Montreal and some of the dividend cheques, after being endorsed by the plaintiff and S., were paid into this account and the plaintiff had the bank-book for this account in her possession. In an action against the executor for a declaration that she was the owner of the shares represented by said certificate and for delivery of the certificate to her:—

*Held*, that the plaintiff's evidence that the shares were given by her to S. to be sold was corroborated by the testimony of her son, and by the evidence of the subsequent transactions. Section 11 of the Evidence Act was satisfied and the *onus* of proof shifted to the defendant. Under the circumstances there is no presumption of a gift by the plaintiff to S.

ACTION for a declaration that the plaintiff is the owner of 2,500 shares in Pioneer Gold Mines, represented by share certificate No. 1448, held by the defendant, and for delivery of same to her. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 11th of March, 1937.

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*Bull, K.C.*, and *Ralston*, for plaintiff.
*Hossie, K.C.*, and *Ghent Davis*, for defendants.

*Cur. adv. vult.*

18th March, 1937.

ROBERTSON, J.: The plaintiff, May L. Sheppard, and the late J. D. Stuart, had been intimate friends for some years, prior to his death, on June 7th, 1936. Before June 10th, 1931, Stuart gave to the plaintiff 5,000 Pioneer Gold Mines shares and on that date she became the registered owner of the shares, and certificates Nos. 1447 and 1448, each for 2,500 shares, were issued to her. She at all times retained possession of certificate 1447 and had certificate 1448 up to a few days prior to November 3rd, 1933, when she left for a three weeks' visit to Los Angeles. Stuart had sold some Pioneer shares for her in 1932. A few days prior to November 3rd, 1933, she was minded to sell 2,500 shares and reinvest the proceeds. She asked Stuart to sell them, while she was away, "if they went up, and he could get a decent price." He said he would. She then endorsed certificate 1448 in blank. Stuart witnessed her signature and she handed it to him. Her son, who is now 22 years of age, says he was present when the plaintiff asked Stuart to sell 2,500 Pioneer shares for her while she was away, provided he got a good price. He saw the plaintiff endorse the certificate. The plaintiff says that after her return Stuart told her the shares had not been sold and she told him to keep them for her. He said they were in his safe at his office and any time she wanted, she could get them. The shares are still registered in her name. The plaintiff received the dividends on all the 5,000 shares up to October 1st, 1933. About this time, she says, Stuart told her she was spending her money too freely and said he would open a trust account for her. It is convenient to mention here that the stock had paid quarterly dividends, of $153 in 1932, of $300 in the first two quarters of 1934 and from July, 1933, until October 1st, 1934, $750, and after that $1,000. All dividend cheques were made payable to the plaintiff. She endorsed the cheque of October 2nd, 1933, and probably handed it to Stuart. It is also endorsed "J. Duff Stuart In Trust." Stuart opened a trust account "J. Duff Stuart In Trust" in the Bank of Montreal

on January 16th, 1934. She had the bank-book for this account. It is not clear whether the October cheque was deposited in this account. It appears to have been cashed on October 2nd, 1933. The dividend cheques from October 1st, 1933, down to October 1st, 1935, are endorsed by the plaintiff and Stuart. The cheque October 1st, 1935, has endorsed, under Stuart's signature, "A/c No. 1141 (G)" which was the number of the plaintiff's account in the Bank of Montreal. The plaintiff received, endorsed and paid into her account No. 1141 the dividend cheques of January 2nd, 1936, and April 1st, 1936, which were the last two dividend cheques prior to Stuart's death. These cheques were not endorsed by Stuart. So that it would appear the plaintiff got the three last dividend cheques. The bank produced all the cheques, but four, drawn on the trust account. They are all signed by Stuart and, with the exception of three, are payable to the plaintiff. The cheques produced show that in 1934 the plaintiff got $1,700 out of $3,000 dividends paid in that year and, in 1935, at least $2,860 out of $4,000 dividends paid in 1935, and, in addition the cheque of October 1st, 1935, for $750, which, as I have said, went to her credit in account 1141. So that she got in cash in that year $3,610 of the dividends. In addition to this she says Stuart bought shares for her in the Federal Gold Mines Limited for which he gave a cheque on the trust account on July 5th, 1935, for $750. He also drew a cheque on this account for $500 on February 9th, 1935, for the purchase of shares in the Hixon Creek (Cariboo) Gold Mines Ltd. She says he told her, then, that was a mistake and he had deposited $500 in the account to make this right. The Bank of Montreal produced a deposit slip for $500, deposited in this account by Stuart on April 16th, 1935. On any basis it is hard to understand why Stuart would pay his own money into this trust account. There is also a cheque on the trust account for $55.20 payable to Columbia Estates Limited which the plaintiff says was to pay the premium on a life-insurance policy on Stuart's life and payable to and received by her. The plaintiff further produced an undated cheque, on this account, signed by Stuart in her favour.

In October, 1933, Stuart had 45,000 Pioneer shares. The market price of these shares in 1931 was about $2.50. The market price rose considerably. From October to December,

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1936, the highest price was $12.55 and the lowest $8.35. On December 28th, 1934, Stuart hypothecated certificate 1448 with the Bank of Montreal. At that time he had about 41,000 Pioneer shares—30,000 of which, in three certificates of 10,000 each, were held for safe keeping by the Canadian Bank of Commerce.

The plaintiff now sues for a declaration that she is the owner of the 2,500 shares covered by certificate 1448 and for delivery to her of it. The defendant submits the plaintiff's evidence is not to be believed, and, alternatively, there is no corroboration of it as required by section 11 of the Evidence Act, R.S.B.C. 1924, Cap. 82, "which corroboration must not be consistent with any other story." Mr. *Hossie* submits that owing to the increase in the value of the shares, it was logical some adjustment should be made and that it should be inferred from this that the shares were given to Stuart by the plaintiff. He was not able, of course, to call anyone to say it was a gift. He further argues the plaintiff is not to be believed because of certain inconsistencies in her evidence and variations between her evidence and that of her son. [After referring to the contentions as to the evidence, ROBERTSON, J. proceeded]: It is noteworthy that the shares still remain in the plaintiff's name. As far as appears all Pioneer shares held by Stuart were registered in his name. If he owned these shares why did he not have them registered in his name and thus avoid any necessity of a trust account? Further, after the plaintiff handed him the certificate, Stuart sold some 12,500 Pioneer shares which were transferred in the books of the company. Why not sell this "street certificate" 1448 if it belonged to him?

After a full consideration of all the evidence I accept the evidence of the plaintiff and her son that these shares were given to Stuart for sale. On the main question, the evidence of the plaintiff is corroborated by her son. Further the above circumstances which I may consider (see *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, at 263) corroborate her story. It is altogether unlikely under the circumstances that Stuart would be asking the plaintiff to return to him any shares which he had given to her. It is also difficult to see why she would give Stuart shares worth then between $25,000 and $30,000. Their relationship would be against any such idea. Moreover, as the plaintiff has

made out a *prima facie* case upon the defendant's admission I think section 11 is satisfied and does not apply to the remaining issue. Once the plaintiff makes out a *prima facie* case against the defendant the *onus* of proof shifts. The defendants admit the gift of the 5,000 shares to the plaintiff, that the share certificate endorsed, as I have mentioned, was handed to Stuart and that no consideration was paid by Stuart to the plaintiff. Under these circumstances there is no presumption of a gift. It was said by Lord Chief Baron Richards, in *George* v. *The Bank of England* (1819), 7 Price 646 at 651; 146 E.R. 1089, that:

> If I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift.

Lewin on Trusts, 13th Ed., p. 160, refers to this case and then says if such an intention cannot be inferred, consistently with the attendant circumstances, a trust will result and cites *Fowkes* v. *Pascoe* (1875), 10 Chy. App. 343; 44 L.J. Ch. 367. Sir G. Jessel's judgment appears in a note at p. 345 in which it is said:

> His Honour did not understand that the law of this Court made any difference between a transfer and a purchase—a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favour of the beneficial owner.

The Court of Appeal reversed his judgment but did not appear to differ from the Master of the Rolls on the ground of presumption.

*Johnstone* v. *Johnstone* (1913), 28 O.L.R. 334, was a case in which the original plaintiff, who died after judgment, had sued the defendant for money alleged to have been put in his hands for safe-keeping. The defendant alleged the moneys were paid to him for services or, alternatively, as a gift. Mulock, C.J., with whom Clute and Sutherland, JJ. agreed, said that whatever were the intentions of the testator in transferring the money to the defendant, no presumption of law arises that she intended to divest herself of her money (almost everything she owned) and make an absolute gift to the defendant.

In *Kinsella* v. *Pask* (1913), *ib.* 393, the plaintiff sued to recover money entrusted to a solicitor for safe-keeping who said it was intended as a gift to the defendant to whom he had given it. Mulock, C.J., with whom Sutherland and Leitch, JJ. agreed,

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said at p. 396 that the *onus* was on the defendant to establish the gift. See also in *In re Howes—Howes* v. *Platt* (1905), 21 T.L.R. 501.

The plaintiff has then made out a *prima facie* case. The defendants have to prove a gift and the *onus* is on them. Beck, J.A., delivering the judgment of the Court of Appeal in *In re Taylor Estate,* [1923] 2 W.W.R. 180; 19 Alta. L.R. 295, in which the facts were that Taylor's executors sued her nephew for moneys advanced to him by the testator which the defendant claimed were a gift, said at p. 185:

> In this case, Taylor being not a son but a nephew, once the evidence had proceeded to the point where the advance was proved or admitted, I think the *onus* then shifted to Taylor [the nephew].

In *Coultwas* v. *Swan* (1871), 19 W.R. 485, affirming (1870), 18 W.R. 746, the facts were that a testator by a deed, purporting to be for valuable consideration, though in fact voluntary, conveyed property to T. as she alleged by way of gift. Lord Hatherley, C. said at p. 486:

> In that state of things, the *onus* is shifted, the deed in truth is gone, and the *onus* on Miss Tooley to make out that there was this gift of the reversion.

It is only necessary for the party seeking to establish a claim against an estate to have corroboration of something essential to be proved by him before he can succeed upon his own evidence. See *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, at 263, where Killam, J. who delivered the judgment of the Court, speaking of the section in the Ontario Act, which is the same as section 11 of our Evidence Act, R.S.B.C. 1924, Cap. 82, says at p. 263:

> In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such "opposite or interested party" in order to entitle him to a "verdict, judgment or decision."

See also *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128, at 131.

*Bayley* v. *Trust and Guarantee Co. Ltd.* (1930), 66 O.L.R. 254, was an action against executors for commission which the plaintiff alleged he was entitled to in respect of a real-estate transaction. The plaintiff proved his claim. The main difference was that the plaintiff was not entitled to the commission as he had without the knowledge of the deceased been paid a commission by the purchaser. The purchaser was called and he proved the payment of a commission by him to the plaintiff. The plaintiff said he had told the deceased all about it and agreed

with him to accept a reduced commission because he was also being paid by the purchaser. It was submitted the plaintiff's evidence should be corroborated because of a section in the Ontario Evidence Act, R.S.O. 1927, Cap. 107, which is the same as our section 11. Hodgins, J.A. said at p. 262 that the Evidence Act had no application to the case. At p. 263 after stating the *onus* on the issue was on the defendant, the executor, he held:

> The plaintiff does not need, on that issue, his own evidence to entitle him to a verdict, . . . on his claim in this action. . . The defendants' defence simply fails because they adduced no evidence in support of it, and they cannot insist on corroborative evidence of the plaintiff's testimony on an issue raised by them but supported by no evidence whatever.

In New Zealand there is apparently no statutory provision like section 11. There the rule that claims against the estate of a deceased person require to be corroborated by other evidence than that of the plaintiff is one of practice and not of law. There it is held the rule has no application when the *onus* of proof, which determines the issue, lies on the representatives of the deceased. In *Tamara Te Angiangi* v. *Treadwell,* [1926] N.Z.L.R. 693, the head-note is:

> The rule, that claims against the estate of a deceased person require to be corroborated by other evidence than that of plaintiff, is a rule of practice rather than of law, and is only applied where the *onus* of proof rests upon plaintiff, and has no application where the *onus* of proof of the facts which determine the issue or issues involved rests upon the representative of the deceased person.

This case was followed and approved in *Cox & Walsh* v. *Burton,* [1933] N.Z.L.R. 249.

Moreover there must be the clearest evidence of an intention to give by way of a voluntary gift—see Stuart, V.C. at 747 in *Coultwas* v. *Swan* (1870), 18 W.R. 746, and Mulock, C.J. in *Johnstone* v. *Johnstone* (1913), 28 O.L.R. 334, at 337, where he said:

> In weighing the conflicting evidence, it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of a gift. The preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift fails.

In my opinion the defendants have failed to prove a gift.

The plaintiff is entitled to the order asked for with costs. There will be no costs of the amendment made at the beginning of the trial.

*Judgment for plaintiff.*

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*March* 22, 23, 24; *April* 26.

## REX v. WILLIAMSON.

*Criminal law—Incorporated club—Place "kept for gain"—Common gaming-house — Game of cards played — Table charge—"Boosters," "sticks," "spares"—Criminal Code, Sec. 226 (a).*

The accused was a steward in the Brunswick Sports Club in Vancouver, incorporated under the Societies Act. The club premises is a three-storey building owned by Con Jones Limited and rented to the club. The basement was used for billiards and snooker pool, and it contained tables for chequers, chess, bridge and other card games. There was also a small library with the daily papers and current magazines. The main floor where the members entered the premises had a number of billiard tables and tables where the members played rummy. The top floor was provided with a large number of tables where the members played poker and included a lunch-counter and cigar-stand. Only members were allowed on the premises, and the club supported football and baseball teams. The members playing poker paid one-half cent, one cent or two cents per hand according to the size of the game, as a table charge. This charge was collected from each player by the steward before each hand was played. When the premises were raided by the police a large number of tables of poker were in play on the top floor. The steward was convicted under section 226 (*a*) of the Criminal Code of unlawfully keeping a common gaming-house.

*Held*, on appeal, affirming the conviction by police magistrate Wood (McQUARRIE, J.A. dissenting), that the Court would not be justified in interfering with the conclusion arrived at by the learned magistrate, namely, that this club is now conducted as and is in substance a proprietary club. While the constitution and frame-work still exist, nevertheless they have been tortured to uses which deprive all the *bona fide* members of any actual control over a body of usurping persons.

APPEAL by accused from his conviction by police magistrate Wood of Vancouver on the charge that he did unlawfully keep a disorderly house, namely, a common gaming-house, on the south side of Hastings Street in Vancouver, and known as the premises of the Brunswick Sports Club. The club premises is a three-storey building. The club is incorporated under the Societies Act. Only members are allowed on the premises and the annual fee for each member is ten cents. The upper floor was used for card games, chiefly poker, and there was a table charge for each player of a certain amount, irrespective of the size or nature of the game. They had pool and billiard tables, and chess was

played on the ground floor and rummy was played on the middle floor. The chief source of revenue is from the card-tables. The defendant was the chief floor steward on the top floor of the premises. The building is owned by Con Jones Limited. On the 17th of January, 1937, the police entered the premises with a search warrant and found eleven tables of poker in play on the upper floor with seven men at each table. A lot of the paraphernalia was seized and brought into Court. It included about 1,000 decks of cards and over 10,000 poker chips.

The appeal was argued at Vancouver on the 22nd, 23rd and 24th of March, 1937, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*Nicholson,* for appellant: The charge is under section 226 (*a*) of the Criminal Code. The club is licensed as a *bona fide* club and the three floors are in charge of stewards. They played poker on the upper floor, which is a mixed game of chance and skill. There was a straight table charge and nothing more, which is legitimate: see *Rex* v. *Bampton* (1931), 44 B.C. 427, and on appeal [1932] S.C.R. 626; 58 Can. C.C. 289. The definition of "club" is in Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 482, sec. 877; *Rex* v. *Riley* (1916), 23 B.C. 192. The collection of money was for the purpose of paying the expenses of the club. There is no element of personal gain. It is not a sham club. There are 60 employees and a steward on each of the floors: see *Salomon* v. *Salomon & Co.,* [1897] A.C. 22 at pp. 30 and 42-3. The accused is a steward and a member of the club: see *Carlisle and Silloth Golf Club* v. *Smith,* [1913] 3 K.B. 75 at 79-80; *Downes* v. *Johnson,* [1895] 2 Q.B. 203 at p. 207. On the question of reasonable doubt see *Rex* v. *McKay* (1919), 32 Can. C.C. 9 at pp. 12-13; *Rex* v. *Mooney* (1921), 36 Can. C.C. 165. Once we have established incorporation and the establishment of a club the Crown must prove its case beyond a reasonable doubt. All a steward need do is to show he is employed and gets a salary.

*Orr* (*Paul Murphy,* with him), for the Crown: The accused poses as a steward. The case comes within *Rex* v. *Sullivan* (1930), 42 B.C. 435. The evidence shows the club is a sham.

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The same premises was once a gambling-house. The game of black jack is an illegal game: see *Reg.* v. *Petrie* (1900), 3 Can. C.C. 439; *Rex* v. *Thomas* (1934), 48 B.C. 76. It is a disorderly house because the housemen were playing in the game. We say the general scheme behind this club was to make money: see *Rex* v. *James* (1903), 7 Can. C.C. 196; *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505 at p. 515. There is no magic in a charter: see *Jackson* v. *Roth* (1918), 35 T.L.R. 59 at p. 61; *Rex* v. *The O.K. Social and Whist Club, Limited* (1929), 21 Cr. App. R. 119. The character of the club is the question: see *Rex* v. *Riley* (1916), 23 B.C. 192. The by-laws of the club provide for a yearly audit but for two years no auditors were appointed and there was no audit of the club's books. This goes to show the club is a sham. With reference to the payment by the poker players to the house when they sit down to play, we say this is an "incident in the game" and therefore illegal. This is a business carried on by the Jones family for gain and is a disorderly house.

*Nicholson*, in reply: The financial statement is read at the annual meeting of the club.

*Cur. adv. vult.*

26th April, 1937.

MARTIN, C.J.B.C.: This is a very difficult case. I shall now briefly express the result of my consideration of it reserving for a later and more opportune date the handing down of written reasons should I think that the necessity therefor arises. Meanwhile my reasons are as follows:

The learned magistrate reached his decision that the appellants were guilty of keeping a disorderly house, *i.e.*, a common gaming-house, contrary to sections 229 and 226 (*a*) of the Criminal Code, because as he succinctly puts it on p. 164 of the appeal book, he found on the whole evidence "that this is not a club but it is a business carried on under the guise of a club and the operations are carried on for the purpose of profit." It was submitted to us that that was tantamount to saying that this is a "sham club," to use an expression which has been aptly employed in the consideration of some cases of this description, and used by myself; but I prefer not to go to that extreme

length on the evidence before us, because I do not think it is necessary to hold that this club is in all respects a sham one, since, owing to the peculiar circumstances of its present operation I do not think that that is an entirely appropriate description of the way it is being operated. But what is appropriate is to say that this club, originally lawfully incorporated in 1919 as a "society" under our Provincial Benevolent Societies Act, R.S.B.C. 1911, Cap. 19, now the Societies Act, Cap. 236, R.S.B.C. 1924, was for a number of years carried on in a way which was admittedly consistent with the activities contemplated by those Acts, but of late that situation has changed, with the result that an unusual one has arisen which, in my opinion, makes this case distinct in certain respects from any other one that has come before us or other appellate Courts.

At the outset it must always be remembered that the law of this land permits gambling of a certain kind to take place in clubs of a certain nature—*Bampton* v. *Regem*, [1932] S.C.R. 626, 630—and favours those which are of the kind that are carried on for the mutual benefit in all respects of the members, and examples of how that can lawfully be done are to be found in many cases, but I just cite these examples—*Bampton* v. *Regem, supra; Rex* v. *Riley* (1916), 23 B.C. 192; and *Rex* v. *Cherry and Long* (1924), 20 Alta. L.R. 400; *e contrario,* as an example of what cannot be done, we have our own recent decision in *Rex* v. *Thomas* (1934), 48 B.C. 76.

Of course it is obvious that a very difficult duty indeed is cast upon the Courts to draw the line between legal innocence and criminality under the varying circumstances of the way in which these clubs of different kinds can be carried on, *e.g.,* under the said Societies Act, under the Co-operative Associations Act, Cap. 48, R.S.B.C. 1924, Sec. 3, and otherwise. With respect to the present one the situation is, as I said peculiar, because not only was it conducted for some considerable time, about twelve years, we are told, in a way which was unquestionably lawful, but that legitimate situation still partly exists in the club as at present carried on, and the fact must be faced that there is evidence to support the submission that there are two or three of its legitimate activities or amenities which are still made use

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of *bona fide* by some of its members to a substantial degree, and who take no part in card games. Now that is an element that I do not find has occurred, to such extent at least, if really identical, in the other cases which have come before this Court. But the present real situation is partly adumbrated by the present Chief Justice of Canada in *Bampton's* case, *supra,* at p. 633, where he points out this:

> Members only were admitted to the premises; and it is well perhaps to emphasize the fact already mentioned that the club was not a proprietary club, but a club incorporated under the Societies Act.

The difficulty I have herein experienced is this, that a club may be originally incorporated properly under the Societies Act and conform not only in its structure and framework but in its method of operation to the intent and spirit of that Act, nevertheless it may later fall under the control of a body of its members, or other persons, so that the essentials of its original incorporation and the legal application of its constitution are changed to the extent that while, as here, it outwardly retains the shell of a legal social club under the Societies Act, yet its true kernel is that it has become a proprietary club; and, if and when that stage of proprietorship is reached it is, or must be, conceded that on the facts before us this conviction must stand.

Now I shall not attempt to review all the complicated circumstances pointing to a scheme of usurpation, but after giving all the facts in evidence most careful consideration I can only come to the conclusion that we would not be justified in interfering with the conclusion that was arrived at by the learned magistrate in substance, though he does not exactly express it, but that is what his judgment must come to, and I prefer to put it upon that, *viz.,* that this club is now conducted as and is in substance a proprietary club, and that while the constitution and framework still exist, nevertheless they have been "tortured" —to use an ancient legal expression, and a very appropriate one —been tortured to uses which deprive all the *bona fide* members of any actual control over a body of usurping persons; whether these usurpers are members of the club or not to my mind makes no difference, because the criminal law regards not the shadow but the substance.

I need only add in coming to this conclusion, and I feel that I ought to say, that I think the submission of Mr. *Nicholson* (who presented an argument that was very able and very useful) that we should not regard the fees that were taken in the way they were taken for the use of the table and equipment as being illegal, is sound. I can see no distinction in principle between the way the fees were exacted here, or taken, as, in effect, for service and equipment charges, and in the way that was done in *Bampton's* case. But there is one thing in connection with this gambling, however, about which I am not satisfied, and that is that the learned magistrate must have taken into consideration the important fact of the employment of five men by the club in a paid capacity styled "boosters" or "sticks," that is to say, men who were on the pay-roll of the club at a certain amount per day, $2, who were permitted and encouraged to assist in and thereby stimulate the carrying on of these poker games, by being immediately available so as to participate therein, and originally to such an extent that they were actually staked by the management. It is only necessary to state that situation to make it apparent that it follows therefrom that the management, however constituted, was carrying on this club unlawfully, whether it was proprietary or not, and those persons who participated in such a thing cannot escape the consequences. But it was submitted to us that the occupation of these men was changed and that their duties and names had been altered and they were now called "spares," and we were invited to say that the nature of their work, whatever it was in the club, being still on its pay-roll at the same rate of $2, had changed so that its former admittedly criminal element had been eliminated. I find it very difficult indeed to say that such is the case. I am not prepared at all to find that the evidence is such as would justify us in coming to the conclusion that these admittedly objectionable hired employees have been purged of what was essentially participation in the offence charged. The magistrate was faced with the difficulty, and he says at large that he finds that the accused did not satisfactorily answer the *prima facie* case which had been admittedly made out against them as a consequence of the raid of the police and the discovery of the gambling paraphernalia.

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I think it is unnecessary to say more, except to read what Chief Justice Duff said at the foot of p. 633, in *Bampton's* case, on subsection (*a*) of section 226, which to my mind is the crux of this whole situation, *viz.*:

> No doubt where it is shown that gain is the real object of the keeping of the place, you have a case within subsection (*a*).

And I would put it this way, that that is what I regard in substance the learned magistrate as having found, and I find it quite impossible to say that he has reached a wrong conclusion in finding in substance that the keeping of this club fell into the hands of a clique of proprietors who usurped and obtained its control for the primary purpose, *i.e.*, the "real object" of acquiring "gain" from gambling carried on therein and that the constitution and framework of the club were used as a screen and a blind to cover that illegal object, and therefore I would dismiss the appeal.

MACDONALD, J.A.: Appeal from a conviction under section 226 (*a*) of the Code for keeping a disorderly house, to wit a common gaming-house, on premises known as the Brunswick Sports Club in Vancouver. As it was entered under a search warrant and the necessary paraphernalia found the Crown relied on its *prima facie* case under sections 985 and 986. The appellant attempted to displace it by evidence relating to the incorporation of the club under the Societies Act, its minutes, records and by-laws, and by the evidence of three employees.

In *Rex* v. *Bampton* reported on appeal to this Court in (1931), 44 B.C. 427, a conviction of the steward of this club about five years ago under the same section was affirmed but on appeal to the Supreme Court of Canada it was set aside (*Bampton* v. *Regem*, [1932] S.C.R. 626). That decision was relied upon as determinative of this appeal. Duff, J., now Chief Justice of Canada, at p. 633, said in that case:

> I have no hesitation in holding that there is no evidence that this club was "a house, room or place kept by any person for gain." There is not the slightest evidence to indicate that the club was not precisely what it purported to be—a club kept for the amusement and recreation, and solely for that purpose, of the members. Fees and other contributions made by the members were for the purpose of defraying the expenses.

That, we must assume, was the situation five years ago as

decided by the Supreme Court of Canada. We are concerned now with the facts existing at the present time and as disclosed by later evidence.

On the same page his Lordship said:

> The section [226 (*a*)] is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself. No doubt where it is shown that gain is the real object of the keeping of the place, you have a case within subsection (*a*).

I am supporting the conviction herein solely under section 226 (a) of the Code, in the light of additional evidence. It was, in my view, disclosed in the recent prosecution that this club is not "what it purported to be" and that "gain is the real object of the keeping of the place." The judgment of the other members of the Supreme Court on that occasion was delivered by Anglin, C.J.C. In it the late Chief Justice followed the decision of *Rex* v. *Riley* (1916), 23 B.C. 192, and *Rex* v. *Cherry and Long* (1924), 20 Alta. L.R. 400. In *Rex* v. *Riley*, MACDONALD, C.J.A., said at pp. 195-6:

> I think the section is aimed at the keeping of a house for gain to which persons come by invitation, express or implied. The members of a *bona fide* club come as of right. This case is analogous to the case of *Downes* v. *Johnson*, [1895] 2 Q.B. 203, where it was held that members of a *bona fide* club were not to be considered persons who resorted to the club. On the facts stated, I am of opinion that the Pender Club was not a house kept for gain, and that, therefore, the accused was wrongly convicted.

If we are concerned in the case at Bar with a *bona fide* organization where a number of persons associate together for some useful purpose other than "the acquisition of gain" it is true that the members go there as of right. That, I think is not this case. MARTIN, J.A., now Chief Justice of British Columbia, at p. 196, said:

> It cannot properly be said, on such facts, that the house or place in question, conducted by the hundred members of the social club all equally interested (*cf.* Halsbury's Laws of England, Vol. 4, p. 406, par. 862) was "kept . . . for gain" within the meaning of the section and as defined by *e.g.*, *Rex* v. *James* (1903), 7 Can. Cr. Cas. 196.

And again:

> I think the conviction could have been supported if it had been found that the club was a sham one, . . .

We are mainly concerned therefore with questions of fact. It should be observed in the *Riley* case, where the conviction was set aside, that (p. 193):

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The only revenue of the club was the entrance fee of $1 per member, amounting to $97, and the "rake-off," and the salaries and other running expenses of the club greatly exceeded the amount paid in by way of membership dues.

These facts will be contrasted with the evidence in this case. Here membership dues in any real sense were not collected at all yet a large daily revenue was obtained by the club or by some parties in control.

In *Rex* v. *Cherry and Long* (1924), 20 Alta. L.R. 400, also approved by the Supreme Court, "the company undoubtedly carried on a *bona fide* club" (p. 405). It, in contrast to the case at Bar, had a substantial entrance fee of $12.50 (not a single payment of 10 cents good for a lifetime) and monthly dues of $2. The money taken from the "pot" was not for gain, but to provide for refreshments. As in *Rex* v. *Riley,* it had no "sticks" boosters or housemen (later referred to) on its pay-roll. The first question properly considered by Beck, J.A., who delivered the judgment of the Court was "whether the place was being conducted for gain" (p. 406). Answering it he said at p. 407:

> As to whether a place is kept for gain, if, from the stakes, bets or other proceeds at or from the same, money is paid to a *bona fide* club, in whose premises the game is being played, in payment for refreshments supplied by the club, I adopt the decision of the Court of Appeal of British Columbia in *Rex* v. *Riley* [(1916)], 23 B.C.R. 192; [1917] 1 W.W.R. 325; 26 C.C.C. 402, and hold that in such a case the club is not kept for gain within the meaning of the statute.

We should follow the judgment of the Supreme Court in *Bampton* v. *Regem* if the facts are alike or so similar that reasonably the same conclusion should be reached: not so if the motive of gain is indicated and *mala fides* disclosed.

Obviously it is important to consider the facts in *Bampton* v. *Regem* upon which the decision of the Supreme Court of Canada was based. The appeal book in that case containing all the evidence before the magistrate was made an exhibit herein. It was a similar charge laid as here against a steward of the club. In the original *Bampton* case, each player paid "two white chips every half hour," having a value of 10 cents. It came out of chips purchased for playing purposes; not out of a pot. The club membership fee was 50 cents. If they had "sticks" or "boosters" at that time it was not disclosed in the evidence. An

even more decisive feature was that certain facts were admitted in the police court. These admissions are given *in extenso* in Exhibit 31. I need only refer to one admission, *viz.*, that "the club is a *bona fide* club and its *status* as such was established by this Court at a hearing in *Rex* v. *Bampton,* 28th February, 1929, before his Worship police magistrate H. C. Shaw, Esquire." There is no such admission in this case. That is one of the issues.

In reference to the foregoing admission Mr. *Orr* for the Crown at that time said, "I would rather that you [the magistrate] came to your own conclusion rather than admit that." That qualified statement, merely indicating a preference, is of little significance. The admission was not withdrawn and Mr. *Orr's* preference was not acted upon because in his judgment the magistrate said "there is no contention that the club is a fictitious club," meaning that the question of its *bona fides* was not in issue. Anglin, C.J.C., in the Supreme Court of Canada when it reached that Court undoubtedly with this admission in mind, after referring to *Rex* v. *Sullivan* (1930), 42 B.C. 435, which was overruled, said, at p. 631:

> Here as there, [*i.e.*, as in the *Sullivan* case] the *bona fide* existence of the club is conceded.

Mr. *Nicholson* for the accused submitted as I understood him that the reference to *bona fides* related to its corporate existence not the *modus operandi* followed. There is no such restricted application in the *Sullivan* case to which reference is made. There "activities" were referred to. MACDONALD, C.J.B.C., at p. 437, said:

> It may be that the appellant is carrying on his activities under cover of a fictitious club, but the evidence falls short of proving it.

In any event whatever was meant one may look under the official cloak to decide the question of *bona fides.*

The evidence before the magistrate in the original *Bampton* case was of the most meagre description. Bampton gave evidence and referred to harmless activities of the club—football, etc. The average takings from the tables in the course of a day was "maybe $5 an hour." Billiard-table revenue was about $1 an hour, rummy tables 80 cents for an hour and a half. Contrast that with a revenue, at times of $700 a day in the case at Bar.

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He said in the original case "there is no money involved as far as the house is concerned." A small revenue was obtained from pool. The biggest collections "were from the poker tables." The magistrate, following *Rex* v. *Sullivan, supra,* now no longer an authority, recorded a conviction, ultimately, as stated, set aside because of its own special facts.

I refer to the evidence in the present case to show how widely the facts now differ from those disclosed in the earlier prosecution. We are concerned, as intimated, with the activities of the same club except that its membership, so called since that time, has grown from 1,700 to 13,000. In dealing with it we should keep in mind the proper method of approach. *Prima facie* it was established by the prosecution that this was

**a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill**

within the meaning of section 226 (*a*) of the Code. If no evidence had been offered on behalf of the accused a conviction would necessarily follow. The assumption therefore at that stage was that the place was kept for gain. It was for the accused to advance proof to a stage where, failing a complete answer at least a reasonable doubt as to the guilt or innocence of the accused would be raised in which event he would be entitled to an acquittal unless the evidence viewed as a whole displaced it (*Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205).

The defence attempted to discharge the burden upon it by calling three witnesses, who (not being directors or committeemen) knew little of the club's internal economy. Mr. *Nicholson* also adduced in evidence the certificate of incorporation under the Societies Act (R.S.B.C. 1924, Cap. 236) and the by-laws, minutes and records of the club's official life. This was strongly relied upon. It will not avail if an official mantle is worn as a cloak to conceal the real purpose of its formation either originally or in the course of its later development. If respect for form and observance of the Act and by-laws was conclusive in its favour (it is of course evidence proper for consideration) there would be no point in Duff, J., now Chief Justice of Canada, speaking in respect to the same club, saying at p. 633, in the original *Bampton* case:

No doubt where it is shown that gain is the real object of the keeping of the place, you have a case within subsection (*a*) [of section 226].

The purpose in calling three employees (stewards) to give evidence instead of the directors or committeemen (the men who actually handled the cash and transacted all banking and other business) was to my mind clear. It was an attempt to satisfy the *onus* without disclosing the true facts. As the case stood at that moment it was as intimated established that this was a house or place kept for gain. To rebut it witnesses with first-hand knowledge of finances from actual participation should have been called to testify. Not to do so was to impose upon the Court. The magistrate commented on this failure to bring forward the best evidence. It was available. It would be idle to suggest that because the accused was a steward the "heads" were not interested. Of one witness put forward the magistrate said:

He does not pretend to tell us anything about the workings of the club as such, committee work or the management or the handling of the money or anything of that kind.

A magistrate would be justified in refusing to accept or at least to give credence to evidence of this sort. With better evidence available and no explanation as to its non-production why should it be accepted at all? The point to refute, as stated, was the question of "gain," and that of *bona fides*, and the best conclusion on that point could be reached only after hearing from the men who were running the club.

The first witness of this character put forward to refute the presumption of guilt was a steward. He paid a membership fee of 10 cents five years before. It was not a monthly nor even an annual payment. He did pay another 10 cents since he joined because he lost his card. The club started with an annual fee of $1. Annual or monthly dues to defray expenses of some reasonable amount is the rule in *bona fide* clubs. This payment soon reduced to 10 cents for what was in reality a life membership is suggestive. They followed the practice of *bona fide* clubs in charging some fee for admission but made the amount so trifling and collections so perfunctory that the real purpose to secure not members, but patrons for the business carried on within was disclosed.

Poker was played on the top floor. It was from poker that

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by far the largest revenue was secured. This witness did not play poker and knew little of activities there. He told of other legitimate activities, promotion of football, etc. A place may be kept for gain although part of its work is legitimate. Such activities may be thought useful as a shield. This witness was paid $21 a week but not by cheque. He said "football was all he was interested in," but he had only a rough idea as to how much money the club spent on it. He never attended an annual meeting (where finances ought to be discussed) nor had he taken any part in the election of officers. There was no evidence, by the way, of auditor's reports. Asked if he thought he had a right to vote at the election of directors he said "I didn't give it any thought." I am satisfied, as an inference from the evidence that the so-called members were not expected to vote, although by paying 10 cents four years before this witness had under the by-laws all the rights of membership. They knew they were not supposed to assert that direction and control incidental to membership in *bona fide* clubs. Then there was another significant feature. Employees (stewards) were given the right to summarily eject "members" from the club and to cancel their membership without assigning reasons or granting a hearing thus violating a fundamental principle. Formerly the by-laws reserved that right to the committee but by amendment the stewards were given power to expel forthwith "subject to the control of the committee." Doubtless that treatment would follow if "rights" were asserted. I think it is obvious that while ordinary rights of membership were given, with all legal formalities conferring full control it was well known that they would never be asserted and if asserted the remedy of expulsion was available. The "members" did not conduct themselves as ordinary members of a *bona fide* club taking part in and controlling its activities. Proof of this will be referred to. This witness could not say if any of his friends voted at any meetings of the club. He never attended an annual meeting and never had any part in the election of officers, nor did he know a single member out of 13,000 who ever voted at a meeting. He "never voted on anything at the club." The annual meetings were held

in the law office of one of the directors where there would be no accommodation for any considerable number of members.

The history of his connection with the club was referred to. Usually a *bona fide* club is formed by a group of prospective members. He learned of its activities at a tobacco store owned some years ago by Mr. Con Jones. He "used to hang around the cigar store and the billiard parlour in the old days," and "then it became a club," and he joined it. "It was a club," he said, "quite a while before I joined it." Asked who really owned the club he said "I don't know who owns it." That is significant. One would expect him to say at once that he was a part owner or at least that it was owned by the members. Far from saying so, though ostensibly a "member" in good standing with 13,000 others, he had no idea as to its ownership except "just from talk." The inference is that rumours as to the real ownership were current. The further inference is that he knew the real ownership was held, not by the members of this "so-called club" but by one or more in the background. Who they were he didn't know except "just from talk." He was again asked the question "You know perfectly well who owns the Brunswick Club," and his answer was as follows:

> I mean this way. I may have heard them say that the Jones Brothers own it.

This witness is put forward on behalf of the accused to rebut a *prima facie* case of guilt: to state all relevant facts to displace that presumption. He succeeds in showing that it is not a *bona fide* club. He should be expected—if it were true—to explain that it was a legitimate club owned and controlled by the working men who, it is said, made up its membership, formed not for the acquisition of gain but to promote legitimate objects. As a "member," however, he does not, either on behalf of himself or his 13,000 co-members, claim any ownership or control. In fact, asked "if there is any single doubt in your mind about it," *i.e.*, about ownership, he said "well it could possibly be one of them," *viz.*, one of the Jones'. How could it "possibly be one of them" if the story advanced by the defence is true that this is a *bona fide* club incorporated under a Provincial Act owned and controlled by its members? This witness saw Dill Jones around the

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club but knew little of his activities. He did know, however, that he hired him, although in keeping with all his evidence he did not say so directly. "I understand," he said, "that Dill Jones hired me." To get his job at the club he said to Harry Jones, not at the club rooms but outside "How about me getting a job in the club?" Harry Jones said something about seeing Dill, his brother, and finally when he did secure the position he said "I still think it was Dill the one who hired me" although "Mercer [was] manager of this place when [he] joined." It was another brother Noel Jones who proposed this witness for membership.

As already stated he ran the football club. If, as he said, he had only a rough idea of finances in his own special department it is obvious that his general knowledge of the club's finances would be meagre and based on hearsay. Indicating where the real control lay—he would use money in the promotion of this sport, but his practice was to "tell Harry Jones." He would tell me "It is alright." Asked, however, if Harry Jones was a member of the club he said "I don't know." He gave an assent to this question as transcribed in the book "You just made yourself that all the brothers [Jones'] were interested." The word "made" doubtless should be "understood." They were perpetual directors for a long period of years.

He didn't know anything about the management of the place. He didn't know "where they keep their money," but guessed "it was upstairs" where poker was played. His own salary was only $21 a week, placing him as a low-paid underling. How could evidence such as that rebut the presumption of gain?

William Poole another steward also gave evidence. He was a member since 1920, and paid a membership fee of 50 cents. That single payment entitled him to share in the privileges of the club for the past sixteen years. He was in charge of the "rummy" floor. He got his job from Mercer who he figured was the general manager but he wasn't sure. He received $21 a week but not by cheque. Bampton, later referred to, said he was paid by cheque. He collected "one cent off each man per game on the table." Eight players take part in a game of rummy and each time a hand was dealt he would collect 8 cents and turn it

over to the cashier. It would amount to about $38 for an 8-hour shift for every day of the week Sunday included. Either chips or money would be used in the game. He had played poker on the top floor but did not understand the system. The Crown's suggestion was that the top floor was the main source of revenue and this witness gave a qualified assent to that suggestion. Like the last witness, although a "member" for 16 years he never voted "on anything in that club," nor out of 13,000 members did he know "anybody else that ever voted on anything." He was never at any meeting although he saw notices of meetings on the board upstairs. No doubt he did. Every form would be rigidly complied with. He knew from the notice that the meetings were held, not in the club premises where presumably there would be accommodation for the attendance of members if they felt they had anything but a *pro forma* interest in the proceedings, but on Howe Street in the law office of *T. B. Jones*. This witness put forward also to rebut the *prima facie* presumption of guilt based on the assumption that this organization was not what it purported to be but was established as a money-making proposition with many harmless activities as a facade knew nothing (or so professed) of the matters essential to that inquiry. He knew his own salary was $21 a week. What the "bosses" got as he termed them he didn't know. He didn't know what rent was paid. The only connection he knew the Jones Brothers had with the place was that he had "seen them around" with Dill, one of their number working there "In the paying off" and "behind the till"; also "paying for the chips to the players." He never saw the by-laws. He didn't know that according to the by-laws two of the Jones brothers were directors for ten years. He never heard definitely who the directors were. As to profits he knew nothing. That is what he should know to be a useful witness. He "had nothing to do with the accounts" nor did he know "what happened to them," but he did see Dill Jones "paying off." He was asked this question by the magistrate:

Mr. Poole, if he (Dill Jones) was the proprietor of the club he would be entitled to take anything he could get? If Mr. Jones was the proprietor?

Yes. Oh, yes, I suppose he would be entitled to take all he could.

He was asked as to "boosters" in the game, *viz.*, men staked

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by the club itself to take part in a game to keep it going so that business would not lag. One enquires naturally why that was necessary or advisable if profit were not the motive. This witness said:

> No, I don't know if they had boosters or not. I have heard Tom Taylor was—he was trying to get a job as a booster.

He knew, he said, what a "stick" was. He is "a booster or houseman in the game." Counsel for the Crown produced an exhibit to the witness used in an earlier prosecution with the names of five men listed on it. He at least knew one of them, *viz.*, Kennedy. Asked "Wasn't he a booster?" he replied "I suppose that is the term you apply to him." The list of "sticks" was made an exhibit in this case. Asked if he had "boosters" up there still he said he didn't think so. One of them, however (Kennedy), was still working there "so far as I know." Another "stick" was Lovejoy. As to whether he was still a stick he did not know. Mr. *Nicholson* for the accused admitting as I understood him the clear implications from this practice stated that it was discontinued. I do not think so in view of other evidence later referred to. At all events abolishing "sticks" and "boosters" permanently or temporarily, disclosing as it does the commercial character of the club and the desire to secure as much revenue as possible would not result in eliminating profits; it would only result in reducing them. Further if more "members" were brought in "sticks" would not be needed to keep the play going on the top floor, and membership increased very rapidly.

Then there was another change recently—why one can surmise. The magistrate said:

> There was a [statement] when the last witness was in the box that there had been some change, not in the method of playing but in the control of the organization: that Mr. Mercer and Mr. Birch are now running it.

The witness in reply said:

> I heard that Mercer and Birch were the committee now.

Before that the Jones Brothers were in that position, although this witness added "but I don't know that of course." When asked "When did the change take place?" *viz.*, from Jones Brothers to Mercer and Birch, he said, as if suggestive of the reason "after the first raid." I may say again in passing that it is now clear that the Jones Brothers and to a lesser degree Birch

and Mercer would be in a position to rebut the presumption of guilt if it were possible to do so. This witness didn't know how this change was effected. "I have never been at any meeting." There was no general meeting of members for that purpose so far as he knew. Asked if he would call the new managers the "proprietors" his answer was "I don't know," adding notwithstanding the change "I can't imagine them being the proprietors. The Jones' still own the building."

As to finances he said he didn't know how the money was handled or what it was used for. The money he collected from rummy games was taken by him upstairs. It would amount to about $50 for each whole day. He knew that the top floor where poker was played would be the biggest money maker. "Oh, yes," he said, "no doubt about it." He had no idea as to the amount taken in. He was never upstairs long enough "to try to figure it." The tables were going from 10 a.m. to midnight seven days in the week. The games were very fast, about 30 an hour. Asked "That would make quite a lot of money if you played 20 games in an hour at five cents each from each player?" he said "Yes, it would mount up alright."

With 20 tables $140 an hour would be collected in the 5-cent game. Asked where all this money was going to he could not say. *Prima facie* it must be assumed it was "gain" until rebutted. This witness did not displace that presumption or raise a degree of doubt. Mr. *Nicholson* volunteered the information that the club had 60 employees at $3 a day—$180 a day—to absorb a lot of the revenue. That statement was not evidence.

The third witness called to rebut the presumption of guilt was George Bampton the accused in the original case of *Rex* v. *Bampton, supra.* He was steward on the top floor, and a member since 1920. As he was the only witness with first-hand knowledge of activities on the top floor I refer in more detail to his evidence pointing out, however, in passing that the precise *modus operandi* is not material in so far as section 226 (*a*) is concerned, except as an aid in throwing light on the profit motive. He gave this evidence:

**What was the charge, if any, that was made for the use of the card-tables and the equipment in the card-room on the top floor? There was a table**

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charge of half a cent to the one game and a one cent charge to the other game. [It was collected on every hand played]. . . .

THE COURT: The one cent game it is one cent per man per game. . . . I said there were two games, a half cent game and a one cent game.

Half a cent a game is half a cent each man? Yes.

Is there a five cent game? No, sir.

No five cent game? Not since the police visit.

After that, two cents? Yes.

And again:

THE COURT: They [a higher Court] may want to know something about this game; let us get it on the notes. Very well; there is a two cent charge to each man per hand per game.

*Nicholson*: When is that charge made, Mr. Bampton? Before the hand starts.

And that money is collected by whom: by the table steward? By the table steward.

And it is turned into the ordinary revenues of the club—into the club's office? Yes.

Tell me about the game? Then each man antes two cents, first starting from the left, the man first dealing five cards around.

All in one bunch? One at a time, just the same as draw poker; and then if the first man wants to stay, he deposits one quarter or whatever he may wish, saying around the table whoever else wants to stay and then they draw cards exactly as they do in draw poker.

And they raise all the way around? No, not until they get their cards?

When they get their cards can they raise? Yes, they can just the same as draw poker.

Asked as to the duties of a steward, this witness said:

He sees that the game is running smoothly at the tables, maybe organize a game if the fellows want to play. If there are five or six members want to get a game started he will see they get started, get the men seated at the table, get the game started for them.

The inference from this statement, although not clearly expressed is significant. No one is concerned in a *bona fide* club whether members play or do not play. Here speed and continuous action was regarded as highly desirable doubtless for revenue purposes.

He was asked, not what the actual average wages were (he did not know) but "What would you say would be the average wage of the employees of the club?" He said: "The average wage would be about $3.50 to $3.75 per day." As to other expenses he said—as any stranger might—that heat, light, etc., had to be paid for out of club funds.

Asked:

Do you know what is done with the proceeds of the table charges that are collected from the poker games and also the money that is collected in

the form of a table charge from the billiard and pool tables and the rummy games?

The answer was: "That is quite a large order all at once." However he volunteered the information that "they use it to pay the wages and all the necessary bills pertaining to the club and the rest," *viz.*, the balance was banked by Mr. Jones. Mr. Jones was not called.

He was asked:

Are you in a position to assist us as to the revenue which the club derives from the table charges on the 17th January: say the average during the first two weeks of this year since the change took place in the method of assessing the table charge?

He answered:

Yes, I am; it is roughly around, between $200 and $225, that was around the average per day.

This money he said was turned into the office "to defray the club expenses." The wage expenses he stated "amount to about $180 a day." A further question raised it to $210 a day (approximately), *viz.*, 60 people at an average of $3.50 a day. Of course if the right witnesses were called with records produced, the exact amount paid out could be given—not a guess at the average sum paid per day. We would also know the revenue exactly not "roughly." This witness would not have first-hand knowledge of the total revenue.

Further we have these questions and answers:

Now the wages, in your opinion, average somewhere around $210 per day; maybe a little more, maybe a little less than that? Yes.

You estimate that income, total income, from the total charges from the—that includes the billiard tables would be . . . Around $270 or $280.

These are approximately "estimates" by a witness who did not know the true facts while those who did know were not produced. Members, he said, could see the annual financial statement if they attended the annual meetings at *T. B. Jones'* office. But when asked if anybody (meaning members) could go there at any time and see them his answer was in the negative.

Speaking of the old days he said doubtless with pride in a great business accomplishment, that "they were taking [in] around $700 a day" and "their wages were to be paid out of that; that is up to December, the end of December [presumably 1936]." "Since then," he said, "they haven't had enough to pay wages and do not make ends meet." How he knows that is

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not explained. At all events if in fact the place was run for the purpose of "gain" or "profits" it would not be material that at times losses may have occurred. It is not essential that a trading profit should be shown. He explained these alleged losses as in the case of any other business venture as follows:

> The bulk of the "business" [note the word] said this witness "was the one cent business, that is the bulk, that is known as the 'bread and butter' and the two cent game and the five cent game is the 'cream and the cake.' That is the way we explain it. But the one cent game is all falling to pieces, besides the two cent and the five cent." We "are not getting the customers."

What more need be said? The word "customers" as deliberately used by this witness is significant because only so-called members were admitted. He also assigned, no doubt correctly, a "police raid" as a contributing cause to alleged business losses. Far from rebutting the presumption of guilt this witness's evidence established beyond reasonable doubt that gain was the motive. Certainly when the magistrate so finds it cannot be said either that he was clearly wrong or that this and other evidence offered by the accused displaced the presumption or advanced the defence to the stage where a reasonable doubt arises.

Then there is another important feature already referred to. He was cross-examined on the question of doing away with "sticks" or club boosters. This was his evidence:

> Take a look at this list, Exhibit 11 in this case; have you not got five sticks on there just the same as ever, but you don't call them "sticks" now? There is five men on there.
>
> I didn't even point to the five; you seem to know what I am talking about? You said, are they "sticks" or "spares." [Counsel did not mention the word "spares."]
>
> You call them "spares" now? Yes.
>
> Aren't they the same five fellows; aren't they the same five men? Yes, because we never laid a man off.
>
> Paid them just the same? Yes.
>
> "Sticks" by the way got paid $2 a day? Yes.
>
> The "spares," these same five fellows are just getting $2 a day? Yes.
>
> All the rest are getting $3? Three dollars and up.
>
> They are the only ones in the whole establishment getting $2 a day? Yes.
>
> You have in the wage book $2 for all those "sticks" for all those five men? For the "spares."
>
> They are down for $2. For example, on the 17th, Taylor, he got $2; Kennedy got $2. . . . Lovejoy also got $2? Lovejoy.
>
> So you had those three men working that day? Yes.

This so-called cleansing process apparently consisted in

changing the name of the operators, not their practice. Later he said these "spares" were kept on five hours a day helping the floor stewards, *viz.*, helping them "to get the games started," virtually that was their work before. He would not swear that none of these "spares" had been playing poker in the club time. This witness stopped work at 6 o'clock.

I refer to further proof that this club was properly looked upon as a commercial proposition. Bampton testified in cross-examination that this "business," as he frankly called it extended very rapidly since the decision of the Supreme Court of Canada in *Rex* v. *Bampton, supra.* He agreed that they "have been extending it by leaps and bounds since then." Later when he claimed that recently, notwithstanding the great daily intake, they were not making expenses he said that "in order to get the business [or in other words the revenue] up again [we] reduced the table fees." Unfortunately, he said that "didn't have the desired effect." He speaks of losing "business" because for a time the game of black-jack was not permitted in the club. He went to Dill Jones and got authority to play it and this caused patrons to "flock back" to the Brunswick Club or as he put it "we got the business back." Then black-jack was stopped by the chief of police. No doubt for business reasons, the new system, differing from the old, of collecting payments on every deal and every hand instead of at intervals, was inaugurated.

He was asked too about salaries. Asked what salary Dill Jones got, he said "I don't know. I saw it in the paper." Pressed further and asked "Do you know that he got $9,000 a year?" he answered "Yes." As to *T. B. Jones,* he said that he now knows that he got $3,000 a year as secretary. As to another Jones he said "I only know through the press that he got $100 a month." Asked what Dill Jones did for his money he said "He was the fellow that issued orders to the underdogs like Mercer and myself." Mercer received $60 a week. Salaries would be profits. This club was sufficiently manned with 60 employees to keep it going. The remaining work for high executive officials would be largely to procure the money from the cashier and bank it, later distributing it in a manner not fully revealed. Bampton didn't know what rent was paid but did know that the building

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was owned by Con Jones Ltd., and that the members of that company were three members of the Jones family.

The banking, he said, is now done by Mr. Birch, the new director substituting for Jones. He never saw the amounts he deposited nor is there any evidence as to how it was dealt with. Before that time Jones did the banking. Asked how Birch came into office he said "that is a mystery to me." (He is not a cardman.) He was given to understand that he was a friend of Jones, doubtless an *alter ego*. This witness said members used to pay an annual fee but now once you pay your 10 cents and get elected "that is the end of it so far as your right to go in and play cards and do what you like" is concerned. The significant thing is that he said this change had a good effect on "business." When the *Bampton* case, *supra*, was disposed of they had 1,700 members; now business had expanded—the membership increased 13,000. It is a misnomer to speak of them as "members" of an ordinary *bona fide* club. They are, as already intimated, customers or patrons of an established business paying a smaller fee for admission than patrons of a cheap theatre. They do not sit down to play in the ordinary way deciding for themselves the sort of game they wish to play. Mr. Mercer directs them. He decides that they will play a one-cent game at certain tables and a five-cent game at other tables although the customers might "make suggestions to him about a change."

The magistrate correctly found, in my opinion, that this is not a *bona fide* club. It is a Jones Club, in a Jones building, with a Jones directorate for over 10 years; with a Jones too at the receipt of customs until recently when (in my view) for the same reasons that prompted other changes Birch "a friend of Jones" was substituted together with Mercer. Birch, this witness said, was not known to the members of the club, indicating that he was placed there. He had never been around the club before. How then did this organization of working men select him? He "travels around with Mr. Jones," he said. Bampton refers to the fact that Mercer took charge lately but "he was just a figurehead." I would gather from Bampton's evidence—if indeed it is not plainly stated—that he considered it a "Jones Club." He said he worked "with the Jones organization for a

long time; also for the late Con Jones," and "then," he was asked, "you have worked for his sons since." His answer was "yes." He calls his employer, not the Brunswick Club, but the Jones'. It is significant that Bampton admitted that if he wanted guidance in making a decision he would go to Mr. *T. B. Jones's* office and he would be "the only executive he would see there." Although a change was made and Mercer and Birch were ostensibly placed in charge, this evidence shows who, at all times, were the real parties in control. He gave this evidence:

If Mr. *T. B. Jones* came in here today and gave you orders you would take them, wouldn't you? Yes, sir.

Undoubtedly? Yes, sir.

Or if Mr. Harry—not Harry, but Dill Jones did, you would do the same? Yes, I think I would.

My conclusion is whatever its *status* may have been a few years ago it became in recent years in substance a proprietary club. In view of that fact and all the evidence it is impossible, in my opinion, to say, following principles already discussed, that the magistrate was not justified in convicting.

I would dismiss the appeal.

McQUARRIE, J.A.: With all due deference to the convicting magistrate I am of the opinion that his finding "on the whole evidence that this is not a club but a business carried on under the guise of a club" cannot be supported. The learned magistrate in his reasons for judgment proceeds to say that:

I do not propose to go into all the evidence, any of the evidence further in detail, except to say that I find on the evidence that this is not a club but it is a business carried on under the guise of a club and the operations are carried on for the purpose of profit.

It might have been useful if his Worship had designated the evidence on which he based his conclusions. He then continues as follows:

That brings them within section 226, subsection (*a*). A great deal has been said with regard to subsection (*b*) (ii). There is no necessity for me to make any finding on that and I refrain from expressing an opinion one way or the other as to whether or not any portion of the stakes or bet or other proceeds of the game is directly or indirectly paid to the person keeping such house, and I find the defendant guilty.

If the magistrate had felt bound to consider the latter proposition he no doubt would on the evidence have found that the question should be answered in the negative. It is clear that

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there was a club duly constituted under the Societies Act of British Columbia and duly licensed by the City of Vancouver under authority of the Vancouver Incorporation Act; that the club was not operated for profit, all revenue being used to defray expenses including rent, the amount of which was not disclosed, and wages of some 60 employees of whom the appellant was one; that there is no evidence that there were any profits; that the club was operated at all times under police supervision; that there was no personal gain; that the principal revenue of the club came from table charges paid indiscriminately by all members taking part in the games, without regard to whether they won or lost; that the club did not take any share of any pot or other bet; that only members were admitted to the club or to take part in any of the games. Before the police raid in December, 1936, which resulted in a previous conviction, from which an appeal is also pending, certain practices, which counsel for the appellant admitted were objectionable, were abandoned. This feature appears to have been overlooked by the learned magistrate and counsel for the Crown before us. The case appears to come clearly within *Bampton* v. *Regem*, [1932] S.C.R. 626 and I would therefore allow the appeal.

*Appeal dismissed, McQuarrie, J.A. dissenting.*

## COMMERCIAL SECURITIES CORPORATION LTD. v. DAVIES.

C. C. 1937

*April* 9, 16.

*Foreign judgment—Action on—Statute of Limitations—"Beyond the seas"—Interpretation—R.S.B.C. 1924, Cap. 145, Sec. 9.*

Section 9 of the Statute of Limitations provides that if, at the time the cause of action accrues the person against whom the cause of action has arisen is "beyond the seas" then the period of limitation for instituting proceedings shall begin from the time of the return of the defendant from beyond the seas.

The plaintiff recovered judgment against the defendant on the 12th of November, 1930, in the Province of Saskatchewan, where the defendant was then resident. The defendant moved to British Columbia in December, 1933. The plaintiff commenced action in this Court on the foreign judgment on the 9th of February, 1937. The only defence was that as the Saskatchewan judgment was recovered more than six years before the commencement of this action the Statute of Limitations should run in favour of the defendant and against the plaintiff from the day judgment was recovered in Saskatchewan.

*Held*, that the words "beyond the seas" are not to be taken literally but are to be interpreted as equivalent to "outside the jurisdiction." As the defendant did not arrive in British Columbia until December, 1933, the period of limitation would commence to run from that date. The defence therefore fails and the plaintiff is entitled to judgment.

SPECIAL case under Order IX. of the County Court Rules. The facts are set out in the reasons for judgment. Heard by HARPER, Co. J. at Vancouver on the 9th of April, 1937.

*J. D. Forin,* for plaintiff.
*Pelton,* for defendant.

*Cur. adv. vult.*

16th April, 1937.

HARPER, Co. J.: This is a special case under Order IX. of the County Court Rules.

The plaintiff recovered a default judgment against the defendant in the Province of Saskatchewan, where the defendant was then resident, on the 12th day of November, 1930. In December, 1933, the defendant removed to British Columbia. On the 9th day of February, 1937, action was commenced in this Court on the foreign judgment.

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It is well-settled law that a judgment of a foreign Court is a simple contract debt in this Province and it is open to the defendant to raise here any defence he might have to the original cause of action. The only defence which is raised is the Statute of Limitations—not to the original cause of action in Saskatchewan but based on the submission that inasmuch as the Saskatchewan judgment was recovered more than six years before the commencement of this action, the statute should run in favour of the defendant and against the plaintiff from the day judgment was recovered in Saskatchewan. Had the parties been resident in this jurisdiction for six years from the date of judgment this would have been the period of limitation but such are not the facts here. The defendant, as stated, came to British Columbia in December, 1933.

Section 9 of the Statute of Limitations—being the statute of Anne—provides in effect that if at the time the cause of action accrues the person against whom the cause of action has arisen is "beyond the seas" then the period of limitation for instituting proceedings shall begin from the time of the return of the defendant from beyond the seas.

The Legislature of British Columbia has, to quote the language of Stephen, C.J. in a similar case—*White* v. *McDonald* (1872), 11 N.S.W. S.C.R. 332 at p. 351—"adopted bodily, without any attempt at modification or adaptation to our local circumstances" the Queen Anne statute.

The words "beyond the seas" has been the subject of interpretation in many Courts.

I follow the interpretation placed upon these words by Osler, J.A. in *Boulton* v. *Langmuir* (1897), 24 A.R. 618. At p. 622 this learned judge summarizes the case as follows:

> The defendant's "absence beyond the seas," at the time the cause of action accrued, within the meaning of the statute of Anne, as applied to the British Dominions, may still be availed of by the plaintiff as an excuse for not bringing the action until his "return from beyond the seas." The expression "beyond the seas" in 4 & 5 Anne ch. 3, sec 19, must, of course, receive the construction which was given to it as applied to a plaintiff, in the principal Act, 21 Jac. I. ch. 16, sec. 7, *viz.*, that it is synonymous in legal import with the phrase "out of the Province of Upper Canada," or "Ontario." So it was construed in the case of *Forsyth* v. *Hall* (1830), Draper's Rep. 304, and so also by the Privy Council many years afterwards in *Ruckmaboye* v. *Lulloo-*

*bhoy* (1852), 8 Moore, P.C. 4, an East Indian appeal, where it was held to be synonymous with "out of the realm," "out of the land," or "out of the territories," and was not to be construed literally.

I conclude therefore on this branch of the special case that these words are not to be taken literally but are to be interpreted as equivalent to outside the jurisdiction.

The general principle governing such actions is set forth by Fullerton, J.A. in *Colonial Investment & Loan Co.* v. *Martin*, [1928] 1 W.W.R. 245 at p. 247:

> It is a well-settled principle of international law that all matters of procedure are governed wholly by the law of the country in which the action is brought. The party invoking the jurisdiction of a Court must take procedure as he finds it. Procedure includes rules of limitation affecting the remedy only.

In *Bugbee* v. *Clergue* (1900), 27 A.R. 96 at p. 106 Osler, J.A. disposes of the question as to when time began to run against the plaintiff in the following language:

> It matters not that both parties were foreigners, residents of the same State where the cause of action arose, and that the plaintiff might have sued, or did sue, the defendant there before he left it to reside in this country. So far as regards our statute the time runs against the plaintiff only from the time when the defendant came within the jurisdiction of our own Courts: *Huber* v. *Steiner* (1835), 2 Bing. N.C. 202; *Harris* v. *Quine* (1869), L.R. 4 Q.B. 653; *Boulton* v. *Langmuir* (1897), 24 A.R. 618; Darby & Bosanquet, 2nd Ed., p. 58; Westlake's Private International Law, 3rd Ed., sec. 239.

There must therefore be judgment for the plaintiff for $444 and costs.

*Judgment for plaintiff.*

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## HADDOCK v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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*Jan.* 8, 15.

*Negligence — Damages — Alighting from train — Swinging door at exit — Plaintiff struck in face by door—Injury.*

The two-car train of the defendant company running between New Westminster and Vancouver has a double exit between the two cars and one at the rear of the second car, on which is a door that opens inwards. The plaintiff who was a passenger on a train that reached the Vancouver station, went to the rear exit preceded by other passengers. As a woman passenger immediately in front of the plaintiff was about to alight she

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swung the door back in such a way that it hit the plaintiff in the face, injuring her. In an action for damages the plaintiff claimed that if the door was permitted to be opened it should have been in charge of an attendant, and there should have been a catch to keep the door in place when opened. The evidence disclosed that there was a catch provided to hold the door if opened to its full extent, but the passenger who first opened it did not push it back far enough to contact with the catch.

*Held*, that the *onus* is on the plaintiff. The case as presented was left somewhat in the realm of conjecture and the *onus* has not shifted. The plaintiff committed a breach of legal duty to take care under the circumstances, which breach was the sole cause of the accident, and the action is dismissed.

ACTION for damages for injuries sustained by the plaintiff when a passenger on the railway of the defendant company between New Westminster and Vancouver, owing to the alleged negligence of the company or its servants. Tried by MORRISON, C.J.S.C. at New Westminster on the 8th of January, 1937.

*McGivern*, and *G. R. McQuarrie*, for plaintiff.
*J. W. deB. Farris, K.C.*, and *Riddell*, for defendant.

*Cur. adv. vult.*

15th January, 1937.

MORRISON, C.J.S.C.: The loss lies where it falls in the absence of negligence by someone owing a duty to the injured person. The duty, a breach of which gives rise to a cause of action in negligence, is to take reasonable care under the circumstances. Negligence consists in doing that which a person of ordinary care would not do under the circumstances or in omitting to do that which persons of ordinary care would do under the circumstances. The plaintiff's actions in this case respond to that compendious definition. The duty is reciprocal. The plaintiff committed a breach of the legal duty to take care under the circumstances which breach was the sole cause of the accident.

The plaintiff alleges that owing to the negligence of the defendant she received her injuries. That as between her and the defendant the defendant's negligence was the sole cause of those injuries. The case as presented was left somewhat in the realm of conjecture. The *onus* is on the plaintiff to show she stands on a firm footing when seeking a remedy at the hands of

the Court. *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41. That *onus* in this case, in my opinion, has not shifted. She had travelled in this self same way for 18 years—knew the facilities afforded for egress. There were no distracting, intervening incidents. There was good light and she was following on the heels of other passengers. There is such a thing as asking for too extreme and unreasonable measure of safety in transportation facilities. I cannot refrain from quoting from the judgment of Avory, J. in the case of *Jones and another* v. *London County Council* (1932), 48 T.L.R. 368 at 369:

> It had been stressed . . . that the game had been played on a wooden floor and that there was no matting; if there had been matting it would have been said that there ought to have been a mattress; and if there had been a mattress it would have been said there ought to have been a feather-bed; if there had been a feather-bed, that the boys ought to have been wrapped up in cotton wool or rubber.

The action is dismissed.

*Action dismissed.*

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## REX v. SALT.



*Motor-vehicles—Constitutional law — Section 60, subsection (7), Motor-vehicle Act, B.C. Stats. 1935, Cap. 50—Validity—Same subject as section 285, subsection (2) of Criminal Code.*

Subsection (7) of section 60 of the Motor-vehicle Act, B.C. Stats. 1935, Cap. 50, imposes a penalty upon the driver of a motor-vehicle who, having caused damage or injury, fails to remain at or return to the scene of the accident.

*Held*, that as said subsection and subsection (2) of section 285 of the Criminal Code both deal with the same subject-matter, and the subject-matter being one with reference to which the Dominion Parliament is competent to legislate, the Criminal Code subsection must prevail and said subsection of the Motor-vehicle Act is inoperative.

TRIAL on a charge under section 60 of the Motor-vehicle Act, B.C. Stats. 1935. Tried by police magistrate Mackenzie Matheson at Vancouver on the 5th of April, 1937.

Police Court

1937

REX
*v.*
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*Scott,* for the Crown.

*Maitland, K.C.,* for accused.

*Cur. adv. vult.*

6th April, 1937.

MATHESON, P.M.: The accused was charged under section 60 of the Motor-vehicle Act, B.C. Stats. 1935, Cap. 50. That section has several subsections. The following are pertinent to this matter:

(1.) In case an accident occurs by which any person or property is injured directly or indirectly owing to the presence or operation of a motor-vehicle on any highway, the person in charge of the motor-vehicle shall remain at or forthwith return to the scene of the accident for the purpose of rendering assistance and giving the information required by this section.

(7.) Any person in charge of a motor-vehicle who, in wilful violation of the provisions of subsection (1), fails to remain at or return to the scene of an accident by which any person is injured shall be liable, on summary conviction, to imprisonment for not less than one month nor more than three months, without the option of a fine.

Counsel for the defence has taken the position that subsection (7) is beyond the competence of the Provincial Legislature, in that section 285 (2) of the Criminal Code is intended to and does cover the same subject.

A large number of authorities were cited. I have carefully considered all of these, as well as numerous others. Indeed, there seems to be no end to reported decisions on similar points.

A careful comparison of the Provincial enactment with the Code section satisfies me that while different in phraseology and in penalty they both deal with the same subject-matter, and further that subsection (7) of the Motor-vehicle Act was in effect passed for the purpose of creating and punishing a crime rather than for the purpose of regulating matters within the jurisdiction of the Province. That being the case and the subject-matter being one with reference to which the Dominion Parliament is competent to legislate, then in my opinion the Code section must prevail. It necessarily follows that the provision under the Motor-vehicle Act is inoperative.

I express no opinion as to the validity of the provisions in that Act respecting what is known as "hit-and-run drivers" as they stood prior to the incorporation of subsection (7) referred to.

The accused, being charged under an inoperative enactment, is therefore entitled to his discharge, which I order.

The following cases appear to me to be in point: *Attorney-General for Ontario* v. *Hamilton Street Railway,* [1903] A.C. 524; 72 L.J.P.C. 105; 7 Can. C.C. 326 (Lord's Day Profanation Act, R.S.O. 1897, Cap. 246); *Rex* v. *Leonard,* [1921] 1 W.W.R. 1099; 14 Sask. L.R. 185; 34 Can. C.C. 242 (The Game Act, R.S.S. 1916, Cap. 30); *Re Race-Tracks and Betting* (1921), 49 O.L.R. 339; 36 Can. C.C. 357 (Ontario, betting); *Rex* v. *Chapman* (1922), 37 Can. C.C. 194 (Motor Vehicle Act, N.S. Stats. 1918, Cap. 12); *Rex* v. *Lichtman* (1923), 54 O.L.R. 502; 42 Can. C.C. 1 (Ontario, publishing betting information); *Rex* v. *Cooper,* 35 B.C. 457; [1925] 2 W.W.R. 778; 44 Can. C.C. 314 (Government Liquor Act, R.S.B.C. 1924, Cap. 146); *Rex* v. *Hanel. Rex* v. *Yelle* (1925), 45 Can. C.C. 381 (Motor Vehicle Act, 1924 (Que.), Cap. 24); *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A.C. 310; 100 L.J.P.C. 84; 50 Can. C.C. 241; 1 W.W.R. 552; *Rex* v. *Ottenson,* [1932] 1 W.W.R. 36; 40 Man. L.R. 95; 57 Can. C.C. 234 (The Highway Traffic Act, Man. Stats. 1930, Cap. 19); *Dufresne* v. *Regem* (1912), 19 Can. C.C. 414 (Quebec, drugs, 1911, Cap. 35); *Rex ex rel. Wilbur* v. *Magee,* [1923] 3 W.W.R. 55; 7 Sask. L.R. 501; 40 Can. C.C. 10 (The Saskatchewan Temperance Act, R.S.S. 1920, Cap. 194).

*Accused discharged.*

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## *IN RE* LAND REGISTRY ACT AND ROBERT H. BAIRD.



*Company—Conveyance—Seal or matrix—Duplicate seal or matrix in branch office—Authority to affix to conveyance—R.S.B.C. 1924, Cap. 127, Secs. 230 and 238.*

The Montreal Trust Company, incorporated in the Province of Quebec with head office in Montreal, established a branch office in Vancouver duly registered to do business, the officers of the branch office being duly authorized to sign all documents and affix the seal of the company. The officers so authorized executed a conveyance from the company to the petitioner and affixed the seal of the company to the conveyance, which

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was impressed on the document by a duplicate seal or matrix kept in the Vancouver office. An application by the petitioner for registration of the conveyance to the registrar of the Vancouver Land Registration District was refused on the ground that the document was executed in Vancouver and a duplicate or facsimile seal was affixed thereto, the head office of the company and the "common seal" of the company being in Montreal. An application by petition under section 230 of the Land Registry Act for an order directing the registrar to proceed with the registration of the said conveyance, was refused.

*Held*, on appeal, *per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. (affirming the decision of ROBERTSON, J.), that the registrar was justified in refusing to register this document and that it was the duty of the Montreal Trust Company to make good the deficiency by themselves signing and affixing the common seal of the company.

*Per* MARTIN and MCQUARRIE, JJ.A.: The authority to affix the seal to the document in question has been *prima facie* established by the evidence. There is no reason why the "common seal" should not be made in duplicate or triplicate for purposes of safety and convenience to avoid delay. It comes down to a question of whether or no the act of attaching the seal to the document has been duly authorized, it being a matter not of the form of the seal but of substance of the authority to affix it. When a seal appears *ex facie* duly affixed to a corporate document it will be presumed to be regularly affixed and those who assert the contrary must strictly prove their case. In the complete absence of evidence or even suggestion, that said company does not regard its indenture valid *ex facie* as being invalid, it should have been admitted to registration.

The Court being equally divided the appeal was dismissed.

APPEAL by petitioner under section 238 of the Land Registry Act from the order of ROBERTSON, J. of the 31st of July, 1936, dismissing the application by petition of Robert H. Baird under section 230 of said Act, for a declaration that a conveyance in fee dated the 30th of June, 1936, made by the Montreal Trust Company as grantor and the petitioner as grantee, was properly executed, and for an order directing the registrar of the Vancouver Land Registration District to proceed with the registration made to him which he had rejected. The application was rejected upon the ground that

it is apparent on the face of the document submitted that the same was executed [by the Montreal Trust Company] in Vancouver and a duplicate facsimile seal affixed thereto (the head office of the Montreal Trust Company and the seal of the said company being both in Montreal).

The Montreal Trust Company is a body corporate, incorporated as a trust company under the laws of the Province of Quebec,

and by its charter has its "principal place of business at the City of Montreal, but the company may establish branch offices in other places" and it is duly registered to do business in the Province of British Columbia where it has an office in the City of Vancouver. By-law of the company No. 16 is as follows:

The seal of the Company shall be in the following form: "Montreal Trust Company, Incorporated 1889."

By-law No. 12 is as follows:

Documents requiring the signature of the Company shall be signed by the President, a Vice-President or a Director with the General Manager, the Secretary, a Manager or an Assistant Secretary, also by such other person or persons, either alone or with a Director or with one of the above mentioned officers as the Board may from time to time by resolution authorize, and all documents so executed shall be binding upon the Company without any further authorization.

The seal of the Company when required may be affixed to documents so executed.

By action duly authorized by the company, the executive committee of the company on the 23rd of August, 1935, resolved as follows:

Under By-law No. 12:

It was resolved that Messrs. R. H. Baird, A. T. Lowe, F. J. Lynn and A. J. Ross, Officers of The Royal Bank of Canada, Vancouver, or any one of them, be authorized to sign as an authorized signing officer where the signature of the President, Vice-President or a Director is required under By-law No. 12 and they are hereby authorized to sign with Robert Bone, Manager of the Vancouver Office, or Frank N. Hirst, Assistant Secretary, and all documents so executed shall be binding upon the Company without any further authorization. The Seal of the Company may be affixed to the documents so executed.

The conveyance in question was executed in the City of Vancouver by being signed by Robert Bone and F. J. Lynn, two of the above named persons, and they affixed the seal of the company to the conveyance as authorized under the said by-law and by the said resolution. The seal affixed was in the form set out in By-law No. 16, and was impressed upon the paper of the conveyance by means of a lever-press matrix other than that in use in the Montreal office.

The appeal was argued at Vancouver on the 19th and 20th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*Burns, K.C.*, for appellant: This is an appeal under section

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238 of the Land Registry Act. The company has a branch office in Vancouver and the seal was affixed to the document in question here, the impression being made by a matrix (commonly called a seal) that is kept in the office here for that purpose. The company is incorporated in Quebec with head office in Montreal. The registrar says the seal can only be affixed with the common seal at the head office in Montreal. The company is registered to do business in British Columbia. Those in charge in Vancouver have authority under the charter and by-laws to do business in British Columbia and to execute all documents. The seal is what is on the document, *i.e.*, the impression on the document, and those who sign have authority to affix the seal. An impression direct on paper, at least as regards an individual is a good seal provided there is sufficient evidence of intention: see *Reg.* v. *The Inhabitants of St. Paul* (1845), 7 Q.B. 232; *In re Sandilands* (1871), L.R. 6 C.P. 411; *S.C. nom. In re Mayer,* 40 L.J. C.P. 201; *Foster* v. *Geddes* (1856), 14 U.C.Q.B. 239; *Re Bell and Black* (1882), 1 Ont. 125. The American cases are to the effect that the word seal shall be construed to mean the impression of such official seal on paper. The corporate seal is spoken of quite generally, but alternatively, as the instrument for impressing the seal, *i.e.*, the matrix. It is the authority to affix the seal which is important and not the seal itself: see Wegenast on Companies, pp. 484-5; *Merchants of the Staple of England* v. *Bank of England* (1887), 57 L.J.Q.B. 418; *Governor and Company of the Bank of Ireland* v. *Trustees of Evans' Charities in Ireland* (1855), 5 H.L. Cas. 389; *Ruben* v. *Great Fingall Consolidated, Lim.* (1906), 75 L.J.K.B. 843. Although it is usual for the deed of a corporation to be sealed with its proper seal, it is laid down by high authority that any seal will do: see *Sutton's Hospital Case* (1612), 5 Co. Rep. 253 at p. 300; 77 E.R. 937 at p. 970; 1 Shep. Touch., 8th Ed., p. 57; 1 Bl. Com., Lewis's Ed., 475; Grant on Corporations, p. 59; Pollock on Contract, 10th Ed., 145. *Prima facie,* anything manifested or affixed upon a document in manner capable of being construed as the seal of the company, is such and authorized the act ordered: see *Ontario Salt Co.* v. *Merchants Salt Co.* (1871), 18 Gr. 551.

*H. Alan Maclean*, for respondent: In the case of statutory corporations at least where the corporation must use a seal, the word "seal" means the common seal of the company kept at its head office unless by statute or the power given in the articles enabled thereto by statute the custody and use of said common seal is vested in some other person: see *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England* (1887), 21 Q.B.D. 160 at p. 166; *Jones* v. *The Galway Town Commissioners* (1847), 11 Ir. L.R. 435; *Woodhill* v. *Sullivan* (1884), 14 U.C.C.P. 265. No authority is conferred upon the directors to make by-laws regulating the custody, control or use of the seal: see *Bonanza Creek Gold Mining Company, Limited* v. *Regem*, [1916] 1 A.C. 566; 85 L.J.P.C. 114; 10 W.W.R. 391. Under the by-laws various persons are authorized to sign documents but no provision is made as to who is to affix the seal, this can only be done at the head office in Montreal. The execution of the document in this case was made by the impression thereon of a facsimile of the seal by persons in Vancouver nominated by a resolution of the executive committee. This cannot be done unless there is either statutory authority therefor or power to that effect given in documents creating the corporation: see *Woodhill* v. *Sullivan* (1864), 14 U.C.C.P. 265.

*Burns*, replied.

*Cur. adv. vult.*

12th January, 1937.

MACDONALD, C.J.B.C.: In this case certain men resident in Vancouver were authorized to sign deeds of property by the Montreal Trust Company and possibly to attach the seal thereof though there is some doubt about the latter.

The Trust Company was incorporated by a statute of Quebec which says nothing about the power of the company to procure and assign to its agents at a distance a corporate seal. The company has a common seal in its office in Montreal but the committee appointed in Vancouver which was appointed not by the company or the board of directors but by a delegate board purporting to authorize the agents in Vancouver to sign deeds of the company.

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Now the first question which occurs to me is has such committee in Vancouver power obtained from a delegate committee in Montreal free from the application of the maxim *delegatus non potest delegare*. The executive committee in Montreal undoubtedly had the power to sell and convey property. There are facts, however, which might exclude the said maxim where the power of the second delegate comes in question. If the second delegate had no discretion to exercise this power but simply a power to execute a document which had been agreed to by the executive committee the maxim would I think not apply. If the Vancouver delegate had any discretion the case would fall within the said maxim.

Now the main question in this appeal is as to the power of the Vancouver committee to affix the seal to the document. The resolution empowering them to sign the document says the seal of the company if required may be affixed to all such deeds. Now, having been authorized to sign the deed it may be that it imported that that carried with it the right to affix the seal but not having a seal, that is the common seal of the company, the committee in Vancouver procured to be made a facsimile of it which they used in sealing the document in question. I am of opinion that the instrument was not the seal of the company. It is true that if by the Act the company had power to make a facsimile of their common seal for use at a distance they might do so and possibly they might do so by resolution of the board of directors, but there is no suggestion that there is any authority in the committee in Vancouver to make such a facsimile and use it as the seal of the company. Nor is there any evidence before us to show that the Vancouver committee or board had power to authorize the seal, that is to say to exercise the discretion to seal. That, I think, I might infer from the document in the cases that that discretion was exercised by the Vancouver committee. If so the maxim above cited applies and the registrar who refused to register the document was right. It was argued that in these modern times a strict rule in regard to the use of the seal is inconvenient, and it is perfectly reasonable that a committee on the spot should be authorized to exercise the powers of the company at a distance, but this is not a legal reason for

departing from what I think has always been the custom with regard to the use of a seal.

In Byrne's Law Dictionary, p. 428, it is said that,

> The Great Seal was formerly required on charters, grants of office, pensions and annuities, licences of denization, licences for theatres and certain other licences: but the Crown Office Act, 1877, enacted that a simple and easily-affixed seal, known as the wafer great seal could be used in all cases instead of the Great Seal.

That seems to show the practice up to that time. But where a seal is required it should be the common seal of the company. Stroud's Judicial Dictionary, 2nd Ed., Supplement, p. 838, says that,

> The presence of a seal . . . is *prima facie* evidence that [the maker] sealed and delivered the document as his act and deed.

The right to make a seal and use it by persons not authorized or only authorized by implication would be very dangerous, especially to corporations in which their seal is a further stamp of approval. And to say that it is a mere trivial thing that a person should be authorized to make and use a facsimile does not advance the argument. There is no authorization in this case to the Vancouver committee to make such a facsimile. It merely says "It may be sealed." It is just as reasonable to assume that it means that the document must be sent to the place where the common seal is, to be sealed by a person authorized, as to empower the Vancouver committee to make a seal and affix it.

It was strongly urged that the seal is the impression not the instrument of the impression. That may be true but on the other hand for a long time the word "seal" had been used as the lever-press which stamps the document. That fact is emphasized when we consider that the delivery of the Great Seal by a retiring Lord Chancellor to the incoming one is the incoming one's appointment to office.

The district registrar of titles must be satisfied that the document is genuine before he registers it, under penalty that the insurance clause of the Land Registry Act will be liable if the document is not genuine. He further has to take great care where he has any doubt as to the genuineness of the document. I think, therefore, that he was justified in refusing to register

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this document and that it was the duty of the Montreal Trust Company to make good the deficiency by themselves signing and affixing the common seal of the company.

As I have stated above I think there is a good deal of doubt as to whether the maxim is applicable to this case. It depends almost entirely upon the question as to whether the Court is convinced that the committee in Vancouver exercised no discretion, and on sufficient evidence of the committee's want of authority to make and apply a facsimile seal.

I would dismiss the appeal.

MARTIN, J.A.: This appeal should, in my opinion, be allowed because, to put it shortly, under the circumstances before us the authority to affix the seal to the document in question has been *prima facie* established by the evidence. As their Lordships of the Privy Council said in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited,* [1915] A.C. 599, 617, "the law must adapt itself to the conditions of modern society and trade," and that language is very appropriate to the affairs of companies which, *e.g.,* are incorporated under a Federal Act and carry on business through branch offices in the other Provinces, and also to companies which, as herein, are incorporated under Provincial law (of Quebec) and have registered branch offices in other Provinces. There is no magic in the term "common seal," which means no more than it is the one used in general by the company to represent the "common" act of its individual members because it would be impracticable for each one of them to affix his particular seal to its necessary documents.

I see no good reason why, *e.g.,* that "common seal" should not be made in duplicate or triplicate for purposes of safety and convenience, to avoid the consequences of delay, or worse, arising from loss or destruction by fire, theft, or accident, or to be used for the quick dispatch of business at its far off branches. To my mind, the submission of Mr. *Burns* is sound., *viz.,* that the matter comes down to the question of whether or no the act of attaching the seal to the document has been duly authorized: it is in other words a matter not of the form of the seal but of

substance of the authority to affix it. The company may choose what device it likes for its seal and appoint those officers who shall make use of it—*cf. Reg.* v. *The Inhabitants of St. Paul* (1845), 7 Q.B. 232, wherein the Queen's Bench *in banco* adopted the opinion of Lord Eldon cited in the note on p. 239, *viz.*:

> This shows the importance which the common law attaches to the ceremony of sealing. But it is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and therefore where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper.

When a seal appears *ex facie* duly affixed to a corporate document it will, as is correctly stated in Gore-Browne on Joint Stock Companies, 37th Ed., 114, "be presumed to be regularly affixed, and those who assert the contrary must strictly prove their case." In *Clarke* v. *The Imperial Gas Company* (1832), 4 B. & Ad. 315, pp. 325-6, cited by Gore-Browne, *supra,* the Court went very far in presuming the due observance of antecedent conditions to the making of an indenture under the common seal of the company (which pleaded *non est factum* thereto) even to the extent of giving effect to the possibility that "an apparent irregularity may not have occurred." This decision is of much weight herein because the appellant Baird would be, to my mind, in quite as strong, if not indeed a stronger position, to resist any attempt on the part of his grantor the Montreal Trust Company to repudiate the indenture, now in question, in his favour than was the plaintiff in *Clarke's* case, and, therefore, in the complete absence of any evidence, or even suggestion, that the said trust company does not regard its indenture valid *ex facie* as being invalid, it should, in my opinion, have been admitted to registration.

McPHILLIPS, J.A.: This appeal is from the judgment of ROBERTSON, J., wherein that learned judge in his reasons for judgment said this:

> It is not necessary to decide whether the Montreal Trust Company is entitled to have, in addition to its common seal kept at its head office in

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Montreal, a facsimile kept in Vancouver for use in British Columbia: because the material shows, affirmatively, that the shareholders never authorized a facsimile and there is nothing in the material to show the directors ever did. The seal referred to in the minutes of the Executive Council under the heading "Under By-law No. 12," refers to the common seal kept in Montreal.

The petition is dismissed.

I am of the opinion that the learned judge arrived at the proper conclusion upon the material before him. Here the alleged deed that was before the registrar of the Vancouver Land Registration District was undoubtedly not executed under the common seal of the company and it was contended upon the part of the company—Montreal Trust Company—that it was a valid deed of the company conveying lands of the company, that is to say, a conveyance in fee from the Montreal Trust Company to Robert H. Baird. The Montreal Trust Company is a company incorporated under the laws of the Province of Quebec and is duly registered and authorized to carry on business in the Province of British Columbia. The registrar of the Vancouver Land Registration District refused to register the conveyance. His refusal was in the following terms:

This application is summarily rejected on the ground that it is apparent on the face of the document submitted that the same was executed in Vancouver and a duplicate or facsimile seal affixed thereto (the head office of the Montreal Trust Company and the seal of the said company being both in Montreal). In fact, solicitor for applicant admits that this is so, claiming that a company can have as many seals as it wishes. In my opinion a company can have only one seal, that is, its common seal, unless enabled thereto by statutory authority.

It unquestionably is the law that a company has but one seal —its common seal—and it has been long assumed to be the law. Wherever there is need for a company to execute deeds abroad it has long been conceded that there must be statutory authority for so doing and if the common seal held at the head office—here it is at Montreal in the Province of Quebec—is not to be affixed, then that statutory authority is to be shown and it has not been shown. To illustrate what I have just said we find in the Companies (Consolidation) Act, 1908, in England, sections 78, 79, subsections 1 to 5, and they read as follow:

78. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United King-

dom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall bind the company and have the same effect as if it were under its common seal.

79. (1) A company whose objects require or comprise the transaction of business in foreign countries may, if authorized by its articles, have for use in any territory, district, or place not situate in the United Kingdom, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorize any person appointed for the purpose in any territory, district, or place not situate in the United Kingdom, to affix the same to any deed or other document to which the company is party in that territory, district, or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

Where a deed conveying land as here is tendered to the registrar and here it was to the registrar of the Vancouver Land Registration District it was incumbent upon the Montreal Trust Company to show that there was statutory authority for the company to execute the conveyance of lands in the Province of British Columbia in the form in which it was executed. Here admittedly the tendered conveyance for registration has not thereon the common seal of the company which is at the City of Montreal in the Province of Quebec. What is relied upon in the present case is by-law No. 12; that is the whole case as advanced by the petitioner. By-law No. 12 reads as follows: [already set out in part in the statement].

It is to be observed that by the last sentence of the by-law,—

The seal of the company, when required, may be affixed to all such deeds, documents and other instruments so signed or executed.

Now to entitle registration of a conveyance of lands in the Province of British Columbia the common seal of the company is required and it is not on the conveyance. There can be only one common seal unless it be shown that there is statutory authority

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for more than one. The seal purporting to be the seal of the company in the present case is not the common seal of the Montreal Trust Company, that seal is at the head office of the company in Montreal. It is a well-known rule at law and in equity that a body corporate is not bound by any contract which is not under its corporate seal. Further, even a resolution of the members of the body corporate is not in any way equivalent to an instrument under its seal. Turning to Palmer's Company Law, 13th Ed., 270, we see these words in reference to contracts under seal of a company: "As Witness the common seal of the Company."

We have no such words in the conveyance in question here and the execution of the conveyance would appear to be as follows:

> Seal. Montreal Trust Company Incorporated 1889. Montreal Trust Company. Robert Bone Manager of the Vancouver office. Countersigned F. J. Lynn.

The "acknowledgment of officer of corporation" required is not sufficient even were the insuperable obstacle not in the way of non-execution under the common seal present. Mr. Bone styles himself as the manager of the Vancouver office: that does not constitute him an officer of the corporation. I cannot and do not come to the conclusion that there was due execution of the conveyance by the Montreal Trust Company. It follows in my opinion that the appeal should be dismissed.

MCQUARRIE, J.A.: I would allow the appeal. I consider the execution of the conveyance mentioned in the petition herein to be in order under by-law No. 12, and to have been properly proved. The registrar should therefore complete the registration.

*The Court being equally divided, the appeal was dismissed.*

## STALEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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*Jan.* 20, 21, 22; *March* 9.

*Negligence—Automobile crossing railway track—Track in course of repair—Removal of planks—Automobile stuck in rut where planks removed—Run down by train—Contributory negligence—Finding of jury—New trial.*

The deceased and his wife were in the back seat of their car driven by one of their two sons, going west on Bose Road. They came to the crossing of the B.C. Electric Railway running between New Westminster and Chilliwack where four workmen of the company had taken up two planks, one on each side of the north rail, the east end of the two planks being at about the centre of the road. When the automobile approached the workmen picked up their tools and got out of the way. The driver of the car then attempted to cross on the south side of the planking that was still in place, but his right front wheel dropped in the hole where the planking was out, failed to jump the rail, and skidded to the right along the northerly rail for about 18 feet parallel with the track. The driver then backed but he was unable to get the wheel out of the rut where the plank had been removed. The B.C. Electric train then came in sight in the west. The foreman of the workmen ran forward and flagged it, but owing to the speed at which it was coming it failed to stop and carried the automobile about 90 feet, wrecking it. The two boys and the mother jumped from the automobile but the father remained in it. He was killed. In an action for damages the jury found the company's servants were negligent in "removing planks at crossing too close to train time and failing to replace temporarily same on approach of automobile." They also found the speed of the train was excessive and that the driver of the automobile was not guilty of any negligence that contributed to the accident.

*Held*, on appeal, MARTIN and MACDONALD, JJ.A. dissenting, that while the railway was guilty of negligence in not taking sufficient care in repairing their tracks at a time when a car was not due to pass, or to warn the driver of the automobile of the danger, contributory negligence was pleaded and fully explained to the jury but they ignored that phase of the case altogether. It is too apparent to be thus ignored and the case should be sent back for a new trial. Further there is not sufficient evidence of the father's failure to alight from the automobile before the crash.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 5th of June, 1936, in an action by the plaintiff as administratrix of the estate of Charles Joseph Staley, deceased, for damages for the death of the said Charles Joseph Staley

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from injuries received when run down by an electric train of the defendant company at a level crossing, which running down was alleged to have been caused by the negligence of the defendants Frank Scales and Joseph Johnson, the servants of the defendant company. On the afternoon of January 21st, 1936, the Staley family were driving west on Bose Road. The two boys were in the front seat and the father and mother were in the back seat. They came to the crossing of the B.C. Electric line that runs between New Westminster and Chilliwack, when the driver stopped about 25 feet from the track. Four men of the B.C. Electric were working on the track and they had taken up two of the planks at the crossing, one on the north side of the north rail and one on the south side of said rail, at the west end of the crossing, the east end of the two planks when in place being at about the centre of the road. The driver endeavoured to cross on the south side of the planking which was still in place but his right front wheel dropped in the hole where the plank was out and the car skidded to the right along the northerly rail for about eighteen feet running parallel with the track. The driver then backed his car but was unable to get the right wheel out of the rut where the plank had been removed, and then the B.C. Electric train came in sight from the west. The foreman ran forward to flag the train but the train was going at considerable speed and was unable to stop. The two boys and the mother jumped out of the car but the father remained inside. The train struck the car and shoved it along the track about 90 feet before it came to a stop. The father was killed.

The appeal was argued at Victoria on the 20th, 21st and 22nd of January, 1937, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*J. W. deB. Farris, K.C.* (*Riddell,* with him), for appellant: The sole cause of the accident was in the driver of the automobile's voluntary act in attempting to make the crossing of the track with full knowledge of the situation. On the approximate cause see Bevan on Negligence, 4th Ed., 44. Knowing and appreciating the whole situation he proceeded to cross the track: see *Keachie* v. *Toronto* (1895), 22 A.R. 371; *Atkin* v. *City of*

*Hamilton* (1897), 24 A.R. 389 at p. 392; Terrell's Law of Running Down Cases, 2nd Ed., 185. As to the speed at which the train can travel on this line see *Grand Trunk Ry. Co.* v. *McKay* (1903), 34 S.C.R. 81 at pp. 86, 89 and 96. The Provincial Act applies in this case. The Legislature has usurped the rate of speed: see *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1 at p. 19.

*McAlpine, K.C.*, for respondent: The workmen were there, they got out of the way and tacitly invited him to cross: see Salmond on Torts, 9th Ed., 290; *McKee* v. *Malcolmson,* [1925] N.I. 120 at p. 129; *Osborne* v. *London and North Western Railway Co.* (1888), 21 Q.B.D. 220 at 223; *Directors, &c. of North Eastern Railway Co.* v. *Wanless* (1874), L.R. 7 H.L. 12; *Stevens* v. *Canadian Pacific Ry. Co.* (1913), 15 Can. Ry. Cas. 28. On the question of whether he assumed the risk see *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 at pp. 696-7; *Yarmouth* v. *France* (1887), 19 Q.B.D. 647 at p. 657; *Elliott* v. *Winnipeg Electric Railway Co.* (1918), 56 S.C.R. 560. As to the speed of the railway the standard of reasonableness must govern: see *Gowland* v. *Hamilton, Grimsby and Beamsville Electric R. Co.* (1915), 24 D.L.R. 49; *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry. Co.* (1927), 38 B.C. 234. There is the common law obligation to keep the car under control so that you can stop within the view before you: see *Ramsay* v. *Toronto R.W. Co.* (1913), 30 O.L.R. 127 at p. 139; *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582; *Durie* v. *Toronto R. Co.* (1914), 15 D.L.R. 747; *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375.

[*Riddell,* in reply, referred to *Grand Trunk Ry. Co.* v. *Perrault* (1905), 36 S.C.R. 671 at pp. 676-7.]

*Cur. adv. vult.*

9th March, 1937.

MACDONALD, C.J.B.C.: The evidence in the case discloses that the accident happened on a branch of the railway company running between Vancouver and Chilliwack, and that the car operated while not that which is usually understood as a train was a rather heavy contrivance in the nature of an ordinary street-car. On the day in question a repair gang of the railway

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company had interfered with a road crossing where it was desired to make a repair in the company's rails. The road-gang had proceeded to the crossing which was in a country place; had turned up a couple of the planks between the railway tracks for the purpose of making the repair. It was some minutes before the car was expected to arrive at that crossing. After these planks had been removed the plaintiff, her husband and two sons arrived at the crossing in an automobile. The driver of the car, a son of the plaintiff, apparently had a good deal of confidence in himself. He had had experience in Saskatchewan with similar crossings where he admitted the railway companies were in the habit of taking up planks at crossings in order to prevent the snow from obstructing rails. The young man was perfectly frank and admitted all the facts that were put to him and that he knew the train was expected in a few minutes and did not regard the crossing as at all difficult and therefore attempted to cross without requiring the railway gang to replace the two planks that had been lifted. When the car approached the railway workmen removed their tools to one side and stood to one side themselves. This was claimed to be an invitation to the driver to cross and it might well be said that it was such. It was at all events an intimation that he could exercise his own judgment. In my opinion he exercised his own judgment very mistakenly. Instead of bringing his car up to the rail at right angles or as near to right angles as possible so that the car would mount the rail and pass over, he took a different course off to the off side of the roadway where the planks had not been removed and he apparently misappreciated the difficulty of getting across there without his wheel falling into the depression caused by the removal of the planks. His crossing was on such an obtuse angle that the wheel slewed along the rail instead of mounting it and he was trapped. At that moment the whistle of the car was heard. The gang foreman ran up the track for a considerable distance to signal the car but it was said the motorman was unable to stop in time to save the situation because of the speed at which he was travelling, 40 miles an hour. The result was that the car was demolished, the father of the driver was killed and the other three occupants escaped without injury. The

jury returned a verdict for the plaintiff of $15,000. Now there is no doubt in my mind that both parties were negligent. The railway company was distinctly negligent in breaking up the crossing just before a car was due to arrive. The car had stopped at a stopping place shortly before reaching the crossing and the company could easily have left word with the agent at that place to notify the motorman of the danger ahead but that was not done. On the other hand the plaintiff was negligent in not requiring or suggesting even that the planks be replaced to enable him to cross. He made no suggestion at all. He simply claimed that he had often met a situation similar and had no fear of it. The foreman swore that he had intended to replace the planks for him and was removing a boulder which had fallen into the depression when the driver was about to cross. I think that his actions at that time would have indicated that he was willing to replace the plank, but the driver went boldly forward without taking any care to see that the place was made safe for him.

In my opinion therefore while the railway was guilty of negligence, although it must be admitted that they had a right to repair their tracks at that point, they did not take sufficient care to do so at a time when a car was not due to pass, or to warn the driver of the car of danger so that he might approach the crossing with due care.

Contributory negligence was pleaded and fully explained to the jury but they have ignored that phase of the case altogether. It is too apparent to be thus ignored and the case should be sent back to a jury for a new trial.

Now the conduct of the driver of the plaintiff's motor-car is well illustrated by his evidence:

And you knew the planks were somewhere? Yes, I did.

And didn't you also know if you could have—if there was not room to clear the hole, it would be better to swing to the right and come to the rail at right angles? Not at that time.

You were not giving much thought to this question, then? No.

No. If you had, perhaps you would not have tried to cross there? No. I might have turned round and gone another way.

Or, asked them to put the planks in? Yes.

You knew it was a simple thing to do? Yes.

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You know the foreman said he intended to put the planks down for you, if you had waited? Yes.

Of course, if the planks had been put down, you would have had no trouble at all? No trouble whatever.

Didn't you say you thought you could go over the tracks, because you had driven over rails in Saskatchewan? Yes, you can. You can go over tracks like that, if you drive on them head on.

THE COURT: In Saskatchewan? Yes, in Dodsland, Saskatchewan, in winter time they take the inside planks up, for snow ploughs to come down.

Then again:

Yes, you could see the hole, and knew it was there, just as well as the men? Yes.

And you decided to go ahead? Yes.

And you were in no hurry? No.

And you knew the planks were around there, and if you had wanted them put down, you could have had them put down? Yes.

You did not ask for them to be put down? No.

And did not wait for them to be put down? No.

You drove eighteen feet? Yes.

And backed up so that you got your hind out again—your hind wheels out, and on to the planks that were there? Yes.

And then you stopped, before you heard your brother holloa that there is a train? Yes.

You made no attempt, from that time, on, to get your car out of the road? No.

Moreover there is not sufficient evidence of the father's failure to alight from the car before the crash.

New trial ordered.

MARTIN, J.A.: This case has given me much difficulty, primarily because of the answers to the questions which absolve the driver of the motor-car from contributory negligence, and, indeed, if I had been trying the case without a jury I should also have found it far from easy to find that the defendant's servants had impliedly invited the said driver to cross the railway track that they were in the act of repairing. But my own view of the facts is not enough to justify me in disturbing the verdict of the jury unless I can go to the length of holding that there was not evidence upon which reasonable men might find as they did, because, as was recently said by the Supreme Court of Canada in *Canadian National Railway* v. *Muller,* [1934] 1 D.L.R. 768 at 769:

We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly

unreasonable as to show that the jury could not have been acting judicially (arts. 50 and 508 (3), C.C.P. (Que.); *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152, at p. 156). In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

And this view of the matter has been very recently (2nd February last) reaffirmed by the same Court in *Montreal Tramways Co.* v. *Guerard,* [1937] S.C.R. 76, 82. The reference to the *Metropolitan Ry. Co.* case relates to the judgment of Lord Halsbury wherein he said:

> If reasonable men *might* find (not "ought to" as was said in *Solomon* v. *Bitton* [(1881)], 8 Q.B.D. 176) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. . . . If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal.

Reference should also be made to the brief report of the still later decision of the Supreme Court (24th February last) in *McCannell* v. *McLean,* noted in (1937) Bench and Bar 6.

Guided by said principles I have carefully considered all the evidence with the result that, while I feel constrained to yield to the force of the able argument submitted by appellant's counsel to the extent above indicated, yet I find it impossible to hold that there is no evidence upon which "reasonable men might find the verdict that has been found," hence, since it is not open to me to substitute my views for theirs, it follows that the appeal should be dismissed.

McPHILLIPS, J.A.: I would order a new trial.

MACDONALD, J.A.: The appeal should be dismissed. Workmen in the employ of the appellant railway company in doing repair work on the track where the line crossed a public highway removed planks on either side of the rail a short time before a train was expected to cross the highway at that point. An automobile driven by a son of the deceased, for whose death this action was brought, upon attempting to cross the track stalled his car in a depression caused by the removal of the planks and before it was possible to remove it a collision with the oncoming

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train took place. All the occupants, except the deceased, leaped from the car before the impact. It is quite clear from the evidence that, wherever the fault lay, the car because of the depression on either side of the rail skidded into a position from which it was impossible to extricate it before the impact.

The jury in answer to questions found that the appellant's workmen were negligent in

removing planks at crossing too close to train time and failing to replace temporarily same on approach of auto.

It was submitted that this finding was not supported by the evidence. I cannot say that the jury demanded too high a standard of care in finding that upon observing the driver of the automobile with several passengers in it approaching the crossing the section-men should have replaced the planks temporarily to enable the car to pass in safety more particularly as they knew, or ought to have known that a train was shortly due at that point. To replace the planks would be the work of a few moments. If not willing to take this precaution to secure a smooth passage for respondents lawfully using the highway little time would have been lost by waiting until the train passed before removing the planks. That, at all events was the view of the jury and Courts must accept their conclusion on a question of fact unless perverse and without evidence to support it. Undoubtedly at least a possibly dangerous situation was created and if the jury chose to designate failure in replacing planks or in removing them too close to train time as an act of negligence causing the accident I cannot say there is no evidence to support it or that it is clearly wrong.

The jury in answer to further questions acquitted the driver of the motor-car of negligence. It was submitted that such a finding was perverse because the driver who could see (as he admitted) that the planks were removed voluntarily undertook to cross, believing he could safely do so. He examined the roadway in this condition with, it was said, an experienced eye, as he encountered situations of this kind before, and elected to cross. It was therefore his own voluntary act that caused the injury. Again I cannot agree, or at all events say that the jury were wrong in not so regarding it. The facts are not altogether as indicated. A narrow space remained on one side of the

travelled portion of the roadway where the planks were not removed over which the driver of the motor-car believed he could pass without permitting one or more wheels of the car to drop into the depression. It is important to enquire why he thought he could do so. The evidence discloses that he received a silent invitation from appellant's workmen to cross over the area referred to with the implication that there was sufficient width and that he might safely do so. That invitation may be implied from actions and conduct (picking up of tools, etc., and standing aside) indicating that he might cross. That may be inferred too from their actions having regard to the position of the motor-car driver at that moment. He was over to the left side of the road opposite this presumably safe area. The jury doubtless thought that the workmen (although mistaken) believed there was room to pass. A witness (Johnson) said so on examination for discovery. He was the track foreman in charge of three other men at that point. When asked if it was possible for a car to cross without dropping into the depression he said "I think so." That was his opinion at the time and he acted upon it by giving a tacit invitation to cross. The track foreman standing near the spot, familiar with the *locus,* was in a much better position to judge than the driver of the automobile some distance away. He also had a responsibility to either summon the driver to cross or to ask him to wait until the planks were replaced. He did not in fact withdraw this evidence given on discovery at the trial. He merely intimated that he looked at the place since the accident and apparently found that he was mistaken. That is not material. The important point is what he thought at that time. It follows therefore that the cause of the accident was that one of the front wheels of the motor-car dropped unexpectedly into the depression causing it to swerve sharply with the result that it finally became wedged close to the rail. It is true there is no finding by the jury of an "invitation" to cross. They were, however, justified in taking it into consideration (and doubtless did so) in deciding whether or not the driver of the motor-car was guilty of negligence contributing to, or solely causing the accident.

It follows that the motor-driver did not cross with full knowl-

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edge of the danger. He did not see or appreciate the true situation. He was justified in relying upon the tacit invitation to cross and the superior knowledge of the track foreman that a passage could be effected without encountering the danger referred to. In any event, whatever our view might be, if viewing it originally, on the question as to whether or not some share of the blame ought to be assigned to the driver of the motor-car I would not say, more particularly after the jury had a view of the *locus,* that they were perverse in acquitting the driver of negligence and in concluding that what he did was reasonable under the circumstances.

In an unresponsive answer to a further question dealing with degree of fault (in case the jury found that the negligence of both caused the accident) they said:

> We consider that the speed of the tramcar was excessive, especially in view of the fact that two crossings had to be negotiated and we refer as well to our answer of question No. 2.

The question arises, Is this an additional finding of negligence? It should be so regarded if that was the intention of the jury. However, as in my view the verdict may be supported apart from this answer I do not propose to deal with the submissions based upon it.

MCQUARRIE, J.A.: I would order a new trial.

*Appeal allowed and new trial ordered, Martin and Macdonald, JJ.A. dissenting.*

Solicitors for appellant: *Farris, Farris, Stultz, Bull & Farris.*
Solicitor for respondent: *H. J. Sullivan.*

## FRASER v. HARRIS AND KAUFFMAN.

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*Negligence—Damages—Automobile accident—Negligence of infant driver—liability of mother—Motor-vehicle Act—Meaning of "entrusted"—R.S.B.C. 1924, Cap. 177, Sec. 18A—B.C. Stats. 1926-27, Cap. 44, Sec. 12; 1929, Cap. 47, Sec. 7.*

The plaintiff, a passenger in a motor-truck driven by the defendant Harris, an infant, was injured in a collision for which Harris was solely responsible. Harris owned the truck and it was bought partly with money of his own and partly with money borrowed on an insurance policy on his own life, the premiums on which were paid by his mother, the defendant Kauffman. The plaintiff and Harris were partners in a business of buying and selling second-hand furniture and junk, and the truck was used in this business. Harris lived with his mother, borrowed money from her from time to time to buy furniture and he and his partner stored furniture and junk which they bought on her premises. In an action for damages it was held that both defendants were liable.

*Held*, on appeal, reversing the decision of FISHER, J. (MARTIN, J.A. dissenting), that the language of section 18A of the Motor-vehicle Act as amended by section 7 of the Motor-vehicle Act Amendment Act, 1929, Cap. 47, is such that it is not possible to construe it as imposing any liability on the parent where the minor is the owner of the car.

APPEAL by defendant Kauffman from the decision of FISHER, J. in an action tried by him at Vancouver on the 21st of November and the 3rd and 13th of December, 1935, for damages, the plaintiff having been injured owing to the negligent driving of a motor-car by the defendant Harris. Harris had purchased a motor-truck in 1934 when he was nineteen years old, and on applying for a driver's licence, his mother, the defendant Fanny Kauffman, was required to attend with him. Mrs. Kauffman could not read English and spoke it with difficulty. The further facts are set out in the judgment of the trial judge.

*Cowan*, for plaintiff.

*Denis Murphy*, for defendants.

FISHER, J.: In this matter, I find that the defendant, Isadore Harris, was, at the time of the accident, an infant residing with his mother Fanny Kauffman and living with her as a member of her family. The negligence of the minor, or infant, in the

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driving or operating of the motor-vehicle, and thereby causing the accident is admitted. The real question in issue apparently is as to liability, if any, of the defendant, Fanny Kauffman, and in my opinion comes back to whether or not the motor-vehicle was entrusted to the minor by the defendant, Fanny Kauffman. I would not be inclined to think that any one particular fact in evidence to which I am going to refer would in itself settle the question, but I have a great many factors here which seem to me to bear on the question of entrustment, and I have endeavoured to consider them all and I will refer to certain ones. The car is being used at times in the business of the defendant, Fanny Kauffman. She supplied the money for a licence. She applied for insurance. It seems to me that she is assuming to exercise control. She takes part in the application referred to, and I have before me the document, Exhibit 12. The defendant Fanny Kauffman knows that the car is being used at different times by her son in what might be called his own business, but his business is more or less entwined with hers. The son and the mother with the plaintiff are occasionally at least storing goods, which they are getting, on the premises where the defendant mother is carrying on business. They might be stored there for a while or perhaps sold there on the premises. All these facts to which I have referred tend, in my mind, to establish that the defendant Fanny Kauffman is making such use of the truck at various times in her own business and so co-operating in supplying the money for the licence and making the application for the insurance that I come to the conclusion that she should be found, and I do find she was entrusting the truck to the other defendant, and that she did entrust it to him, and she is liable along with the defendant Isadore Harris and the two of them are liable to the plaintiff. There will be judgment against both defendants for the special damages which, I think, total $461.50. If there is any doubt about it, it can be spoken to. Doctor $250 and another doctor $50, making $300. Hospital $154.50 and a special back support $7, $461.50, and I assess the general damages at $1,200.

From this judgment the defendant Kauffman appealed.

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The appeal was argued at Vancouver on the 25th and 26th of November, 1936, before MACDONALD, C.J.B.C., MARTIN and MCPHILLIPS, JJ.A.

*Denis Murphy* (*David Freeman,* with him), for appellant: Section 18A was inserted in the Motor-vehicle Act by section 12, Cap. 44, B.C. Stats. 1926-27, and this section was amended by section 7, Cap. 47, B.C. Stats. 1929. Harris owned the car and was on business of his own with Fraser at the time of the accident. The car being his own it was not entrusted to him by his mother. She does not come within the section. As to the construction to be placed on the word "entrustment" see *Moshier* v. *Keenan* (1900), 31 Ont. 658 at p. 660; *Nelson* v. *Dennis,* [1929] 4 D.L.R. 282; *LeBar* v. *Barber and Clarke,* [1923] 3 D.L.R. 1147; *Fuentes* v. *Montis* (1868), 38 L.J.C.P. 95; *Staffs Motor Guarantee, Ld.* v. *British Wagon Co.,* [1934] 2 K.B. 305 at p. 313; *Lake* v. *Simmons* (1927), 96 L.J.K.B. 621. There is no entrustment whatever and the declaration made by the mother when the boy received his driving licence does not increase her liability under the Act.

*Cowan,* for respondent: There was a re-enactment in 1935 which was assented to nine days after the accident, and section 45 of that Act is the same as old section 18A with a clause added to it. In cases of procedure the Act is retrospective: see *Rex* v. *Kumps,* [1931] 1 W.W.R. 812; *Gardner* v. *Lucas* (1878), 3 App. Cas. 582 at p. 603. Under the added clause the *onus* is on the parent to show she was not responsible for the son's negligence. To pay for the car he borrowed on an insurance policy, his mother having paid the premiums. The word "entrustment" need not include ownership. He could not use the car without the mother's assistance. Anything the boy made went into the common purse and their respective businesses were so intertwined that they were substantially partners. Getting the licence is the exercise of control and makes her liable.

*Murphy,* replied.

*Cur. adv. vult.*

12th January, 1937.

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

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MARTIN, J.A.: Upon the special facts of this case I am of opinion that the learned judge has reached the right conclusion and therefore this appeal should be dismissed.

MCPHILLIPS, J.A.: The defendant Fanny Kauffman appeals from the judgment of FISHER, J., imposing upon her liability in respect of a motor accident whereby James William Fraser (the respondent) suffered injuries when riding in a motor-truck of her son Isadore Harris, and being driven at the time of the accident by her son Isadore Harris. It must be admitted that unless by virtue of statute law there can be no liability upon the mother for the negligence of her son he being a minor. The son is in business and is in partnership with James William Fraser (the respondent). The son in carrying on his business drives the motor—his motor—with his partner a passenger therein. The accident takes place. The question is can it be contended that the liability is a liability of the mother? The statute law that the learned trial judge relied upon as entitling liability being imposed on the mother reads as follows:

18A. So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor-vehicle entrusted to the minor by the parent or guardian; but nothing in this section shall relieve the minor from liability therefor.

With great respect to the learned trial judge it would seem to me that the language of the statute is such that it is not possible to construe it as imposing any liability on the parent where the minor, as here, is the owner of the motor-vehicle. The owner of the motor-vehicle in the present case is in no way "entrusted" with the motor-vehicle by his mother. She has no property in the car whatsoever. To entrust any one with property could only be where the property in that which is entrusted is in the one entrusting it.

I would therefore allow the appeal.

*Appeal allowed, Martin, J.A. dissenting.*

Solicitors for appellant: *Murphy, Freeman & Murphy.*
Solicitors for respondent: *Cowan & Cowan.*

## RATTENBURY v. THE ROYAL TRUST COMPANY.

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*Practice—Transfer of property from husband to wife—Trust agreement—Contest as to ownership—Originating summons—Jurisdiction—Appeal—Order LV., r. 3 (g).*

By three conveyances in 1928 and 1929, the late Francis M. Rattenbury conveyed his Oak Bay property on Vancouver Island to his wife. On the 10th of November, 1929, she leased the property with option to purchase for $85,000 to the St. George and The Dragon Hotel Company, Limited. On December 17th, 1929, a trust agreement was entered into between Mr. and Mrs. Rattenbury and The Royal Trust Company, whereby the wife conveyed the property in question to The Royal Trust Company subject to the lease of the 10th of November, 1929, upon certain trusts, including the division of the rentals equally between her and her husband, and upon the death of one to pay to the survivor and after the death of the survivor to their two children. On April 30th, 1930, The Royal Trust Company leased the lands to the St. George and The Dragon Hotel Company, Limited with option to purchase for $85,000. On the 13th of May, 1931, the Hotel Company released all its rights in the property and was released from all obligations by The Royal Trust Company. Francis M. Rattenbury died in England, where he and his wife were domiciled, on the 28th of March, 1935, and his wife died on the 5th of June following. On the application of The Royal Trust Company, ROBERTSON, J. made a declaration that the trust set out in the trust agreement had wholly failed, and that The Royal Trust Company held the lands in trust either under the last will of Francis M. Rattenbury or the last will of his wife. On the application of Francis B. Rattenbury and Mary Burton, a son and daughter of Francis M. Rattenbury by a previous marriage, ROBERTSON, J., on the 4th of June, 1936, acting under the Testator's Family Maintenance Act, made an order directing that the applicants should have a charge upon the real estate of Francis M. Rattenbury situate in the Province, and upon the proceeds of the property in question in Oak Bay, should it be determined that the same now belongs to the estate of Francis M. Rattenbury. The Royal Trust Company now being both administrator with will annexed of Francis M. Rattenbury, deceased, and executor of the will of Alma Victoria Rattenbury, deceased, issued an originating summons for an order as to whether the Oak Bay property belongs to the estate of Francis M. Rattenbury. On the 23rd of December, 1936, it was held by ROBERTSON, J. that the property in question was held by The Royal Trust Company in trust for the estate of Alma Victoria Rattenbury, and that the estate of Francis M. Rattenbury had no interest in the lands.

*Held*, on appeal, that this case is one of conflict as to which estate the property belongs, and an issue will have to be decided on evidence *de hors* the wills of the respective deceased. A contest of this kind is not

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within the contemplation of a proceeding initiated by originating summons under Order LV., r. 3 (*g*). The issues here do not involve "the determination of any question arising in the administration of the estate or trust." The order below is set aside as having been made without jurisdiction.

APPEAL by plaintiff from the decision of ROBERTSON, J. of the 23rd of December, 1936 (reported *ante,* p. 334) on an originating summons under rule 765 (*g*) to determine whether certain property in the Municipality of Oak Bay belongs to the estate of the late Francis Mawson Rattenbury. On the 12th of January, 1928, F. M. Rattenbury, in consideration of $1, conveyed part of his Oak Bay property to his wife. On the 12th of June, 1929, he conveyed another part (which included his residence) to her for $3,000, and a small strip remaining he conveyed to her on the 13th of December, 1929. On the 10th of November, 1929, Mrs. Rattenbury agreed to lease the property to the St. George and The Dragon Hotel Company, Limited, with option to purchase for $85,000. On the 17th of December, 1929, the Rattenburys and The Royal Trust Company entered into an agreement which recited:

> Whereas the husband granted and conveyed to the wife the lands and premises hereinafter described and at that time it was agreed between the husband and wife that the wife would on request grant and convey the said lands and premises in fee simple to the trustee to the uses and upon the trusts hereinafter stated.

Under the agreement Mrs. Rattenbury conveyed the property to The Royal Trust Company subject to the agreement of the 10th of November, 1929, upon certain trusts, namely, to divide the rentals equally between her and her husband and upon the death of one to pay to the survivor and after the death of the survivor to hold the capital and income in trust for their two children. On April 4th, 1930, The Royal Trust Company leased the lands to the St. George and The Dragon Hotel Company, Limited, with option to purchase for $85,000. On the 13th of May, 1931, the company released all its rights under the agreement and was released by The Royal Trust Company from all its obligations. It was held that the trust lapsed and The Royal Trust Company held the property as bare trustee; that $3,000 was paid for a considerable portion of the property;

that Mrs. Rattenbury did all she was required to do by the recital, and having done this and the trust having failed, The Royal Trust Company held the property in trust for her estate, and the F. M. Rattenbury estate has no interest in the lands.

The appeal was argued at Victoria on the 19th of April, 1937, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

*A. deB. McPhillips*, for appellant: There were three conveyances by the husband to the wife. The only consideration mentioned is in the second conveyance of $3,000. This was the portion of the property on which the residence is situate. The lease to the St. George and The Dragon Hotel Company, Limited with option to purchase fell through, and later the property was sold for $17,500 for a school. This money is in dispute. The property originally belonged to F. M. Rattenbury. When the property was transferred to Mrs. Rattenbury she was in fact a trustee for him: see *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Archibald* v. *Goldstein* (1884), 1 Man. L.R. 45; *Harrods Ld.* v. *Tester*, [1937] 2 All E.R. 236. The trust having failed there was a resulting trust in favour of the F. M. Rattenbury estate.

*Maclean, K.C.*, for The Royal Trust Company, administrator of F. M. Rattenbury estate: The learned judge below followed *Powell* v. *City of Vancouver* (1912), 17 B.C. 379. There is a presumption that a husband desires to provide for his wife during her life and the trust deed is evidence of the intention to provide for both of them during their lives. They are both dead and the trust failed. There is a resulting trust in favour of the husband.

*Manzer*, for The Royal Trust Company as executor of the will of Alma V. Rattenbury, deceased: Conversations that took place in the absence of Mrs. Rattenbury referred to in the affidavit of Francis B. Rattenbury and the affidavit of Mrs. Burton should not be accepted in evidence against Mrs. Rattenbury: see Phipson on Evidence, 7th Ed., 247. Rattenbury disposed of the property in his wife's favour. He cannot get it back; an estoppel results: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 398, secs. 448 and 451. As to the third conveyance, a road known as Mount Baker Avenue divided his

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main property from a strip of land he owned across the road, and by arrangement with the municipality in order to consolidate his property he was given title to the road allowance, and the road was constructed on the strip that he formerly owned. In the very deed his wife is described as the owner of the property: see Halsbury's Laws of England, Vol. 28, p. 57, sec. 107. There must be distinct and precise testimony of a trust in his favour: see *Hyman* v. *Hyman,* [1934] 4 D.L.R. 532. The failure of the sale to the St. George and The Dragon Hotel Company, Limited, did not change the matter: see *Poirier* v. *Brule* (1891), 20 S.C.R. 97 at p. 102.

*McPhillips,* replied.

*Cur. adv. vult.*

On the 26th of April, 1937, the judgment of the Court was delivered by

SLOAN, J.A.: The circumstances under which this appeal comes before us are somewhat peculiar. The decision to which I have come necessitates an examination of those circumstances, and to a degree the relevant facts in the controversy.

By three conveyances dated respectively the 12th of January, 1928, 12th of June, 1929, and the 13th of December, 1929, the late Francis Mawson Rattenbury conveyed to his wife Alma Victoria Rattenbury the properties therein described for the considerations expressed. The third conveyance was apparentely to "round out" the area previously conveyed.

On the 17th day of December, 1929, a trust agreement was entered into between Alma Victoria Rattenbury, Francis Mawson Rattenbury and The Royal Trust Company whereby the wife conveyed the properties in question to The Royal Trust Company upon the trusts therein stated. It appears also that the wife had on the 10th day of November, 1929, leased the said property, with an unimportant exception, to the St. George and The Dragon Hotel Company, Limited for a term of 99 years at an annual rental of $5,100 with an option to purchase for the sum of $85,000.

The trust agreement of the 17th of December, 1929, was made subject to this lease and purchase agreement of the 10th

of November, 1929, and it was a term of such trust agreement that the trust company would fulfil and perform the covenants and agreements contained in the lease and purchase agreement.

The rentals to be derived from the premises were to be divided equally between husband and wife during their lives share and share alike and upon the death of one of them were to go to the survivor. In the event of the St. George and The Dragon Hotel Company, Limited exercising its right of purchase the moneys arising therefrom were to be invested by the trustee and the resulting income was to be divided in the same manner as the rentals had been.

Upon the death of both husband and wife trusts were created in favour of the children of the husband and wife. Two children of a prior marriage of the husband were not included in the trust agreement.

On the 13th of May, 1931, the St. George and The Dragon Hotel Company having failed to fulfil its covenants under the lease and purchase agreement surrendered to The Royal Trust Company the said lease and abandoned all claims to the covenants contained therein. On the 20th of December, 1935, Mr. Justice ROBERTSON, on the application of The Royal Trust Company, made a declaration that the trust set out in the trust agreement had wholly failed and that The Royal Trust Company held the lands described in the trust agreement in trust either under the last will and testament of Francis Mawson Rattenbury or the last will and testament of Alma Victoria Rattenbury. Both husband and wife had come to their death in 1935.

On the 4th of June, 1936, Mr. Justice ROBERTSON, acting under the provisions of the Testator's Family Maintenance Act, made an order on the application of Francis Burgoyne Rattenbury and Mary Burton, a son and daughter of Francis Mawson Rattenbury by a previous marriage, directing that the applicants should have a charge upon the real estate of Francis Mawson Rattenbury situate in the Province and upon the proceeds of the sale of the dwelling-house and property conveyed by Francis Mawson Rattenbury to Alma Victoria Rattenbury by the deed bearing date the 12th of June, 1928, and to which previous reference has been made, should it be determined that the same now belongs to the estate of Francis Mawson Rattenbury.

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On the 9th of October, 1936, The Royal Trust Company issued an originating summons as administrator with the will annexed of Francis Mawson Rattenbury deceased for an order adjudicating whether all the property described in the trust agreement, hereinbefore referred to, which of course includes the dwelling-house and property upon which the charge was granted, belongs to the estate of Francis Mawson Rattenbury. By a mere coincidence The Royal Trust Company is also the executor of the will of Alma Victoria Rattenbury.

The originating summons came on for hearing before Mr. Justice ROBERTSON on the 8th of December, 1936, and The Royal Trust Company as administrator of the estate of Francis Mawson Rattenbury was represented by Mr. *H. A. Maclean, K.C.;* in its capacity as executor of the estate of Alma Victoria Rattenbury it was represented by Mr. *Roy Manzer,* while Mr. *A. deB. McPhillips* appeared for Francis Burgoyne Rattenbury and Mr. *W. H. Langley* appeared for Mrs. Burton.

After hearing argument Mr. Justice ROBERTSON reserved judgment and on or about the 15th of December, 1936, directed the deputy registrar of the Court to write to counsel in the following terms:

> During the argument the question arose as to whether these proceedings were properly instituted by way of originating summons. In this connection I am directed by the Hon. Mr. Justice ROBERTSON to refer you to *In re Carlyon* (1886), 56 L.J. Ch. 219; *In re William Davies* (1888), 38 Ch. D. 210, from which it would appear that his decision upon the merits would be final. After a perusal of these cases I would like to hear from you immediately as to whether you desire his Lordship to decide the question on the merits so that there will be no misunderstanding.

Mr. *Maclean* replied that he had looked at the cases quoted and on behalf of The Royal Trust Company, in the capacity in which he acted for it, wished his Lordship to decide the question on the merits. Mr. *Manzer* took the same stand in his reply.

For reasons, no doubt valid but not indicated on the record, Mr. *Langley,* it seems, was neither in receipt of a communication from the registrar nor did he appear before us on the appeal.

The letter in reply from Mr. *McPhillips* was in the following form:

> I have your letter of the 15th inst. and may say that I have read the cases referred to therein.

In my opinion these cases do not apply in this matter and accordingly it is my desire that his Lordship Mr. Justice ROBERTSON should decide the question herein on the merits.

Mr. Justice ROBERTSON read Mr. *McPhillips's* letter as a consent to his adjudication on the merits on the terms indicated, and subsequently gave his opinion wherein he concluded that the property in question was held by The Royal Trust Company in trust for the estate of Alma Victoria Rattenbury and that the estate of Francis Mawson Rattenbury had no interest in the lands.

From this adjudication Francis Burgoyne Rattenbury appealed to this Court. At the opening of the appeal both counsel for the respondent The Royal Trust Company took the preliminary objection that this Court had no jurisdiction to entertain the appeal upon the ground that the judge below had no jurisdiction to make the direction he did in the absence of consent of all parties and that as all parties had consented the order made was a consent order from which no appeal would lie. We did not give effect to the objection holding that Mr. *McPhillips's* letter was not, in terms, the consent required. This left two questions to be determined. Did the learned judge below, in the absence of consent, have any jurisdiction to make an order in proceedings commenced by originating summons under the circumstances herein? If so was the order he made a proper one?

Mr. *McPhillips,* for the appellant, based his argument on the merits, upon the submission that when Rattenbury conveyed the various properties to his wife there was at that time a contemporaneous agreement, either oral or in writing between them by virtue of which Mrs. Rattenbury was to hold the property as trustee for her husband. In support of this contention he relied upon certain evidence given by affidavit and also stressed a recital in the trust agreement of the 17th of December, 1929, reading as follows:

Whereas the husband granted and conveyed to the wife the lands and premises hereinafter described and at that time it was agreed between the husband and wife that the wife would on request grant and convey the said lands and premises in fee simple to the trustee to the uses and upon the trusts hereinafter stated.

Mr. *McPhillips* did not limit his submission to a claim that a resulting trust arose by implication of law from the failure of

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the express trusts set up in the trust agreement but rather invited us to regard the trust agreement and its recital merely as having some evidentiary value in relation to his contention that there had been an express trust agreement between Rattenbury and his wife. Mr. *Manzer* strongly supported the finding of the judge below and Mr. *Maclean,* while supporting the order made, stated that The Royal Trust Company would prefer to step aside and allow the contest to be decided between the conflicting interests and more intimately concerned in the result.

We thus have on one side the appellant endeavouring to add the dwelling-house property to his father's estate by alleging that his step-mother was in fact trustee for his father notwithstanding the absolute nature of the conveyances of the property. On the other hand we have the representative of the estate of Mrs. Rattenbury resisting this contention and claiming the property as an asset of her estate.

In my opinion a contest of this kind is not within the contemplation of a proceeding initiated by originating summons under Order LV., r. 3, clause (*g*), the only rule on which appellant's counsel bases the jurisdiction of the judge below. I cannot bring myself to find that the issues here involve "the determination of any question arising in the administration of the estate or trust."

Our attention has been drawn to the following authorities: *In re Carlyon* (1886), 56 L.J. Ch. 219; *In re William Davies. Davies* v. *Davies* (1888), 38 Ch. D. 210; *In re Royle* (1889), 43 Ch. D. 18; *In re Giles* (1890), *ib.* 391; *In re Amalgamated Society of Railway Servants. Addison* v. *Pilcher,* [1910] 2 Ch. 547; *Re Collins* (1927), 61 O.L.R. 225; *In re Delaere Estate and Royal Trust Co.,* [1933] 2 W.W.R. 258. From a reading of the foregoing cases to which may be added *In re Gladstone,* [1888] W.N. 185, and *In re Powers* (1885), 30 Ch. D. 291, it appears to me to be beyond question that, in the absence of consent, the learned judge below had no authority to decide the questions in issue on the form of proceeding adopted. The learned judge himself was of this same opinion as appears from the letters he directed the registrar to send to counsel and from his reasons for judgment. With respect to him, however,

he in my opinion, misconstrued the answering communication from Mr. *McPhillips*.

Mr. *McPhillips* sought to clothe the learned judge below with jurisdiction on the authority of *In re Hargreaves* (1890), 43 Ch. D. 401. Cotton, L.J., at p. 405, states shortly the facts of that case as follows:

> This is a case where trustees of a will in whom the legal estate in fee is vested, and who are in possession of the property, come asking to have a decision, to whom, according to the true construction of the will, they ought to hand over the property.

In my view the *Hargreaves* case is clearly distinguishable from the case at Bar. This case is one of conflict as to which estate property belongs and the issue will have to be decided on evidence *dehors* the wills of the respective deceased. It is not a case of construction of a will as is the *Hargreaves* case, *supra*.

Mr. *McPhillips* submitted that The Royal Trust Company in some capacity was in possession of the property in question but was frank to admit that if instead of the one company acting in different capacities the estates were represented by strangers an originating summons would not be the proper procedure for determining the issues involved. It is my opinion that this matter should be approached as if in fact the estates were represented by an administrator and an executor at arm's length and the mere coincidence of representation should not be allowed to cloud the real contest.

Appellant's counsel also referred us to *In re Parsons* (1890), 45 Ch. D. 51. In that case an executor had funds in his hands with which he did not know what to do. No objection was made to the question there being determined on originating summons. *Parsons's* case is also distinguishable for the same reason as *Hargreaves's* case. In this case we have an executor and an administrator in a contest as to which of them shall receive property, not to whom they shall pay it.

For the reasons I have stated I would allow the appeal and set aside the order below as having been made without jurisdiction.

*Appeal allowed.*

Solicitors for appellant: *McPhillips & McPhillips.*

Solicitors for respondent: *Elliott, Maclean & Shandley,* and *Heisterman & Manzer.*

C.A. 1937 *March 24.*

## *IN RE* RICHARD ARLAN PORTEOUS. PORTEOUS v. PAPINEAU.

*Husband and wife—Foreign divorce—Petition—Custody of child—Equal Guardianship of Infants Act—Evidence—Discretion of trial judge—Appeal—R.S.B.C. 1924, Cap. 101, Sec. 13.*

A husband obtained a divorce from his wife in the State of Washington, giving him the custody of their child. He then moved with the child to Nanaimo, British Columbia, where he still resides. On petition of the wife under the Equal Guardianship of Infants Act, an order was made giving her the custody of the child.

*Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., that the interest of the child itself is paramount and the wide discretion of the judge below who exercised it, will not be interfered with unless there is a strong case, and a lack of proper material for the exercise of that discretion.

APPEAL by the father from the order of MORRISON, C.J.S.C. of the 26th of February, 1937, on the petition of the mother under the Equal Guardianship of Infants Act for the custody of their child, Richard Arlan Porteous, whereby the custody of the child was given to the mother. The parents were married March 3rd, 1928, and the infant was born in Seattle on February 5th, 1929. The parents were separated at various times during their married life owing to differences between them. In 1929 the husband moved to Tacoma and in 1930 he moved to Pocatello in the State of Idaho, where he was later joined by his wife and child. They quarrelled in Pocatello and the wife went to Sheridan, Wyoming, with the child. She then moved to Billings, Montana, then to Seattle and thence to Tacoma. In August, 1930, the father took the child away from his mother and went to Pocatello where he obtained an order restraining his wife from moving the child out of the jurisdiction. The father was transferred to Salt Lake City and he gave the custody of the child to his mother who lived in Saskatoon, Saskatchewan. On October 8th, 1930, the parents came to an agreement with respect to the child, and they lived together until August, 1931, when the mother left her husband and took the child with her. On September 2nd, 1931, the husband brought action in Washington

State for divorce. On November 1st, 1933, the husband obtained a decree *nisi* in the divorce action, giving him the custody of the child, and later obtained a decree absolute. In August, 1934, the husband obtained employment in Nanaimo, British Columbia, and has resided there since. On June 24th, 1935, he took the child from the mother in Los Angeles and brought him to Nanaimo, where the child has since lived. Both the parents have remarried since the Seattle divorce.

The appeal was argued at Vancouver on the 24th of March, 1937, before MARTIN, MACDONALD and MCQUARRIE, JJ.A.

*Maitland, K.C.*, for appellant: No real ground has been shown for taking the child away from the father. The child's upbringing and surroundings are excellent. It is not in the interest of the child to take him away from the father. The paramount consideration is the welfare of the child. When the mother remarried the child was given to the father and has been with him for two years: see *Re C* (1922), 67 D.L.R. 630. The father has done nothing to forfeit his common law right to custody of the child: see *Re Gray*, [1925] 4 D.L.R. 381; *Re Scarth* (1916), 35 O.L.R. 312. The order should not be made that he be taken back to the United States: see *Dawson* v. *Jay* (1854), 3 De G. M. & G. 764; *Re Louise Mott* (1912), 4 Alta. L.R. 193. At common law the father has the paramount right to the custody of the child: see *Ex parte Dzyez*, [1927] 1 D.L.R. 1110; *In re Ayers* (1921), 16 Alta. L.R. 433; *Rex* v. *Hamilton* (1910), 22 O.L.R. 484. As to the welfare of the child, the word "welfare" must be taken in its widest sense: see *Painter* v. *McCabe* (1927), 39 B.C. 249.

*Nicholson*, for respondent: The order was made pursuant to power conferred by section 13 of the Equal Guardianship of Infants Act. The evidence given before the trial judge is not in the appeal book. It is the duty of the appellant to have this evidence before the Court. In the absence of the evidence the Court should not interfere with the discretion exercised by the Court below: see *Ex parte Firth. In re Cowburn* (1882), 19 Ch. D. 419; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Rendell* v. *McLellan* (1902), 9 B.C. 328. The

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trial judge considered the various elements required by section 13 of said Act. There was sufficient material before the trial judge upon which he could exercise his discretion: see *In re Befolchi* (1919), 27 B.C. 460; *Snyder* v. *Snyder* (1927), 38 B.C. 336; *In re Gehm, an Infant. Gehm* v. *Gatjens* (1927), 39 B.C. 45.

*Maitland,* replied.

MARTIN, J.A.: This case has given us some difficulty because all matters of this description are of an unusual delicacy and nicety, but after giving it that consideration which it merits, we feel that we should be guided by our decisions which were cited yesterday, and particularly *Snyder* v. *Snyder* (1927), 38 B.C. 336, where the brief effect of the statute was given at p. 339, where it is said:

> As I understand it, there was one principle laid down which was this: that the interest of the child itself is paramount and that the wide discretion of the judge below who exercises it will not be interfered with, unless there is a strong case and a lack of proper material for the exercise of that discretion.

Applying that, we feel we would not be justified in interfering with the discretion that was exercised by the learned judge below.

We have to say that it would be, of course, more satisfactory if we had the evidence before us which was taken *viva voce,* but at the same time we do not feel that it is open to us to remit the case to the learned judge below, or that the lack of that evidence in the case would justify us, upon the facts presented to us, in applying the principles of *Painter* v. *McCabe* (1927), 39 B.C. 249.

MACDONALD, J.A.: I agree.

MCQUARRIE, J.A.: I agree.

*Appeal dismissed.*

Solicitor for appellant: *C. Murray Reynolds.*
Solicitor for respondent: *W. S. Lane.*

## McDERMID v. BOWEN: THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA, THIRD PARTY.

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*March* 31; *April* 1, 2, 20.

*Negligence — Motor-vehicles — Plaintiff gratuitous passenger — Volens — Insurance company—Added as third party—B.C. Stats. 1935, Cap. 50, Sec. 53; B.C. Stats. 1932, Cap. 20, Sec. 5 (159M).*

The plaintiff, being injured in an accident when a gratuitous passenger in a car driven by the defendant, brought action for damages and The General Accident Assurance Company of Canada was added as a third party by order pursuant to section 159M of the Insurance Act. The jury answered questions and found the defendant guilty of negligence which contributed to the accident consisting of "Excessive speed at the time of the accident." To the question, "At the time of the accident was there a fog there of such density as to prevent the defendant from having a proper or sufficient view of the highway or of the traffic thereon so as to render driving on the highway in question hazardous and dangerous?" Answer "Yes." To the question, "Did the driving of the defendant in such fog contribute to the accident?" Answer "Yes." To the question, "Did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk she ran agree to incur it?" Answer "Yes."

*Held*, that in view of the charge to the jury and construing the whole of their answers, the negligence they found was driving at an excessive rate of speed in the fog and the plaintiff was *volens* as to this. Under these circumstances the plaintiff cannot recover.

ACTION for damages in respect of personal injuries, loss and damage alleged to have been suffered as a result of the defendant's negligent driving of a motor-car in which the plaintiff was a gratuitous passenger. The third party was added by order of MORRISON, C.J.S.C. pursuant to section 159M of the Insurance Act. The defendant in his defence denied that he was negligent. The third party was given the liberty to file pleadings in the action, set up in its defence, in addition to denying negligence, that the plaintiff's injuries were the result of the defendant driving his motor-car while under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the said motor-car and that the plaintiff was *volens* with respect thereto. The third party set up a further defence that the plaintiff's injuries were the result of the defendant driving his motor-car in a fog of such density

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as to prevent drivers including the defendant from having a proper or sufficient view of the highway or traffic thereon and of rendering driving on the said highway hazardous and dangerous and that the plaintiff was *volens* with respect thereto. The third party also set up as a defence that the plaintiff and the defendant were engaged in a common purpose or joint enterprise.

Tried by ROBERTSON, J. at Vancouver with a special jury on the 31st of March and the 1st and 2nd of April, 1937.

The questions submitted to the jury with answers thereto were as follow:

1. Was the defendant guilty of negligence which contributed to the accident? Yes.

2. If so, in what did such negligence consist? Excessive speed at time of accident.

3. Was the defendant, at the time of the accident, under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of his car? Seven say no; one says yes.

4. If you answer Question 3 in the affirmative, did the condition of the defendant contribute to the accident?

5. If you answer Questions 3 and 4 in the affirmative, did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk she ran by reason of such condition of the defendant impliedly agree to incur it?

6. Was the defendant at the time of the accident in such a condition, as a result of imbibing intoxicating liquor, as to render it dangerous for him to drive his car? Seven say no; one says yes.

7. If your answer to Question 6 is in the affirmative, did the condition of the defendant contribute to the accident?

8. If your answer to Questions 6 and 7 is in the affirmative did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it?

9. At the time of the accident, was there a fog there of such density as to prevent the defendant from having a proper or sufficient view of the highway or of the traffic thereon so as to render driving on the highway in question hazardous and dangerous? Yes.

10. If your answer to Question 9 be in the affirmative did the driving of the defendant in such fog contribute to the accident? Yes.

11. If your answer to Questions 9 and 10 be in the affirmative did the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran impliedly agree to incur it? Seven say yes and one says no.

11a. Was there an arrangement express or implied made between the plainiff and the defendant and whereby they had joint control of the car at the time of the accident? No.

12. Damages. Special $812.45. General $2,000.

The jury after the expiration of three hours from the time

when it retired (see section 51, Jury Act) brought in its answers.

Motion for judgment by the plaintiff was heard by ROBERTSON, J., at Vancouver, on the 16th of April, 1937.

*Denis Murphy,* and *D. A. Freeman,* for plaintiff.

*L. St. M. Du Moulin,* and *R. T. Du Moulin,* for defendant.

*Bull, K.C.,* and *Housser,* for third party.

*Cur. adv. vult.*

20th April, 1937.

ROBERTSON, J.: The plaintiff submits that *"volens"* does not apply in this case because the negligence, which the jury found in answer to Questions 9 and 10, consisted of a breach of a statutory obligation imposed by section 53 of the Motor-vehicle Act. That section provides that a person driving a motor-car shall drive and operate the same in a careful and prudent manner, having regard to all the circumstances, and, then, provides that in describing any offence under the section it shall be sufficient to charge the person with driving to the common danger. It further provides that the Court, trying the case, shall be entitled to receive certain evidence. Subsection (2) of section 53 says there is to be a presumption that the driver of a car was driving "in other than a careful and prudent manner" if the speed exceeds 30 miles per hour. Subsection (3) of section 53 provides a penalty for breach of subsection (1). In my opinion this is a penal section involving penalties for its breach and does not affect civil liability. With reference to this, Lord Wright in delivering the judgment of the Judicial Committee in *Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690 said at p. 692:

> Reference was also made to s. 15, which reads as follows: "Every motor vehicle shall be equipped with adequate brakes, sufficient to control such motor-vehicle at all times, and also with suitable bell, gong, horn, or other device which shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle." That section, however, is a penal clause involving penalties for its breach under s. 52 of the Act, and is not material in a case of civil liability such as the present; it may accordingly be disregarded for the present purpose.

See also judgment of Davis, J.A. in *Falsetto* v. *Brown, et al.,*

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[1933] O.R. 645 at 655 and 656 and the case referred to by the learned judge, *viz., Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832. Then it is said the jury have found negligence on two counts, *viz.*: excessive speed, and, driving in the fog when the conditions were such as to render it hazardous and dangerous and that they have found the plaintiff was *volens* only in respect of the latter. In view of my charge to the jury, and, construing the whole of their answers (see *Marshall* v. *Cates* (1903), 10 B.C. 153) I think the negligence they found was driving at an excessive rate of speed in the fog and that the plaintiff was *volens* as to this. Under these circumstances I am of the opinion the plaintiff cannot recover. See *Delaney* v. *City of Toronto* (1921), 49 O.L.R. 245 and *Stewart* v. *Godwin*, [1934] O.W.N. 49.

The action is dismissed.

*Action dismissed.*

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*March* 31;
*April* 1, 2, 6;
*May* 7.

## McDERMID v. BOWEN: THE GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA, THIRD PARTY. (No. 2).

*Costs—Action for damages—Insurance company third party—Action dismissed—Dismissal due to defence raised by third party—Third party fails on one issue—Two-thirds of third party's costs given against plaintiff—Rules 176 and 976.*

In an action for damages owing to the alleged negligence of the defendant in an automobile accident the insurance company was added as a third party. The action was dismissed owing to the defence raised by the third party but the third party failed on the allegation that the plaintiff's injuries were the result of the defendant driving his motor-car while under the influence of intoxicating liquor. On an application to settle the judgment:—

*Held*, applying rule 176, that the costs of the drunkenness issue in which the third party failed should be allowed at one-third of the third party's costs, that is, the third party's costs are to be taxed as a whole and then the third party is to recover from the plaintiff two-thirds of the amount so taxed.

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APPOINTMENT for settling the draft of a judgment referred by the registrar to the trial judge, heard by ROBERTSON, J. in Chambers at Vancouver on the 31st of March and the 1st, 2nd and 6th of April, 1937. In an action for damages brought by the plaintiff against the defendant in respect of personal injuries, loss and damage alleged to have been suffered as a result of the defendant's negligent driving of a motor-car in which the plaintiff was a gratuitous passenger, the third party, which had denied liability under a motor-vehicle liability policy issued by it to the defendant by reason of the alleged breach by the defendant of a statutory condition of the policy which reads as follows:

2. (1) The insured shall not use or drive the automobile:—

(*a*) Whilst under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile;

was added in this action by order of MORRISON, C.J.S.C. (4 I.L.R. 215), pursuant to section 159M of the Insurance Act. The defendant in his defence denied that he was negligent. The third party, which by the terms of the said order was given liberty to file pleadings in the action, set up in its defence, in addition to denying negligence, that the plaintiff's injuries were the result of the defendant driving his motor-car while under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the said motor-car or being in such a condition, as a result of imbibing intoxicating liquor, as to render it dangerous for him to drive the said motor-car and that the plaintiff was *volens* with respect thereto. Both the plaintiff and the defendant took issue with the third party on this defence and the jury by their answers to certain questions submitted to them at the trial found against the third party on this defence (see 4 I.L.R. 252 at p. 253).

The third party set up a further defence that the plaintiff's injuries were the result of the defendant driving his motor-car in a fog of such density as to prevent drivers including the defendant from having a proper or sufficient view of the highway or traffic thereon and of rendering driving on the said highway hazardous and dangerous and that the plaintiff was *volens* with respect thereto. The plaintiff joined issue with the third

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party on this defence. The jury answered certain other questions submitted to them as aforesaid in the manner set out in the report of this case (see 4 I.L.R. 252 at p. 253) as a result of which the trial judge upon motion for judgment gave effect to this defence and dismissed the action.

*Denis Murphy,* and *D. A. Freeman,* for plaintiff.
*L. St. M. Du Moulin,* and *R. T. Du Moulin,* for defendant.
*Bull, K.C.,* and *Housser,* for third party.

*Cur. adv. vult.*

7th May, 1937.

ROBERTSON, J.: The plaintiff set up, *inter alia,* that the accident was caused by the defendant's negligence in driving at an excessive rate of speed. The third party, alone, pleaded that the accident was caused by the defendant driving in a fog, which rendered driving conditions dangerous, and also that he was drunk and that the plaintiff was *volens* in respect of both these defences.

The jury found the defendant was negligent because of excessive speed; that the defendant's driving in the fog contributed to the accident and that the plaintiff was *volens.* If it had not been for the defence raised by the third party the plaintiff would have succeeded. The judgment was drawn by the solicitors for the third party and contains the following provisions as to costs:

THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff's action be and the same is hereby dismissed as against the defendant without costs, and that the third party do recover its costs of this action from the plaintiff forthwith after taxation thereof.

Counsel for the defendant agrees to this. Counsel for the plaintiff points out that the third party failed on the issue of drunkenness and submits his client is entitled to the costs of this issue. I think this was clearly an issue. See *Williams* v. *Stanley Jones & Co.,* [1926] 2 K.B. 37. In my opinion rule 976 has no application because of the words, at the commencement of the rule, "Subject to the provisions of these rules." Rule 176 is as follows:

The Court or judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require.

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There is no doubt of the power of the Court under this rule to order the plaintiff to pay the third party's costs. See *Russell v. Eddy* (1903), 5 O.L.R. 379 and *Edison & Swan United Electric Light Company* v. *Holland* (1889), 41 Ch. D. 28; *Klawanski* v. *Premier Petroleum Co. Lim.* (1911), 104 L.T. 567; *Baker* v. *Atkins* (1909), 14 B.C. 320. In applying rule 176, I think it will be fair to allow the costs of the drunkenness issue at one-third of the third party's costs, that is, the third party's costs are to be taxed as a whole, as if no question of separate issues had arisen, and then the third party is to recover from the plaintiff two-thirds of the amount so taxed. See *Canada Rice Mills Ltd.* v. *Morgan* (1934), 49 B.C. 202. The judgment will be amended accordingly.

*Order accordingly.*

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## *IN RE* CROMARTY ESTATE.

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*Devolution of estates—Intestate — Unmarried — Survived by uncles and aunts—Two predeceased aunts leaving children—Administration Act, R.S.B.C. 1924, Cap. 5, Secs. 117, 118 and 119—B.C. Stats. 1925, Cap. 2, Sec. 4.*

An intestate who never married was survived by three paternal uncles and a maternal aunt and uncle. Two aunts had predeceased the intestate, leaving children.

*Held*, under sections 117, 118 and 119 of the Administration Act that the estate was distributable *per capita* solely among the surviving aunt and uncles.

ORIGINATING SUMMONS by the official administrator for the County of Victoria, administrator of the estate of Charlotte Spencer Cromarty, deceased, intestate, for directions as to the distribution of her estate. The facts are set out in the reasons for judgment. Heard by McDONALD, J. in Chambers at Vancouver on the 2nd of December, 1936.

*Rae*, for administrator.

*Clearihue*, for Jennings and King.

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IN RE CROMARTY ESTATE

McDONALD, J.: These proceedings are brought by way of originating summons under Order LV., r. 3, of the Rules of Court, by Rupert Leslie Cox, official administrator for the County of Victoria, administrator of the estate of Charlotte Spencer Cromarty, deceased, intestate, for directions as to distribution of the estate amounting to approximately $3,700.

The deceased died at the age of approximately 55 years, having never married, an only child of her parents who both predeceased her. The surviving next of kin on the paternal side are as follows: Charles Smith Cromarty, Robert Teid Cromarty and James Cromarty, uncles; a paternal aunt, Marie Margaret Carr (formerly Cromarty) predeceased the intestate leaving two children, namely, Annie Spencer Carr and Marie Smith (formerly Carr). The surviving next of kin on the maternal side are an aunt, Mary Ann Charlotte Jennings and, I find, an uncle Albert William Parker, hereinafter referred to; a maternal aunt Elizabeth Stenett (formerly Sythe) predeceased the intestate leaving two children, namely, Elizabeth Jane King (formerly Stenett) and William Stenett.

The first question to dispose of is as to the claim of Albert William Parker, who claims to be a maternal uncle of the deceased. As I have said I find, on the material before me, and on the material before the administrator filed as exhibits, that the said Albert William Parker is entitled to share in the estate of the intestate as uncle.

The principal question before me is as to whether the estate of the intestate should be distributed solely amongst the uncles and aunts who survive the intestate to the exclusion of the children of the aunts who predeceased the intestate, or whether such children are entitled to share in the estate, and if so, to what extent. This question arises under sections 117, 118 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. I follow in this connection the decisions in *Carter* v. *Crawley* (1681), T. Raym. 496, 83 E.R. 259; *Maw* v. *Harding* (1691), Prec. Ch. 28; 24 E.R. 15; 2 Vern. 233; 23 E.R. 751; *Bowers* v. *Littlewood* (1719), 1 P. Wms. 594; 24 E.R. 531; decided on the Statute of Distributions, 22 & 23 Car. II., Cap. 10, which is

in this connection very similar to our own; and *In re Kroesing Estate,* [1928] 1 W.W.R. 224, decided on The Intestate Succession Act of Alberta, R.S.A. 1922, Cap. 143, which is also in this connection very similar to our own.

The cases of *In re Estate of David McKay, Deceased* (1927), 39 B.C. 51; and *Carter* v. *Patrick,* 49 B.C. 411; [1935] 1 W.W.R. 383, are not applicable to the present case. The facts in these cases differed from the present case and those cases fell to be determined under section 116 of Part VII. of the statute, which has no application here. The estate, therefore, is to be distributed *per capita* solely amongst the three surviving paternal uncles and the surviving maternal aunt and uncle of the intestate, to the exclusion of all other persons.

Costs of all parties out of the estate.

*Order accordingly.*

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## MATTOCK v. MATTOCK AND JAMIESON.



*Divorce—Wife's petition for—Application by petitioner for costs under Divorce Rule 91—Previous separation deed—Weekly payment under—Covenant by wife to release husband from all further claims—Effect of.*

A covenant by the wife under a previous separation agreement to release and discharge her husband from all claims of whatsoever nature or kind arising by virtue of their marriage other than a certain weekly payment, does not preclude the Court from allowing her necessary and proper costs under rule 91 of the Divorce Rules in an action for divorce.

APPLICATION by petitioner in a divorce action under rule 91 of the Divorce Rules. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 15th, 18th and 21st of June, 1937.

*Woodworth,* for petitioner.
*Aubrey,* for respondent.

*Cur. adv. vult.*

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26th June, 1937.

MANSON, J.: Upon an application by the petitioner to the registrar under rule 91 of the Divorce Rules the respondent set up clause 6 of a separation agreement entered into under seal between the husband and the wife on September 22nd, 1936, which clause reads as follows:

6 (6). The party of the second part doth hereby release and forever discharge the party of the first part of and from all claims of whatsoever nature or kind, whether now existing or hereafter arising by virtue of the marriage or any dissolution thereof, other than the payment by the party of the first part to the party of the second part of the said sum of eight ($8.00) per week, referred to in paragraph three (3) of this agreement, and payment of one year's taxes aforesaid, and provided however, that in the event of a dissolution of the marriage the said weekly payment referred to in paragraph three (3) may be reduced, but to not less than five (5) dollars per week.

The petition herein was launched on May 8th, 1937, and alleges adultery as between the respondent and the co-respondent.

Rule 91 of the Divorce Rules is a statutory rule passed because it was deemed to be in the public interest that a wife should not be prevented from taking divorce proceedings as against her husband for want of funds. In my view the parties could not by agreement as between themselves derogate from the statutory power of the Court. In this view I am supported by the reasoning in *Hyman* v. *Hyman*, [1929] A.C. 601; 98 L.J.P. 81. That was a maintenance case. There the wife covenanted in a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed. She thereafter obtained a decree for the dissolution of the marriage. Their Lordships held that the wife was not precluded by her covenant from petitioning the Court for permanent maintenance. Lord Atkin, who founded his judgment in favour of the wife upon the narrowest grounds, after discussing other grounds upon which other members of the Court decided in favour of the wife, said (98 L.J.P. at p. 94):

I think, however, that the wife is entitled to succeed upon another ground. Her marriage has been finally dissolved upon her petition. The Legislature has invested the Matrimonial Courts in such a case with powers to make such provision for the future maintenance of the wife as the Court may think reasonable. . . . The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to

maintain his wife. . . . But the duty of the husband is also a public obligation. . . . When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true the powers of the Court in this respect cannot be restricted by the private agreement of the parties.

The Lord Chancellor and the other members of the Court put their decision upon broader grounds. The reasoning throughout, however, supports the view which I give effect to in the case at Bar. I do not think that the parties could by private agreement derogate from the power of the Court to give to the wife her necessary and proper costs in the cause.

The matter will be referred back to the registrar. There will be costs to the petitioner of this application in any event in the cause.

*Order accordingly.*

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## REX v. KOLBERG.



*Criminal law—Having stolen goods in possession—Evidence—Identity of goods—Magistrate's finding—Appeal—Criminal Code, Sec. 399.*

An employee of a company which used second-hand sacks for sacking different kinds of produce, identified some five or six second-hand dust sacks from a pile of from 400 to 600 mixed sacks in a junk shop, as sacks that were some days previously stolen from his employer's premises. He identified them from the dust in the fibre and from strings attached to some of the sacks. The owner of the junk shop testified that a portion of the sacks in the pile were sold to him by the accused four days previously. The accused's explanation was that he had bought the sacks at night in a garage from a man whom he did not know and could not produce. Accused was convicted of having stolen goods in his possession knowing them to have been stolen.

*Held*, on appeal, on an equal division of the Court, that the appeal should be dismissed.

*Per* MARTIN and MACDONALD, JJ.A.: That the evidence is abundantly sufficient to justify the learned magistrate in coming to the conclusion he did and it is the duty of this Court not to interfere.

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*Per* MCPHILLIPS and MCQUARRIE, JJ.A.: That there was no satisfactory legal identification of the goods and the Crown has failed to make out its case.

APPEAL by accused from his conviction by police magistrate Wood at Vancouver on the 16th of February, 1935, on a charge of being in possession of 500 second-hand sacks, knowing them to have been stolen. The Pacific Milling Company Limited, who use large quantities of second-hand sacks for carrying grain, lost 300 second-hand dust sacks, 200 bran sacks and 200 flour sacks on the 29th of December, 1934, and 300 dust sacks and 300 screenings on the 13th of January, 1935. The dust carried in dust sacks is used for bedding live-stock, and the sacks are the lowest form of sacks and when once used for dust they are practically useless for any other purpose. One Donald McRae, an employee of Pacific Milling Company, went with detectives to the Davis Junk Shop on Main Street in Vancouver on the 18th of January. In the store were several thousand mixed second-hand sacks in a pile and in a side room was a small pile of mixed sacks of from 400 to 600. From the small pile McRae picked out and identified a number of dust sacks as part of those stolen. He said he identified them from the dust and by strings that were attached to some of the sacks. David Davis, the owner of the junk shop said that a portion of the sacks in the side room were from a bunch of 800 sacks that accused sold to him on the 14th of January. The accused in testifying on his own behalf said he bought the sacks at night in a one-car garage from a man whom he did not know. He was unable to produce the man from whom he said he bought them.

The appeal was argued at Vancouver on the 11th of March, 1935, before MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

*Soskin*, for appellant: The charge was that accused had 500 sacks in his possession knowing that they were stolen. They were all second-hand sacks which had been used continually. We submit that it is impossible to identify one second-hand sack from another. One witness for the Crown, McRae, was shown only four or five sacks and he said he could identify them as

belonging to his company, but another witness for the Crown, one Davis, a man of long experience, said it was impossible to identify any of the sacks. In the light of this flimsy and uncertain evidence there should not be a conviction. They must prove (a) that the sacks were stolen; (b) that they were in the possession of accused; (c) that he knew they were stolen: see *Rex* v. *Havard* (1914), 11 Cr. App. R. 2. On the question of identification see *Rex* v. *Scheer* (1921), 57 D.L.R. 614. As to the four or five sacks in Court, there was no evidence that they were in accused's possession: see *Rex* v. *Schama* (1914), 84 L.J.K.B. 396.

*Owen,* for the Crown: The *onus* is on the Crown. In the absence of reasonable explanation the judge is entitled to assume goods coming into the accused's possession is with the knowledge that they were stolen. The magistrate has found the accused guilty, and where there is evidence upon which he can so find this Court will not interfere.

*Soskin,* replied.

MARTIN, J.A.: The Court is equally divided in its opinion as to what our judgment should be, and therefore the appeal must be dismissed.

I put my judgment simply upon the ground which is the crux of the case, *i.e.,* identification of the sacks found in the appellant's possession. If there was no evidence upon which the learned magistrate could reasonably find identification then this conviction should be set aside, but as I regard the evidence it is abundantly sufficient, when fairly and fully stated, to justify him in coming to the conclusion he did come to, and as our duty is not to interfere where the facts have been found upon evidence by a jury or by a Court of summary jurisdiction, as has been repeatedly held in this Court, the appeal should be dismissed.

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

In a criminal case as this is as I scan the evidence that is here it was unwarranted—with respect—for the learned magistrate in the Court below to find the appellant guilty. The allegation is he retained in his possession stolen property, knowing it to have been stolen, to wit, 500 sacks of the value of $25,

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McPhillips, J.A.

the property of the Pacific Milling Company Limited. There is no identification sufficient in law. The too scant evidence never extended beyond the four or five sacks at most. Merely taking up four or five sacks out of a large pile of sacks, with no clear identification, surely is not such identification that the whole pile of sacks was stolen property. Really, in a criminal prosecution there must be some certainty. Here we have a man in business who apparently has no criminal record. It is true the man pursued a very poor kind of a way to make a living, but men have to in these days. A great many men are today, as we know, in relief camps. This man was pursuing an avocation which after all can be pursued by any honourable man. It is a lowly one, but he is entitled to pursue it. I would go so far as to say I do not see in this case a tittle of evidence that would stigmatize him as being a criminal.

There was no proof which the law requires, and certainly in this case the cardinal feature of it is the absolute necessity for identification. And when we find a man going into the box and attempting to say these sacks were sacks of his company, and the strongest manner in which he can put it is there was some dust in the fibre of the sacks and in one case a piece of common string on a sack. That there was dust in the fibre of a sack used for carrying bran or meal is nothing distinctive.

Now, the appellant, engaged in this lowly avocation, is dragged into a criminal court and has charged against him that he was in possession of stolen property—500 sacks—and the most that is adduced in evidence against him is four or five sacks on which there is nothing to identify them.

The witness does not even speak of any mark upon them to identify them at all. Any decent, honourable citizen might be placed in jeopardy in this way. It is laid down as the law of the land that in a case of this kind the explanation that the accused man gives is to be given very serious consideration, and the Court of Appeal has said time and again in England, and we have followed it here, that although the Court might be inclined to disagree with the likelihood of the truth of the explanation, all we are bound to say as a matter of law is it might be true. The explanation is in no way extraordinary.

It is not without reasonableness and may be true, and in my opinion I would hesitate to say it is not true.

That being the case, and there being no satisfactory legal identification, the prosecution has failed to make out its case. This man is innocent up to the time he is proved guilty, and in my opinion here there was no guilt established and he should not have been convicted.

I would allow the appeal and quash the conviction.

MACDONALD, J.A.: I agree with my brother MARTIN.

MCQUARRIE, J.A.: I agree with my brother MCPHILLIPS that the appeal should be allowed.

There is a very decided difference between two of the witnesses called on behalf of the Crown, McRae and Davis. McRae says it was possible to identify the sacks which were put in as exhibits, and which afterwards disappeared, and he gives his reasons why he says he can identify them as belonging to his concern. Standing by itself, that might be very strong evidence, but in the face of the evidence given by Davis, I think that it is rather doubtful. Davis is a man who has been in the sack business for some 26 years, with an unblemished reputation, I think it was stated and agreed to by both counsel. He said positively that it was absolutely impossible to identify any of these sacks. A Crown witness making a statement of that kind, it seems to me, causes considerable doubt, and in any event the accused should get the benefit of it. That is all.

*The Court being equally divided, the appeal was dismissed.*

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April 23,28.

## WHITEHEAD v. CORPORATION OF THE CITY OF NORTH VANCOUVER.

*Trial—Notice of trial given—Application for jury—Made out of time—Application to extend time to apply for jury—Discretion—Rules 426, 430 and 967.*

The plaintiff applied for an order for trial by jury, but finding he was out of time he applied under rule 967 for an order extending the time within which he could apply for an order for a trial by jury. The order was granted.

*Held*, on appeal, affirming the order of MCDONALD, J., that on such an application the learned judge below is not obliged to satisfy himself that the case is one which should properly be tried with a jury although where the circumstances are exceptional he may properly take that question into consideration. All the circumstances surrounding the failure to comply with rule 430 should primarily govern the exercise of the discretion conferred by rule 967.

APPEAL by defendant from the order of MCDONALD, J. of the 13th of April, 1937, extending the time within which the plaintiffs may apply for an order that this action be tried by a judge with a jury. The plaintiffs' solicitor had issued a Chamber summons pursuant to rule 430, asking for an order that the action be tried by a jury. It then came to the solicitor's notice that, through inadvertence, he was eight days out of time inasumch as under the rule he ought to have moved within four days after notice of trial. On objection being taken, plaintiffs' solicitor asked that his application be adjourned and then moved under rule 967 that the period of four days be extended.

The appeal was argued at Victoria on the 23rd of April, 1937, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

*J. W. deB. Farris, K.C.*, for appellant: This is a question of practice arising in an action for damages resulting from the death of the plaintiff's husband. The plaintiffs applied for a jury under rule 430 but was eight days late in applying, as under that rule they must apply within four days after notice of trial is given. He asked that the application be adjourned and then applied to extend the time under rule 967. The time was extended and this is an appeal from that order. The learned

judge below followed *Williams* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 338, and *Clarke* v. *Ford-McConnell Ltd.* (1911), 16 B.C. 344. We say he proceeded on a wrong principle. The bald fact that it is a negligence action is no reason for exercising discretion. If the slip is such as to justify an extension then discretion can be exercised: see *Nantel* v. *Hemphill's Trade Schools* (1920), 28 B.C. 422. Under rule 426 the learned judge for cause or reason may order a trial by jury: see *Jenkins v. Bushby* (1891), 60 L.J. Ch. 254. A mistake of a solicitor is not in itself a ground for extending the time: see *Fraser* v. *Neas* (1924), 35 B.C. 70 at p. 73.

*J. G. A. Hutcheson,* for respondents: As to whether the learned judge should exercise his discretion under rule 967, the litigant should not lose his right to a jury owing to a slip by his solicitor: see *Gold* v. *Evans* (1920), 29 B.C. 81. The dominant rule is rule 430 and it is not subject to rule 967: see *Andrews* v. *The Canadian Northern Ry. Co.,* [1918] 2 W.W.R. 331; *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78. Rule 967 is available to get an extension of time limited by rule 430 and the defendant is not prejudiced by the order: see *Atwood* v. *Chichester* (1878), 3 Q.B.D. 722; *Baker* v. *Faber,* [1908] W.N. 9.

*Farris,* replied.

*Cur. adv. vult.*

28th April, 1937.

MARTIN, C.J.B.C.: I agree with the judgment of my learned brother SLOAN.

MACDONALD, J.A.: I agree with my brother SLOAN.

SLOAN, J.A.: This is an appeal from the order of MCDONALD, J. granting the plaintiffs an extension of time in which to apply for an order that this action be tried by a judge with a jury.

The plaintiffs are the widow and children of Philip Whitehead, deceased, and sue the defendant corporation for damages as owner of a ferry-slip situated on Burrard Inlet in Vancouver alleging that the deceased came to his death by reason of the negligent operation of the ferry-slip in question.

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This appeal turns upon the construction to be placed upon Order XXXVI., r. 2 (M.R. 426), Order XXXVI., r. 6 (M.R. 430) and Order LXIV., r. 7 (M.R. 967).

Under the provisions of rule 430, the plaintiffs in this action had an absolute right to trial by jury upon an application therefor being made within four days after notice of trial had been given (*Trower* v. *The Law Life Assurance Society* (1885), 54 L.J.Q.B. 407). The cause of action does not fall within rules 2 (*a*), 3, 4, or 5 of Order XXXVI. as appears from the issues now clearly joined by the pleadings. Upon these pleadings notice of trial has been given and in my view a further definition of the pleadings by affidavit as was deemed to be essential under the special circumstances in *Bell* v. *Wood and Anderson* (1927), 38 B.C. 310 is unnecessary in this case.

The solicitor for the plaintiffs herein, inadvertently overlooked the four day time limit in the rule and in consequence the plaintiffs lost their absolute right to trial by jury under rule 430, at the expiration of that period. An application was then made by the plaintiffs to MCDONALD, J. under rule 967 for an order extending the time in which an application could be made for an order under rule 430. This application was granted and the order made which is now the subject-matter of this appeal. The effect of this order is, of course, that the plaintiffs are once more clothed with the absolute right of trial by jury.

Senator *J. W. deB. Farris, K.C.*, counsel for the appellant corporation, contended before us that the learned judge below did not exercise his discretion on proper principles. He submitted that once the plaintiffs lost the shelter of rule 430, the defendant had a vested right under rule 426, to have the action tried by a judge without a jury; that this right could not be taken away under rule 967 unless the judge was satisfied that the issues involved should be tried by a jury; that the learned judge below has not considered this circumstance and in consequence the order was not made in the proper exercise of his discretion.

Assuming, without deciding, that the learned judge below did not take into consideration as the determining factor in the

conclusion to which he came, the question as to whether or not this case was one which should be properly tried by a judge and jury, I cannot find he was clearly wrong.

To my mind the decision of this Court in *Clarke* v. *Ford-McConnell Ltd.* (1911), 16 B.C. 344, determines this case and is an answer to the submission of counsel for the appellant.

That case came up on an appeal from CLEMENT, J., who refused to grant an extension of time under Order XXXVI., r. 2 (now Order XXXVI., r. 2 (*a*)). The action was for damages for libel and under the rule in question the defendants could apply as of right for an order that the issues of fact be tried by a judge with a jury. By the rule the defendants were obligated to signify their desire for this mode of trial by giving notice within four days from the time of service of the notice for trial or "within such extended time as the Court or judge may allow." Notice of trial was served on the 11th day of May, 1911, and the defendants, on the 6th day of June, 1911, launched an application for an order extending the time for giving notice signifying their desire to have the action tried by a judge and jury, explaining the delay as a slip on the part of their solicitor. CLEMENT, J. dismissed the application stating that, in his opinion, it was not a proper case for trial by jury.

Counsel for the appellant contended on the appeal that CLEMENT, J. was in error in considering as an element in the exercise of his discretion, whether or not the case was one that should be tried by a jury and that rule 2 (now 2 (*a*)) gives no discretion in this aspect of the matter and only permits the judge to determine whether or not the time should be extended within which the defendant could give the required notice.

While the reasons given were meagre nevertheless it must be assumed that the Court gave approval to the argument of counsel in allowing the appeal, thus in effect disapproving the contention advanced before us by counsel for the present appellant.

In the construction of these rules as "a code of regulations as to the mode of trial" as Lopes, L.J., says in *Jenkins* v. *Bushby* (1891), 1 Ch. 484, at 492, I can see no material distinction between a rule in which the discretionary power to extend time

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is inserted in specific terms and a rule into which that same power is imported by the general rule 967.

It follows then, according to the view I have taken, of the *Clarke* case, *supra*, that on an application for an extension of time under rule 967, in an action of this character, all the circumstances surrounding the default should primarily govern the exercise of the discretion conferred by the rule.

For examples of the exercise of the discretion conferred by the rule I would mention *Williams* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 338, in which MURPHY, J., granted the extension of time while in *Heathorn* v. *British Columbia Electric Co.* (1912), 3 W.W.R. 1130, a similar case, he refused to exercise his discretion in favour of the applicant.

There may be cases arise where, *e.g.*, by reason of admissions on examination for discovery in the result nothing is left for decision but a question of law, or for some other special reason arising in the action itself, the judge in the exercise of his discretion may take into consideration on an application made under rule 967, the question of whether the action should be triable by a judge without a jury, but, in my opinion, that could only arise in very exceptional circumstances not apparent to me in this case.

To my mind the language of Bowen, L.J., in *Gardner* v. *Jay* (1885), 29 Ch. D. 50 at p. 58, is appropriate to rule 967. He said:

> That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed, but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the judge why should the Court do so?

I cannot agree that in all applications under rule 967 for an extension of time in which to comply with the requirements of rule 430, that there is the obligation as to the exercise of that discretion sought to be imposed by counsel for the appellant. The rule itself imposes no such obligation so in the language of Bowen, L.J., *supra*, "why should the Court do so?"

The learned judge below has found that the defendant has suffered no harm by reason of the slip and that the delay was not long.

In the result I would not disturb the order made below and would dismiss the appeal.

*Appeal dismissed.*

Solicitors for appellant: *Farris, Farris, Stultz, Bull & Farris.*
Solicitor for respondents: *T. E. Lawrance.*

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## ELGETI v. SMITH.



*Practice—Appeal—Taking benefit under judgment below—Set off of costs—Effect of—Negligence—Damages—Rented house—Fall from porch—Defective railing—Concealed danger—Knowledge of defect by landlord—Obligation to repair.*

The plaintiff recovered judgment in the action with costs. In a prior interlocutory proceeding the defendant succeeded with costs. The costs of the motion and of the trial were taxed. The costs of the motion were deducted from the amount of the plaintiff's costs of the action and the balance was paid to the plaintiff. The defendant appealed from the judgment on the trial. On motion that the defendant had taken a benefit under the judgment and was precluded from the right of appeal:—

*Held*, MCPHILLIPS, J.A. dissenting, that the defendant was entitled to her costs of the interlocutory order from which no appeal was taken, and not having taken any benefit under the judgment from which she appealed the motion is dismissed.

The plaintiff desiring to see the tenant of a certain house, went to the back of the house, and walked up some stairs on to a porch in front of the back door. He knocked at the door and then stepped to one side and leaned against a railing. The railing giving way, he fell about seven feet to the ground below and was severely injured. In an action for damages against the landlord it was found that the defendant agreed to make all necessary repairs, that she knew of the defective condition of the railing and that it was a trap to anyone who might visit the premises, and she was liable.

*Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. dissenting), that the learned judge below having rightly found upon the evidence that the defective condition of the railing on the porch constituted a trap to the knowledge of the landlord, who was under obligation to the tenant to repair, the appeal should be dismissed.

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APPEAL by defendant from the decision of FISHER, J. of the 15th of August, 1936, in an action for general and special damages, the plaintiff having sustained injuries owing to the negligence of the defendant in not properly repairing certain premises owned by the defendant on Collingwood Street in the City of Vancouver. The premises were rented to one Kraupner, and on the 17th of February, 1936, the plaintiff went to the Kraupner house to invite Kraupner's little girl to a party his own little girl was about to have. He walked up the stairs at the back of the house on to a porch, knocked at the door and then stepped back to a side railing on the porch. On leaning against the side railing it gave way and he fell to the ground below (about seven feet) and was severely injured.

The appeal was argued at Vancouver on the 17th, 18th and 19th of November, 1936, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

*J. A. MacInnes* (*J. A. Grimmett,* with him), for appellant.

*S. S. Taylor, K.C.* (*C. F. MacLean,* with him), for respondent, moved to quash the appeal on the ground that the defendant had taken a benefit under the judgment. There were two orders, one giving the plaintiff costs that were taxed at $365.75, and another order giving the defendant costs that were taxed at $111.60. The amount of the defendant's costs was deducted from the amount of the plaintiff's costs and the balance of $254.15 was paid the plaintiff. By deducting his own costs from the amount to which the plaintiff is entitled he is taking a benefit under the judgment that deprives him of the right of appeal.

*MacInnes, contra*: Nothing has been taken by the appellant in respect of the judgment below. What has been done does not come within the cases in respect to taking a benefit under the judgment: see *Manley* v. *O'Brien* (1901), 8 B.C. 280; *International Wrecking Co.* v. *Lobb* (1887), 12 Pr. 207; *Consolidated Railway Co.* v. *Victoria* (1897), 5 B.C. 266 at pp. 271-2; *Anthony* v. *Blain* (1902), 5 O.L.R. 48; *Thurlow Logging Co.* v. *National Pole Co.* (1923), 31 B.C. 491 at p. 500; *Barkley*

v. *Pacific Stages Ltd.* (1934), 49 B.C. 158; *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432; *Duffy* v. *Donovan* (1891), 14 Pr. 159; *Phillips* v. *City of Belleville* (1905), 6 O.W.R. 129; *Reid* v. *Galbraith* (1927), 38 B.C. 287; *Coleman* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1930), 42 B.C. 499.

*Taylor,* replied.

17th November, 1936.

MACDONALD, C.J.B.C.: I think that this motion should be dismissed. It seems to me that it is based entirely on technicalities which have no merit in them at all. If an appeal is taken and the Court of Appeal should hold in favour of the appellant and send the matter back for taxation of costs of the appeal there will be no interference with the judgment below as to costs. If on the other hand they should dismiss the appeal, of course there will be nothing to be done with regard to the costs of the case in the Court below. This rule, I understand, is based upon this, that if you take an appeal after you have secured a benefit under it it prejudices the respondent. There is no prejudice at all in taking an appeal in this case, because the Court above had no right to change the order in the interlocutory proceedings. They have no right to touch them at all. They are the things the respondent is entitled to and they have been set off quite properly under this rule, and apart from the rule have been set off. There is no peril as Mr. *Taylor* has contended, there is no peril to the respondent in taking up the appeal because the Court above can in no way possibly interfere with the appellant's right to these interlocutory costs. That has been decided and there has been no appeal from them. Therefore, the motion should be dismissed.

MARTIN, J.A.: The question raised is one of considerable interest and has been fully and well argued, and I have reached the conclusion, upon the particular facts of this case, that the matter should be regarded as one wherein the defendant appellant in reality is doing nothing more than submitting for taxation her interlocutory costs and taking judgment thereon by way of direction by the taxation officer. When the successful plaintiff

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taxed his costs the unavoidable consequences of that taxation were that under the present circumstances the defendant's interlocutory costs payable in any event to her would have to be adjusted by the taxing officer and the certificate in the form of an *allocatur* given showing a balance of $254 payable, as was done herein. The direction in the formal judgment of the set off of costs was, strictly speaking, under ordinary conditions unnecessary, or was merely explanatory of the right of set off which the defendant is entitled to under rule 1002 (21), quite apart from the settlement of the final judgment.

So, therefore, the defendant in this matter of costs was in the position of controlling the taxation under the section I have just referred to, and which gave her a right which she was entitled to rely on as one which should be exercised in her favour under ordinary circumstances, such as we have before us, and therefore, she was not taking any benefit under the judgment which she was appealing from in the sense laid down in the decision cited to us and which I do not for one moment depart from and, therefore, it cannot be said that she was approbating and reprobating the judgment she now complains of. On present facts, it is a nice question but I feel that we would be taking an unwarranted step if we go farther than the cases cited, the facts of which do not cover this one.

I would, therefore, dismiss the motion.

MCPHILLIPS, J.A.: I would allow the motion. I think that the Court is bound by its previous decision in *Barkley* v. *Pacific Stages Ltd.* (1934), 49 B.C. 158.

In my view what we have to look at is the final order made and practitioners must be careful and I think most of them have had this instilled into them from time to time in their practice. You must be careful to see that nothing appears in an order or judgment under which you will receive some benefit intending to appeal afterwards. You cannot do that. To refine this principle away would be absolutely wrong. Therefore, when an order for judgment is drawn the practitioner must scrutinize it most carefully and see that there is no provision therein which inures to the benefit of the person intending to appeal later or

whereby that litigant obtained the benefit. I do not feel called upon to go behind the order at all, nor am I entitled to. I merely look at the order and I see the order in its terms confers a benefit. That benefit was exercised in this case. Independent of any other right at all, I do not feel called upon, nor am I called upon to analyze whether those costs could be got by any other form or method below, but when I see the order gives a benefit to a person, a litigant, who now wishes to appeal from that order, it seems to me an absolute barrier exists and the decisions as I read them are all that way.

McQUARRIE, J.A.: I agree that the motion should be dismissed.

*Motion dismissed, McPhillips, J.A. dissenting.*

*Grimmett,* on the merits: The defendant was notified that the porch was in a dangerous condition. The defendant was the landlord but there was no contract with the tenant to repair. The plaintiff was careless in backing up and leaning against the railing: see Williams on Landlord and Tenant, 2nd Ed., 352. Even if there is a contract to repair, only the tenant has the right to take advantage of it: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 207, sec. 226; *Robbins* v. *Jones* (1863), 15 C.B. (N.S.) 221; *Lane* v. *Cox,* [1897] 1 Q.B. 415; *Cavalier* v. *Pope,* [1906] A.C. 428; *Malone* v. *Laskey,* [1907] 2 K.B. 141; *Bottomley* v. *Bannister,* [1932] 1 K.B. 458 at p. 464; *Cameron* v. *Young,* [1908] A.C. 176; *Gregson* v. *Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584 at p. 593; *Bentley* v. *Vancouver Exhibition Association* (1936), 50 B.C. 343; *Dymond* v. *Wilson* (1936), *ib.* 458, and on appeal, [*ante*] p. 301. Even when the landlord is in control there must be a trap: see *Sutcliffe* v. *Clients Investment Co.,* [1924] 2 K.B. 746 at pp. 754 and 756; *Agnew* v. *Hamilton* (1932), 46 B.C. 147 and 362; *Bentley* v. *Vancouver Exhibition Association,* [*supra*]. If the landlord is not in possession or control he owes no duty to anyone coming on the premises.

*Taylor*: We base our case on the existence of a trap. The cases referred to are not applicable as they do not deal with a trap. The case of *Dobson* v. *Horsley,* [1915] 1 K.B. 634 was

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one of a condition and not a trap. This was the case of a hidden trap: see *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; *Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; Salmond on Torts, 8th Ed., pp. 247-9; *Hambourg* v. *The T. Eaton Co. Ltd.*, [1935] S.C.R. 430 at pp. 435-8.

*Grimmett,* in reply: The cases from the *Payne* case to the *Hambourg* case are all nuisance cases and do not apply.

*Cur. adv. vult.*

12th January, 1937.

MACDONALD, C.J.B.C.: The defendant was the owner of a house which she leased to one Kraupner by verbal lease. At the time the lease was entered into the question of repairs came up between the parties and the tenant asked Miss Smith if she would redecorate the kitchen. On cross-examination the tenant gave the following evidence:

And was there any further discussion about repairs? Yes, I made a suggestion to Miss Smith, if Miss Smith would reduce my rent, or would give me credit for whatever work I done there, or was being done through a painter or decorator, I was willing to get one of my friends who was a painter and decorator, who was out of work at that time, to do it very reasonably for me, and I would be very glad to do that if I could get credit on my rent for that, and Miss Smith did not agree to that.

So that was practically the whole of your discussion. You asked Miss Smith if she would do that, and she said she couldn't do it? She could not afford it, but she said she might do so a little later on in the Spring—maybe a little later on.

But she certainly did not agree to do it at that time? No.

What repairs she did later on was not under contract but voluntary.

Did she at the time—— I never asked her, as a matter of fact, to redecorate the kitchen, because so many things came up during the time I was there I was afraid to ask for anything, because I knew I was not going to get it done anyway.

Well, anyway, this talk that you had with Miss Smith concerned decorating? As far as I was concerned I was to pay the rent, and any repairs in the house were to be done by the landlord and not by myself.

This is inconsistent with his evidence above and with what follows:

Well, now, did she say that? I didn't ask her point blank "Are you going to do this, or are you going to do that" in case something happened like

that, but when I asked her about the decorating in the kitchen and she told me she could not afford it at the time, it naturally was understood by me it included any repairing in the house.

But it was only the decorating in the kitchen that was mentioned? Yes.

And there was really no occasion to mention anything else, because the house was in a fair state of repair? That is what appeared to me at the time.

Now, this action arises out of a visit by the plaintiff Elgeti to this house while occupied by Kraupner which resulted in his falling off the porch by the giving way of a railing which appeared to both parties to be in repair but which turned out not to be. Kraupner says in answer to the question

Did you make any particular reference to this railing at that time? No, I don't think so—oh, yes, I mentioned the railing to her for this simple reason, that my wife had complained to her that while she was hanging up——

Witness: I said to Miss Smith the back railing of the porch was not safe, and my wife could not go out and hang out washing at the back, because the back porch might fall to pieces.

He then said he did not examine it and never paid any attention to it although he often came up the steps.

In my opinion the decision of this case depends upon whose obligation it was, the landlady, or the tenant to repair the railing. I think it is shown by the evidence that I have referred to, which is not displaced by other evidence in the case, that it was the tenant's obligation. The plaintiff was a mere visitor to the house at the time of the accident. A Mrs. Ashley gave evidence that she saw him "running up the steps and knocking at the door and that he then walked back two steps and leaned over and then went over" and was hurt. She stated "I saw him go back and lean up against it." If she is believed plaintiff's evidence must be untrue.

I am therefore of the opinion, treating it as a trap, that the learned judge came to the wrong conclusion on the facts and the law and that the appeal must be allowed.

MARTIN, J.A.: In my opinion the appeal should be dismissed, the learned judge below having rightly found upon the evidence that the defective condition of the railing on the porch constituted a trap to the knowledge of the landlord who was under the obligation to the tenant to repair the same.

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McPHILLIPS, J.A.: At the outset it may be remarked that the law as to liability in respect to landlord and tenant for injuries sustained by persons lawfully coming upon the leased premises, and as to whether that liability is upon the lessor or tenant, is in an unsatisfactory state. Now we have here a very careful and elaborate judgment of FISHER, J. The learned judge has made findings of fact which upon the evidence as set forth in the appeal book I agree with and in connection with those facts it may well be found that at the time the premises were let there was an existent nuisance known to the lessor; further the lessor agreed to make all necessary repairs and the dangerous nature of the railing was from time to time drawn to the attention of the lessor (the appellant) by the tenant. It may well be said on the facts that the premises were let with a nuisance on them, that is, the nuisance existed at the commencement of the tenancy and was known by the landlord (the appellant) to exist and the premises were let without any covenant on the part of the tenant to repair or otherwise discontinue or prevent the nuisance (*St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1 at p. 7, *per* Scrutton, L.J., also see Stallybrass in 45 L.Q.R. p. 120).

It may well be said that the landlord by letting the premises with the nuisance or trap already existing thereby assented or authorized its continuance. When he takes no covenant from the tenant requiring him to discontinue it, also see *Wilchick* v. *Marks and Silverstone*, [1934] 2 K.B. 56.

Now we have upon the finding of facts the landlord undertaking the duty of repair but disregards it, it must then be taken that he has authorized his tenant to leave the premises as they are, that is, in a state of disrepair, and in such a case which is this case the liability must fall on the landlord (*Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401, 405). I am not unmindful of *Cavalier* v. *Pope*, [1906] A.C. 428; *Cameron* v. *Young*, [1908] A.C. 176 but on the special facts of this case, having undertaken to make all necessary repairs and knowing the existent conditions at the time of the letting and not making the repairs it is a case of patent liability on the lessor (*Payne* v. *Rogers* (1794), 2 H. Bl. 349; *The King* v. *Pedly* (1834), 1 A. & E. 822; *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), 2 C.P.D. 311).

Turning to that very able work, Pollock's Law of Torts, 13th Ed., I make this quotation. I do so because, as I have already pointed out, of the unsatisfactory state of the law and there being variance of judicial opinion—so as to make it as plain as possible what the state of the law is on the decided and controlling cases. At p. 448:

As to liability: The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not. (See *Thompson* v. *Gibson* (1841), 7 M. & W. 456, 56 R.R. 762). The owner or occupier of land on which a nuisance is created, though not by himself or by his servants, may also be liable in certain conditions. If a man lets a house or land with a nuisance on it, he as well as the lessee is answerable for the continuance thereof (*Todd* v. *Flight* (1860), 9 C.B. (N.S.) 377, 30 L.J.C.P. 21, 127 R.R. 684. The extension of this in *Gandy* v. *Jubber* (1864), 5 B. & S. 78, 33 L.J.Q.B. 151, 136 R.R. 490, by treating the landlord's passive continuance of a yearly tenancy as equivalent to a reletting, so as to make him liable for a nuisance created since the original demise, is inconsistent with the later authorities cited below: and in that case a judgment reversing the decision was actually prepared for delivery in the Ex. Ch., but the plaintiff meanwhile agreed to a *stet processus* on the recommendation of the Court: see 5 B. & S. 485, and the text of the undelivered judgment in 9 B. & S. 15, 136 R.R. 642. How far this applies to a weekly tenancy, *quære*: See *Bowen* v. *Anderson*, [1894] 1 Q.B. 164), if it is caused by the omission of repairs which as between himself and the tenant he is bound to do, but not otherwise (*Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; *Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658).

I would dismiss the appeal.

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

*Appeal dismissed, Macdonald, C.J.B.C. dissenting.*

Solicitors for appellant: *Beck & Grimmett.*
Solicitors for respondent: *Fleishman & MacLean.*

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April 23, 26, 27; May 3.

## BRISCOE v. HIXON CREEK (CARIBOO) GOLD LIMITED (NON-PERSONAL LIABILITY).

*Lease — Placer mines — Executed contract — Water licences obtained by lessee—Works constructed to put in operation—Lessee in default—Reassignment of lease—Water licences and works appurtenant to leaseholds—R.S.B.C. 1924, Cap. 271, Sec. 13.*

On the 9th day of March, 1933, the plaintiff agreed to transfer and assign to the defendant company certain placer-mining leaseholds on Hixon Creek to be held subject to conditions upon default of which the leaseholds were to be reassigned to the plainiff. The plaintiff duly assigned the leaseholds to the defendant and a deed of assignment thereof to the plaintiff with appurtenances including water rights was placed in escrow and subsequently upon default of the defendant was delivered out of escrow to the plaintiff. While in possession of the leaseholds the defendant company obtained certain conditional water licences entitling the plaintiff to use the water of Hixon Creek on the leaseholds for hydraulic purposes; the defendant later constructed a dam, ditch, flume and penstock, being works authorized by the conditional water licences. The defendant company having laid claim to the works, the plaintiff brought action for a declaration that he is entitled to the water rights, and the said works, and the right of way across lands traversed by the ditch and flume, as appurtenant to the leaseholds, and for an injunction. The defendant alleged that the works were constructed before the date of the conditional water licences which referred to works "to be constructed" and counterclaimed for rescission of the contract of March 9th, 1933, on the ground of innocent misrepresentation by the plaintiff.

*Held*, that the works constructed by the defendant were the same works authorized by the conditional water licences which although dated and issued on February 10th, 1936, were applied for on February 8th, 1934, and contain a statement that the same are to take effect from the date of application.

*Held*, further, that the water rights, conditional water licences, and all works contructed under the authority thereof, being the dam, ditch, flume, and penstock mentioned in the pleadings, together with any right of way acquired by the defendant for the purpose of the beneficial use of the water belong to the plaintiff, and are appurtenant to the plaintiff's placer-mining leaseholds, and are inseparable therefrom by virtue of section 13 of the Water Act, R.S.B.C. 1924, Cap. 271.

*Held*, further, that the plaintiff is entitled to the bungalow and camp buildings erected and constructed by the defendant on the said leasehold.

*Held*, further, that the contract of March 9th, 1933, being an executed contract cannot be rescinded on the ground of innocent misrepresentation.

*Held*, further, that to entitle any person to rescission of a contract on the ground of innocent misrepresentation, such person must repudiate at once after discovery of the misrepresentation.

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ACTION for a declaration that the plaintiff is entitled to water rights and conditional water licences, and the dam, ditch, flume and penstock constructed under the authority thereof as appurtenant to certain placer-mining leaseholds assigned by the defendant to the plaintiff; and for a declaration that a certain dwelling-house and cabin affixed to the leasehold lands belong to and are the property of the plaintiff; and for an injunction restraining the defendant its agents and workmen from trespassing upon the said leaseholds or the said works or interfering with the plaintiff's enjoyment thereof. The further necessary facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver, on the 23rd, 26th, and 27th of April, 1937.

*A. M. Whiteside, K.C.*, and *P. A. White*, for plaintiff.
*McCrossan, K.C.*, and *Gillespie*, for defendant.

*Cur. adv. vult.*

3rd May, 1937.

ROBERTSON, J.: By agreement, dated 9th March, 1933, the plaintiff agreed to sell to the defendant (then known as the Stanley Basin Mines Limited (N.P.L.) some placer-mining leases, for common and preference shares in the company. The agreement provided that the vendor should execute assignments in favour of the defendant and after these assignments had been registered, they, together with reassignments, were to be placed in escrow. The plaintiff received the shares; the leases were duly transferred and after registration, they and the reassignments were duly deposited in escrow. The agreement further provided that time should be of the essence and that in the event of the defendant failing to carry out certain covenants, such as an annual expenditure of moneys on the claim and payment of rentals, the defendant's right to the leases and all interest thereunder should "*ipso facto* be determined" and that the leases and all water rights appurtenant thereto and the reassignments should forthwith be delivered out of escrow to the plaintiff and be deemed his absolute property. In June, 1936, the defendant notified the plaintiff that it would not pay the rentals on the said leases, as it was bound to do. Later the plaintiff brought an

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action against the escrow holders and obtained an order for delivery to him of all the documents in escrow. He is now the registered owner of the leases. After the making of the agreement in 1933 the defendant applied for water rights on Hixon Creek. It obtained the following conditional water licences, all of which are dated February 10th, 1936:

Licence No. 12773 for 20 cubic feet a second to be used upon the lands covered by the placer-mining leases in question to which the licence by its terms was declared to be appurtenant. It set out that the works for the diversion and carriage of the water were a ditch and flume to be commenced on or before the 1st of May, 1936, and to be completed on or before 31st December, 1938. The licence further stated that it should have precedence from the 7th of November, 1935. (2) Licence 12774 for three cubic feet a second. Its provisions are practically the same as licence 12773 except that the licence is to have precedence from the 8th of February, 1934. (3) Licence No. 12775 to store 27 acre feet per annum which is practically the same. The water was to be used on the lands set out in 12774. The licence was to have precedence from the 8th of February, 1934. It stated however that the work to be done was the construction of a dam "which has been commenced and shall be completed and the water beneficially used on and before the 31st of December, 1938." The defendant, also as the holder of licence No. 12774, had obtained under section 50 of the Water Act, a right of way permit. This permit is dated February 10th, 1936. The dam, flume and ditch as a matter of fact had been completed to a great extent in 1935. The defendant refuses to give up possession of the dam, flume and ditch and to allow the plaintiff to occupy the right of way. The plaintiff asks for a declaration that the works, etc., constructed under the water licences are appurtenant thereto and that the water licences and works, etc., "passed to the plaintiff," and are his property and for an injunction restraining the defendant from trespassing on the leased lands and works. The defendant in its pleading asked for rescission of the agreement, or, alternatively, for relief against the forfeiture and return of the shares on the ground of misrepresentation and failure of consideration. Alternatively it pleads that the flume,

ditch and dam were constructed independently of the Water Act, and before the date of the issue of the licences, so that section 13 of the Water Act does not apply so as to vest these in the owner of the placer leases. At the trial the defendant relied only on its claim to rescission on account of innocent misrepresentation and on its submission upon section 13 of the Act. It expressly abandoned all other points. It seems clear the agreement came to an end by reason of the resolutive condition contained in it. This would have no effect on its right, if any, to have rescission. I find that some of the placer leases did overlap the properties of the Quesnelle Quartz Company. I hold the defendant is not entitled to rescission. The alleged misrepresentation was innocent. It knew the facts shortly after the making of the 1933 agreement. Exhibits 10 and 39 show this. It was then advised it was necessary to have a survey to clear up the matter. Notwithstanding this, it continued to hold the properties until June, 1936, when it notified the plaintiff that it would not pay the rentals. It is trite law that to entitle a person to rescission on the ground of innocent misrepresentation such person must repudiate at once after discovery of the misrepresentation. Anson's Law of Contract, 17th Ed., 183-4. Further in my opinion this was an executed contract and could not therefore be rescinded on the ground of innocent misrepresentation. *Angel* v. *Jay,* [1911] 1 K.B. 666; *Cole* v. *Pope* (1898), 29 S.C.R. 291.

The permit was issued under section 50 of the Water Act. On its face it was issued to the defendant as the holder of licence No. 12774. Section 51 of the Water Act reads that the easement granted by the permit shall be appurtenant to the lands to which the licence mentioned in the permit is appurtenant and shall be inalienable save and in connection with such lands. Now the lands mentioned in licence 12774 are the lands covered by the placer-mining licences which the plaintiff agreed to sell to the defendant. The permit then clearly goes with the licence as is shown by section 13 of the Act which provides as follows:

(1) In the issuance of every licence, the Comptroller shall specify therein the particular portion of any land or mine, or the particular undertaking to which the licence is to be appurtenant, and he shall, as far as practicable, where, under any licence, the water is to be used on any land

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or mine, and especially in licences for domestic, irrigation, mining, or hydraulicking purpose, set out in the licence that it shall be appurtenant to such particular portion of the land or mine; but where it is not practicable to so set out, and especially in any Class C licence, he shall set out in the licence the particular undertaking to which it shall be appurtenant. The licence and all easements acquired and all works constructed thereunder shall thereupon, save as hereinafter provided, be appurtenant to such portion of the land or mine or to the undertaking, and, unless the consent of the Lieutenant-Governor in Council is first obtained, shall be inseparable therefrom, and shall pass with any demise, devise, alienation, transfer or other disposition of the same, whether by operation of law or otherwise.

So far as the licence No. 12775 is concerned it is clear that it comes under section 13 because the licence refers to the dam as having been commenced. Now there was only one ditch and flume constructed on the right of way and apparently they were constructed prior to the issuance of licences 12773-4. It is submitted that the words "all works constructed thereunder" can only apply to works constructed after the date of the issuance of the licences. There are two answers made to this. First: the licences provide that the work shall be commenced on or before the 31st of May. It seems to me it might be a compliance with this if works had already been commenced. Secondly, the licence 12774 is to have precedence from the 8th of February, 1934. That means, in my opinion, that the position is just the same as if the licence had been issued on the 8th of February, 1934, with the result that works constructed in 1935 would be deemed to be works commenced after the issuance of the licence. The same is true of licence 12773 except that the licence would have precedence from the 7th of November, 1935. However, the ditch and flume would be works constructed under licence 12774 and would therefore pass with it, pursuant to section 13.

For these reasons I think that by the reassignment of the placer-mining leases to the plaintiff he became entitled to the water licences and to the dam, flume and ditch and other works constructed by the defendant upon the right of way or otherwise in connection with the water licences. The plaintiff is entitled to the declaration and injunction asked for with costs.

For the reasons which I have given the counterclaim must be dismissed with costs.

*Judgment for plaintiff.*

## LOWE CHONG COMPANY v. B.C. COAST VEGETABLE MARKETING BOARD *ET AL.*

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*Practice—Judgment—Minutes not settled—Notice of appeal given after reasons for judgment were handed down but before settlement of minutes—Validity of notice of appeal.*

After the trial, judgment was reserved and reasons for judgment were handed down on the 10th of June, 1937. Further reasons for judgment were handed down on the 28th of July, 1937. Notice of appeal was filed and served on the 30th of July, 1937. Minutes of judgment were not settled by the trial judge until the 3rd of August, 1937, and entered on the 5th of August following. On preliminary objection that the notice of appeal was premature and therefore a nullity:—

*Held*, that as the judgment had been entered before this appeal came on for hearing and is now before the Court in the appeal book, and notice of appeal was given within time, there is no ground for the Court to hold that the judgment so entered is a thing of no existence and from which an appeal cannot be taken, and the motion to quash must be dismissed.

APPEAL by defendants from the decision of MANSON, J. pronounced on the 10th of June, 1937, and the 28th of July, 1937. Argued at Victoria on the 10th of August, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and MACDONALD, JJ.A. By way of preliminary objection the respondents moved to quash the appeal on the grounds that the alleged notice of appeal was given on the 30th of July, 1937, and the judgment purported to be appealed from was not settled by the learned trial judge until the 3rd of August, and the notice of appeal was therefore premature and is a nullity. Further, that the notice of appeal was not given within the period of time prescribed by the Court of Appeal Act and is a nullity.

*Maitland, K.C.*, for appellants.

*G. P. Hogg*, for respondent, for the motion: The trial was heard on the 2nd, 3rd and 4th of June, 1937, and judgment was reserved. Reasons for judgment were handed down on the 10th of June following and further reasons for judgment were handed down on the 28th of July, 1937. It was not possible from a perusal of the reasons for judgment to determine what the judgment would be, as many matters of substance remained to be determined. In the first reasons handed down the learned

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judge stated no injunction would be granted, whereas in the reasons handed down later he stated an injunction would be granted. The notice of appeal was filed and served on the 30th of July, 1937, whereas the judgment was not actually settled until the 3rd of August following, when the learned judge initialled memorandum on the minutes of judgment "Settled this 3rd day of August, 1937." Until the said settlement on the 3rd of August there was no judgment and the parties had no knowledge of their rights. This is shown by the fact that the premature notice of appeal of the 30th of July is entirely incorrect in its description of the anticipated judgment.

[*Maitland,* was not called on.]

The judgment of the Court was delivered by

MARTIN, C.J.B.C.: We do not think it is necessary to call upon you, Mr. *Maitland.* Since it appears that the judgment had been entered (on the 5th instant) before this appeal came on for hearing and is now before us in the appeal book and that you gave notice of appeal within time, there seems to be no reason at all why we should, in effect, hold that though a final judgment is pronounced yet is a thing of no existence from which an appeal could be taken. That would frustrate the intention of section 14, which aims not to curtail the right to appeal forthwith after judgment is pronounced, but to give additional time to appeal by the method of "calculation" it provides for after the judgment is "signed entered or otherwise perfected," as was held by the Full Court in *Lang* v. *Victoria* (1898), 6 B.C. 117, wherein also WALKEM, J. pointed out that the words "in Court" (in present rule 571) are intended to contrast with and exclude proceedings in Chambers as distinguished from those in Court, and they obviously do not refer to the actual presence of the judge upon the bench at the time of pronouncement of judgment. Our recent decision in *Tatroff* v. *Ray* (1934), 49 B.C. 321 (which at p. 323 explains *Lang's* case) settled the practice as above, and therefore the motion to quash must be dismissed. Reference may also be made to *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312; 1 M.M.C. 408, and *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28 at 56-7.

*Motion dismissed.*

# APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE ROYAL BANK OF CANADA AND ISLAND AMUSEMENT COMPANY LIMITED (p. 241).—Affirmed by Supreme Court of Canada, 1st June, 1937. See [1937] S.C.R. 441; 3 D.L.R. 393. Petition for special leave to appeal to the Judicial Committee of the Privy Council granted conditionally 14th November, 1937.

REX v. DUNBAR (p. 20).—Affirmed by Supreme Court of Canada, 9th November, 1936. See [1936] 4 D.L.R. 737; 67 Can. C.C. 20; 6 F.L.J. 211.

REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE (p. 81). —Affirmed by Supreme Court of Canada, 2nd November, 1936. See [1936] 4 D.L.R. 749; 67 Can. C.C. 33.

REX v. RUSSELL (p. 1).—Affirmed by Supreme Court of Canada, 2nd November, 1936. See [1936] 4 D.L.R. 744; 67 Can. C.C. 28.

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Case reported in 49 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

WARREN v. GRINNELL COMPANY OF CANADA LIMITED AND LEGGATT (p. 512).—Affirmed by Supreme Court of Canada, 8th February, 1937. See [1937] S.C.R. 353; 1 D.L.R. 705.

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**AGREEMENT**—*Continued.*

in writing entered into between the plaintiff and defendant on the 18th of May, 1935, the plaintiff leased a premises to the defendant for five years from the 23rd of September, 1935, at the rate of $540 per annum. The agreement further provided that "The sum of $100 to be deposited as good faith, and should the lessee fail to occupy the premises on the above-mentioned date, *viz.*: the 23rd day of September, 1935, he shall forfeit his deposit." The $100 was so deposited and was retained by the lessor. The lessee never occupied the premises. The lessor sued for five years' rent from the 23rd of September, 1935, or alternatively for damages for breach of the agreement. *Held*, that the agreement was understood by the parties to mean and should be construed as meaning that if the defendant failed to occupy the premises he forfeited the said deposit of $100, and that was the end of the whole matter. The agreement was satisfied by the forfeiture of the said sum of $100. PITT-CROSS v. MALNICK. - - - - - - - - - - **77**

**ALIBI**—Murder—Shooting — Bank hold-up —Jury trial — Identification—Misdirections by trial judge—Whether "substantial wrong or miscarriage of justice" — Criminal Code, Sec. 1014. - - - - - - **1**
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**APPEAL.** - - - - - **161**
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**2.**——*Costs—Amount claimed on cross-appeal—Appendix "N," Column 4.* - **19**
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**3.**——*Validity of notice of.* - **559**
*See* PRACTICE. 10.

**APPELLANT**—Death of. - - **206**
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**ARREST** — *Without warrant — False imprisonment — Photographing and fingerprinting—Liability of police for damages—Criminal Code, Secs. 30 and 1144—R.S.C. 1927, Cap. 38, Sec. 2.*] At about 11.15 on the morning of the 15th of January, 1936, three men went to The Vancouver Taxi Company in Vancouver and hired a taxi. The plaintiff, a chauffeur, who was in its employ was directed to drive them. They drove to Stanley Park where at the point of a gun two of the men took him down a trail some distance where they bound and gagged him. The three men then took his car and drove off. After a time he managed to get rid of

**ARREST**—*Continued.*

the gag and calling he was heard by a park employee who released him. He then telephoned the police advising them what had happened. Shortly after, a prowler car came out and took him to the police station where he told the police all the facts. In the meantime there was a hold-up at the branch of the Canadian Bank of Commerce at the corner of Victoria Drive and Powell Street and one of the bank's staff was shot and killed. The taxi with which the hold-up was carried out was identified as a taxi of The Vancouver Taxi Company. Later in the day the plaintiff was arrested under instructions by the chief constable and remained in custody for five days. He was never charged with an offence and while in custody he was photographed and fingerprinted. In an action for damages for wrongful arrest and false imprisonment:—*Held*, that the evidence did not disclose that the chief constable believed on the day of the murder or on any later date that the plaintiff had committed an offence on January 15th. He therefore had no right to arrest him without a warrant; and even if the chief constable had the right to arrest him without a warrant he should at once have laid a charge and brought him before a justice of the peace as soon as practicable. *Held*, further, that as the chief constable knew that there was no charge against the plaintiff he could not have "purported" to act under the Identification of Criminals Act, when he authorized the taking of the photographs and fingerprints, and therefore section 1144 of the Criminal Code, requiring notice to be given to a proposed defendant of an action for anything "purporting" to be done in pursuance of an Act of Parliament, did not apply. WARNOCK v. FOSTER *et al.* - **179**

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**2.**——*Collision—Contributory negligence —Right of way—Damages.* - - **197**
*See* NEGLIGENCE. 8.

**2.**——*Charge of possession of opium—Speedy trial—On appeal new trial ordered—Right to re-elect.*] The accused having elected to be tried by a County judge when charged with possession of opium, was duly tried and acquitted. The Court of Appeal ordered a new trial. He was again tried and convicted. On application by way of *habeas corpus* for his release on the ground that before his second trial he was not required to and did not re-elect as to whether he would take a speedy trial or trial by jury, and the County judge had no jurisdiction to try him:—*Held*, that the prisoner is not entitled to re-elect and the application is dismissed. REX v. GEE DUCK LIM. - - - - - - - - **61**

**3.**——*Having stolen goods in possession—Evidence—Identity of goods—Magistrate's finding—Appeal—Criminal Code, Sec. 399.*] An employee of a company which used second-hand sacks for sacking different kinds of produce, identified some five or six second-hand dust sacks from a pile of from 400 to 600 mixed sacks in a junk shop, as sacks that were some days previously stolen from his employer's premises. He identified them from the dust in the fibre and from strings attached to some of the sacks. The owner of the junk shop testified that a portion of the sacks in the pile were sold to him by the accused four days previously. The accused's explanation was that he had bought the sacks at night in a garage from a man whom he did not know and could not produce. Accused was convicted of having stolen goods in his possession knowing them to have been stolen. *Held*, on appeal, on an equal division of the Court, that the appeal should be dismissed. *Per* MARTIN and MACDONALD, JJ.A.: That the evidence is abundantly sufficient to justify the learned magistrate in coming to the conclusion he did and it is the duty of this Court not to interfere. *Per* MCPHILLIPS and MCQUARRIE, JJ.A.: That there was no satisfactory legal identification of the goods and the Crown has failed to make out its case. REX v. KOLBERG. - - **535**

**4.**——*Homicide — Killing of constable during an arrest—Necessity for stating cause of arrest—Knowledge of by accused—Charge — Sufficiency—Criminal Code, Secs. 40, 69 and 1014 (2).*] On the 23rd of May, 1934, one of the accused, Eneas George, an Indian, committed an assault upon his wife with a knife on the Canford Indian Reserve, severely wounding her. At the instance of



the Indian agent at Merritt, about twelve miles away, constable Carr and a doctor were sent to the reserve, and finding the woman severely injured, took her to the hospital at Merritt. Carr, with constable Gisbourne, then drove back to the reserve to arrest Eneas George, arriving there between 11.30 and 12 o'clock at night. Eneas was not in the village, but receiving information from others there that he was on the road back of the row of Indian houses, Gisbourne went across to the road where he saw Eneas and his three brothers, Richardson, Alex and Joseph coming towards the Indian houses. Gisbourne advanced with an electric flash-light in his hand and said "I want Eneas." Richardson George then said "Who sent you?" He answered "Barber" (the Indian agent). Gisbourne then said "Nobody can stop me. I am going to perform my duty." He then grabbed Eneas, saying "I am going to take this man to Merritt." Anticipating resistance, Gisbourne then called for Carr who was some distance away. Richardson then said "Get hold of the policeman. We are going to fight them." The Indians then attacked Gisbourne and threw him down, Richardson snatching the flash-light from Gisbourne and hitting him over the head with it. Gisbourne managed to get to his feet and he ran some 60 or 70 yards back of the houses and towards the entrance to the reserve, closely followed by the Indians. He then turned and fired his revolver. Richardson and Eneas then attacked him with sticks, Richardson finally hitting him on the head with a heavy stick and killing him. About the time Gisbourne fired his revolver Joseph fell, the medical testimony being that the wound in Joseph's head may have been caused by a glancing blow from a bullet, but the subsequent loss of hearing and concussion from which it appeared he suffered, must have been due, not to a bullet, but to striking his head when falling or to some other blow. Constable Carr then came to Gisbourne's assistance, but on the three men attacking him he ran through the entrance gate followed by the Indians, who caught up to him a short distance past the gate where they attacked him with sticks and killed him. The three Indians then put the bodies of the policemen in the police car, and forcing another Indian to drive, they drove to the main highway between Merritt and Spence's Bridge where they tried to push the car over into the Nicola River, but the car stuck against a tree on the way down where it stayed, and as they could not move it they took the two

**CRIMINAL LAW**—*Continued.*

bodies out and threw them into the river. The accused had been tried before, and on the first trial were found guilty and sentenced to be hanged. On appeal the defence was allowed to call Joseph as a witness as he was in the hospital and very ill at the time of the trial. He admitted that he and his brothers knew why Eneas was to be arrested. A new trial was ordered by the Court of Appeal. On the second trial the four Indians were tried on the charge of murder. Richardson George, Eneas George and Alex George were convicted of murder and Joseph George was acquitted. On appeal by the three convicted:—*Held, per* MACDONALD, C.J.B.C., that Gisbourne did not notify Eneas of the cause of his arrest as required by section 40 (2) of the Criminal Code. The trial judge's charge on this question was insufficient or if not insufficient the finding of the general verdict was perverse. I confine my judgment to what I think was the illegal arrest of Eneas, the consequences of which was not murder, but manslaughter. I would therefore set aside the conviction. *Per* MARTIN, J.A.: The Crown's case was based on the existence of a common intention to prosecute the unlawful purpose of resisting the arrest of Eneas. In this vital respect the charge was calculated to and did mislead the jury to the prejudice of the accused beyond redemption by reason of grave misstatements of fact and misrepresentation of motives. This primary ground of misdirection on the foundation of the case has been clearly established. The appeal should be allowed and a new trial directed. *Per* MACDONALD and MCQUARRIE, JJ.A.: The decisive facts in the case under review are simple. A charge, however erroneous, could scarcely prevent the jury from reaching a fair decision. The existence of a few simple facts in the case of a determinative nature and of comparatively easy solution should not be lost sight of in a lengthy discussion of errors, some possibly well founded in so far as legal principles are concerned, but in no sense leading or tending to lead to a miscarriage of justice. No substantial wrong occurred. The appeal should be dismissed and the conviction affirmed. The Court being equally divided the appeal was dismissed. REX v. RICHARDSON GEORGE, ENEAS GEORGE AND ALEX GEORGE. (No. 3). - **81**

**5.**——*Incorporated club—Place "kept for gain" — Common gaming-house — Game of cards played — Table charge — "Boosters," "sticks," "spares"—Criminal Code, Sec. 226 (a).*] The accused was a steward in the Brunswick Sports Club in Vancouver, incorporated under the Societies Act. The club premises is a three-storey building owned by Con Jones Limited and rented to the club. The basement was used for billiards and snooker pool, and it contained tables for chequers, chess, bridge and other card games. There was also a small library with the daily papers and current magazines. The main floor where the members entered the premises had a number of billiard tables and tables where the members played rummy. The top floor was provided with a large number of tables where the members played poker and included a lunch-counter and cigar-stand. Only members were allowed on the premises, and the club supported football and baseball teams. The members playing poker paid one-half cent, one cent or two cents per hand according to the size of the game, as a table charge. This charge was collected from each player by the steward before each hand was played. When the premises were raided by the police a large number of tables of poker were in play on the top floor. The steward was convicted under section 226 (*a*) of the Criminal Code of unlawfully keeping a common gaming-house. *Held*, on appeal, affirming the conviction by police magistrate Wood (MCQUARRIE, J.A. dissenting), that the Court would not be justified in interfering with the conclusion arrived at by the learned magistrate, namely, that this club is now conducted as and is in substance a proprietary club. While the constitution and frame-work still exist, nevertheless they have been tortured to uses which deprive all the *bona fide* members of any actual control over a body of usurping persons. REX v. WILLIAMSON. - - - **456**

**6.**——*Murder—Bank hold-up — Common intention—Jury trial—Misdirection by trial judge—Criminal Code, Secs. 20, 69 (2) and 1014 (2).*] Four men, Russell, Hyslop, Lawson and Dunbar, went to a house on East 10th Avenue in Vancouver on the 11th of January, 1936, where they lived together for five days. Russell hired a car and on the morning of the 15th of January he instructed Dunbar to drive the car to a certain spot on Woodland Drive and wait for him there. Russell, Hyslop and Lawson then hired a Terraplane car and driver at a car-stand on Howe Street, and after disposing of the driver, Hyslop drove the car to where Dunbar was on Woodland Avenue, and Dunbar was ordered to drive the Terra-

plane car to the branch office of the Canadian Bank of Commerce at the corner of Powell Street and Victoria Drive, where the three men alighted and ordered Dunbar to drive the car round the block and come back in front of the bank. Dunbar drove round the block twice, and when he arrived the second time in front of the bank the three men came out and entered the car after holding up the bank, when Russell shot the teller and killed him. Dunbar then drove the car a certain distance, when they abandoned the car and made their way back to the house on 10th Avenue. They then divided the stolen money, Dunbar taking $190, he paying his share for the first car that was hired. On the following day the police surrounded the house and Russell and Dunbar were arrested. Hyslop and Lawson left the house before the police arrived, but six days later when hard pressed by the police, they committed suicide. On his trial for murder Dunbar's defence was that he was forced by Hyslop at the point of a gun to drive the car, to bring it back to the front of the bank after the hold-up and to take his share of the money stolen. He further stated that he did not know there was to be a hold-up until he arrived with the car in front of the bank. He was found guilty and sentenced to be hanged. *Held*, on appeal, confirming the conviction (MARTIN, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: Dunbar is clearly shown to be a person pursuing a common purpose with the others. It was urged that he drove the car under compulsion, but his action before that clearly indicates that he was in the scheme with the others from the beginning. *Per* MARTIN, J.A.: While the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect. There was a mistrial and the case should be brought before another jury. *Per* MACDONALD and MCQUARRIE, JJ.A.: This is a case where the judgment of the jury on simple facts may safely be accepted; they did not believe the appellant's story. His early history and association with the others in and out of prison, his movements before and after the robbery, his sharing in the loot on a full partnership basis, his sharing in the expenses of the hired car, the important role he played in the execution of the plan to hold up the bank alike point to guilt and to concerted action. REX v. DUNBAR. - **20**



**7.**——*Murder — Circumstantial evidence —Judge's charge—Trial heard on Ascension Day—Dies non juridicus — Evidence of child.*] The accused was convicted on a charge of murder. The evidence was circumstantial with the exception of that of deceased's wife who, when standing beside the automobile in which the accused was sitting on the evening of the alleged killing, heard him mutter "I killed him." The main ground of appeal raised was that the learned judge failed to caution the jury that before they could find the prisoner guilty on circumstantial evidence they must be satisfied not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person, or words to that effect. The further ground of appeal was raised that the trial was a nullity as it was commenced on the 21st of May (Ascension Day), which is a holiday. *Held*, on appeal (MACDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting), that there should be a new trial. *Per* MARTIN and MACDONALD, JJ.A.: The trial judge in part of his address, when dealing with the question of "reasonable doubt" said: "That is, convinced beyond reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence." If this extract had been included in that part of the charge where he dealt with circumstantial evidence, no difficulty would arise. This sentence used in relation to reasonable doubt might not convey to the jury the thought that it should also be applied to circumstantial evidence. The two subject-matters should be dealt with separately, otherwise the jury may not have all the assistance to which they are entitled and there should be a new trial. *Per* MCPHILLIPS, J.A.: The trial took place on Ascension Day, a holiday. Ascension Day is a *dies non juridicus*. There was no jurisdiction in the learned trial judge in this case in sitting as he did on Ascension Day, and there should be a new trial. REX v. MACCHIONE. - - - - - - - **272**

**8.**——*Murder—Shooting — Bank hold-up —Jury trial — Identification—Alibi — Misdirections by trial judge — Whether "substantial wrong or miscarriage of justice"—Criminal Code, Sec. 1014.*] At about noon on the 15th of January, 1936, three men entered a branch office of the Canadian Bank of Commerce at the corner of Powell Street

**CRIMINAL LAW**—*Continued.*

and Victoria Drive in Vancouver and one of them shot and killed the teller and shot and wounded the manager. They took about $1,050, and going out drove away in the car in which they had driven to the bank. On the following day the accused Russell was arrested and six days later the two other men in the hold-up, being hard pressed by the police, committed suicide. On his trial for murder Russell was identified as the man who did the shooting by the ledger-keeper in the bank, by a customer and a news boy, both being in the bank at the time, also by two men who were at the street door as he went out. Russell gave evidence on his own behalf and swore that on the morning of the 15th of January he went for a walk on Commercial Drive and Broadway some distance away from the bank and did not arrive home until after the time of the hold-up. He was found guilty by the jury and sentenced to be hanged. *Held*, on appeal, affirming the conviction (MARTIN, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: Russell was clearly identified as one of those who entered the bank and took part in the hold-up. The *alibi* which is the oath of the accused is not entitled to much respect, and the observations of the trial judge that an *alibi* must be proved at the earliest opportunity, assuming this is not absolutely correct on the law, did not bring about a miscarriage of justice. *Per* MARTIN, J.A.: It is complained that the learned judge not only failed to present fairly but in effect "brushed aside" the defence of an *alibi* as one not seriously raised and further misled the jury by thus directing them: "I think perhaps in referring to the *alibi*, if you are considering it seriously, one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard." Such a direction is contrary to authority and is radically different from and goes far beyond anything that is permissible from any point of view in the circumstances. This ground of misdirection has been established, with the result that the conviction must be quashed and a new trial directed. *Per* MACDONALD and MCQUARRIE, JJ.A.: A phrase in the charge relating to the *alibi* to which serious objection is taken, *viz.*, "one aspect you must consider in an *alibi* defence is that it must be set up at the earliest possible moment," is said to transgress the rule that the accused is not called upon to disclose his defence before the trial or during the prosecution of the case by the Crown. Although it is not right to say to the jury that "it must be set up at the earliest possible moment" it is clear that where a finding on the identity of the accused as the man who shot Hobbs, based on satisfactory evidence of identity, effectively disposed of the *alibi* set up, no substantial wrong within the meaning of section 1014 (2) occurred. REX v. RUSSELL. - - - - - **1**

**CRIMINAL LAW**—*Continued.*

**9.**——*Preliminary inquiry—Evidence in longhand—Reading of evidence to accused—Mandatory—Criminal Code, Secs. 359 (a), 684 and 1120.*] On a preliminary inquiry the evidence was taken down in longhand by the magistrate and after the evidence for the prosecution was completed the magistrate did not ask the accused whether he wished the depositions to be read over, nor were they read, but he proceeded to address the accused pursuant to section 684, subsection 2 of the Criminal Code and committed him for trial. After the charge was read to the accused on the trial, but before he pleaded, counsel for accused moved to quash the commitment on the ground that the magistrate had not asked the accused whether he wished the depositions to be read over again as required by section 684, subsection 1 of the Criminal Code. *Held*, that the provision in said section 684, subsection 1 is imperative and the warrant of commitment was quashed. REX v. CAMERON. - - - - - - - - - **313**

**10.**——*Receiving stolen goods — Knowledge that goods were stolen—Identity of the goods as those stolen—Evidence—Appeal.*] The accused with his brother carried on an extensive coal business in Vancouver. About the 26th of February, 1936, two men with a truck came to their warehouse and asked him if he wanted to buy some tyres. They showed him a tyre and he said "Are you sure it was not stolen?" They replied "Yes, we are sure of it." He then bought it for $13. On the 1st of March the men came again and asked him if he wanted to buy more. He replied "Yes, I would buy them provided they were sure they were not stolen." He then bought eleven more tyres and paid $156 for the twelve tyres in cash. On the 2nd of February, 1936, the premises of the Pioneer Carriage Truck and Tyre Company were broken into and fourteen tyres were stolen. The salesman of the

company testifying was asked "Tell the Court whether those twelve correspond in general appearance with those stolen." He replied "Yes." He further testified there were no serial numbers on the tyres but there was one tyre there in particular a "heavy duty dump truck" that no other dealer in Vancouver carries in stock. The twelve tyres were worth about $400 retail. Accused was convicted on a charge of "unlawfully retaining in his possession stolen property, to wit: twelve automobile tyres, the property of the Pioneer Carriage Truck and Tyre Company, knowing the same to have been stolen." *Held*, on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that there was no doubt the company's premises were broken into, new tyres were stolen and new tyres were found in the possession of the accused. They were tyres for use on trucks and one in particular found among them that no other dealer in Vancouver handled. Those found were of different sizes and corresponded with those that were lost. The magistrate found that those were the tyres stolen from the company and he came to that conclusion on sufficient evidence. *Per* MCPHILLIPS and MCQUARRIE, JJ.A.: The Crown's case does not advance beyond this, *i.e.*, that the tyres are in general appearance like tyres that the claimants say were stolen. There is no proof of the numbers of the tyres or other reasonable proof; it halts at general appearance only. There is no evidence to indicate in any way that the accused was aware of the fact that the tyres were stolen. The evidence fails to establish the crime as alleged. The Court being equally divided the appeal was dismissed. REX v POMEROY. - - - - - - **161**

**11.**——*Sale of flowers without a licence —Order by police officer to desist—Failure to comply with order—Obstruction—Criminal Code, Sec. 168 (a)—B.C. Stats. 1933, Cap. 79, Sec. 13 (10).*] The accused with three other men each occupied one of the four corners of the intersection of two streets in the City of Vancouver, offering flowers for sale. A police officer asked accused if he had any lawful right to sell flowers. Accused replied he had not. The policeman then told him it was contrary to the city by-law and that he would have to move. Accused then moved across the street to another corner. The policeman then crossed the street and told accused that he did not mean that he was to move across the street from one corner to the other, but that



he was to move off the street altogether and to cease selling these flowers. The policeman then went to each man on each of the other corners and told him the same thing. He waited a few minutes and as the four men failed to do as they were told he went to each of them and told them they were under arrest. On a charge that accused unlawfully did wilfully obstruct a police officer in the execution of his duty, he was convicted and sentenced to six months' imprisonment. *Held*, on appeal, affirming the conviction by deputy police magistrate Matheson (MARTIN, J.A. dissenting), that accused understood the police officer, that he persisted in doing what he was told he had no legal right to do, and there was obstruction of the police officer in the discharge of his duty. REX v. GOLDEN. - **236**

**12.**——*Theft—Money delivered accused for specific purpose in connection with an undertaking—Money used for other payments in connection with same undertaking —Liability—Form of information.*] At the instance of the two accused one Desford, a steam engineer, took over the management of a sawmill that required work and expenditure to put it in running order, and the accused undertook to raise money for this purpose. Desford and one Handley, another steam engineer, then took possession of the mill and spent money of their own in the way of additions and repairs. When so engaged they found that they could not start operations until the balance of a chattel mortgage put upon the machinery by a former manager was paid. Desford then endorsed a promissory note for $400 made by Handley to the Bank of Montreal, for which Handley was to receive an interest in the mill. The bank then gave Desford a cheque for $400, payable to one *Tait*, solicitor for accused. Desford and Handley then went to the office of accused, where they explained to them that this money was for the purpose of paying off the chattel mortgage. The accused Van Oudenol then said "*Tait* is in Court. I will take it to him." The cheque was then given to Van Oudenol who took it to *Tait*, who deposited the cheque and then gave the two accused the $400. Desford eventually paid off the promissory note. The balance due on the chattel mortgage was not paid. On an information by Desford against the two accused for stealing $400, the defence was that the money was used in paying other accounts with relation to the mill. It was found by the trial judge that the accused

**FOREIGN JUDGMENT**—*Action on—Service of process in foreign action—Burden of proof—Validity.*] The plaintiff brought action on a judgment obtained by her against the defendant in the Superior Court in the State of Washington, U.S.A., on the 20th of October, 1934, on a promissory note for $3,000, and she sues alternatively on the note. The defendant swears he was not served with process in the Washington action. In his evidence he swears that on September 28th, 1934, one Hanna handed him an envelope saying that the plaintiff had given it to him to give to the defendant. He put the letter down and continued his work and later in the day he could not get the letter because the plant where he was working was closed. He noticed the plaintiff's attorney's name was on the envelope but never got the letter afterwards. The plaintiff swore she gave the letter to Hanna to serve on the plaintiff on the above-mentioned date, and in this she is corroborated by a lady who saw the plaintiff hand it to Hanna at the company's plant and saw him go through the door which the defendant had recently gone through and return shortly after without the papers. *Held*, that the *onus* is on the defendant and he has not discharged the *onus* that is upon him of displacing the *prima facie* case that he was served. The service on the defendant did not offend against natural justice and the plaintiff is entitled to judgment on the Washington judgment. *Held*, further, that if the plaintiff is not entitled to succeed on the judgment as held, she is entitled on the merits. ROMANO V. MAGGIORA. (No. 4). - - - - - - - - - **352**

**2.**——*Action on—Statute of Limitations—"Beyond the seas"—Interpretation—R.S.B.C. 1924, Cap. 145, Sec. 9.*] Section 9 of the Statute of Limitations provides that if, at the time the cause of action accrues the person against whom the cause of action has arisen is "beyond the seas" then the period of limitation for instituting proceedings shall begin from the time of the return of the defendant from beyond the seas. The plaintiff recovered judgment against the defendant on the 12th of November, 1930, in the Province of Saskatchewan, where the

**FOREIGN JUDGMENT**—*Continued.*

defendant was then resident. The defendant moved to British Columbia in December, 1933. The plaintiff commenced action in this Court on the foreign judgment on the 9th of February, 1937. The only defence was that as the Saskatchewan judgment was recovered more than six years before the commencement of this action the Statute of Limitations should run in favour of the defendant and against the plaintiff from the day judgment was recovered in Saskatchewan. *Held*, that the words "beyond the seas" are not to be taken literally but are to be interpreted as equivalent to "outside the jurisdiction." As the defendant did not arrive in British Columbia until December, 1933, the period of limitation would commence to run from that date. The defence therefore fails and the plaintiff is entitled to judgment. COMMERCIAL SECURITIES CORPORATION LTD. V. DAVIES. - **481**

the jury found the company's servants were negligent in "removing planks at crossing too close to train time and failing to replace temporarily same on approach of automobile." They also found the speed of the train was excessive and that the driver of the automobile was not guilty of any negligence that contributed to the accident. *Held*, on appeal, MARTIN and MACDONALD, JJ.A. dissenting, that while the railway was guilty of negligence in not taking sufficient care in repairing their tracks at a time when a car was not due to pass, or to warn the driver of the automobile of the danger, contributory negligence was pleaded and fully explained to the jury but they ignored that phase of the case altogether. It is too apparent to be thus ignored and the case should be sent back for a new trial. Further there is not sufficient evidence of the father's failure to alight from the automobile before the crash. STALEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - - **499**

**4.**——*Automobiles—Collision at intersection — Injury — Costs — Two defendants—Costs of successful defendant payable by unsuccessful defendant.*] In an action for damages for negligence against two defendants, resulting from an automobile collision, each defendant served the other with third-party notice. The defendant Thomas was found solely responsible for the accident. Judgment was given against him, and in addition to paying the plaintiff's costs he was ordered to pay the defendant Kennedy's costs of the action and of the third-party proceedings. *Held*, on appeal, on the question of costs, *per* MACDONALD, C.J.B.C. and MCQUARRIE, J.A., that the evidence shows the plaintiff thought K. was not responsible and he should not therefore have joined him as a party defendant. The proper disposition of the costs is that the plaintiff recover his costs of the action from T. and that as K. was dismissed faultless, the knowledge of which was known to the plaintiff, the plaintiff should pay his costs. *Per* MARTIN and MACDONALD, JJ.A.: That whatever their opinion might be in regard to the manner in which a sound discretion should best be exercised in this case they find themselves bound to hold that there was jurisdiction to exercise it and the learned judge was justified in the opinion he took of its effect and in judicially exercising his discretion in the way he did upon the materials before him. *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144, followed. The Court being



equally divided the appeal was dismissed. SMITH v. KENNEDY AND THOMAS. - **52**

**5.**——*Contract by defendant to supply plaintiff with instruction in Diesel engineering including acetylene welding — During term instruction in acetylene welding transferred by defendant to another company—Dangerous operation—Explosion during instruction—Injury to plaintiff—Liability of defendant.*] The defendant entered into a contract with the plaintiff to provide him with practical and theoretical instruction in its Diesel Engineering Course, which included instruction in acetylene welding. The consideration was $240, which was paid by the plaintiff to the defendant. The plaintiff received instruction in engineering, but in the course of his instruction the defendant abandoned teaching acetylene welding on its own premises and arranged with the New Method Company on adjacent premises to provide the plaintiff with instruction in acetylene welding, for which the defendant paid the New Method Company $25. When the plaintiff was engaged as part of his instruction in watching one Smith, a partner in the New Method Company, recharging an acetylene-gas generator, another student was engaged at a distance of six or eight feet in arc welding, which operation resulted in the engendering of sparks. An explosion which followed was found to be the result of a spark from the arc welding operation having come into contact with gas escaping from the generator. As a result of the explosion the plaintiff lost an eye and sued the defendant for damages so suffered. *Held*, that whether or not the New Method Company is to be considered the servant of the defendant or an independent contractor under contract with the defendant to provide instruction to the defendant's student, the defendant in law must be held liable for the negligence which caused the plaintiff's injuries. A term of the contract was in the following words: "I clearly understand that I use the School tools and equipment entirely at my own risk and that no claim can be made against the Hemphill Schools in the event of an accident to me while I am in training." *Held*, that the words are those of the defendant and do not provide a defence in case of negligence. SANFORD v. HEMPHILL DIESEL ENGINEERING SCHOOLS LIMITED. - **268**

**6.**——*Damages—Alighting from train—Swinging door at exit—Plaintiff struck in face by door—Injury.*] The two-car train of

**NEGLIGENCE**—*Continued.*

the defendant company running between New Westminster and Vancouver has a double exit between the two cars and one at the rear of the second car, on which is a door that opens inwards. The plaintiff who was a passenger on a train that reached the Vancouver station, went to the rear exit preceded by other passengers. As a woman passenger immediately in front of the plaintiff was about to alight she swung the door back in such a way that it hit the plaintiff in the face, injuring her. In an action for damages the plaintiff claimed that if the door was permitted to be opened it should have been in charge of an attendant, and there should have been a catch to keep the door in place when opened. The evidence disclosed that there was a catch provided to hold the door if opened to its full extent, but the passenger who first opened it did not push it back far enough to contact with the catch. *Held*, that the *onus* is on the plaintiff. The case as presented was left somewhat in the realm of conjecture and the *onus* has not shifted. The plaintiff committed a breach of legal duty to take care under the circumstances, which breach was the sole cause of the accident, and the action is dismissed. HADDOCK V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - **483**

**7.**——*Damages — Automobile accident— Negligence of infant driver — Liability of mother — Motor-vehicle Act — Meaning of "entrusted"—R.S.B.C. 1924, Cap. 177, Sec. 18A—B.C. Stats. 1926-27, Cap. 44, Sec. 12; 1929, Cap. 47, Sec. 7.*] The plaintiff, a passenger in a motor-truck driven by the defendant Harris, an infant, was injured in a collision for which Harris was solely responsible. Harris owned the truck and it was bought partly with money of his own and partly with money borrowed on an insurance policy on his own life, the premiums on which were paid by his mother, the defendant Kauffman. The plaintiff and Harris were partners in a business of buying and selling second-hand furniture and junk, and the truck was used in this business. Harris lived with his mother, borrowed money from her from time to time to buy furniture and he and his partner stored furniture and junk which they bought on her premises. In an action for damages it was held that both defendants were liable. *Held*, on appeal, reversing the decision of FISHER, J. (MARTIN, J.A. dissenting), that the language of section 18A of the Motor-vehicle Act as amended by section 7 of the

**NEGLIGENCE**—*Continued.*

Motor-vehicle Act Amendment Act, 1929, Cap. 47, is such that it is not possible to construe it as imposing any liability on the parent where the minor is the owner of the car. FRASER V. HARRIS AND KAUFFMAN. - - - - - - - - - **509**

**8.**——*Damages—Contributory negligence —Collision—Automobile and motor-cycle— Right of way—Findings of trial judge—Evidence to support—Appeal.*] The collision in question took place on 12th Avenue about 20 feet east of the intersection of 12th Avenue and Larch Street. The plaintiff Plunkett with the plaintiff Beazley as a passenger, was driving his motor-cycle east on 12th Avenue, and the defendant Mills on his way home was driving his car west on 12th Avenue, intending to turn south on Larch Street. The plaintiffs allege that before reaching Trafalgar Street (first street west of Larch Street) a car came out of Trafalgar Street and turned east on 12th Avenue in front of them and they followed close behind this car and did not see the defendant's car until they were past the intersection at Larch Street, when the defendant, who was then about the centre of the road, suddenly turned to his left in front of them, that Plunkett then swerved to the right and nearer the curb to avoid him, but he was too close and he crashed into the left front of the defendant's car, and both plaintiff's were thrown over the left side of the car and severely injured. The defendant Mills swore that as he approached Larch Street he gradually went over to the centre of the road. He saw the motor-cycle coming for half a black at 40 miles an hour and there was no intervening car between the motor-cycle and himself. He held out his hand showing his intention to turn south on Larch Street, and when he saw the motor-cycle coming straight for him he slowed down and was barely moving when he was struck, and he could not turn back to the right owing to the traffic going west. The learned trial judge found that the defendant was on the wrong side of the centre line of the road and found him solely responsible for the accident. *Held*, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. dissenting), that the finding acquitting the driver of the motor-cycle of any negligence causing or contributing to the accident cannot be interfered with if there is reasonable evidence to support it. It is enough to say that the car travelling ahead of Plunkett (and we should assume that evidence was accepted) going

in the same direction, obscuring or at all events partially obscuring his view, would explain his inability to see the on-coming motor-car sooner than he did. With the findings of fact (one of negligence on Mills's part and the other of no negligence on Plunkett's part) both supported by evidence, the appeal must be dismissed. BEAZLEY AND BEAZLEY v. MILLS BROTHERS LIMITED *et al.* PLUNKETT AND PLUNKETT v. MILLS BROTHERS LIMITED *et al.* - - **197**

**9.**——*Damages — Defective railing on stairway—Invitee injured — Liability of owner—Action dismissed—Death of plaintiff before setting down of appeal—Administration Act—B.C. Stats. 1934, Cap. 2, Sec. 2.*] The defendant acquired a two-story building in 1918 that was erected in 1892. The upper story, containing a large number of rooms, was leased to the plaintiff's brother in 1930, who kept it as a rooming-house, a term of the lease being that the landlord was to receive a percentage of the earnings as rental. 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 half way down the side of the wall of the building to a platform and then turned at right angles from the wall, going to the courtyard below. At the side of the platform was a railing extending at right angles from the wall to a post at the top of the lower steps, 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 this railing she leaned against it, and it gave way, precipitating her to the courtyard below, and she sustained injuries. The lease of the upper story 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 swept it from time to time. An action for damages for negligence was dismissed. *Held*, on appeal, reversing the decision of ROBERTSON, J., that the plaintiff was ordered by the tenant to keep the rooms clean and she was working at the time of her injuries in doing this. Both the tenant and the landlord were interested in this work by reason of the terms of the lease and the fact that the landlord received 25 per cent. of the earnings as rental. The landlord is liable. *Held*, further, that as the plaintiff Sophia Dymond died before this appeal was set down for hearing, her executor may continue the appeal under section 2 (2) of the 1930 amendment to the Administration Act, and recover judgment for the amount claimed in the appeal. DYMOND v. WILSON. - - - **301**

**10.**——*Damages—Master and servant—Salesman driving car—On his way home—Pedestrian run down—In course of employment—Liability of employer.*] The defendant H. was a salesman of the defendant company whose head office is in the City of Vancouver. H. had no special hours for work but had a roving commission to sell the company's products in and about New Westminster. He was on salary, used his own car but the cost of its operation was borne by the company whether used for the company or for private purposes. His employment included lectures at the company's head office. He had his home in New Westminster where he had no office of his own, but by arrangement had his customers telephone or mail orders to a gas-station in New Westminster where he picked them up. He attended the head office for salesmen's meetings, salesmen's lectures and to receive instructions from the sales manager. While driving to his home in New Westminster after attending an evening lecture for salesmen at the company's head office, he ran into and severely injured the female plaintiff. In an action for damages:—*Held*, that the accident was due to H.'s negligence, that his home in New Westminster was his business headquarters and the company's sales headquarters in that district, and under the terms of his employment the accident occurred in the course of his employment. DALLAS v. HINTON AND HOME OIL DISTRIBUTORS LIMITED. - - - - **327**

**11.**—*Damages—Pedestrian run down by motor-truck—Loss of money from pocket—Liability for loss.*] The plaintiff, who was run down by a motor-truck negligently driven by the defendant, remained unconscious until he woke up in a hospital. While unconscious he lost $80 from his pocket. *Held*, that if the defendant is negligent he is liable for the consequences of his act, whether probable or not, and the plaintiff is entitled to recover the sum so lost. *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, followed. PATTEN v. SILBERSCHEIN. - - - - - **133**

**12.**——*Damages — Rented house — Fall from porch—Defective railing — Concealed danger—Knowledge of defect by landlord—Obligation to repair.* - - **545**

*See* PRACTICE. 4.

**PAYMENT**—*British Columbia Lower Mainland Dairy Products Board—Charge in respect of milk marketing scheme—Natural Products Marketing Act—Act subsequently declared "ultra vires"—Action to recover—Mistake of law—Can. Stats. 1934, Cap. 57—B.C. Stats. 1934, Cap. 38—R.S.B.C. 1924, Cap. 48—B.C. Stats. 1926-27, Cap. 42.*] The first-mentioned defendant Board was constituted under the "Milk Marketing Scheme of the Lower Mainland of British Columbia," a scheme approved by the Governor in Council under The Natural Products Marketing Act, 1934 (Dominion). The second defendant Board was constituted under a like marketing scheme approved by order in council under the Natural Products Marketing (British Columbia) Act. The *personnel* of the two Boards was the same, with common staff and office, and the whole field with respect to the marketing of natural products was under the operation of the two statutes. Under both schemes "agency" meant "a group of producers joined in corporate form for the purpose of marketing milk" and both schemes had power "to designate the agency or agencies through which the regulated product should be marketed." The plaintiff association, composed of about 300 members, requested that the association be designated an "agency" under the marketing scheme, and on the 22nd of January, 1935, the said association with two others were so designated. On the 25th of January, 1935, the Board (Dominion) passed an order imposing a charge or toll in respect of the marketing of all milk produced within the area as defined in the marketing scheme, the toll being fixed at one cent for every pound of butterfat content of the milk marketed. The toll was varied by subsequent orders. The plaintiff voluntarily paid the tolls for the period between the 1st of February, 1935, and the 15th of June, 1935, paying in all $3,954.26. The plaintiffs then made no further payments owing to an intimation from the defendants that they were about to put into effect a pooling scheme provided for in both marketing schemes, and cancel existing agencies. On the 17th of June, 1936, the Supreme Court of Canada

**PAYMENT**—*Continued.*

advised that the Dominion Act was *ultra vires (Reference re The Natural Products Marketing Act, 1934, and its Amending Act, 1935,* [1936] S.C.R. 398, affirmed by the Privy Council, [1937] W.N. 57; 1 W.W.R. 328). Upon the plaintiff's action claiming the return of $3,954.26 received by the defendants to the use of the plaintiff:—*Held*, that no question of coercion, duress or fraud arises here. The moneys were paid voluntarily with full knowledge of the facts under a mistake of law and cannot be recovered. INDEPENDENT MILK PRODUCERS CO-OPERATIVE ASSOCIATION v. BRITISH COLUMBIA LOWER MAINLAND DAIRY PRODUCTS BOARD AND B.C. LOWER MAINLAND DAIRY PRODUCTS BOARD. - - - **423**



**PRACTICE**—*Action for forfeiture of lease—Right of examination for discovery—Precedent—Rule 370c.*] In an action for forfeiture of a lease the party against whom forfeiture is sought cannot be forced to submit to examination for discovery. *Seddon* v. *Commercial Salt Co.*, [1925] Ch. 187 followed. In regard to precedent, a decision is valueless as a guide unless it discloses some principle. *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited*, [1914] A.C. 25 applied. HODGSON AND TAIT v. TURNER. - **308**

**2.**——*Amendment of statement of claim—Whether raising new cause of action—Statute of Limitations.*] On the 8th of August, 1930, the plaintiffs delivered to the defendants at their wharf, known as Canadian National Dock, in Vancouver, 1,588 cases of canned salmon for storing and carriage. The wharf and the goods thereon

plaintiffs in carrying on the business of exporting potatoes and other natural products to points outside the Province. Alleging two breaches of the undertaking, the plaintiffs moved for an order that the defendants be committed for contempt in failing to carry out the undertaking, and in support filed affidavits, two in support of the first breach reciting that a truck laden with potatoes and onions had been stopped by an official of the defendant and a Provincial police constable who were told that the onions and potatoes were being transported to a warehouse prior to exporting, and were shown the order that recited the undertaking, but the officers refused to allow the truck to proceed. The affidavits did not state that in fact the onions and potatoes were being transported to the warehouse for storage preliminary to export. The defendants' official swore that he did not know of the Court order and was not informed of it at the time of the seizure. The affidavit in support of the second breach made by the truck-driver recited that when driving his truck loaded with potatoes he was stopped by the same officers. He told them he was taking the potatoes to his warehouse prior to exportation and also of the said order. The policeman in his affidavit swore that prior to seizure the driver said he was taking the potatoes to town, and after seizure he asked him if it would be all right if he exported them but did not indicate that he was exporting them. *Held*, that an application to commit for violation of an order of the Court for an injunction is a matter *strictissimi juris*. There must be the strictest evidence that there has been an actual breach of the injunction and it is impossible to say upon the evidence that it is clear that there has been such a breach. The motion was therefore dismissed. *Held*, further, that affidavits stating facts which it is more likely the deponent did not know of his own knowledge, and not stating such facts as his belief and the grounds thereof, are inadmissible. LOWE CHONG *et al.* v. GILMORE *et al.* - - - - - **157**

**7.**——*Costs — Appendix N — Proviso in last clause of letterpress—Question involved in action—"Special cause" — Jurisdiction.*] The last clause of the letterpress in Appendix N of the Supreme Court Rules provides that "In all other actions and proceedings there shall be taxable the amount set out opposite each respective tariff item in Column 2: Provided, however, that for special cause the Court or judge may, at any time at or after trial and before the bill of costs has been taxed, order the costs to be taxed under Column 1, 3 or 4." In an action for damages for wrongful dismissal and for recovery of certain moneys alleged to have been wrongfully deducted from his salary, the plaintiff recovered judgment for over $3,000 damages for wrongful dismissal, but his other claim was dismissed. He then applied for an order to have his costs taxed under Column 3 or 4 of Appendix N alleging as a "special cause" the difficult nature of the questions involved in that part of the action in which he succeeded. *Held*, that the only issue was the amount involved, the proviso is limited to actions and proceedings other than those for liquidated amounts and there is no jurisdiction to make any special order. *Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry* (1930), 42 B.C. 315, followed. MCLEAN V. VANCOUVER HARBOUR COMMISSIONERS. - - - - - - - **74**

**8.**——*Discovery — Examination of past officer of company—Rules 370c (1) and (2).*] Rule 370c (1) of the Supreme Court Rules provides that "In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of the Court or a judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation," etc. The plaintiff applied under said rule to examine a past officer of the defendant company, an officer of the company having previously been examined. *Held*, that the application should be granted. *Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934), 49 B.C. 301, distinguished. DES BRISAY *et al.* v. CANADIAN GOVERNMENT MERCHANT MARINE LTD. - - **57**

**9.**——*Judgment and notice of appeal given—Death of appellant—Executor—Order of revivor — Application for — B.C. Stats. 1934, Cap. 2, Sec. 2, Subsec. (4).*] The plaintiff's action for damages for injuries sustained owing to the alleged negligence of the defendant was dismissed on the 25th of April, 1936. The plaintiff gave notice of appeal on the 28th of April, 1936. On the 8th of June following she died. On motion to the Court of Appeal by the executor of the deceased for an order that the proceedings herein be continued between himself as executor of deceased and the respondent, and that he be added as appellant in substitu-

**PRACTICE**—*Continued.*

tion for deceased under the provisions of subsection (4) of section 2 of the Administration Act Amendment Act, 1934:—*Held*, that the expression "action pending" in the above-mentioned subsection, when used in its natural meaning, refers to any proceeding in the nature of litigation between the plaintiff and the defendant. The action should therefore be continued in this Court. DYMOND v. WILSON. - - - - **206**

**10.**——*Judgment—Minutes not settled—Notice of appeal given after reasons for judgment were handed down but before settlement of minutes—Validity of notice of appeal.*] After the trial, judgment was reserved and reasons for judgment were handed down on the 10th of June, 1937. Further reasons for judgment were handed down on the 28th of July, 1937. Notice of appeal was filed and served on the 30th of July, 1937. Minutes of judgment were not settled by the trial judge until the 3rd of August, 1937, and entered on the 5th of August following. On preliminary objection that the notice of appeal was premature and therefore a nullity:—*Held*, that as the judgment had been entered before this appeal came on for hearing and is now before the Court in the appeal book, and notice of appeal was given within time, there is no ground for the Court to hold that the judgment so entered is a thing of no existence and from which an appeal cannot be taken, and the motion to quash must be dismissed. LOWE CHONG COMPANY v. B.C. COAST VEGETABLE MARKETING BOARD *et al.* - - - - - - - - - **559**

**11.**——*Substitutional service—Order for—No affidavit in support—Application to set aside—Rule 63.*] An order for substitutional service should not be made unless an affidavit setting forth the ground upon which the application is made has been filed. REID v. MCKINNON. - - - - - **188**

**12.**——*Transfer of property from husband to wife—Trust agreement—Contest as to ownership—Originating summons—Jurisdiction—Appeal—Order LV., r. 3 (g).*] By three conveyances in 1928 and 1929, the late Francis M. Rattenbury conveyed his Oak Bay property on Vancouver Island to his wife. On the 10th of November, 1929, she leased the property with option to purchase for $85,000 to the St. George and The Dragon Hotel Company, Limited. On December 17th, 1929, a trust agreement was entered into between Mr. and Mrs. Rattenbury and The Royal Trust Company, whereby the wife conveyed the property in question to The Royal Trust Company subject to the lease of the 10th of November, 1929, upon certain trusts, including the division of the rentals equally between her and her husband, and upon the death of one to pay to the survivor and after the death of the survivor to their two children. On April 30th, 1930, The Royal Trust Company leased the lands to the St. George and The Dragon Hotel Company, Limited with option to purchase for $85,000. On the 13th of May, 1931, the Hotel Company released all its rights in the property and was released from all obligations by The Royal Trust Company. Francis M. Rattenbury died in England, where he and his wife were domiciled, on the 28th of March, 1935, and his wife died on the 5th of June following. On the application of The Royal Trust Company, ROBERTSON, J. made a declaration that the trust set out in the trust agreement had wholly failed, and that The Royal Trust Company held the lands in trust either under the last will of Francis M. Rattenbury or the last will of his wife. On the application of Francis B. Rattenbury and Mary Burton, a son and daughter of Francis M. Rattenbury by a previous marriage, ROBERTSON, J., on the 4th of June, 1936, acting under the Testator's Family Maintenance Act, made an order directing that the applicants should have a charge upon the real estate of Francis M. Rattenbury situate in the Province, and upon the proceeds of the property in question in Oak Bay, should it be determined that the same now belongs to the estate of Francis M. Rattenbury. The Royal Trust Company now being both administrator with will annexed of Francis M. Rattenbury, deceased, and executor of the will of Alma Victoria Rattenbury, deceased, issued an originating summons for an order as to whether the Oak Bay property belongs to the estate of Francis M. Rattenbury. On the 23rd of December, 1936, it was held by ROBERTSON, J. that the property in question was held by The Royal Trust Company in trust for the estate of Alma Victoria Rattenbury, and that the estate of Francis M. Rattenbury had no interest in the lands. *Held*, on appeal, that this case is one of conflict as to which estate the property belongs, and an issue will have to be decided on evidence *de hors* the wills of the respective deceased. A contest of this kind is not within the contemplation of a proceeding initiated by originating summons under Order LV., r. 3 (*g*). The issues here do not involve "the

**STATUTES**—*Continued.*



**STATUTES**—*Continued.*

**SUPERANNUATION**—*Policeman—Action to recover—Parties—R.S.B.C. 1924, Cap. 247, Secs. 5, 7, 10, 11, 14, 17, 19, 21 and 44—B.C. Stats. 1930, Cap. 69, Secs. 5 and 6.*] The plaintiff, after serving nearly 25 years as a policeman in the City of Vancouver, was dismissed on the 3rd of January, 1935. Pursuant to section 5 of the Superannuation Act the city deducted each year, commencing on January 1st, 1928, 4 per cent. from his salary and paid it to the Minister of Finance as a contribution from the employee to the Superannuation Fund, and pursuant to section 7 of said Act the city paid a like amount. The plaintiff was 55 years of age on September 23rd, 1935. On the 19th of December, 1935, he was again temporarily employed as a policeman and was dismissed on the 31st of December, 1935. He was paid his salary for this period but the city did not deduct the 4 per cent. from his salary and did not make any payments either on the plaintiff's behalf or itself to the Minister of Finance. Later the plaintiff requested the paymaster to forward to the Minister the amount which should have been deducted from his salary but this was refused. In an action for a declaratory judgment to enforce his rights under the Act:—*Held*, that the Act applies to temporary employees of the city police department. *Held*, further, that the Minister of Finance looks to and holds the city responsible. As soon as the plaintiff re-entered the employ of the city "he was again a contributor" and the failure of the city to pay the Minister and the acceptance by the plaintiff of the full amount of his December salary did not deprive him of his rights under the Act. There was no necessity for him to make an application for reinstatement of his account in the Superannuation Fund, and on his re-

**WILL**—*Construction—General legacy—Gift of shares—Testator not possessed of the shares—Misdescription in name of the company—Validity of bequest.*] The testator died on the 11th of April, 1936, and his will dated the 20th of July, 1935, contained the following provisions: "I give and bequeath to my brother, George Henry Barnard of Victoria, B.C. eighty-seven (87) shares of common stock of the British Columbia Telephone Company, Limited and all my shares in the Victoria Realty Company Limited." The Vernon and Nelson Telephone Company was incorporated by Provincial statute in 1891 with power to amalgamate with any other company having similar objects. By a statute of 1903 the company was authorized to extend its operations throughout the Province and to change its name. Pursuant thereto the company changed its name to "British Columbia Telephone Company, Limited." By Dominion statute of 1916 a company was incorporated under the name of "Western Canada Telephone Company" which included a provision for amalgamation with the Provincial company, and with power to change its name to "British Columbia Telephone Company." In 1922 the two companies amalgamated under the name of "British Columbia Telephone Company." Since that time the Provincial company ceased to carry on business. All the shares of the common stock of the new company with the exception of fifteen, had, prior to deceased's death, been acquired and still are held by the Anglo-Canadian Telephone Company. They are not for sale and cannot be purchased. It is agreed that at the time of testator's death the 87 shares were worth $13,050. From the date of his will to the time of his death the testator did not own any common shares in the British Columbia Telephone Company or in the Provincial company, but some years prior to the date of the will he had owned a greater number of common shares in the British Columbia Telephone Company than 87, and at the time of his death and for some years prior thereto he owned preference shares in the British Columbia Telephone Company. Evidence disclosed that the name "British Columbia Telephone Company, Limited" is often erroneously applied by members of the public to the British Columbia Telephone Company. In answer to questions (1) Whether or not George Henry Barnard is entitled to benefit under the above provision; (2) In case he is, the nature thereof; (3) In case he is entitled to 87 shares of common stock of the British Columbia Telephone Company, what amount the executors are entitled to expend in the purchase thereof; (4) In case the stock cannot be purchased whether the executors are entitled to pay him in lieu thereof a sum of money, and if so, what sum:—*Held*, that the "British Columbia Telephone Company, Limited" on the facts applies to no subject at all, since the Provincial company has ceased to exist. The description "British Columbia Telephone Company" applies to one subject and one subject only. The erroneous addition in the description does not vitiate the gift. George Henry Barnard is entitled to benefit by the said bequest of 87 shares of common stock of the British Columbia Telephone Company. He takes the shares as a general legacy. A general legacy not being a particular thing but something which is to be provided out of the testator's general estate, the executors should expend in the purchase of the shares the sum of $13,050, and if the stock cannot be purchased they should pay him the sum of $13,050. *In re* ESTATE OF SIR FRANK STILLMAN BARNARD, DECEASED. THE CANADA TRUST COMPANY *et al.* v. LADY MARTHA A. S. BARNARD *et al.* - - - **230**

**2.**——*Probate—Renunciation of probate—Passing of accounts.* - - **359**
*See* EXECUTORS AND ADMINISTRATORS.

**3.**——*Settled Estates Act—Tenant for life—Remaindermen—Cost of repairs—Capital and income — Costs — R.S.B.C. 1924, Cap. 228.*] The will of one G. W. Jones, made on the 3rd of September, 1889, after making certain pecuniary bequests, devised the residue of his estate in equal shares to his three daughters for their respective lives, and after their death to their children in equal shares. Part of the estate consisted of five lots in the City of Kamloops on which stood certain buildings known as the Central Hotel. The hotel was destroyed by fire on the 3rd of September, 1931. On the 12th of November, 1932, the only surviving beneficiaries under the will were two daughters, Mary Charlotte Pearce and the plaintiff, Alice Kathleen Homfray, and their children, the two daughters being trustees of the estate. All the beneficiaries then entered into an indenture in writing whereby the estate then remaining unadministered was divided between Mary Charlotte Pearce and her children and Alice Kathleen Homfray and her children, and Mrs. Homfray and her

**WILL**—*Continued.*

children took as their share of the estate the lands and premises known as the Central Hotel, subject to the trusts declared in the will, and Mrs. Homfray and her daughter, the defendant Rosabel Emily Homfray, were by said indenture appointed trustees. Following the indenture of November 12th, 1932, it was agreed between all members of the Homfray family that the hotel should be rebuilt, the ultimate cost of which approximated $15,000. Attempts to raise the necessary funds by mortgage were made by the defendant but these being unsuccessful, $7,259.44 was provided by the plaintiff Mrs. Homfray, $3,000 was advanced by the contractors, Miller & Lewis, who were secured by a mortgage on the premises, and the hotel was rebuilt. On completion of the hotel on June 1st, 1933, it was leased to one, Alice Bral, for five years. The defendant, Rosabel E. Homfray, who lived in Kamloops, looked after the building generally and collected the rents and out of the same paid the remaining expenses of rebuilding the hotel and refused until these were liquidated to pay Mrs. Homfray any but small amounts of the rents and profits of the premises. Disputes having arisen between Mrs. Homfray and the defendant as to the former's rights as tenant for life, the plaintiff commenced this action for a declaration that the property in question is a settled estate within the meaning of the Settled Estates Act and that she as tenant for life is entitled to possession of the property and to its management with power to lease the same, and for further declarations that she is entitled to a charge on the premises for all moneys actually advanced by her as well as for all sums paid out of the rents and profits on account of repairs, alterations and improvements or on account of the principal of the Miller & Lewis mortgage and generally to have her rights as tenant for life declared. *Held*, that the hotel property is a settled estate within the meaning of the Settled Estates Act and Mrs. Homfray is entitled as tenant for life to receive the net rents and profits of said property, but she is not entitled as of right to possession and management as it is a discretionary matter with the Court, and in the circumstances of this case the powers of management or leasing should be left with the trustees, and that the life tenant should not be let into possession of the property. *In re Bagot's Settlement. Bagot* v. *Kittoe* (1893), 63 L.J. Ch. 515 followed. *Held*, further, that Mrs. Homfray is entitled to the declaration asked for with respect to

**WILL**—*Continued.*

both the moneys actually advanced by her and the moneys paid out of the rents on account of repairs, alterations or improvements, or on account of the principal of the Miller & Lewis mortgage, and such moneys will, therefore, be a charge on the property. Such charge will also include the expenses of and incidental to the repairs, alterations and improvements. She is entitled to the net income of the property but she must pay or keep down the interest. Sale ordered unless plaintiff's charge satisfied within four months. *Held*, further, with regard to any further insurance, that the trustees ought not to keep the property insured out of the rents and profits therefrom but as to whether the trustees ought to insure the premises at the expense of the estate generally no order will be made. *Re McEacharn; Gambles* v. *McEacharn* (1911), 103 L.T. 900 followed. *Held*, on the counterclaim, that the defendant is entitled to remuneration at five per cent. on the gross amount of rents collected since the completion of the building on June 1st, 1933. *Held*, further, that the defendant trustee, having acted unreasonably in opposing the plaintiffs' claim with respect to the charge but having succeeded on the issue as to possession and management, the defendant was ordered to pay her own costs personally and half the taxed costs of the plaintiffs. HOMFRAY *et al.* v. HOMFRAY. - - - - - - **287**

**4.**——*Testamentary capacity — Delusions —Burden of proof — Evidence—Weighing of.*] A testatrix made a will on the 13th of April, 1933, and made a subsequent will in the latter part of September or the first week in October, 1935. She died on the 17th of December, 1935, and after her death the second will could not be found. The second will was drawn by her solicitor, who was unable to fix the exact date of its execution, but testified it was probably in the latter part of September or the first week of October, 1935. He further stated the will contained a clause revoking all former wills, but further than this he could not pledge his oath as to what were its provisions. On the 9th of November following, the testatrix became violently insane and was taken to a mental hospital where she remained until her death. The solicitor testified that he was acquainted with deceased and that when the will was executed he had an extended conversation with her and she showed herself perfectly capable of giving instructions for the will and of discussing intelligently other matters. In

this he is corroborated by his stenographer who conversed with testatrix about several matters. A doctor who was called in consultation to see deceased on November 10th, 1935, testified that in his opinion deceased was suffering from *senile dementia*, which must of necessity be a slow progressive condition which gradually impairs the mental powers, and he was of opinion that deceased had not the mental capacity to make a will within a period anterior to her death which would embrace the suggested date of the 1935 will. This is corroborated by another doctor, whose opinion is based on the evidence adduced at the trial. Deceased's clergyman, her sister and other friends were called as witnesses, the general purport of their evidence being that in the winter of 1934-35 deceased had an attack of influenza, and after that a great change in deceased was noticed; she became suspicious and had delusions of attempted persecution. In an action to prove the will of the testatrix with counterclaim to have the testatrix declared intestate:—*Held*, that the defence had not established affirmatively that the testatrix was of sound mind when she executed the 1935 will and therefore the question of intestacy does not arise since it is founded primarily on the validity of the 1935 will. The result is that the will of April 13th, 1933, is the last will and testament of the testatrix and probate thereof is decreed. *In re* ESTATE OF BERTHA PRUDHOMME FOWLER. THE ROYAL TRUST COMPANY AND BERTHA FOWLER v. EDITH AILEN. - - - - - - - - - - - - **128**

**5.**——*Trustee—Income and capital—Adjustments between life tenants and remaindermen—Securities purchased at premium and others at discount—Opinion of Court.*] By the will of Walter C. Nichol, deceased, apart from an annuity to his sister, he gave the income of his entire estate to his wife and children for their lives, with remainder to his grandchildren. By originating summons his trustee submitted the following questions: (a) As to the procedure to be followed by the said trustee in administering the assets of the said estate consisting of bonds and income therefrom heretofore purchased or which may hereafter be purchased by the trustee at a discount or at a premium; (b) as to the determination of the amounts to be accounted for as capital and revenue respectively as between life tenants and remaindermen in respect to bonds so purchased; (c) as to the procedure to be followed by the trustee in adjusting the respective interests of life tenants and



remaindermen in respect to bonds heretofore sold or which may hereafter be sold by the trustee at a discount or at a premium; (d) as to the procedure to be followed by the trustee in adjusting the respective interests of life tenants and remaindermen in respect to bonds forming part of the said estate at the date of the death of the said Walter Cameron Nichol. *Held*, that in answering questions (a), (b) and (c) the Court is not dealing with cases where the interest in respect of authorized investments has not been paid but only with cases where there has been no loss of income to the life tenant and the answer is that the life tenant is entitled to the actual interest paid. In case of a sale the proceeds are capital. The point arising under question (d) is whether the difference between the value of the securities at the date of the death of the testator and the amount of the proceeds of the sale is income which should go to the life tenant or is capital and should be held for the remainderman. The life tenants did not suffer any loss of income. The matter is concluded either by the latter part of paragraph 4 (a) of the will which provides that no part of the proceeds of such selling or calling in or conversion, etc., shall be paid or applied as past income or by the authorities. The answer therefore is that the life tenants are not entitled to the moneys which represent the proceeds of the sale of the securities over and above their value at the time of the death of the testator. *In re* ESTATE OF WALTER CAMERON NICHOL, DECEASED. - - - - - - - **213**

**WORDS AND PHRASES**—"Beyond the seas"—Interpretation. - - **481**
*See* FOREIGN JUDGMENT. 2.

**2.**——*"Boosters," "Sticks," "Spares"—Meaning of.* - - - - - - **456**
*See* CRIMINAL LAW. 5.

**3.**——*"Colore officii"—Meaning of.* **433**
*See* CONSTITUTIONAL LAW. 2.

**4.**——*"Dies non juridicus"—Interpretation.* - - - - - - - - **272**
*See* CRIMINAL LAW. 7.

**5.**——*"Entrusted"—Meaning of.* - **509**
*See* NEGLIGENCE. 7.

**5.**——*"Fair market value"—Meaning of.* - - - - - - - - - - **368**
*See* TAXATION. 2.

**7.**——*"Passenger hazard"—Interpretation.* - - - - - - - - **406**
*See* NEGLIGENCE. 2.

**8.**——*"Special cause"—Meaning of.* **74**
*See* PRACTICE. 7.