CITY OF VANCOUVER

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 LII.

VICTORIA, B. C.
Printed by The Colonist Printing & Publishing Company, Limited,
1938.

Entered according to Act of the Parliament of Canada in the year one thousand nine hundred and thirty-eight by the Law Society of British Columbia.

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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THE HON. JAMES ALEXANDER MACDONALD.
THE HON. ARCHER MARTIN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICES:

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THE HON. ARCHER MARTIN.

JUSTICES:

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THE HON. ALBERT EDWARD McPHILLIPS.
THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. WILLIAM GARLAND ERNEST McQUARRIE.
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ATTORNEY-GENERAL:

THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDA.

On the 24th of January, 1938, the Honourable Albert Edward McPhillips, a Justice of Appeal, died at the City of Victoria.

On the 29th of January, 1938, Cornelius Hawkins O'Halloran, one of His Majesty's counsel learned in the law, was appointed a Justice of Appeal, in the room and stead of the Honourable Albert Edward McPhillips, deceased.

On the 15th of February, 1938, David Whiteside, one of His Majesty's counsel learned in the law, was appointed Judge of the County Court of the County of Westminster and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Frederic William Howay, resigned.

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"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers thereunto enabling, Schedule No. 3 of Appendix M of the Appendices to the "Supreme Court Rules, 1925," as amended, be further amended by adding the following words and figures to Item 20A of the said Schedule:—

"Deposit to apply on cost of transcript and fee for entry of decree (to be paid before the trial or hearing is proceeded with), subject to refund by the Registrar upon entering the decree or upon the dismissal of the petition of such portion thereof as is not required..........$25.00."

And by adding the following after Item 20A of the said Schedule:—

"ADOPTION FEES.

"20B. Deposit to apply on cost of all adoption proceedings, including fee on filing petition and material in support and entry of adoption order, subject to refund by the Registrar upon entering the adoption order or upon the dismissal of the petition of such portion thereof as is not required.....................$15.00."

GORDON S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., July 22nd, 1938.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

Sec 7
6

REX v. PATRY.

C.A.
1935
Jan. 31.

Criminal law—Automobile entrusted by owner to a driver—Automobile driven to the common danger—Liability of owner—Charge—R.S.B.C. 1924, Cap. 177, Sec. 34 (1).

Section 34 (1) of the Motor-vehicle Act provides that "The person holding a licence for the use or operation of a motor-vehicle by means of or in respect of which motor-vehicle an offence against any provision of this Act or of the regulations is committed by his employee, servant, agent, or workman, or by any person entrusted by him with the possession of the motor-vehicle, shall be deemed to be a party to the offence so committed, and shall be personally liable to the penalties prescribed for the offence as a principal offender."

The accused, owner of a car, rented it out to a Chinaman in the course of his business as the proprietor of a duly licensed "Drive Yourself" business. The Chinaman in driving the car exceeded the speed limit and drove to the common danger. Accused was convicted on a charge "that the said T. A. Patry, owner of Auto No. 83-458, at the said City of Vancouver, on the 20th day of May, A.D. 1934, at 8.40 p.m. unlawfully did drive an automobile to the common danger upon a public highway." On appeal to the County Court the conviction was quashed.

Held, on appeal, reversing the decision of LENNOX, Co. J. (MCPHILLIPS and MCQUARRIE, J.J.A. dissenting), that the above section did not constitute a new offence, that the charge was properly laid against the accused and the conviction should be restored.

C.A.
1935

Rex
v.
Patry

Appeal by the Crown from the decision of Lennox, Co. J. of the 2nd of November, 1934, allowing an appeal and quashing the conviction of accused by J. A. Findlay, deputy police magistrate for the City of Vancouver, on the charge that owner of automobile No. 83-458 at the City of Vancouver on the 20th of May, 1934, unlawfully did drive an automobile to the common danger upon a public highway. The accused, the owner, rented out the car in the course of his business as the proprietor of a duly licensed "Drive Yourself" business to a customer who unlawfully drove the car to the common danger.

The appeal was argued at Victoria on the 31st of January, 1935, before Macdonald, C.J.B.C., Martin, McPhillips, Macdonald and McQuarrie, JJ.A.

Scott, for appellant: Accused was convicted by the magistrate and on appeal Lennox, Co. J. quashed the conviction. The accused rented the car in the course of his business to a Chinaman who drove the car too fast on Kingsway, in contravention of the Act. The charge is under section 34 (1) of the Motor-vehicle Act. The charge was that the car was driven to the common danger and the question is whether the licensee can be guilty under the charge as laid. He entrusted the car to one who drove it to the common danger. I say it does not create a new offence and he was properly charged. The learned judge held it created a new offence.

McPhee, for accused: He must be found guilty of some offence as prescribed by statute. The offence must be proved and a conviction made before they can go against the owner. He is convicted as being the driver of the automobile when he was not the driver. He cannot be convicted on the charge as laid and there is no evidence of his entrusting the car to any person.

Scott, replied.

Macdonald, C.J.B.C: The conviction should be restored.

Martin, J.A.: It is clear, with respect, that the learned County Court judge proceeded on the mistaken assumption that an offence distinct from driving to the common danger, based

on the words "entrusted . . . by him with the possession of the motor-vehicle" contained in section 34, had been created by that section; but upon considering it I find it impossible to come to such an opinion. Putting it briefly, the man who committed this offence against the Act of driving to the common danger, was at least a bailee of the appellant, the licensee of the car, and where a licensee "entrusts" another with the possession of his car he is by the statute put in the same position of responsibility as though he had entrusted it to an "employee, servant, agent, or workman": therefore the provision of the section making the licensee "liable . . . as a principal offender," extends to the facts of this case, and hence the appeal should be allowed and the conviction affirmed.

McPHILLIPS, J.A.: I must say this, that this legislation looks to me to be quite formidable; but in the interests of natural justice I would construe it as the learned judge below construed it. In my opinion, as a prerequisite to holding the owner responsible, a conviction should first be obtained against the person who is the natural offender. Failing in that, there is no liability upon the person prosecuted here. I would uphold the judgment below, and dismiss the appeal.

MACDONALD, J.A.: I would allow the appeal. A new offence is not created by section 34, subsection (1), with respect to endorsement; the question of endorsement only comes up as a matter of evidence in the course of the inquiry; it is not part of a separate criminal offence. I think the respondent was properly charged with driving the car to the common danger; it makes no difference whether he did so by himself or by a driver to whom he hired the car.

McQUARRIE, J.A.: I am inclined to think that the charge should be drawn as suggested by the learned trial judge. Certainly the offender in this case did not drive the motor-car; and it is not fair to him to state it that way in the charge. It may be that the section goes further than the learned trial judge thought it did. But at the same time there is no reason why the charge under section 34 should not be drawn in such a way that that would be clearly apparent.

Appeal allowed and conviction restored, McPhillips and McQuarrie, JJ.A. dissenting.

S. C.
1937
May 19, 26.

BURNS v. BURNS.

Devolution of estates — Widow — Inheritance by — Administration Act— Adultery as a bar to wife's sharing in husband's estate—R.S.B.C. 1924, Cap. 5, Sec. 127 (1)—B.C. Stats. 1925, Cap. 2, Sec. 4.

Section 127 (1) of the Administration Act provides: "If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate."

Held, that the words "living in adultery at the time of his death" refer to a state of affairs existing at the death of the husband and it is not sufficient to prove that the wife was living in adultery, say for two years, before the death of her husband, or to show isolated acts of adultery committed a long time prior to the husband's death.

ACTION by the administrator of the estate of Dominic Burns, deceased, asking that the sealing in British Columbia of the letters of administration of the estate of James Francis Burns, deceased, obtained in the Province of Alberta, should be revoked and administration of the estate of James Francis Burns be granted to him as next of kin. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 19th of May, 1937.

Lennie, K.C. (*McMaster,* with him), for administrator of estate of Dominic Burns.

Cassidy, K.C., for Michael Burns.

W. B. Farris, K.C. (*G. S. Miller,* with him), for defendant.

Cur. adv. vult.

26th May, 1937.

ROBERTSON, J.: The plaintiff is administrator of the estate of Dominic Burns who died on June 19th, 1935, leaving him surviving a nephew, James Francis Burns, who died, without issue, on December 31st, 1935, at Calgary, Alberta, which, as is admitted, was his place of domicil. In 1923 the defendant married James Francis Burns. She obtained administration of his estate in the Province of Alberta. Later, on September 22nd, 1936, the letters of administration were sealed under the Probates Recognition Act of this Province. It is clear

James Francis Burns was entitled to an interest in the estate of Dominic Burns. In 1936 the defendant demanded an accounting from the plaintiff of the administration of the assets of the estate of Dominic Burns. This was refused. The defendant then applied under section 91 of the Trustee Act. The application stood over pending the determination of an action to set aside the sealing. The plaintiff then brought this action, asking that the "sealing" should be revoked and administration of the estate of James Francis Burns be granted to him as next of kin. The plaintiff puts his case upon two grounds. He says that at the time of the alleged marriage of the defendant to James Francis Burns, she was already married to one, Huggins, who was living at the time of the alleged marriage, and that that marriage had not been dissolved; and, therefore, the defendant was not the wife of James Francis Burns and had no interest in his estate or right to apply for administration. Alternatively he relies on section 127 (1) of the Administration Act as amended by section 4 of Cap. 2, B.C. Stats. 1925, which provides as follows:

> If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate.

Referring now to the first point: The evidence shows, as a matter of fact, that the defendant was not married to Huggins. The plaintiff's counsel, however, submits that the defendant is estopped either *in pais,* or *quasi* of record, from saying that she was not married to Huggins. He led evidence from which it appears that the defendant and her husband separated in 1926; that in that year she took proceedings against him under the Deserted Wives' Maintenance Act; that in those proceedings she swore, falsely, that she had been married to Huggins in 1914; that she did not know whether he was alive or dead; that she had got a divorce from him in Chicago in 1919 and that she was "free from him." As the very evidence relied upon, as creating an estoppel, shows the defendant was free to marry, I cannot see how it assists the plaintiff. Then it is said there is an estoppel by record, the record consisting of the certificate of the magistrate who heard the charge under the Deserted Wives' Maintenance Act. The effect of this certificate is stated in

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1937

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BURNS

Robertson, J.

section 45, Cap. 245, R.S.B.C. 1924, to "be a bar to any subsequent information or complaint for the same matter against the same defendant." The plaintiff has put in part of the defendant's discovery in which she says, speaking of the charge:

It was dismissed that we would settle out of Court.

This would tend to show that the dismissal was not on the merits. However, giving full effect to the certificate I do not see how it assists the plaintiff. No reasons are given in the certificate for the dismissal. Under the Deserted Wives' Maintenance Act an order may be refused for various reasons. It does not follow at all that the petition was dismissed because the defendant said she had been married to Huggins. In fact it would not follow because she said, at the same time, she had been divorced from him, prior to her marriage to Burns.

Further, in my opinion, estoppel *in pais* does not arise because the plaintiff has not shown facts establishing the "essential factors" giving rise to an estoppel which are set out by Lord Tomlin in *Greenwood* v. *Martins Bank,* [1933] A.C. 51 at p. 57 when he delivered the unanimous opinion of the House of Lords as follows:

(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission.

Then turning to the second branch: First of all there is no evidence that the defendant left her husband. The second requirement of the statute is that she "is living in adultery at the time of his death." In my opinion this statute means exactly what it says. This means a state of affairs existing at the death of the husband. It is not sufficient to prove that a person was living in adultery, say for two years, before the death of her husband. It is not sufficient to show isolated acts of adultery committed a long time prior to the husband's death. There must be evidence from which the Court can draw the inference that the wife was living in adultery at the time of her husband's death. Several of the Provinces have exactly the same legislation on this point. Counsel have not been able to find any

Canadian authorities upon the section. They have however found two American decisions of the Courts of the State of Indiana based upon a very similar statute which I think support the view which I have taken. The first is *Zeigler* v. *Mize* (1892), 31 N.E. 945. In that State, a statute prohibited a wife who "shall have left her husband, and shall be living at the time of his death in adultery" from sharing in his estate. The facts were that the wife had separated from the husband shortly after their marriage and had, later, lived in adultery with a man for several years until his death, which occurred several years prior to the death of her husband. The Court held that this was not a bar to her right under the statute. The other case is *Spade* v. *Hawkins* (1916), 110 N.E. 1010. In that case the facts were the husband had died October 9th, 1912. The trial judge had found that:

> Since about October, 1906, and up to and including October 9, 1912, appellant lived from time to time in the practice of adultery with persons whose names are not disclosed by the evidence.

The Court ordered a new trial. At p. 1012 Mr. Justice Caldwell, who delivered the judgment of the Court, said:

> Nothing can be added to a special finding by presumption, inference, or intendment, and when a special finding is silent upon material point, it is deemed to be found against the party upon whom rests the burden of proof. *Donaldson* v. *State* [(1906)], 167 Ind. 553; 78 N.E. 182; *Garretson* v. *Garretson* [(1909)], 43 Ind. App. 688, 88 N.E. 624. However, where the primary facts found lead to but one conclusion, there is no occasion for a statement of the ultimate facts. . . . It is just as reasonable to conclude from such facts that while appellant now and then between the dates named was guilty of adultery, there may have been an absence of a continuous purpose and inclination to do wrong, and that previous to her husband's death appellant had reformed and that at that time she was living innocently.

In other words what he was saying was: It must be clear that at the time of the death of her husband the wife was living in adultery. Again at p. 1013 he says as follows:

> It is true that where a woman is proven to have been unchaste or to have been guilty of specific acts of adultery at a certain time, a presumption of continuance to a subsequent time is, under some circumstances, indulged. It is only reasonable, however, that there be a limit to the application of this rule. If in a given case there is in fact such a continuance for a long period of time, it is reasonable that there will be some visible overt act, some open manifestation of the fact. Here for a period of two years there is no evidence that appellant was guilty of a single act of indiscretion or of any lascivious conduct or of any suspicious actions, nor were there any

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incriminating circumstances, as that she met or associated with men at questionable times or places, or in the midst of improper surroundings, or that her associates were persons of bad repute. Divorce her from her past, and during the two years she environed herself with the indicia of chastity as far as the evidence reveals. Under such circumstances, it is doing violence to mental processes to presume that she was living in adultery at the time of the decease of her husband.

Now the facts in this case are that prior to her marriage to Burns, the defendant had lived in adultery with Huggins, up to about 1919. There is nothing to show what her actions were between that date and 1923 when she married Burns, with whom she lived for about three years and then separated. It is shown that she had a child in 1931. It is also shown that she went into a mental hospital in 1934 and continued there until 1935 and that she was suffering from neuro-syphilis. There is nothing to show when she became infected with the disease mentioned or by whom she was infected; in fact, it might have been hereditary. There is nothing to show any improper conduct on her part since she left the hospital. For these reasons I think the plaintiff has failed to bring the defendant within the section of the statute. The action is dismissed with costs.

At the conclusion of the plaintiff's case, the defendant applied to withdraw the counterclaim. The plaintiff would not consent. The defendant then put in evidence to show the plaintiff's refusal to account and closed her case. The defendant's reason for wishing to withdraw was, that, the relief asked for in her counterclaim, was that asked for in the pending application under section 91 to which I have referred. I think the matter should be dealt with in Chambers as section 91 provides. I therefore dismiss the counterclaim, but, under the circumstances, without costs.

Action dismissed.

MACAULAY NICOLLS & MAITLAND COMPANY LIMITED v. BURMAN.

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April 9, 12;
June 14.

Principal and agent—Sale of warehouse—Negotiations with purchaser—Subsequent sale through other agent on same terms—Efficient cause of sale—Right of commission.

In May, 1917, the plaintiff took over the management and collection of rents of a warehouse property owned by the defendant and situate in close proximity to the departmental stores of David Spencer Ltd., in Vancouver. In 1926 the property was listed with the plaintiff for sale at $41,250. Upon the depression coming on in 1929, the plaintiff recommended that an offer of the Spencers of $25,000 for the property be accepted. This the defendant refused. In 1930 she lowered her selling price to $38,000. The plaintiff continued his endeavours to make a sale to the Spencers and in March, 1930, the defendant listed the property with the plaintiff at $30,000. In January, 1936, the defendant gave one Burr exclusive listing of the property for seven days at $26,000, but nothing came of it. On February 4th, 1936, the defendant gave an exclusive listing to the plaintiff at $28,000 which was never cancelled and shortly after she orally agreed to lower the price to $27,000. The plaintiff continued in his endeavours to make a sale but the Spencers would not pay more than $26,000. In the latter part of May, 1936, one *MacGill* the defendant's solicitor negotiated with Victor Spencer to bring about a sale and finally meeting him on June 1st, 1936, a sale was made at $27,000. In an action for a commission or in the alternative for a *quantum meruit* for services in connection with negotiations for a sale of the property:—

Held, that while the Spencers were approached by others than the plaintiff none of them appears to have had a definite listing (except Burr who had one for a short period) and the evidence discloses that the plaintiff did the real spade work and was most persistent of those who negotiated with the Spencers—in fact, the only really persistent negotiator. The statement of the law that "if the relation of the buyer is really brought by the act of the agent he is entitled to commission, although the actual sale has not been effected by him" is applicable here. The plaintiff is entitled to damages on a *quantum meruit* assessed at the full amount of the regular commission.

ACTION for a commission upon the sale of a warehouse in Vancouver and alternatively a *quantum meruit* for services rendered in connection with negotiation of the sale. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 9th and 12th of April, 1937.

Maitland, K.C., and *Dryer*, for plaintiff.

S. S. Taylor, K.C., and *MacGill*, for defendant.

Cur. adv. vult.

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14th June, 1937.

MANSON, J.: The plaintiff, a duly licensed real estate agent, claims as against the defendant, the executor and trustee of the estate of the late Robert Mee a commission upon the sale of a warehouse in the downtown part of the City of Vancouver, British Columbia, and alternatively a *quantum meruit* for service rendered in connection with negotiation of the sale.

The plaintiff took over the management of the property and the collection of rents in May, 1917, and continued in charge until the sale of the property on June 1st, 1936, except for the period September 3rd, 1930 (Exhibit 11), to March, 1933. The property was sold on June 1st, 1936, to Victor Spencer of David Spencer Ltd. The latter company operates one of the three big departmental stores in the City of Vancouver and its store premises are situate in close proximity to the property sold to Victor Spencer by the defendant. On the 24th of November, 1926, the plaintiff noted in writing a listing of the property for sale at a price of $41,250 (Exhibit 7). In 1929 the depression came upon the City of Vancouver, as it came upon Canada and the United States generally. The defendant then became anxious to sell. Mr. Nicolls of the plaintiff company wrote the defendant very fully on March 31st, 1930, reviewing the situation with respect to the property—noting that warehouse properties were a drug on the market, that the defendant's property was not modernly equipped, that necessary alterations and repairs would cost $4,000 and recommending sale. Mr. Nicolls stated that the property could not be sold as an investment but that he had been negotiating with David Spencer Ltd. "who own the adjoining 100′ and who contemplate some time putting a garage upon it in connection with their store." He stated that Spencers had offered $25,000 and recommended the offer for acceptance in face of an annual tax outlay of $1,400, $4,000, or $5,000 for repairs and a low rental income (Exhibit 2). The defendant did not favourably consider the offer but apparently lowered her selling price to $38,000 in June, 1930 (Exhibit 7). Spencers who were the logical prospective purchasers were in no hurry to buy during the depression and were cautious about making an oral offer lest the defendant might be impressed with their desire

to purchase and hold out for a price beyond what they deemed a reasonable figure. Nevertheless the plaintiff continued its endeavours to bring about a sale and in March of 1932 prepared a written listing (Exhibit 9) at a price of $30,000. The defendant did not sign the listing but she did apparently consult her co-heirs in the East and on the 2nd of June, 1932, she authorized the plaintiff to wire one of them in her name pressing for a reply to her communication to them (Exhibit 8). The negotiations with the defendant for a listing at a price of $30,000 were still under way on July 21st, 1932 (Exhibit 10). On the 27th of June, 1933, the defendant gave a written exclusive listing to the plaintiff, good for a period of six weeks at a figure of $30,000. Negotiations with Spencers were continued by the plaintiff but unsuccessfully through 1934 and on March 6th, 1935, the plaintiff wrote Col. Victor Spencer who wished a lower price than the one quoted, seeking from him a definite offer to be laid before their client (Exhibit 12). On August 6th, 1935, the defendant gave the plaintiff a written exclusive listing for a period of 30 days at a price of $30,000 on terms—the commission to be $1,000 (Exhibit 13). Spencers would not meet that price, and negotiations continued after the expiry of the listing. On the 23rd of January, 1936, the defendant gave to one Burr a written exclusive listing for a period of seven days at a price of $26,000 cash (Exhibit 14). Two days later *J. H. MacGill,* the solicitor of the defendant, wrote Col. Victor Spencer offering him the property at a net cash price of $25,000, the offer to be subject to the exclusive listing given to Burr (Exhibit 15). The defendant was frequently in and out of the office of the plaintiff at this period—they were in charge of rentals, etc.—and on the 4th of February, 1936, Mr. Nicolls of the plaintiff noted in his diary "Mrs. Burman advises property off market. Is open to offer of $30,000. It is in our hands exclusively" (Exhibit 6). The defendant does not appear to have been able to make up her mind and in any event was not dealing frankly with the plaintiff, having just ten days previously authorized her solicitor to offer the property at a price of $25,000. The plaintiff was actively trying to close the deal with Spencers and on February 24th, 1936, Mr. Nicolls noted in his diary "Mrs.

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Burman in presence of R. Kerr and J. R. N. says we have exclusive sale of her Block" (Exhibit 6). I accept this note as a true memorandum of fact. This oral exclusive listing was never withdrawn. Mr. Nicolls stated in his evidence that he had some fear that the defendant might "side track" the plaintiff. A price of $28,000 was definitely discussed between the defendant and the plaintiff on February 24th, 1936. On the 23rd of March, 1936, the defendant advised Mr. Kerr of the plaintiff that she had decided to make a price of $28,000 and requested that that figure be submitted to Spencers. This was done but Col. Spencer intimated he was not interested—though he obviously was—he merely wanted a lower price. On the 19th of March, 1936, a question arose in connection with a lease of a portion of the premises and the defendant agreed that Spencers should be advised before the proposed lease was consummated. Spencers were advised. About the 1st of April, 1936, the defendant gave Mr. Kerr of the plaintiff a sale figure of $27,000. This was submitted to Col. Spencer and he considered it and finally intimated he would pay $25,000 or $26,000; Spencer was still cautious about making an offer, he wanted the defendant to make a binding offer in writing. On the 16th of May, 1936, the plaintiff sought to have the defendant sign a letter authorizing the plaintiff to offer the property for sale at $27,000 cash (Exhibit 4) but this letter was never signed although it was presented to the defendant for signature. She was advised that Spencer had said he would pay $25,000 or $26,000 and that it was thought the deal could be closed—and that Spencer wanted something in writing. She refused to sign till she had seen her solicitor and the matter being pressed she advised a few days later that he had advised her not to sign the letter.

Colonel Spencer said in evidence that the plaintiff was the most persistent of the agents who approached him—that Mr. Smith of the plaintiff "did his very best" and it is to be borne in mind that the plaintiff carried on protracted negotiations with Mr. Christopher Spencer and with Mr. Will Spencer of David Spencer Ltd. before Col. Victor Spencer took charge of the handling of the matter. Colonel Spencer says further that Mr. *MacGill* came along after the 15th or 16th of May, 1936 (some-

what *dubitante* as to the date but confirmed by the evidence of Mr. *MacGill*), and offered the property at $27,000—this after, it is to be noted, Mr. Smith of the plaintiff had sought to have the defendant agree in writing to that very price (Exhibit 4). The defendant recalled Exhibit 4 on her discovery (Questions 154-157 inclusive) but could not recall it at the trial.

The defendant's recollection of events at the trial was by no means satisfactory and was not reconcilable with her evidence on discovery in some respects nor with the documents in other respects. Mr. *MacGill* says he approached Spencers with regard to the purchase of the property in 1925 at a price of $45,000 when he was told they were not buying any more property. He approached them again in 1929 but could not recall the price he quoted. He says he approached them again in 1932 and again in 1934 and again in 1935. In 1935 he says he saw Mr. Christopher Spencer several times but could make no headway. In later 1935 and January, 1936, he saw Burr the estate agent several times, discussed with him the sale of the property and the matter of an option which Burr wanted. He says that on the 25th of January he saw his client and "he understood" her to say she would take $25,000 and on the strength of his understanding he wrote Col. Spencer (Exhibit 15) only to find that his client a few days later entirely repudiated the figure of $25,000 and he was compelled to withdraw his offer to Spencer. At the end of February, 1936, the defendant reported to her solicitor her conversations with the plaintiff and he thereupon kept out of the situation until May when he again took up negotiations with Spencers and succeeded in closing the deal.

While it is a fact that the Spencers were approached by others than the plaintiff and the defendant's solicitor, none of whom appears to have had a definite listing except Burr, who had one for a short time, I have no hesitation in concluding upon the evidence that the plaintiff did the real spade work and was the most persistent of those who negotiated with Spencers—in fact the only really persistent negotiator. The plaintiff, as pointed out above, finally got Spencers to the point where they stated they were prepared to buy at a price of $25,000 or $26,000 and

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to a point where they felt they could tell their client that a deal could be closed at $27,000. This was at a time when they had an exclusive listing, as noted in Exhibit 6. It was just at that time that the defendant's solicitor stepped into the situation again. Colonel Spencer thinks that Mr. *MacGill* saw him after the 15th or 16th of May when he had his last interview with Mr. Smith of the plaintiff. Mr. *MacGill* himself says that it was towards the end of May, the 27th or 28th. The defendant gives an account of her conversation with Mr. *MacGill* in her examination for discovery. In Question 175 she says that Mr. *MacGill* said to her "What do you say if I go and see the man?" (presumably Spencer). Her answer was "It is immaterial to me and that is all there was to it." Hereunder is a further excerpt from the examination of the defendant for discovery:

Maitland: Now, I want to ask a few questions in regard to Mr. *MacGill*. Did he ever get instructions in writing from you at any time to sell this property? No.

No. Did he ever have any listing from you in writing to sell this property? No.

Did he ever have an exclusive listing to sell this property, from you? No.

No. Did he ever bring you an offer in writing from anybody for this last sale that was consummated to sell this property? No.

How many times did he submit to you offers that he had from people quoting a price on this? I think I only got the one offer.

I think this action must be determined on what transpired after the exclusive listing given by the defendant to the plaintiff on the 4th of February, 1936, which listing she did not cancel. The plaintiff worked conscientiously from the 4th of February onward to close the deal. They were acting for a difficult client. After they got her to fix orally a sale figure of $27,000 they pressed Spencer very persistently to accept and they got him to the point where he displayed interest in the price and requested that the vendor's offer be reduced to writing. The defendant admits that she agreed to a price of $27,000 but she could not be persuaded to do the businesslike thing and put her offer in writing. Instead she went to her solicitor and presumably told him the situation and he advised her not to sign the written authority at the $27,000 price and he suggested further that he might go and see Spencer. He saw Spencer and closed at $27,000 on the 1st of June. Whether Mr. *MacGill* was of the

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opinion there was some reason why Spencer would not deal through the plaintiff or not I do not know. Certainly there was, upon the evidence, no foundation for any such idea. Colonel Spencer made it clear in his evidence that in so far as he was concerned what he wanted was an offer in writing. One wonders why Mr. *MacGill,* if he was fully informed by his client of the situation, did not get in touch with the plaintiff and enquire whether or not there was any stumbling block to the closing of the deal and as to whether or not he could be of assistance. I have no manner of doubt that if the defendant had done what her agent asked her to do, namely, put her oral offer in writing, the plaintiff would have closed the deal. It was her unbusinesslike refusal that frustrated the consummation of the deal by the plaintiff. Under those circumstances the plaintiff is entitled to recover damages as against the defendant. Its claim was made promptly: *vide* Exhibit 5. The *quantum meruit* is assessed at the full amount of the regular commission, *viz.,* $1,175: *vide Kahn* v. *Aircraft Industries Corporation,* [1937] 3 All E.R. 476 and cases therein cited, and also *Burchell* v. *Gowrie and Blockhouse Collieries, Limited,* [1910] A.C. 614. The latter case is also in point on the general principles to be applied in consideration of the case at Bar. The authorities are clear that the mere fact that a plaintiff was not the first to introduce the property does not determine the matter of the plaintiff's claim for commission: *vide Barnett* v. *Brown and Co.* (1890), 6 T.L.R. 463 cited by MARTIN, J.A. (as he then was) in *Wallace* v. *Westerman* (1928), 40 B.C. 35. Erle, C.J. said in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681 at p. 685,—

> If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him.

In my view that statement of the law is applicable here—*vide* also *Bunting* v. *Hovland* (1924), 33 B.C. 291.

Judgment accordingly. Costs will follow the event.

Judgment for plaintiff.

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June 7, 14.

CANADIAN BANK OF COMMERCE v. YORKSHIRE & CANADIAN TRUST LIMITED.

Banks and banking—Security on land—When valid—Assignment of moneys under agreement for sale of land—Chose in action—Assignment of—When absolute—Can. Stats. 1934, Cap. 24, Sec. 75 (2) (c)—R.S.B.C. 1924, Cap. 135, Sec. 2 (25).

The prohibition against taking security on land in The Bank Act is only against the taking of security to secure future advances at a time when no advance has been made, it does not apply when additional security is taken after an advance has once been made. An assignment of moneys due and to become due under an agreement for sale of land was found to have been taken as additional security for a past debt, and it was held that it did not become invalid through the fact that payments received thereunder paid off the debt of the assignor to the bank as it existed at the times when said payments were received.

Whether an assignment of a chose in action is an equitable assignment or an absolute assignment within the meaning of the Laws Declaratory Act, all the terms of the instrument must be considered and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention of the parties was to give a charge only upon the debt or other legal chose in action the assignment is not absolute, while, on the other hand, if it is clear that the intention was to transfer all the debt or other legal chose in action to the assignee and to give him complete control, then the assignment is absolute. It is the real intention of the parties that must be ascertained and it is to be ascertained from the document itself.

SPECIAL CASE for the opinion of the Court on two questions of law arising out of an assignment of an agreement for sale to the plaintiff bank. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 7th of June, 1937.

Hossie, K.C., and *Ghent Davis*, for plaintiff.
Macrae, K.C., and *Clyne*, for defendant.

Cur. adv. vult.

14th June, 1937.

FISHER, J.: This is a special case for the opinion of the Court on two questions set out as follows:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the defendant, as personal representative of the estate of Nellie Grace Silk deceased and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the defendant?

The assignment referred to, dated July 23rd, 1929, and signed by G. B. Silk reads as follows:

As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned, under a certain agreement for sale *re* lot 18, block 31, district lot 541, group 1, N.W.D., dated the 14th of June, 1929, made between George Baillie Silk and Nanson Rothwell & Co. Ltd. are hereby assigned to the said bank, and the bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the bank and shall be paid over to or accounted for by the undersigned to the bank.

The said sums are amounts which became due and payable by Nanson Rothwell & Co. Ltd. under said agreement for sale and are still unpaid with the exception of the said sum of $574.87 which the defendant received without prejudice to the plaintiff's position.

The answers to the said questions depend upon whether the assignment as aforesaid was an equitable assignment or an absolute assignment within the meaning of the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, Sec. 2 (25), under the provisions of which the legal right to a debt or other legal chose in action may be transferred to the assignee together with all legal remedies including the right to sue in his own name. In this connection reference might be made to what is said in Halsbury's Laws of England, 2nd Ed., Vol. 4, pp. 431-2:

To be within the statute the assignment must not purport to be by way of charge only. A document given by way of charge is a document which only gives a right to payment out of a particular fund or property, and does not absolutely transfer the fund or property.

In order to determine whether an assignment purports to be by way of charge only, all the terms of the instrument must be considered, and whatever may be the phraseology adopted in some particular part, the intention must be determined on consideration of the whole. It is immaterial whether the consideration is a fixed sum or a current account, nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance. The fact that the assignment is expressed to be by way of security is not by itself sufficient to make it purport to be by way of charge only, but such an expression coupled with other circumstances may have that effect. An assignment of so much of a future debt as shall be enough to satisfy an uncertain future indebtedness is an assignment by way of charge only.

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Counsel for the defendant would appear to concede that, as stated in one of the paragraphs as above set out from Halsbury, the fact that the assignment is expressed to be by way of security is not by itself sufficient to make it purport to be by way of charge only but relies on the statement that "such an expression, coupled with other circumstances, may have that effect." That the circumstances here are unusual is quite apparent from a perusal of the special case. It may be noted in the first place that the assignment is to a bank and refers to moneys payable under an agreement for sale *re* certain land and it has already been adjudged in this Court in the case of *Walker and Roberts* v. *Silk*, 43 B.C. 43; [1930] 2 W.W.R. 407, that the said land and other properties "were purchased with the moneys of the above-named Nellie Grace Silk, deceased, and are the property of her estate and in so far as any portions thereof are held in the name of the defendant" being the said G. B. Silk, "they are so held by him in trust for the said estate." With reference to this it must also be noted that the special case says, in part, as follows:

> The reasons for the said judgment are contained in volume 43 of the British Columbia Reports at page 43, and the hereinbefore described property is referred to therein as the "Howe Street property." The parties hereto admit the validity of the said judgment and further admit the findings of fact contained in the said reasons for judgment.

Counsel on behalf of the defendant submits that the plaintiff bank is not in a position to convey to the purchaser upon payment pursuant to the terms of the said agreement for sale and that the defendant is unwilling to do so except upon payment to it. It is argued therefore that under such circumstances either the assignment must be an equitable one or the transaction contrary to the provisions of The Bank Act, Can. Stats. 1934, Cap. 24, if under it the plaintiff bank claims that it can call for a conveyance. Reference may be made here to two cases, *viz.*, *Re Wiarton Lumber Co. Limited*, 26 O.W.N. 21; 4 C.B.R. 477; [1924] 2 D.L.R. 160, and *Re Shaw*, 5 C.B.R. 825; [1925] 3 D.L.R. 1205. Counsel for the defendant agrees that these cases hold that a bank may take an assignment of moneys due under an agreement for the sale of land as additional security for a past debt but contends in the first place that the assignment in question herein was not taken by the plaintiff bank as addi-

tional security for a past debt. In the second place it is contended by counsel on behalf of the defendant that in any event on September 18th, 1929, the then existing debt was paid off and that thereafter the assignment operated only to secure future advances and is therefore invalid. Counsel refers to paragraph 12 of the special case, reading as follows:

12. On the 18th day of September, 1929, the said Nanson Rothwell & Co. Limited paid to the plaintiff the sum of $5,000, $3,500 of which was applied against the loans made by the plaintiff to the said George Baillie Silk, as appears in paragraph 9 hereof, and the balance of $1,500 was deposited in the current account of the said George Baillie Silk with the plaintiff. On the 23rd day of June, 1930, the said Nanson Rothwell & Co. Limited paid to the plaintiff the sum of $4,338.92, $4,000 of which was applied against the loans made by the plaintiff to the said George Baillie Silk, as appears in paragraph 9 hereof, and the balance of $338.92 was deposited in the current account of the said George Baillie Silk with the plaintiff.

So far as the submission of counsel for the defendant is based on the provisions of The Bank Act I have to say that I find as a fact that the said assignment was taken by the plaintiff bank as additional security for a past debt of $500 contracted to the bank in the course of its business and was therefore not contrary to the provisions of The Bank Act. Such being the case, I do not think that what was a valid assignment became an invalid one through the circumstances set out in said paragraph 12. I think it is clear that the prohibition is only against the taking of the security to secure future advances at a time when no advance had been made and that the objection does not apply when additional security is taken after an advance has once been made.

So far as the submission of counsel for the defendant is based upon the contention that a conveyance to the said Nanson Rothwell & Co. Ltd. will not be forthcoming except upon payment of the said moneys to the defendant, I have to say that in my view the rights of the parties depend upon whether or not the said assignment was an absolute one within the meaning of the said subsection. If it was, then the provisions of said section 2 (25) apply and the present rights of the parties will have to be determined accordingly. I pause here to state that I do not think that the Land Registry Act, R.S.B.C. 1924, Cap. 127, affects the situation. See *The Canadian Bank of Commerce* v.

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The Royal Bank of Canada, 29 B.C. 407, especially at 417-18; [1921] 2 W.W.R. 462. If the assignment was an absolute one within the statute then the result is that the moneys payable under the said agreement for sale are payable to the plaintiff and without deciding the question I would say that upon payment of such moneys the purchaser under the agreement for sale would be entitled to a conveyance from the vendor or from the defendant as the present registered owner of the property who, in my view, would be in no better position than the vendor. It is quite apparent that there is no suggestion that said agreement for sale is void or that the purchaser thereunder is not entitled to a conveyance upon payment of the purchase-moneys. As already indicated the whole issue is as to who is entitled to receive the balance of the purchase-moneys. What is the position of the plaintiff with regard to such moneys? This brings me back to the question whether or not the said assignment was an absolute one within the meaning of said subsection for if it was then the right of the assignee would be paramount to that of the persons claiming under the trust. In my opinion this question must be settled by a consideration of the whole of the particular instrument in question herein in the light of the circumstances as they were at the time the assignment was given and I do not think this question is affected by the taking of the subsequent assignment (Exhibit 4). Counsel for the defendant relies especially upon *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765, especially at 774; 67 L.J.Q.B. 484; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613, especially at 616; 68 L.J.Q.B. 921; and *Jones* v. *Humphreys* (1901), 71 L.J.K.B. 23; [1902] 1 K.B. 10. On the other hand counsel for the plaintiff relies especially on *Burlinson* v. *Hall* (1884), 12 Q.B.D. 347, at 349-350; 53 L.J.Q.B. 222; *Comfort* v. *Betts*, [1891] 1 Q.B. 737; 60 L.J.Q.B. 656; and *Hughes* v. *Pump House Hotel Company*, [1902] 2 K.B. 190, especially at 195, 197, 198; 71 L.J.K.B. 630. In *Durham Brothers* v. *Robertson*, *supra*, the Court held the particular document in question was not absolute but conditional and the terms of the document are set out in the head-note of the case. At pp. 769-774 Chitty, L.J. says in part

as follows: [His Lordship quoted from pp. 769-774 and continued].

[His Lordship quoted at length from *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239, at 242; 58 L.J.Q.B. 459; *Burlinson* v. *Hall, supra,* at p. 350; *Hughes* v. *Pump House Hotel Company, supra,* at pp. 195, 197-8 and continued].

I have set out a considerable portion of the judgments in the cases as aforesaid because they deal with many contentions similar to those put forward by counsel on behalf of the defendant in the present case and because it is from a comparison of the forms of assignment and a perusal of the comments thereon in such cases that I have reached my conclusion as to the principles to be applied. In every case all the terms of the instrument must be considered and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention of the parties was to give a charge only upon the debt or other legal chose in action the assignment is not absolute, while, on the other hand, if it is clear that the intention was to transfer all the debt, or other legal chose in action, to the assignee and to give to the assignee complete control, then the assignment is absolute. Thus it would seem that it is the real intention of the parties that must be ascertained and that this is to be ascertained from the document itself. It may be said that one must have in mind the circumstances under which the debt or other legal chose in action arose in order to understand the nature of the subject-matter of the assignment but this cannot mean that the intention of the parties must be determined by having in mind what was not known to either of the parties at the time. In the present case it is or must be admitted that at the time the assignment was given the assignor Silk was apparently the person entitled to receive or claim the moneys referred to in the assignment. I think it is a fair inference that the assignment was given and taken on that basis. Therefore the fact that this Court has since held that Mr. Silk held the said lot in trust cannot be a circumstance to be taken into consideration in coming to a conclusion as to what the intention of the parties was at the time of the

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assignment. In the same way the fact now apparent that the conveyance will have to be given by some one else in a representative capacity cannot be a circumstance to be taken into consideration in coming to a conclusion as to what the intention was. Similarly the argument now advanced by counsel on behalf of the defendant, which, in my opinion, is unsound, being in effect that the plaintiff bank cannot sue now because the conveyance cannot be given by itself or its assignor, is not based upon a circumstance to be taken into consideration in determining the intention of the parties who no doubt thought at the time that there would be no difficulty about the conveyance. In other words, the intention must appear from the instrument itself considered in the light of the circumstances existing at the time. Applying this principle I hold that it is clear that the intention of the parties was not to give to the assignee a charge only but to transfer all the debt or chose in action to the bank as assignee and to give it complete control over the moneys. Such being the intention it follows from what I have already said that the assignment was an absolute assignment within the meaning of the said subsection and in such case I do not think it assists the defendant to argue that in view of the findings of the Court in the *Walker and Roberts* v. *Silk* case as aforesaid the assignor had nothing at the time of the assignment and therefore could transfer nothing. Undoubtedly at the time of the said agreement for sale, dated June 14th, 1929, Silk had the legal estate in the property, which he sold. Under the agreement for sale he had the right to receive the purchase-moneys and Nanson Rothwell & Co. Ltd. obtained the right to call for the legal estate upon payment as *bona-fide* purchasers for value without notice. The assignment was made on July 23rd, 1929, and admittedly nothing happened before then to give notice that there was anything wrong. If Silk could thus give a valid agreement for sale of the property itself and the purchaser be protected I think it follows that he could give a valid assignment of the balance of the purchase-moneys to the bank as assignee for valuable consideration and the assignee be in the same position as a *bona-fide* purchaser for value without notice. As already intimated, therefore, the real issue is as to the nature and effect of such assign-

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ment. If the assignment was, as I hold, an absolute assignment within the meaning of the statute and therefore a legal assignment, then the legal estate, or the best right to call for same, passed to the assignee and the defendant cannot follow and recover the trust property or money into which it has been converted because such money has come into the hands of a purchaser for valuable consideration without notice of the trust, "who has acquired a right to it paramount to that of the persons claiming under the trust by reason of his having the legal estate therein or the best right to call for it": see Halsbury's Laws of England, Vol. 28, p. 208, sec. 415, and cases there referred to.

My answers to the questions, as above set out, therefore are: 1. Yes. 2. The said sums should be paid to the plaintiff.

Judgment accordingly.

Judgment accordingly.

OFFERDAHL *ET AL.* v. OKANAGAN CENTRE IRRIGATION AND POWER COMPANY LIMITED AND GRAHAM.

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March 2, 3; *April* 26.

Negligence—Master and servant—Negligent driving of servant—Course of employment.

The deceased Offerdahl, a passenger on a motor-truck loaded with boxes of apples, was sitting on one of the boxes at the back of the truck when the defendant Graham, driving a car of the defendant company coming in the opposite direction "sideswiped" the on-coming motor-truck. Offerdahl was thrown from the motor-truck and from injuries received he died nine days later. The defendant company had an irrigation system of which the defendant Graham was superintendent. At the instance of the defendant company Graham had been appointed water bailiff by the Government with jurisdiction over areas beyond that of the defendant company, and over which it had no control, his duties as such being under the direction of the district engineer. The defendant company had previously had trouble with other water users below their own system and an arrangement was made between the defendant company and the Winfield Irrigation District, which was below that of the defendant company, whereby the defendant company carried the Winfield water (the Winfield Irrigation District having a water licence

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of its own) through its flumes and delivered it into the Winfield flumes within its own district. At the time of this accident Graham had been inspecting the Winfield flume as water bailiff under the superintendence of the district engineer. In an action by the wife and children of the deceased for damages, one-quarter of the blame for the accident was attributed to deceased and three-quarters to Graham, and it was further held that Graham was at the time working in the course of his employment for the defendant company. On appeal by the defendant company:—

Held, reversing the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the defendant company is not liable for Graham's negligence at a time when he was performing certain duties as water bailiff at a place beyond the point where the appellant company delivered water for further distribution, and in an area over which it had no control.

APPEAL by defendant company from the decision of McDONALD, J. of the 27th of November, 1936, in an action brought by the wife, father and two children of Irving Offerdahl, deceased, for damages for the death of said Irving Offerdahl from injuries received by reason of the negligence of the defendant Graham, the servant of the defendant Okanagan Centre Irrigation and Power Company Limited in the operation of a motor-vehicle. On the 9th of September, 1935, the deceased was riding on a motor-truck driven by one Drasching. The truck was partly loaded with boxes of apples in the rear, and deceased was sitting at the back with his feet hanging over on the left side. When proceeding south on the highway about one-quarter of a mile north of Winfield railway station, they were met by a motor-vehicle owned by the defendant company driven by the defendant Graham. The Graham car "sideswiped" the Drasching car and the impact was sufficient to throw deceased from the car, causing injuries from which he died on the 18th of September following. It was found on the trial that as Graham failed to keep a proper look-out for approaching traffic and to drive on his own side of the road therefore he was responsible for the accident.

The appeal was argued at Vancouver on the 2nd and 3rd of March, 1937, before MARTIN, McPHILLIPS and MACDONALD, JJ.A.

W. B. Farris, K.C. (*H. V. Craig,* with him), for appellant: The defendant Graham was superintendent of the defendant

company but he was at the same time a water bailiff under the Provincial Government, and as such at times acted under the direction of the Provincial engineer. At the time of the accident he was not engaged on the business of the defendant company but was engaged as water bailiff under the direction of the Provincial engineer. He was working on other people's property and outside the property of the defendant company. The defendant company should not be held liable for any act or default of Graham at the time of the accident: see *Union Steamship Company* v. *Claridge,* [1894] A.C. 185 at p. 188; *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; *Willis* v. *Belle Ewart Ice Co.* (1906), 12 O.L.R. 526; *Harrington* v. *W. S. Shuttleworth and Co., Limited* (1930), cited in 171 L.T. Jo. 71; *Battistoni* v. *Thomas,* [1932] S.C.R. 144; *Britt* v. *Galmoye and Nevill* (1928), 44 T.L.R. 294; *Mitchell* v. *Crassweller* (1853), 13 C.B. 237.

Bredin, for respondents: The defendant company had to supply water to the flume that he was inspecting and he drove there in the defendant's car. He was superintendent for the irrigation system of the defendant company, and the work he was doing was included in that employment. He was paid by the defendant company as a water bailiff. The engineer has full control and they are all subject to the engineer's orders. That Graham was acting in the course of his employment with the defendant company see *M'Kenzie* v. *M'Leod* (1834), 10 Bing. 385; *McKay* v. *Drysdale,* [1921] 2 W.W.R. 592; *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; *St. Helens Colliery Co.* v. *Hewitson,* [1924], A.C. 59; *Consolidated Mining & Smelting Co. of Canada* v. *Murdoch,* [1929] S.C.R. 141 at 145; *Halparin* v. *Bulling* (1914), 20 D.L.R. 598. That the defendant company owned the car is *prima facie* evidence of its use on behalf of the owner: see *Barnard* v. *Sully* (1931), 47 T.L.R. 557.

Farris, replied.

Cur. adv. vult.

26th April, 1937.

MARTIN, C.J.B.C.: I agree that this appeal should be allowed for the reasons given by my learned brother MACDONALD.

MCPHILLIPS, J.A.: This appeal was taken by the company

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only, the defendant Graham not appealing. The action was one for claimed negligence in the operating of an automobile by Graham the superintendent of the appellant company, the automobile being the property of the company, whereby upon a highway, owing to a collision with another automobile, one Irving Offerdahl was so seriously injured that death ensued. The evidence is very voluminous but upon being carefully scanned and analyzed I am firmly of the opinion that the learned trial judge arrived at a proper conclusion in imposing liability upon the appellant company. The appellant company appealed upon the usual grounds denying negligence, but in this Court abandoned all the grounds save one and that was confined to ground No. 9:

> That at the time of the accident the defendant, Ernest St. Clair Graham, was not engaged upon the business of the defendant, Okanagan Centre Irrigation and Power Company Limited, and that the said defendant company should not be held liable for any act or default of the said defendant Graham occurring at that time.

Shortly it may be stated that troubles had arisen from users of water below the water distributed in the main to users above, and in the result pressure was brought to bear upon the company by the Government so that the company delivered the water into what is called a by-pass flume not built by the company, but the company as to their own flume had to expend some $10,000 "to carry that down . . . and we wanted to get a little revenue." The above is a statement of Marshall the manager of the appellant company. Therefore it is apparent that the appellant company was materially interested in seeing that the water delivered got to the users of the water below and interested to see that no obstruction would take place in the by-pass flume. Now Graham was the superintendent for the appellant company and he was at the time of the accident driving the automobile of the appellant company when the accident took place being upon a trip of inspection along the by-pass flume and said in his evidence he took his instructions from the appellant company, and he said he had no set time to do this but had to supervise the flume and that he was doing this upon this occasion when the accident took place. [After quoting from the evidence at length his Lordship continued].

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I am satisfied that the learned trial judge who heard all the witnesses was justly entitled to come to the conclusion which he did. I do not hesitate to say that it is nothing but idle contention to advance the argument that upon this evidence the appellant company can be excused from liability. Graham, the superintendent of the appellant company, was upon the company's business in the automobile of the company and was in the course of his employment and on his master's business.

Some of the relevant authorities might be referred to in this connection: *West and West* v. *Macdonald's Consolidated Ltd. and Malcolm,* [1931] 2 W.W.R. 657; *Battistoni* v. *Thomas* (1931), 44 B.C. 188; [1932] S.C.R. 144; *Harris* v. *Brunette* (1894), 3 B.C. 172; *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144; *Storey* v. *Ashton* (1869), 38 L.J.Q.B. 223 at 224.

Upon the evidence as I view it Graham the superintendent of the appellant company was at the time of the accident in the course of his employment and acting in the discharge of his duty to the appellant company and that being the case liability for the accident necessarily falls upon the employer which in this case, in my view, is the appellant company (*St. Helens Colliery Co.* v. *Hewitson,* [1924] A.C. 59, 92; *Consolidated Mining & Smelting Co. of Canada* v. *Murdoch,* [1929] S.C.R. 141, 145; *Halparin* v. *Bulling* (1914), 20 D.L.R. 598; *McKay* v. *Drysdale* (1921), 30 B.C. 81; *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; Beven on Negligence, 4th Ed., Vol. 1, p. 582).

In my opinion therefore the learned trial judge arrived at a proper conclusion when he said "It is seriously contended that Graham was not although being the servant of the defendant company, actually working in the course of his employment for the company at the time of the accident." This submission, I think, must be rejected. I am satisfied upon the evidence that the defendant company is responsible under the circumstances for their servant's negligence.

I would dismiss the appeal.

MACDONALD, J.A.: This appeal is brought on behalf of the appellant company only. It was held liable in damages for the negligence of Graham, its co-defendant in the action, on the

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ground that the latter was engaged on the company's business when the accident occurred. The evidence on this point is indefinite and unsatisfactory. The details necessary for an intelligent view of the facts were not properly elucidated.

I will outline the facts and inferences in a light most favourable to respondent's contention and then enquire, if even on that state of facts, the appellant company can be held liable. Graham was its superintendent. He was driving the company's car at the time of the accident. For some purpose not clearly stated the appellant by arrangement with the Government procured Graham's appointment as a water bailiff under the Water Act with jurisdiction in an area over which it had no control. The Minister of Lands appoints a water bailiff on the recommendation of the Comptroller of Water Rights. The bailiff takes his directions not from the appellant but from a district engineer. Relevant statutes are B.C. Stats. 1925, Cap. 61, Sec. 51, and R.S.B.C. 1924, Cap. 271, Sec. 299 (2), and Sec. 300. It is therein provided that water bailiffs shall be under the direct supervision of the engineer of the Water District within the locality to which he is assigned. He is *qua* water bailiff a servant of the Crown in no way subject to the direction or control of the appellant while so employed.

From the foregoing it should be clear that as the accident happened while Graham was performing his duties as a water bailiff in an area under the control of another company he was not acting in the course of and within the scope of his employment as a servant of the appellant. However, it appears from the evidence that, to some degree at least, the appellant company considered that in so doing he was advancing its interests. Picking up the threads of evidence pointing in that direction Graham when asked his occupation said he was "water bailiff for the Okanagan Centre Irrigation and Power," the appellant herein. He said too that he was "superintendent for the Irrigation Company [the appellant] which is practically the same thing." No enquiry was made as to why he considered that these two positions were practically identical. Some light is thrown on it by the evidence, equally vague, of Marshall, the manager of the appellant company. He said that "on the day of the accident"

Graham was "in the employment of the company." Then he gives some history to show how it transpired that its own superintendent was made a water bailiff. "Five or six years ago," he said, "there was a shortage of water, and the company was in trouble all the time with the water users." After explaining these difficulties and as a *sequitur* thereto, he proceeded to say:

So the company's superintendent was appointed [as water bailiff] and one of the things I helped to try to reduce—one of the ways to reduce this friction was the company's superintendent was appointed by the Minister of Lands as a bailiff to look after the water lower down.

This is vague and almost incomprehensible but no further details were given or asked for. This fact emerges, however, that the appellant company was in trouble; that friction developed with water users and to reduce or remove it, it was thought to be in the interests of the appellant company to have its own superintendent made a water bailiff. He could then enter upon and exercise jurisdiction over an adjoining area receiving its water (delivered at a certain point) from the appellant.

Again it was said to be in the interest of the appellant to have its superintendent appointed a water bailiff "so they wouldn't waste it." To whom "they" refers is not stated but the presumption is reasonably clear. He meant by it "those people down there in the adjoining district." Then Marshall continues:

We have no right of way over it as a company, but Mr. Graham by virtue of being a bailiff appointed by the Minister of Lands was able to go over it that way.

This is an indication of an advantage to appellant, again however, not clearly elucidated. It probably explains, in part, why Graham was not paid by the Government.

Mr. Marshall's counsel then attempted to summarize the situation by saying:

That is the arrangement, that your company's bailiff [he is again describing him as the bailiff of the appellant company] would do the supervising, and that is part of the arrangement your company made with the Government.

The answer to this question was:

With the minister of the Government, and the work was done under the minister and the water engineer at Kelowna. I have nothing to do with it.

The first part of this answer is an assent to the suggestion that appellant company arranged with the Government that its superintendent should be appointed a water bailiff. That in

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fact was only part of the arrangement. Appellant in the ordinary course should have nothing to do with the appointment. It intervened to procure it however to advance its own interests.

> And it is made on the terms if you did not do it [*i.e.*, arrange to have its superintendent appointed bailiff] you would have your water cut off, or words to that effect?

The answer was:

> If there wasn't enough water got past to these people then they would turn our water down to them, and therefore since then I have made that arrangement, that Mr. Graham was to be as a bailiff for the Government, and he did that work, and since then there has been no friction and that is the only material benefit we have got out of it, if you would call it a benefit.

There was an implied request that the servant should assume the duties of a water bailiff and an assent thereto by the Minister in part at least for appellant's benefit. Even apart from the evidence it is difficult to conceive of circumstances, divorced from self-interest, where one company would allow its superintendent to engage in duties foreign to his employment. I am assuming that where, as here, the appellant company actively intervened to secure an appointment for one of its own staff to a position over which in the ordinary course it would have no direction or control, relieving the Government from payment of the remuneration provided for by the Act, permitting him to use its equipment all to advance its own interests that the appointee was doing something of assistance to the business of his employer when the accident occurred. To serve its own purpose it provided for and created a dual role for one of its servants.

Assuming, however, the foregoing facts and inferences (placed as strongly as possible in respondent's favour) I am still of the opinion that the appellants are not liable for Graham's negligence at a time when, as here, he was performing certain duties as water bailiff at a place beyond the point where the appellant company delivered water for further distribution and in an area over which it had no control. One can conceive of a case where a corporation by arrangement with the appointing power might secure the appointment of one of its own servants to a public office where he would not be under its direction and control, while performing the duties of that office, yet while doing so indirectly advancing its interests. Nevertheless he would not in such a

case be acting as the servant of the company when discharging the duties of his office. Nor would it be material that at the same time he was appellant's superintendent. If the company should be willing, as it was in this case, to have its servant assume the duties of a public office, taking from his employers enough time at intervals to perform public duties appertaining thereto, the former could not be said to be engaged on the company's private business when engaged on public business or in the discharge of public duties. Again the manner in which he discharged his public duties as a water bailiff would not be material. He might use the office to advance the interests of the appellant company: nevertheless (however badly) he would be discharging the duties of his office.

If a servant filled two positions for a master one as master mechanic and another as salesman it would of course be immaterial in respect to the master's liability whether or not the accident occurred while engaged in one or the other employment. If, however, the master also permitted him to assume a public office under the Crown with duties defined by statute and with direction and control vested solely in a public official he would not be responsible for his servant's acts while so engaged although by design or otherwise he might receive a greater benefit than others in the community from the way the public official discharged the duties of his office.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *H. V. Craig.*
Solicitor for respondents: *W. B. Bredin.*

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April 21, 22; *May* 18.

VANCOUVER GROWERS LIMITED v. G. H. SNOW LIMITED.

Constitutional law—The Natural Products Marketing Act, 1934, (Dominion) ultra vires—Money received under the Act—Liability of persons receiving same—Voluntary payments—Mistake of law—Can. Stats. 1934, Cap. 57; 1935, Cap. 64.

By an agreement of the 20th of June, 1935, between the B.C. Coast Vegetable Marketing Board and the appellant, the Board agreed to designate the appellant as the agency through which the regulated product, as defined in the B.C. Coast Vegetable Marketing scheme, shall be marketed. Under its terms the appellant assumed obligations to the said Board and to the producers and agreed to duly account to the producers and to the Board for all regulated product delivered to it. The respondent brought action for an account of all moneys received by the Board and the appellant in respect to the marketing of its vegetables between the 27th of May and the 15th of July, 1935, and for an account of all levies or tolls retained by them for marketing services. A further claim was made for labour and material supplied in the packing of vegetables and for a declaration that all levies and tolls purporting to be levied by them were illegal, first, because certain conditions defined by the statute and regulations necessary to validly constitute the Board were not complied with, and second, that The Natural Products Marketing Act, 1934, (Dominion) was *ultra vires*. It was held on the trial that The Natural Products Marketing Act, 1934, was *ultra vires*, that the plaintiff had no choice but to market its products through the defendant, and as under the agreement between "the Board" and the appellant they dealt with the money jointly, they were both liable.

Held, on appeal, reversing the decision of FISHER, J., that the retention of levies and tolls was submitted to willingly. In the period in respect to which levies were made no question was raised; the payments were made voluntarily under an assumed liability creating in law no obligation to repay. The respondent, if not actually co-operating with the Board and this appellant, at least paid the levies under the impression that it was bound to do so, and the appeal should be allowed.

APPEAL by defendant G. H. Snow Limited from the decision of FISHER, J. of the 2nd of February, 1937 (reported, 51 B.C. 433). In pursuance of an agreement in writing under seal of the 20th of June, 1935, made between the B.C. Coast Vegetable Marketing Board and G. H. Snow Limited, G. H. Snow Limited was, in pursuance of the powers granted said Board, designated the agency to market any of the regulated product delivered to

it in accordance with and subject to the terms set forth in said agreement. Certain products of the plaintiff were delivered to G. H. Snow Limited to be handled and dealt with in accordance with the terms of the agreement. G. H. Snow Limited claims that it handled the products delivered to it in accordance with the terms of the agreement, and all moneys received by it from the sale of such products have been fully accounted for in statements delivered to the plaintiff in accordance with the agreement. The said defendant claims that in the latter part of August, 1935, after all proper credits had been allowed and debits made, the sum of $82.97 was owing to the plaintiff and this sum was paid into Court. The plaintiff claims that the defendant illegally exacted levies and tolls in respect to the vegetables marketed, that it illegally purported to prohibit the producing and harvesting of vegetables, and the scheme of the 23rd of January, 1935, set up under the Natural Products Marketing (British Columbia) Act and The Natural Products Marketing Act, 1934, (Dominion) was not in force, and that there is due the plaintiffs a balance of $4,412.37 had and received by the defendant to the use of the plaintiff, and a further sum of $415.07 for work done and materials supplied in packing vegetables.

The appeal was argued at Victoria on the 21st and 22nd of April, 1937, before MARTIN, C.J.B.C., MACDONALD and McQUARRIE, JJ.A.

McPhee (*Bonnell,* with him), for appellant: We rely on section 5 of Cap. 30, B.C. Stats. 1936 (Second Session), as being a bar to this action. The plaintiff dealt with G. H. Snow Limited as the agent of the Board. There is no suggestion of any bad faith on those whole proceedings. The plaintiff's dealings with G. H. Snow Limited from beginning to end was entirely voluntary. There is no evidence that G. H. Snow Limited ever compelled anyone to deliver vegetables to it. The contract shows that G. H. Snow Limited was bound to do what it did. G. H. Snow Limited acted under the orders of the Board in pursuance of the contract. It must be shown that there was compulsion, and there is not a particle of evidence of force or inducement of any kind on the part of G. H. Snow Limited. No money was

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ever paid into a joint account. On June 20th, 1935, $8,000 was advanced to the plaintiffs on future shipments. The other payments were $5,419.87 on July 8th; $5,294.05 on July 12th, and $3,077.73 on July 24th. These payments were accepted without protest or comment. That the sums claimed are not recoverable see *Halliday* v. *The Southland County Council* (1906), 25 N.Z.L.R. 939; *Spring-Rice* v. *Town of Regina* (1901), 5 Terr. L.R. 171. We adopt the argument of *Maitland, K.C.,* [*post,* p. 44] in the case against the individual members of the Board.

Higgins, K.C., for respondent: Our argument in the case against the members of the Board applies to this case: see also *Scottish Metropolitan Assurance Co.* v. *P. Samuel & Co.,* [1923] 1 K.B. 348.

McPhee, in reply, referred to *Parker* v. *The Bristol and Exeter Railway Co.* (1851), 6 Ex. 702.

Cur. adv. vult.

18th May, 1937.

MARTIN, C.J.B.C.: This appeal should in my opinion be allowed for the reasons given by my learned brother MACDONALD.

MACDONALD, J.A.: The appellant G. H. Snow Limited was co-defendant with McLenan, Gilmore and Peterson, members of the B.C. Coast Vegetable Marketing Board in an action brought by the respondent company for an account of all moneys received by them, or either of them in respect to the marketing of its vegetables between the 27th of May and the 15th of July, 1935, and for an account of all levies or tolls retained by the Board or by this appellant for marketing services. A further claim was made for labour and material supplied by the respondent in the packing of vegetables. A declaration was sought that all levies and tolls purporting to be levied by the Board or by the appellant were illegal and void first on the ground that certain conditions defined by the statute and regulations necessary to validly constitute the Board (*e.g.,* a poll of the producers) were not complied with and second that The Natural Products Marketing Act, 1934, Can. Stats. 1934, Cap. 57, was *ultra vires* in so far as it purported to control, regulate, restrict, or impose levies or tolls on vegetables grown in British Columbia

for shipment to another Province in Canada. Before judgment was delivered the Judicial Committee on a reference sustained that view. We must assume therefore that the B.C. Coast Vegetable Marketing Board and this appellant, in so far as they purported to act under statutory powers, did so without legal authority.

I have already found that as against the Board the appeal must be allowed and the action dismissed on the ground that the action was barred by B.C. Stats. 1936 (Second Session), Cap. 30, Sec. 5. As this appellant, however, did not act, or purport to act, as a member of a Board appointed pursuant to the provisions of the Dominion statute, it is not protected by this section and must seek relief on other grounds.

It is first essential to understand the position of this appellant in the marketing scheme. Although a Provincial Marketing Act (1934, Cap. 38, B.C. Stats.), was passed in order that the legislative powers of both the Dominion and Provincial Parliaments might be utilized we are mainly concerned with the Dominion statute (1934, Cap. 57), later declared *ultra vires,* as the action was brought in respect to tolls and levies made by a local board exercising powers derived from that Act. The vegetables as already stated were marketed for shipment outside the Province; hence Dominion authority was thought to be necessary. The Board could designate the agency through which the regulated products might be sold and by an agreement in writing dated June 20th, 1935, between the B.C. Coast Vegetable Marketing Board and this appellant the former agreed to designate the latter as the agency " . . . through which the regulated product as defined in the B.C. Coast Vegetable Marketing scheme shall be marketed." Under its terms the appellant assumed obligations to the B.C. Coast Vegetable Marketing Board and to the producers. It agreed to "duly account to the producers and to this Board for all of the regulated product delivered to it." The respondent was not a producer. It was a body corporate carrying on the business of marketing vegetables. The allegation therefore that a marketing scheme drawn up to regulate and control the marketing of vegetables in a designated manner was never approved because a number of producers

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entitled to vote were not permitted to do so, does not affect this appellant. There was in any event no finding on this point by the trial judge and the evidence in respect thereto is inconclusive. The appellant's connection with the operation of the scheme was limited and defined by the terms of the agreement referred to.

I may add, although it was advanced in argument at this Bar, that there was no allegation of bad faith on the part of the appellant in the pleadings; no finding in that respect by the trial judge nor is there anything in the evidence to substantiate that claim. Appellant simply made a contract with the Board and carried out its terms. If, too, there was any compulsion exercised by the Board as found by the trial judge (in view of the outcome of the appeal in respect to the Board a decision on that point was not necessary) it does not follow that this appellant was a participant. The respondent in my judgment voluntarily, without protest or reservations of any kind dealt freely with the marketing agency G. H. Snow Limited, accepting from time to time large cash advances to facilitate marketing and receiving at intervals cheques in satisfaction of its claims after deduction of levies and tolls. The suggestion of compulsion is an afterthought.

The Act, however, constituting the Board was *ultra vires*. It follows that there was no Board *in esse* with authority to engage the appellant as "a designated agency" to market vegetables. There was never any right therefore to levy or retain tolls. The respondent, however, can not succeed merely on that statement of facts. One who voluntarily pays a sum of money to another cannot demand repayment as money had and received to his use. Duress, compulsion or other forms of imposition must be shown. If the respondent assented to the deduction of tolls and levies with full knowledge of the facts and without bad faith or imposition of any kind as a payment for marketing services received by it equitably it should not recover the sum paid for such services.

In disposing of the question I will assume that this appellant is in the same position as the Board in so far as the obligation to account is concerned and that the respondent is a proper party

to bring the action. It will not be necessary therefore to refer to several points dealt with by the trial judge, *viz.*, (1) that the respondent was not the owner of the goods but merely a selling agent for another company; (2) that from the manner in which accounts were dealt with this appellant was obliged to account if liable in law to do so. My view is that, in any event on the facts, the action will not lie.

Although principles have been established in many cases dealing with illegal impositions we were not referred to any case arising from a declaration by the Courts that an Act of a Legislature was *ultra vires* where there is a division of legislative powers, as in Canada and Australia. No doubt the same principles apply in all cases where one purports to act under an assumed, but non-existent statutory authority. I would, however, venture to suggest that the Courts should not, without the strongest reasons, make it difficult to carry out, through Boards and officials, legislation enacted by the Provincial or Federal Parliament—Acts which may, sometimes, after many years be declared invalid on one or more of many grounds. If payments made pursuant to an invalidated Act are to be regarded as made involuntarily because presumably the parties making the payments were not on equal terms with the authority purporting to act under the statute it may be difficult to procure officials willing to assume the necessary risk. A declaration of invalidity may be made after many years of operation and large amounts might be recoverable if it is enough to show in a literal sense that "the payments were made under circumstances which left the party no choice," or that "the plaintiff really had no choice and the parties [*i.e.*, the respondent and appellant] were not on equal terms." Every Act for taxation or other purposes, whether valid in fact, or for the time being thought to be valid, compels compliance with its terms under suitable penalties. The payee has no choice and the authorities imposing it are in a superior position. It does not follow, however, that all who comply do so under compulsion, except in the sense that every Act imposes obligations, or that the respective parties in the truest sense are not "on equal terms." It should be assumed that all citizens

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voluntarily discharge obligations involving payments of money or other duties imposed by statute.

I think too that while the Dominion Marketing Act has been held *ultra vires* one may still look at it as a written document if it throws light—as it must—on the nature of the scheme and assist in deciding whether or not anyone acting under it did so voluntarily or under compulsion. It will be found that the basis of the Act was that a representative number of producers by petition might on their own initiative (and therefore voluntarily) bring a scheme for the regulation control and marketing of their products into being under the supervision of a board. The respondent company was not compelled to submit. It might have declined to market vegetables through the appellant on the ground that the Act was invalid and have the question decided by the Courts. It submitted to the scheme no doubt believing at the outset at all events that it would prove to be profitable.

We were referred to a number of cases all depending on their own special facts. It is not always sound to base a decision on the precise grounds given in somewhat analogous cases. They may not be appropriate to the case at Bar.

In *Brocklebank, Ld.* v. *The King,* [1925] 1 K.B. 52, it was held that the payment in question was not a voluntary payment. Bankes, L.J., at p. 62, said:

> The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless.

Even if this statement should be literally applied to the case at Bar it could be said that the respondent herein made no open protest. That was not because it was thought useless to do so but because, so far as we can gather from the evidence, far from protesting it might have been favourable to the scheme. Scrutton, L.J., at p. 67, said "the petitioners made several inquiries and protests as to the legality of the claim." Not so in this case.

The evidence does not show as in *Maskell* v. *Horner,* [1915] 3 K.B. 106, that respondent only permitted these deductions to be made to avoid prosecutions or seizure of its goods or that it did not intend to give up its right to recover. No reservations were made. At p. 109, Rowlatt, J., referred to a judgment of

Tindal, C.J., in *Valpy* v. *Manley* (1845), 1 C.B. 594 at p. 602, where he said:

I am not aware that there is any difficulty or impropriety in laying it down, that, where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that it is otherwise, where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold.

It is clear, I think, that the respondent when it marketed its vegetables through the agency of the appellant company and permitted deductions to be made intended to give up its rights, if any, to demand repayment; or possibly it is more correct to say that it never contemplated such action. It follows that it did not give notice of intention to resist or submit only to save itself from injury.

I would suggest that while it is true as stated by Lord Reading, C.J., at pp. 119 and 120, in *Maskell* v. *Horner* that "no express words are necessary and that the circumstances attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions" still the intention to reserve the right to recover should be made clear. He should make it apparent that he was "prepared to fight the question whether the liability in fact existed" (p. 123). At p. 118, on appeal Lord Reading, C.J., said:

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received.

There was no actual or threatened seizure of respondent's goods. Reference will be made later to a case of "compulsion of urgent and pressing necessity" to illustrate what was meant.

Cushen v. *City of Hamilton* (1902), 4 O.L.R. 265, was referred to by the trial judge and in his opinion distinguished. There it was held that certain fees paid by butchers under a by-law, later held invalid, could not be recovered back as they were paid with full knowledge of the facts under a claim of right

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"and without actual interference with the business of the butchers." With the greatest deference I think the whole judgment of Osler, J.A. supports the appellant's view. The trial judge referring to this case, said that,—

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.

The suggestion is that the marketing Act and the regulations and orders of the Board, found to be illegal, was in fact "an actual interference with the business" of the respondent within the purview of the phrase used in the *Cushen* case, meaning, I assume, that it was compelled to carry on business under certain restrictions, instead of in a free and independent manner. With deference there was the same sort of interference—although it differed in degree—with the business of the butchers in the *Cushen* case. They were obliged to pay an illegal licence fee just as in the case at Bar; there was interference to the extent that respondent had to pay levies and tolls and market its vegetables in a certain way. What was meant may be understood from an example of compulsion given at p. 267 by Osler, J.A. He showed by reference to a case that an excessive freight charge paid to a public carrier to carry goods can be recovered although the shipper may have paid the excess with full knowledge of the facts. (*Parker* v. *The Great Western Railway Company* (1844), 7 Man. & G. 253.) If he did not pay the excess demand he could not ship at all. His business (shipping) would be interfered with and because the law looks upon such a payment as one made under compulsion; in other words "paid through necessity and the urgency of the case" (p. 254) the sums so paid may be recovered. There was no interference with business in that sense either in the *Cushen* case or in the case at Bar. The respondent could continue to carry on its business: it was only directed in a certain channel, for the benefit, it was thought, of all concerned.

At p. 267, Osler, J.A., said:

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.

This statement was relied on, the submission being that the

respondent in the case at Bar had no choice: it had to pay. Mr. Justice Osler, however, pointed out that the latter alternative in that passage is expressed in condensed form and proceeded to give illustrations that conveyed the sense in which the phrase was used. The danger too should be avoided of reaching the conclusion that because the learned judge gave as an example, *viz.*, "payments of illegal demands *colore officii*" that he meant to say that all such payments may be recovered because the parties making them had no "choice." The question cannot be decided on one aspect of any case or on one set of facts; all the facts and circumstances must be taken into consideration.

I quote further paragraphs from the judgment of Osler, J.A. At pp. 267-8, he said:

The licence fees were demanded [in the case at Bar the levies and tolls] under a claim of right, without fraud or imposition, and they were paid by the plaintiff and others who knew the facts and chose to yield to the demand rather than contest it. In Dillon on Municipal Corporations, 4th Ed., sec. 944, p. 1150, it is said: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, licence, or fine, cannot without statutory aid be recovered back from the corporation either at law or in equity, even though such tax, licence, fee, or fine, could not have been legally demanded or enforced," . . . In *Town Council of Cahaba* v. *Burnett* (1859), 34 Ala. 400, it was held that a payment of money to the clerk of the council as the price of a licence for retailing spirituous liquors could not be considered to have been made under compulsion though the ordinance imposed a fine and imprisonment as the penalty for its breach; and therefore the money could not be recovered back by action. "No one" (says the Court) "can be heard to say that he had the right and the law with him, but he feared his adversary would carry him into court, and that he would be unlawfully fined and imprisoned; and that being thereby deprived of his free will, he yielded to the wrong, and the Courts must assist him to a reclamation."

And at p. 269:

The fact that the payments were made in compliance with the supposed obligation of the by-law seems to me to make no difference, because it was open to the plaintiff to have questioned its validity on the occasion of the first demand, as he successfully did on the last.

I am satisfied therefore that the retention of levies and tolls was submitted to willingly. There are stronger grounds for saying so here than in the *Cushen* case. There, in one year at least, there was a positive refusal to pay licence fees and a prosecution followed. Nor is that aspect of voluntary action altered because later respondent changed its mind and started an action.

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We are concerned with its attitude before action brought in the short period in respect to which levies were made. No question was raised at that time. It was a voluntary payment made under an assumed legal liability creating in law no obligation to repay. The respondent if not actually co-operating with the Board and this appellant at least paid the levies, as in *Henderson* v. *The Folkestone Waterworks Company* (1885), 1 T.L.R. 329, because it was "under the impression that it was bound to do so."

I would allow the appeal.

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

Appeal allowed.

Solicitor for appellant: *J. D. McPhee.*
Solicitor for respondent: *Frank Higgins.*

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April 20; *May* 18.

VANCOUVER GROWERS LIMITED v. McLENAN, GILMORE AND PETERSON.

Constitutional law—The Natural Products Marketing Act, 1934, (Dominion)—Validity—Money received under ultra vires Act—Liability of persons receiving same—Colore officii—Mistake of law—Can. Stats. 1934, Cap. 57; 1935, Cap. 64—B.C. Stats. 1936 (Second Session), Cap. 30, Sec. 5.

Section 9c of Cap. 38, B.C. Stats. 1934, as enacted by B.C. Stats. 1936 (Second Session), Cap. 30, Sec. 5, provides: "No action shall be brought against any person who at any time since March twenty-ninth, 1934, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of 'The Natural Products Marketing Act, 1934,' of the Dominion or under this Act for anything done by him in good faith in the performance or intended performance of his duties under either of the said Acts, and every action now pending which if it were brought hereafter would be within the scope of this section is hereby stayed."

The three individual defendants purported to be and to act as a local Board under the provisions of said Acts, 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 plaintiff's claim is for a certain amount as money had and received by it 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. It was held on the trial that the plaintiff was entitled to judgment on both claims.

Held, on appeal, reversing the decision of FISHER, J., that the action was pending when the above amendment to the Act was passed. The Legislature had authority either to stay a pending action or to provide that no action should be brought by one party against another for anything done by the latter in good faith or otherwise in the exercise of supposedly statutory powers. The question of good faith was not raised on the pleadings nor is there a finding of bad faith by the trial judge, and it must be assumed that good faith was exercised throughout. The above section protects the appellants herein and the appeal should be allowed.

APPEAL by defendants, McLenan, Gilmore and Peterson from the decision of FISHER, J. of the 2nd of February, 1937 (reported, 51 B.C. 433). The plaintiff, in compliance with orders made by the defendant Board and the defendants McLenan, Gilmore and Peterson, believing that such defendants had power to make such orders, marketed a large quantity of its vegetables grown in certain areas in British Columbia for inter-provincial trade through the defendant G. H. Snow Limited, purporting to be the agent of the defendant Board, between the 27th of May and the 15th of July, 1935, which vegetables were shipped and sold by the defendants in another Province of Canada and the defendants received moneys from the sale of said vegetables. The plaintiff claims for an accounting for the sum of $4,412.27, being the balance of money had and received by the defendant for the use of the plaintiff; also for the sum of $415.07 for work done and materials supplied by the plaintiff in packing vegetables; for a declaration that the defendants cannot prohibit the production or harvesting of vegetables, that the defendants cannot exact levies or tolls in respect of vegetables marketed in British Columbia or in other Provinces, and that the scheme of the 23rd of January, 1935, set up under the Natural Products Marketing (British Columbia) Act and The Natural Products Marketing Act, 1934, (Dominion) for the regulation and control of the marketing of vegetables, and amendments thereto, are not in force; and further for an injunction restraining the defendants from interfering with the marketing of vegetables by the plaintiff.

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VANCOUVER GROWERS LIMITED v. MCLENAN, GILMORE AND PETERSON

The appeal was argued at Victoria on the 20th of April, 1937, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

Maitland, K.C. (*J. G. A. Hutcheson,* with him), for appellants: This is simply a case of money being paid under a mistake of law and is not recoverable. The defendants had the power and did designate an agency but they never appointed agents. All parties voluntarily acted on the understanding that the Acts were good and they did what the statute permitted them to do. From the commencement of the statute whatever was done was done voluntarily in the belief that they had the power. G. H. Snow Limited sold as agents and deducted brokerage and charges as well. There is no evidence that any money came into our pockets. It was not found as a fact that Snow was our agent. We never received any of this money nor was there a joint account: see 15 C.J. 738. The case of *Chapleo* v. *Brunswick Building Society* (1881), 6 Q.B.D. 696, cited by the other side, does not apply to this case. That money paid under a mistake of law is not recoverable see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 131, sec. 16, p. 166, sec. 243, p. 168, sec. 246; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351 at p. 357; *Colwood Park Association Limited* v. *Corporation of Oak Bay* (1928), 40 B.C. 233; *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265; *Fowler and Andrews* v. *Spallumcheen Township,* [1930] 3 W.W.R. 12; *O'Grady* v. *City of Toronto* (1916), 37 O.L.R. 139; *Holt* v. *Markham,* [1923] 1 K.B. 504; *Henderson* v. *The Folkestone Waterworks Company* (1885), 1 T.L.R. 329; *National Pari-Mutuel Association, Limited* v. *The King* (1930), 47 T.L.R. 110; *Julian* v. *Auckland (Mayor),* [1927] N.Z.L.R. 453. The case of *Independent Milk Producers Co-operative Ass'n* v. *B.C. Lower Mainland Dairy Products Board,* [1937] 1 W.W.R. 679 is in our favour. What is considered a voluntary payment see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 280; *Brocklebank Ld.* v. *The King,* [1925] 1 K.B. 52. Section 5 of Cap. 30, B.C. Stats. 1936 (Second Session), was raised before judgment was entered in this action, and precludes any right of action. We cite this as a complete answer for these defendants. G. H. Snow Limited are not our agents,

they were designated under the Act. Countersigning a cheque is quite different from signing a cheque. In any event, if liable, there is only $869.08 owing.

Higgins, K.C., for respondent: This is a case where the plaintiff was forced to hand over its goods to the defendant for sale. We are suing them as acting under the Dominion scheme. Under section 121 of the B.N.A. Act all articles of produce can go free from one Province to another. This is a violation of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.*, [1933] A.C. 168 at p. 176. We rely on the judgment of Abinger, C.B. in *Atlee* v. *Backhouse* (1838), 3 M. & W. 633 at p. 646, approved in *Maskell* v. *Horner*, [1915] 3 K.B. 106 at pp. 118 and 126. The defendant received the money under colour of office: see *Brocklebank, Ld.* v. *The King*, [1925] 1 K.B. 52 at pp. 67-8. All the defendants are guilty of conversion carried out under colour of office: see *Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216; Salmond on Torts, 9th Ed. 310-11; and 318; Pollock on Torts, 13th Ed., 372. Members of the Board are personally liable: see *China Mutual Steam Navigation Company* v. *MacLay*, [1918] 1 K.B. 33 at p. 41; *Marshal Shipping Co.* v. *Board of Trade*, [1923] 2 K.B. 343 at p. 350; *Raleigh* v. *Goschen* (1897), 67 L.J. Ch. 59. G. H. Snow Limited were the agents of the Board: see Bowstead on Agency, 8th Ed., 210; *Bailey* v. *Rawlins* (1829), 7 L.J.K.B. (o.s.) 208; *Josephs* v. *Pebrer* (1825), 3 B. & C. 639; *Hunter* v. *Prinsep* (1808), 10 East 378. As to section 5 of Cap. 30, B.C. Stats. 1936 (Second Session), the action was commenced before this section came into force so it does not apply: see Craies's Statute Law, 4th Ed., 334; Maxwell on Statutes, 7th Ed., 192. This section enacting that no action be brought is inoperative as there is no authority to pass it: see *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 at p. 7; *Dobie* v. *The Temporalities Board* (1882), 7 App. Cas. 136 at pp. 147 and 149; *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Rex* v. *Zaslavsky*, [1935] 2 W.W.R. 34 at p. 40; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*,

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[1896] A.C. 348 at p. 363; *Royal Bank of Canada* v. *The King,* [1913] A.C. 283 at p. 298. On the question of good faith see *Ex parte Banner* (1881), 17 Ch. D. 480 at p. 492.

Maitland, in reply: The licence was not cancelled until August 15th, 1935, and long after all these transactions took place. All payments were made voluntarily and there is not a word in the evidence that any protest whatever was made with respect to any of the payments. There is no suggestion of fraud or bad faith. They were told every day that the levies were made and there was no protest. There was no change in attitude until after the Act was declared *ultra vires.*

Cur. adv. vult.

18th May, 1937.

MARTIN, C.J.B.C.: This appeal should in my opinion be allowed for the reasons given by my learned brother MACDONALD.

MACDONALD, J.A.: Appellants invoke section 5 of Cap. 30, B.C. Stats. 1936 (Second Session), reading as follows: [already set out in head-note].

The action herein was pending when this amendment was added to the main Act and as the Legislature in express terms directed a stay it should not, with respect, have been proceeded with after notice of this enactment. The Legislature had authority either to stay a pending action or to provide that no action should be brought by one party against another for anything done by the latter in good faith or otherwise in the exercise of supposedly statutory powers. It is not an answer to say that the moneys claimed in the action arose from interprovincial trading transactions. It is the civil right to invoke the aid of the Court that is taken away by the Legislature. The subject-matter of the action is not material.

On the question of good faith no issue in respect thereto was raised on the pleadings nor is there any finding of bad faith by the trial judge. Whether or not under the section the *onus* of proving it is on the appellant or that good faith in the discharge of public duties should be presumed until displaced, the only reasonable conclusion from all the evidence is that good faith was exercised throughout.

I would allow the appeal.

McQUARRIE, J.A.: Section 5 of the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), reads as follows: [already set out in head-note].

I am of opinion that the said section fully protects the appellants herein and that this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Maitland, Maitland, Remnant and Hutcheson.*

Solicitor for respondent: *Frank Higgins.*

CONTINENTAL MARBLE COMPANY LIMITED v. LANGS.

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May 21; *June* 22.

Company—Action—Style of cause—Name of company—The abbreviation "Co." used for word "company"—Judgment—Order for committal—Prohibition—Appeal—R.S.B.C. 1924, Cap. 1, Sec. 23, Subsec. 13 (a); Cap. 53, Sec. 25—County Court Order VII., r. 6.

In an action for money loaned, the defendant not having entered a dispute note, judgment by default was entered against him in December, 1931. In the style of cause the plaintiff was described as "Continental Marble Co. Limited." In September, 1936, on being summoned to appear for examination as a judgment debtor, the defendant was examined and committed to gaol for twenty days. Before his actual arrest the defendant applied to the Supreme Court for a writ of prohibition restraining the plaintiff from enforcing its judgment by attachment, on the ground that the corporate name of the company was "Continental Marble Company Limited" and the "Continental Marble Co. Limited" having no existence in fact there was no plaintiff, and consequently all proceedings were void and the County Court was without jurisdiction. It was ordered that a writ of prohibition do issue.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the writ of prohibition cannot be supported if the Court has jurisdiction to cure the irregularity complained of, which consists in a trifling misnomer or clerical error in the name of the plaintiff, whereby the word "company" in its corporate name was contracted to "Co." The powers of amendment apply to companies in like manner as to private persons, and the abbreviation in question is a matter of amendment well within the powers conferred by section 25 of the County Courts Act and Order VII. of the County Court Rules.

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APPEAL by plaintiff from the order of MORRISON, C.J.S.C., of the 12th of March, 1937, staying all further proceedings in the action and directing that a writ of prohibition do issue. The action was commenced on the 2nd of December, 1931, in the County Court of Westminster for money loaned by the plaintiff to the defendant the plaintiff being described as "Continental Marble Co. Limited." The defendant not having entered a dispute note, judgment by default was entered against him for $300 on the 17th of December, 1931. No steps were taken to enforce the judgment until the 11th of September, 1936, when the defendant was examined as a judgment debtor and committed to the common gaol for twenty days. Before his actual arrest the defendant applied to the Chief Justice of the Supreme Court for a writ of prohibition that there was no plaintiff herein in that there is not now nor was when the action was commenced any such person, firm or company, the corporate name of the company being "Continental Marble Company Limited."

The appeal was argued at Vancouver on the 21st of May, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Dickie, for appellant: Prohibition only lies when there is no jurisdiction. Abbreviating the word "company" by "Co." comes under the slip rule and does not vitiate the proceedings: see *F. Stacey and Co. Limited* v. *Wallis* (1912), 106 L.T. 544 at p. 547; Wegenast's Company Law, 128-9; *Thompson* v. *Big Cities Realty and Agency Co.* (1910), 21 O.L.R. 394; *A. E. Thomas Limited* v. *Standard Bank of Canada* (1910), 1 O.W.N. 379 at p. 382; *McRae* v. *Corbett* (1890), 6 Man. L.R. 426 at p. 429; *Grand Junction R.W. Co.* v. *Midland R. Co.* (1882), 7 A.R. 681 at pp. 686-7. He allowed judgment to go against him by default and has waived any right to raise this objection: see Daniell's Chancery Practice, 8th Ed., Vol. II., 1437; *Broad* v. *Perkins* (1888), 21 Q.B.D. 533; *Rex* v. *Deputy Industrial Registrar* (1912), 15 C.L.R. 576; *Re Hawkins* v. *Batzold* (1901), 2 O.L.R. 704; *In re "The Cork Constitution"* (1882), 9 L.R. Ir. 163.

C. W. Hodgson, for respondent: The corporation has no existence apart from its corporate name. There was a misnomer:

see *Re Rex* v. *Pelissiers Ltd.* (1926), 45 Can. C.C. 161 at p. 164; *Rutherford* v. *Walls* (1892), 8 Man. L.R. 96. That there was want of jurisdiction see *De Haber* v. *The Queen of Portugal* (1851), 20 L.J.Q.B. 488 at p. 498. Corporations must sue and be sued in their corporate title or registered name: see Annual Practice, 1937, p. 223; Yearly Practice, 1937, pp. 12 and 190.

Dickie, in reply:

Cur. adv. vult.

22nd June, 1937.

MARTIN, C.J.B.C.: This writ of prohibition to the County Court of Westminster cannot, beyond question, be supported if that Court had jurisdiction to cure the irregularity complained of which consists in a trifling misnomer, or clerical error, in the name of the plaintiff, an incorporated company, whereby the word "company" in its corporate name was contracted to "Co." There is nothing in the County Courts Act or Rules upon principle to warrant the view that the very wide powers of amendment conferred upon the County Courts of this Province by said Act and Rules (*cf.* section 25, and Order VII., etc.) have a narrower scope when applied to companies than to private persons, and it was, as it had to be, conceded by respondent's counsel that if the plaintiff's name had been "Richard Roe" that his misnomer, if such it be at most, by contraction into "Richd. Roe," could have been amended, if necessary to "Richard." But it was submitted that where a name is derived from the Companies Act and not from baptism, the most trifling and obvious error in the spelling of that corporate name, even to an alteration in one single letter, is an irregularity beyond redemption because it instantly and irrevocably ousts the entire jurisdiction of the Court. Now if this startling submission be correct it will lead to still more startling consequences, as may well be illustrated by the case of the greatest and oldest of our corporations, the Hudson's Bay Company, which its Royal Charter from King Charles II. of 2nd May, 1670 (to be found conveniently in Martin's Hudson's Bay Company's Land Tenures, London, 1898, p. 164) declares:

shall be one Body Corporate and Politique, in Deed and in Name, by the Name of The Governor and Company of Adventurers of England, trading into Hudson's Bay, . . .

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Now if a writ of prohibition lies in this case it will also lie if the said Governor and Company issued a plaint in a County Court and left the letter "s" off the word "Hudson's."

The extremity of the submission carries its own refutation.

An instructive case on the difference between the amendment of a "technical slip" in the name of a litigant, and a "substantial change altogether" therein is the leading one in the House of Lords on the subject, *i.e.*, *Munster* v. *Cox* (1885), 10 App. Cas. 680, particularly the judgment of Lord Blackburn at p. 689, and if any principle be needed to support the exercise of a jurisdiction to amend such unsubstantial irregularities, it will there be found.

In the case at Bar not only does this plaint show *ex facie* the jurisdiction of the County Court, but when the proceedings are gone behind a further jurisdiction to amend the irregularity is disclosed by the facts uncovered, as is set out fully by my brother Sloan, with whose reasons I agree.

It follows, therefore, that the appeal must be allowed and the writ of prohibition set aside.

McPhillips, J.A.: I agree in allowing the appeal.

Sloan, J.A.: The facts in this case are not in dispute and the point of law for decision is a narrow one.

It appears from the record that a company was incorporated under the laws of the Province of British Columbia under the name "Continental Marble Company Limited."

On or about the 8th day of September, 1931, the defendant addressed a letter in the following terms to one Pendleton in California:

> I drew a draft on you today for $300 through Continental Marble Co. Ltd. of this city and Mr. E. C. Dougherty endorsing same. Please arrange payment for this draft immediately and deduct from statement of Royalties on Eagle Wrench.

The draft was protested for non-payment and action was commenced against the defendant by plaint and summons issued on the 2nd day of December, 1931, out of the County Court of Westminster in which the plaintiff was described as "Continental Marble Co. Limited."

On the 17th day of December, 1931, the defendant not having

entered a dispute note, judgment by default was entered against him for the sum of $350.

So far as the proceedings before us indicate, no steps were taken to enforce this judgment until the 11th day of September, 1936, when the defendant was summoned to appear for examination as a judgment debtor. He duly appeared on the 27th of February, 1937, was examined and committed to the common gaol for a term of twenty days.

Before his actual arrest, an application was made to the Chief Justice of the Supreme Court for an order for a writ of prohibition to issue restraining the Continental Marble Co. Limited from enforcing its judgment by attachment or committal proceedings on the ground, to quote the notice of motion:

that the plaint and summons herein do not disclose any jurisdiction in the County Court of Westminster to entertain the said action and that there is no plaintiff herein in that there is not now nor was when the said action was commenced any such person, firm, partnership, corporation, body corporate or company by the name of Continental Marble Co. Limited and the said County Court of Westminster is therefore without jurisdiction.

Upon this application, an order was made by the Chief Justice of the Supreme Court staying all further proceedings in the County Court of Westminster in the action and directing that a writ of prohibition issue. From this order the plaintiff now appeals.

It was common ground before us that on the face of the proceedings jurisdiction is established. The defendant showed by affidavit, however, that the corporate name of the company was Continental Marble Company Limited and argued that Continental Marble Co. Limited having no existence in fact there was no plaintiff and consequently all proceedings were void and the County Court was without jurisdiction in the matter.

The narrow point is, therefore, whether the contraction of the word "company" in the plaintiff's name to "Co." is a sufficient ground for a writ of prohibition. With great respect to the Chief Justice of the Court below, I think not. While it is true that a body corporate is to sue by its corporate name (Interpretation Act, Sec. 23, Subsec. 13 (*a*), R.S.B.C. 1924, Cap. 1) nevertheless it is my opinion that an immaterial variation from

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the precise name of a corporation, not misleading to the defendant, cannot be said to oust the jurisdiction of the County Court. In this connection the observations of Scrutton, L.J., in *F. Stacey and Co. Limited* v. *Wallis* (1912), 106 L.T. 544 at 547 are of interest. He says:

In the present case the name is correct except that part of it is abbreviated with what is a very common English abbreviation for the word "Limited." . . . The same point might have been raised by counsel—and I suppose this decision may also be taken as a decision on the same point—whether "Co." instead of "Company" would be a legal description of a company's name.

He holds that the contraction of "Limited" to "Ltd." does not incorrectly name the company. It would thus appear that the same result follows in the use of the usual and common abbreviation for "company." See also *Thompson* v. *Big Cities Realty and Agency Co.* (1910), 21 O.L.R. 394.

These and cases of a like nature were decided in commercial contests relative to the form in which names of companies were affixed to instruments of various kinds. I prefer to base my opinion herein on other aspects present in this case. As Lopes, L.J., says in *Farquharson* v. *Morgan* (1894), 1 Q.B. 552 at 557:

. . . there has always been a recognized distinction between what I will call a latent want of jurisdiction, *i.e.*, something becoming manifest in the course of the proceedings, and what I will call a patent want of jurisdiction, *i.e.*, a want of jurisdiction apparent on the face of the proceedings.

In this case we have jurisdiction apparent on the face of the proceedings and the defendant alleging "a latent want of jurisdiction," because of his discovery five years after judgment that the plaintiff in the style of cause abbreviated the word "company" in its name to "Co." At most this abbreviation might be termed a misnomer, a matter of amendment well within the wide powers conferred by section 25 of the County Courts Act.

This procedure of amendment was suggested as proper by MARTIN, J.A. (now Chief Justice of British Columbia) in *Beaton* v. *Sjolander* (1903), 9 B.C. 439 at 443 and followed by SWANSON, Co. J., after consultation with HUNTER, C.J.B.C. in *Hahn* v. *Seibel* (1920), 28 B.C. 387 even where jurisdiction was not apparent on the face of the proceedings but was disclosed by the evidence.

When, therefore, this latent want of jurisdiction, if it be such,

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may, by a simple amendment to the style of cause, be cured, it is my view, with respect, that a writ of prohibition should not have issued, but that the application should have been refused or enlarged to give an opportunity to the plaintiff of amendment; a course followed in *Blunt* v. *Harwood* (1838), 8 A. & E. 610. To hold otherwise is to nullify the power of the County Court to amend proceedings which *ex facie* show jurisdiction and where jurisdiction exists in fact over the subject-matter of the action.

It is to be also noted that after judgment and "where the absence or excess of jurisdiction is not apparent on the face of the proceedings it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ, which under other circumstances he would be entitled." *Farquharson* v. *Morgan, supra.* The material filed by the defendant in support of his application makes no explanation of his long delay of five years. In my opinion, in the absence of any such explanation, a proper discretion could not have been exercised in his favour.

There has been no submission to us; indeed, it would have been idle to suggest that the defendant was at all misled by the plaintiff styling itself with the abbreviated form of "company." He dealt with it as the "Continental Marble Co. Ltd." in his own correspondence.

For the reasons I have given, I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *E. A. Dickie.*
Solicitor for respondent: *C. W. Hodgson.*

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May 18, 19, 20; *June* 23.

BANCROFT v. MONTREAL TRUST COMPANY.

Contract—Mining shares—Placed in escrow—Terms and conditions as to withdrawal of shares — Whether complied with by applicant — Interpretation.

By agreement in writing of the 18th of April, 1933, as amended on September 11th, 1933, between the plaintiffs and others with the Clifton Corporation with head office in New York 2,000,000 shares of Nicola Mines & Metals Limited were placed in escrow with the defendant company upon the terms and conditions set out in the agreement. Paragraph 7 of the agreement is as follows: "On and after the 21st day of March, 1934, Donohoe Mines Corporation, *J. A. Campbell*, Hazel Bancroft, Leo Bancroft, Nick Thodos, Anna Thodos and Minnie Bancroft, and each of them may draw down every three months commencing on the 21st day of March, 1934, from the said escrow deposit, his or her *pro rata* share of 50,000 shares of the said vendors' shares provided that prior to such withdrawal he or she shall have offered to sell to the Clifton Corporation or its assignees upon fifteen days' notice to them in writing addressed by registered mail to the said Clifton Corporation, 11 West 42nd Street, New York City, such *pro rata* part of the said 50,000 shares at seventy-five per cent. (75%) of the market price of the said shares as may be determined by the closing market price on the day before the date of the said notice on any recognized stock exchange whereon the same shall be listed or traded. The Clifton Corporation or its assignee shall have the right to accept or reject the said offer within the said fifteen-day period provided in the aforesaid notice. Upon its failure to accept the said offer or any of them the said shares thus offered and rejected shall be released by the Trust Company to the persons entitled thereto." On the 19th of April, 1934, the plaintiffs sent a letter to Clifton Corporation under the terms of paragraph 7 of said agreement giving 15 days' notice of their intention to withdraw from escrow their proportion of the 50,000 shares, and offering the shares to Clifton Corporation at 75 per cent. of the then market price of the shares. There being no reply from Clifton Corporation on the 15th of May, 1934, the plaintiff demanded from the defendant delivery of said shares and delivery thereof was refused. In an action for damages the plaintiff, Leo Bancroft, recovered judgment.

Held, on appeal, reversing the decision of FISHER, J., that the question for determination is whether the notice of the 19th of April was a good notice. Nothing turns on the form of the notice the contest being limited to the time at which it must be given. The notice was ineffective as an offer in respect of the shares which would have been deliverable by the defendant to the plaintiff on the 21st of March, 1934, pursuant to the provisions of paragraph 7 of the agreement.

APPEAL by defendant from the decision of FISHER, J., of the 12th of September, 1936, whereby the plaintiff, Leo Bancroft was awarded $1,650 damages for non-delivery of 3,750 shares of Nicola Mines & Metals Limited which the plaintiff claims were deliverable to him by the defendant acting as trustee or escrow agent pursuant to certain agreements between the parties. By agreement in writing of the 18th of April, 1933, between Donohoe Mines Corporation the plaintiffs and others of the first part and Clifton Corporation with office in New York of the second part 2,000,000 shares of Nicola Mines & Metals Limited were placed in escrow with the defendant, the defendant agreeing to act as escrow agent under the agreement. By section 7 of said agreement, as amended by a subsequent agreement between the same parties and dated the 16th of September, 1933, the parties agreed as follows: (already set out in head-note). On the 20th of March, 1934, the Clifton Corporation notified the defendant that it had not received any notice as provided for in said section 7 in connection with the release of 50,000 shares on March 21st, 1934, that the said release provision must be deemed to have been waived and that the company would look to the defendant to release no part thereof. On April 19th, 1934, the plaintiffs addressed a letter to Clifton Corporation purporting to act under said section 7 of the agreement as amended advising said corporation that they intended to draw down their *pro rata* share of the 50,000 shares and offering to sell the shares to Clifton Corporation at 75 per cent. of the market price the previous day. On the 15th of May following the plaintiff Leo Bancroft and his solicitor demanded from the defendant delivery of the shares referred to in their notice but the defendant refused delivery owing to the advice received from Clifton Corporation.

The appeal was argued at Vancouver on the 18th, 19th and 20th of May, 1937, before MARTIN, C.J.B.C., MCPHILLIPS, MACDONALD, MCQUARRIE and SLOAN, JJ.A.

Locke, K.C., for appellant: The learned judge should have found that the plaintiff did not comply with paragraph 7 of the agreement. The construction to be placed on paragraph 7 is of

paramount importance. There must be strict compliance with its terms. The agreement must be construed in accordance with the ordinary sense of the words: see *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384 at pp. 387 and 388; *Grey* v. *Pearson* (1857), 26 L.J. Ch. 473; *Ex parte Walton* (1881), 17 Ch. D. 746 at p. 751. Unless notice in writing be given fifteen days prior to the 21st of March the Clifton Corporation is not required to purchase any shares on that date and the next date upon which said Clifton Corporation is required to purchase would be three months later, *i.e.,* June 21st, 1934. Notice was given on April 19th, 1934, and demand for surrender of the shares was made on May 15th, 1934. The notice is ineffective both as to March 21st, 1934, and June 21st, 1934. The *onus* is on the plaintiff to prove strict compliance with the section: see *Lord Ranleagh* v. *Melton* (1864), 34 L.J. Ch. 227 at p. 229. If paragraph 7 is capable of being taken in several meanings the *onus* is on the plaintiff to show that his interpretation is the correct one: see *Falck* v. *Williams,* [1900] A.C. 170; *Adams* v. *Acheson* (1916), 26 D.L.R. 633. The conduct of the parties subsequent to the agreement may be looked to: *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 at p. 307; *Brandon Steam Laundry Co.* v. *Hanna* (1908), 9 W.L.R. 576. The Canary agreement shows that the parties contemplated that the shares would be released on March 21st, 1934, and every subsequent three months. The learned judge should have found on the evidence that Leo Bancroft, if he were at any time entitled to delivery, abandoned his claim to the same. Even if the notice given was good the learned judge should have found that Leo Bancroft was not entitled to delivery of the shares on May 15th as the defendant was entitled to retain 5,000 shares for Canary. The learned judge should have found that the defendant in carrying out his duties acted with reasonable diligence and was not guilty of any wilful acts and defaults within the meaning of paragraph 13 of the said agreement. Further he should be excused under section 88 of the Trustee Act. The plaintiff Leo Bancroft failed to prove on the trial that he had suffered any damage.

J. A. Russell, K.C., for respondent: The points of fact and

law raised by the defendant during the trial were fully considered, discussed and rightly decided in the reasons for judgment of the trial judge. Reference is given to evidence of fact which negative all contentions of counsel raised in the notice of appeal as to the value of the stock at the time the notice was given: see *Corkings* v. *Collins*, [1936] S.C.R. 37; 2 D.L.R. 193.

Cur. adv. vult.

23rd June, 1937.

MARTIN, C.J.B.C.: I would allow this appeal for the reasons assigned by my learned brother SLOAN.

MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A. agreed in allowing the appeal.

SLOAN, J.A.: The defendant appeals from a judgment of Mr. Justice FISHER, dated the 12th of September, 1936, whereby the plaintiff was awarded the sum of $1,650 damages and costs against the defendant for non-delivery to the plaintiff of 3,750 shares of Nicola Mines & Metals Limited (hereinafter referred to as the Nicola Company) which shares the plaintiff claims were deliverable to him by the defendant acting as escrow agent pursuant to the terms of an agreement, dated the 18th of April, 1933, and subsequently amended by a further agreement dated the 16th of September, 1933. The main point in the appeal turns upon the construction of paragraph 7 of the amended agreement which reads as follows: [already set out in head-note].

The Clifton Corporation by letter, dated the 17th of March, 1934 (received by the defendant on March 20th, 1934), notified the defendant that the plaintiff (*inter alia*) had not given it notice pursuant to the terms of paragraph 7 of the agreement and instructed the defendant not to release any shares of the Nicola Company to the plaintiff or his assigns.

The Clifton Corporation by a telegram, dated the 20th of March, 1934, reiterated to the defendant the stand taken in the letter of the 17th of March, 1934.

On the 19th of April, 1934, the plaintiff, and others, for-

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warded to the Clifton Corporation a notice in writing offering for sale a *pro rata* amount of their shares of the Nicola Company at 75 per cent. of the market price on the Vancouver Stock Exchange as of April 18th, 1934.

Mr. *W. W. B. McInnes,* solicitor for the plaintiff, and one P. L. Bancroft, who acted for the so-called Bancroft interests in the Nicola Company, in or about the middle of May, 1934, called upon the manager of the defendant company. Mr. *McInnes* in his evidence states that, no word having been received from the Clifton Corporation, he at that time "in accordance with the tenure of the application pressed for the delivery of the shares."

The manager of the defendant company on the 15th of May, 1934, wired the Clifton Corporation as follows:

> Solicitor McInnes and P. L. Bancroft have requested us to wire you for advice as to whether you received the notice forwarded to the Clifton Corporation dated the Nineteenth ult. from Thodos and Leo Bancroft and if there is any change in the position of the Clifton Corporation regarding the release of vendor's shares we would appreciate a wire by return.

To which the Clifton Corporation answered on the 16th of May, 1934, that their position was unchanged from that stated in their telegram of March 20th, 1934.

The manager of the defendant company, apparently anticipating the tenor of the reply of the Clifton Corporation to his query, wrote to Mr. *McInnes* on the 15th of May, 1934, in part as follows:

> Following the personal call of yourself and Mr. P. L. Bancroft this morning regarding delivery of escrow shares held under the agreement of the 18th of April, 1933, and made between Donohoe Mines and other parties and the Clifton Corporation, as varied by the further agreement dated the 16th of September, 1933, we beg to inform you that we have been notified by the Clifton Corporation of New York that none of the 50,000 shares called for release on the 21st of March can be released. They state that your clients and other vendors waived their rights to receive any of the aforesaid shares by not giving notice.

Subsequent negotiations took place between the parties and various solicitors intervened but because of the conclusion to which I have come it is unnecessary for me to deal with these other aspects of the case.

In the result the Clifton Corporation did not recede from its original position that it has not received the fifteen-day notice under paragraph 7; the defendant refused to deliver the shares

to the plaintiff for the same reason, and the plaintiff brought his action for damages against the defendant in which he was successful below.

The question then for determination by us is, whether or not the notice of the 19th of April, 1934, was a good and sufficient notice under paragraph 7 of the agreement in question. Nothing turns upon the form of the notice—the contest is limited to the time at which the notice must be given.

The defendant contended below that the notice to comply with paragraph 7 must be given fifteen days prior to each "draw down" date. Thus before the defendant could release the shares in question in the action to the plaintiff, the plaintiff was bound by paragraph 7 to offer the said shares to the Clifton Corporation fifteen days before the 21st of March, 1934. Upon the failure of the Clifton Corporation to accept the offer of the said shares before the expiration of the fifteen-day period then, and in that event only, could the defendant release the shares to the plaintiff.

The plaintiff, on the other hand, successfully contended below that the fifteen days' notice could be given before or after the "draw down" date within the three-month period and that the notice of the 19th of April, 1934, related to the three-month period beginning March 21st, 1934.

When counsel for the plaintiff was called upon to address us however he advanced what, with respect, I consider to be an untenable submission. He first conceded that the notice given on April 19th, 1934, was not in time for the "draw down" on March 21st, 1934, and that a notice to be effectual had to be given fifteen days before each "draw down" date. He then submitted that the notice of the 19th of April, 1934, had no relation whatever to the "draw down" date of March 21st, 1934, but was the notice required to be given prior to a "draw down" on June 21st, 1934.

A careful consideration of the record has led me to the conclusion that such a submission is not open to counsel before us as the position he now takes is inconsistent with the form of his pleadings, the course of the trial, the reasons for judgment below and by the submissions contained in his own factum. Counsel

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may not depart from "the rule long established which holds a litigant to a position deliberately assumed by his counsel at the trial," to quote the language of DUFF, J. (as he then was) in *Scott* v. *Fernie* (1904), 11 B.C. 91 at p. 94.

We now have counsel for the plaintiff saying in effect that the learned judge below reached the right destination while following a wrong path. It is quite clear to me that the learned trial judge was following the path which he was invited to travel by counsel for the plaintiff, and I cannot conceive how, at this stage, counsel can start this Court on an exploring expedition into an uncharted wilderness. I must refuse the hazard.

It is only right to say, apart from the admission of plaintiff's counsel that the learned judge below erred in his reasons for judgment, with respect, I have reached the same conclusion. In my opinion the notice of the 19th of April, 1934, was ineffective as an offer in respect of the shares which would have been deliverable by the defendant to the plaintiff on the 21st of March, 1934, pursuant to the provisions of paragraph 7 of the agreement.

In view of the admissions and submissions made before us, and to which I have referred, I do not see that any purpose would be served by an extension of the reasons which have led me to this conclusion.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondent: *Gordon M. Grant.*

BROOKE v. THE INDEPENDENT MILK PRODUCERS CO-OPERATIVE ASSOCIATION.

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May 25, 26, 27; June 23.

Natural Products Marketing (British Columbia) Act—Marketing board—Agencies appointed by board to market milk — Equalization levy by agency against producer—Right to charge—B.C. Stats. 1934, Cap. 38.

The plaintiff, a dairyman, marketed his milk through a firm named Gibson's Dairy Produce Limited. Milk was dealt with on the basis of the butterfat it contains and when sold as fluid milk the price received was higher than when the butterfat content was sold for manufacturing purposes. Gibson's Dairy purchased the milk on the fluid basis at prevailing prices. After the plaintiff had dealt with Gibson's Dairy for about one year a scheme for controlling the marketing of milk was set up under statutory authority conferred by the Natural Products Marketing (British Columbia) Act. The Marketing Board was given authority to appoint agencies through which all producers were required to market their milk. The defendant was appointed one of such agencies and Gibson's Dairy dealt through the defendant. The plaintiff continued shipping his milk to Gibson's Dairy as formerly but instead of receiving payment from the dairy he received cheques with accompanying statements from the defendant. The statements indicated that certain deductions were charged one of which was termed an equalization levy. The idea of a general pool contemplated by the Marketing Board was abandoned and never came into operation, and the above levy arose out of the operation of an individual milk pool by members of the defendant association, the purpose being to distribute the burden put upon the producers whose fluid milk quota was fixed, and who then sold their surplus milk on the manufacturing market at a lower price. The defendant sought to justify the levy on the ground that the plaintiff was a member of the defendant association and was bound by its pool operation, also that he was estopped by his conduct in denying that in fact he was a member. It was held that the plaintiff never became a member of the association, that the evidence falls short of the knowledge and conduct on the part of the plaintiff necessary to create an estoppel and the plaintiff is entitled to judgment.

Held, on appeal, affirming the decision of HARPER, Co. J., that the manner in which the defendant dealt with the plaintiff's milk was as an association and not as an agency of the Marketing Board, the pool operation was therefore one not authorized by the marketing scheme, and the plaintiff not being a member of the defendant association, the defendant had no authority to deduct the equalization levy from the moneys received by it from Gibson's Dairy on the account of the plaintiff.

APPEAL by defendant from the decision of HARPER, Co. J. of the 31st of December, 1936, in an action to recover the amount of certain levies made by the defendant against the

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plaintiff on the sale of the plaintiff's milk under the Milk Marketing Scheme of the Lower Mainland of British Columbia. The defendant was appointed an agency under the Milk Marketing Scheme of the Lower Mainland of British Columbia, and under the rules and regulations of the said scheme the plaintiff was required to market all milk produced by him through the agency of the defendant. Under the scheme the defendant was required to make certain levies against the plaintiff and the plaintiff claims the defendant did not make proper levies against the plaintiff but made levies under its own rules and regulations and the levies were collected from the plaintiff against his will and illegally. The plaintiff recovered judgment for $293.12.

The appeal was argued at Vancouver on the 25th, 26th and 27th of May, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Hossie, K.C., for appellant: A scheme to regulate the marketing of milk approved by the Lieutenant-Governor in Council and passed under the Natural Products Marketing (British Columbia) Act came into force on February 1st, 1935. Under the scheme these agencies were established for the sale of milk and all sales had to be made through an agency. The defendant was one of the agencies. The plaintiff was a producer and had to sell through an agency. Previous to the scheme coming into force the plaintiff had been marketing his product with a firm known as Gibson's Dairy Produce Limited in Vancouver, but after this dairy was assigned to the defendant agency the plaintiff continued to send his milk to Gibson's Dairy but the monthly statements and cheques were sent by Gibson's Dairy to the defendant who after making deductions, remitted to the plaintiff. When the plaintiff was selling direct to Gibson's Dairy he got 40 cents per pound butterfat but under the scheme he got 53 cents per pound on what was sold for the "fluid" market and 40 cents for what was sold for the manufacturing market. He got an average of 44 cents per pound. We say the plaintiff was a member of the defendant association, further he is estopped by his conduct in denying that he was in fact a member of the

defendant association. The association was acting as a designated agency of the Marketing Board and could charge the levy complained of under the authority conferred by the marketing scheme.

Denis Murphy, for respondent: The defendant association never did act as an agency under the Board. They were appointed agents but they did not operate as an agency. They raised the defence that the plaintiff was a member of the association and secondly that if not a member the plaintiff was estopped from denying membership as he acted under it. We say Brooke was never a member and was compelled to do what he did under protest.

Hossie, replied.

Cur. adv. vult.

23rd June, 1937.

MARTIN, C.J.B.C.: I would dismiss this appeal for the reasons assigned by my learned brother SLOAN.

MCPHILLIPS, J.A. agreed in dismissing the appeal.

SLOAN, J.A.: This is an appeal from a judgment of HARPER, Co. J., whereby the plaintiff was awarded the sum of $293.12 and costs against the defendant.

The facts are somewhat complicated but the question for decision is a simple one, and a recitation of the facts can be correspondingly narrowed.

The plaintiff is a dairyman and was marketing his milk through Gibson's Dairy. It appears that milk is dealt with on the basis of the butterfat it contains and when sold as fluid milk the price received is higher than when its butterfat content is sold in a manufactured form. Gibson's Dairy purchased the milk produced by the plaintiff on the fluid basis at prevailing prices. After the plaintiff had been dealing with Gibson's Dairy for approximately a year a scheme for controlling the marketing of milk was set up under the statutory authority conferred by the Natural Products Marketing (British Columbia) Act, B.C. Stats. 1934, Cap. 38. A marketing board was given authority to appoint agencies through which all producers were required to market their milk. The defendant was

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appointed one of such agencies and Gibson's Dairy chose to deal through the defendant.

After the inception of the marketing scheme the plaintiff continued shipping his milk to Gibson's Dairy as formerly but instead of receiving payment from the dairy he was in receipt of cheques with accompanying statements from the defendant.

The defendant and other appointed agencies by arrangement (later confirmed by an order of the Marketing Board) fixed the price for fluid milk at 53 cents per pound butterfat, which thus became the prevailing market price for this commodity in this form.

The statements and cheques received by the plaintiff from the defendant indicated that certain deductions were charged by the defendant against the plaintiff one of which, and the only one in issue here, being termed an equalization levy.

The question for decision by us is whether or not the defendant had the right to charge this equalization levy against the plaintiff. Without going into exhaustive detail it is enough to say that this levy arose out of the operation of a private or individual milk pool by the members of the defendant association. The apparent purpose of this pool was to distribute the burden put upon producers whose fluid milk quota was fixed and who then sold their surplus product on the manufactured market at a lesser price, but it was not a general or comprehensive pool such as was contemplated by the Marketing Board. The idea of a general comprehensive pool was abandoned by the Marketing Board and its pooling scheme never did become operative.

In the Court below the defendant sought to justify the levy for this private pool by alleging that the plaintiff was a member of the defendant association and consequently bound by its pool operation or alternatively that he was estopped by his conduct from denying that he was in fact a member of the defendant association.

Before us counsel for the defendant adopted another line of defence. He argued that the defendant in its dealing with the plaintiff was acting not as an association but as a designated agency of the Marketing Board and that it derived its right to charge the plaintiff with the levy from the authority conferred

by the marketing scheme. This submission was not supported by any pleadings but without deciding the question I am assuming that the argument is open to counsel before us on the evidence adduced below.

It was not disputed before us that the plaintiff was not a member of the defendant association and could not be bound by any agreement of its members nor by any obligation imposed upon the members by the association.

It remains therefore to determine if the pool conducted by the defendant was operated by the defendant as an agency of the Marketing Board or as a co-operative association.

It is clear from the exhibits filed and the evidence of the secretary of the Marketing Board and of the accountant of the defendant that the pool operation was not one authorized by the marketing scheme. In fact the secretary of the defendant states frankly that the manner in which the defendant dealt with the plaintiff's milk was as an association and not as an agency of the Marketing Board.

The plaintiff not being a member of the defendant association it follows therefore that the defendant did not have any authority to deduct the equalization levy from the moneys received by it from Gibson's Dairy on the account of the plaintiff.

The learned trial judge, in my opinion, reached the right conclusion and I would dismiss the appeal.

Counsel for the defendant submitted, and rightly so, that in any event judgment could not be given against the defendant for any sums other than those actually received by the defendant from Gibson's Dairy on account of the plaintiff after crediting the defendant the amount of charges not in dispute.

If there is any error in the sum awarded it is of such a small amount that I do not think we should direct any further proceedings to be undertaken in that regard.

The real contest between the parties was in relation to the defendant's right to charge the equalization levy. That having been decided against the defendant, in my opinion the judgment below ought not to be disturbed.

Appeal dismissed.

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*
Solicitors for respondent: *Murphy, Freeman & Murphy.*

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Negligence—Defendant's work-car run into by automobile—Contributory negligence—Ultimate negligence—Jury—Answers to questions—Alleged inconsistency in answers—Jury sent back—Recharge—Change of answer as to ultimate negligence—Effect of.

In an action for damages owing to the driver of an automobile running into a stationary work-car of the defendant company, the driver being killed, the jury answered questions finding that the company was guilty of negligence, that the deceased was guilty of contributory negligence, and that the deceased was guilty of ultimate negligence. The jury then fixed the percentage of responsibility for the accident and fixed the amount of damages to which the plaintiffs were entitled. Upon submission of the answers, counsel for the plaintiffs objected that the finding of ultimate negligence was inconsistent with apportioning damages and with finding the amount payable in damages. The jury were sent back, subject to objection by defendant's counsel, and on their return found that the deceased was not guilty of ultimate negligence. Judgment was given for the plaintiffs for the amount found by the jury.

Held, on appeal, reversing the decision of ROBERTSON, J., that the appeal should be allowed and that there should be a new trial.

Per MACDONALD, C.J.B.C.: Although a judge can send a jury back for reconsideration of their verdict when it is proved that a mistake is made, care should be taken not to do so where the jury have found the facts beyond any reasonable doubt.

Per MARTIN, J.A.: There was the particular and obvious danger, resulting largely from the lead that was given by the remarks of plaintiffs' counsel and of one of the jurors following immediately thereupon, that the jury would improperly return a new answer to bring about a verdict which would not be properly based upon the facts they ought to find, regardless of the legal consequences, but upon their conception of the legal consequences that should flow therefrom and from an intention to assist the plaintiffs in recovering damages on that conception. The presence of this unusual danger called for a corresponding redirection of unusual care, and required that they should have been warned of this unusual danger and given a clear and definite caution that their sole duty was to find the facts in answer to the questions and leave it to the Court to determine the legal consequences of their finding. A mistrial has resulted from this inadequacy and a new trial must be directed.

Per MACDONALD, J.A.: There is no inconsistency in the answers given by the jury: no confusion evident therein nor any justification for the request by counsel for respondents to the trial judge to resubmit the case to the jury. In any event the jury were perverse in finally finding

in effect on the admitted facts that the deceased could not have seen the work-truck in time to avoid hitting it. His carelessness in failing to see it was the sole and final cause of the accident.

APPEAL by defendant from the decision of ROBERTSON, J. and the verdict of a jury in an action for damages resulting from the death of the plaintiff's son through the alleged negligence of the defendant in operating a working-car at night with defective lighting. At about 1.30 in the morning of April 18th, 1936, the deceased, with two girls and a boy, drove his car north on Granville Street and passed a working-car of the B.C. Electric between 39th and 40th Avenues. He continued on to 45th Avenue where he turned off to the west for two blocks, left the two girls at their home and then came back with the boy to Granville Street where he turned north. In the meantime the B.C. Electric work-car continued on and stopped about 50 feet north of the intersection of 41st Avenue. The deceased, driving north, crossed the intersection of 41st Avenue and ran into the front of the work-car at its left side. The deceased died from injuries the same day, and his companion, one George Smith, was severely injured. On the front of the work-car was a standard head-light on the left side about eight feet high, and a lantern at the front centre hanging on a hook with a reflector behind it, and about six and one-half feet from the ground.

The appeal was argued at Victoria on the 18th, 19th and 20th 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 work-car was about to take the turn on to 41st Avenue but they had to raise the grinders before they took the turn, and two of their men were under the car raising the grinders when the accident took place. It was an ordinarily dark night but the street was well lighted at this intersection. There were two lights on the front of the work-car. The lights of deceased's car were on and there was ample light to see the work-car. He ran head on into the work-car and in doing so he was on the wrong side of the road. Assuming there were no lights on the work-car, with his own lights there was ample light to see the work-car and he was guilty of ultimate negligence. The jury first brought

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in a verdict of ultimate negligence on the part of deceased. The learned judge sent the jury back and then they found there was no ultimate negligence. First there was error in sending back the jury at all. Second, he erred in telling the jury that if they found he was so close to the work-car when he first saw it that he had no opportunity of avoiding it this absolved him of ultimate negligence. That he should not have sent the case back see *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719 at 725; *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106; *Warren* v. *Grinnell Co. of Canada Ltd. and Leggatt* (1936), 50 B.C. 512 at p. 521. Even if he was right in sending the case back the verdict was perverse as the cause of the accident was that deceased drove on the wrong side of the road and he should have seen the work-car with the lights on it: see *Badley* v. *London and North Western Ry. Co.* (1876), 1 App. Cas. 754 at p. 759.

Wismer, K.C., for respondent: We say the work-car was not a well-lighted car; it was a trap. It is apparent the jury were confused and in order that justice be done they should be sent back after understanding the effect of their answer to Question 6. The evidence does not justify the finding of ultimate negligence in this case: see *Irvine* v. *Metropolitan Transport Co.,* [1933] 4 D.L.R. 682; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263. That the light on the work-car was not sufficient see *Wintle* v. *Bristol Tramways and Carriage Co., Lim.* (1916), 86 L.J.K.B. 240; *Atwood* v. *Lubotina* (1928), 40 B.C. 446; *W. L. Morgan Fuel Co.* v. *British Columbia Electric Ry. Co. Ltd.* (1930), 42 B.C. 382; *Baker* v. *E. Longhurst & Sons, Ltd.* (1932), 102 L.J.K.B. 573.

Farris, in reply, referred to *Davies* v. *Mann* (1842), 10 M. & W. 546; *Swadling* v. *Cooper,* [1931] A.C. 1.

Cur. adv. vult.

9th March, 1937.

MACDONALD, C.J.B.C.: On the 17th of May, 1935, at about 2 o'clock in the morning Peter Murray Grant son of the plaintiffs was proceeding in his automobile in a northerly direction on Granville Street, a highway in the City of Vancouver, when

the same collided with a truck or motor standing on Granville Street about 50 feet north of the intersection of 41st Avenue and Granville Street. As a result of the said collision Peter Murray Grant was killed. The defendant is charged with negligence with having the said work-truck on the street without sufficient lights. The defendant's work-truck is a truck used at night only, not in the day time, and was on duty at the time in question as such night-truck. It was a large dark truck and ought to be visible to any person on the street. There was a light on the front of it rather high up and of the character of head-lights of an ordinary street-car and there was a lighted lantern swinging from a bar lower down. The said deceased was on the wrong side of the street when the collision occurred. In fact it occurred by that very circumstance since the automobile struck only the corner of the truck. The body of the automobile which projected on the wrong side of the street hit the truck and therefore caused the disaster.

The young man who was driving the automobile had been at a party and had driven some young ladies home thereafter. He saw this truck when he was driving them home and remarked that it was a very dangerous thing. Having taken the young ladies home he was returning to his own home when the accident occurred. It is difficult to explain how the young man could have failed to see the truck. The lights I have mentioned were on it and there were lights in the neighbourhood which must have disclosed the presence of the truck. The truck was standing where it was only for a few minutes and the finding of the jury on first returning disclosed that he (Grant) was guilty of ultimate negligence.

Questions were submitted to the jury and answered as follows by this first verdict. I set them forth because they are of some importance in this case:

(1) Was the defendant guilty of negligence which contributed to the accident? Yes.

(2) If so, in what did such negligence consist? Inadequate and confusing position of lights on work-car.

(3) Was the deceased P. M. Grant guilty of negligence which contributed to the accident? Yes.

(4) If so, in what did such negligence consist? Insufficient caution in crossing the intersection of Granville Street and 41st Avenue.

(5) If the deceased was guilty of negligence could the defendant, notwithstanding the negligence of the said deceased, have avoided the accident thereafter by the exercise of reasonabl care? If so, in what way? No.

(6) If the defendant was guilty of negligence could the deceased, notwithstanding the negligence of the defendant, have avoided the accident thereafter by the exercise of reasonable care? If so, in what way? Yes. More caution in crossing the intersection of Granville Street and 41st Avenue.

(7) If both the deceased P. M. Grant and the defendant were guilty of negligence, to what degree did the negligence of each contribute to the accident? Express this in the terms of a percentage of the total fault. P. M. Grant 60 per cent. Defendant 40 per cent.

(8) Damages, if any? Duncan Grant $2,000. Mary Grant $3,000.

When the jury returned with their answers to the questions counsel for the plaintiff immediately arose and claimed there must be some mistake in the answer. Thereupon one of the jurymen arose and said that they had made a mistake and said that the jury did not intend to give a verdict against the plaintiffs. The Court thereupon asked the jury to retire and reconsider their verdict. In the reconsidered answer the jury said:

6. If the defendant was guilty of negligence could the deceased, notwithstanding the negligence of the defendant, have avoided the accident thereafter by the exercise of reasonable care? If so, in what way? No.

That is the very opposite of what they said in their first answer. Now, I am of the opinion that although it may be that a judge can send a jury back for reconsideration of their verdict when it has been proved that a mistake is made, care should be taken not to do so where the jury have found the facts beyond any reasonable doubt. The mistake alleged in this case was that the jury found negligence and contributory negligence and apportioned the fault which is inconsistent with their answer to Question 6. They found the answer to Question 6 clearly and unequivocally in their first verdict and they explained their reason by saying "Yes, more caution in crossing the intersection of Granville and 41st Avenue." That is they held that he could have avoided the accident by taking more care in crossing these streets and in the second answer to Question 6, they say he could not have done so. Now in these circumstances I think it was a very dangerous thing to send the jury back for reconsideration of Question 6. The jury did make a mistake in their verdict but that was not the mistake they really made. The only mistake I find in the first answer is that the jury having found that the

defendant could have avoided the accident by the exercise of reasonable care which would have disposed of the case, allowed answers on negligence and contributory negligence to remain. It was a mistrial and the remedy is a new trial, which I would direct.

I note that they did not find the gross amount of damages as required by the statute.

MARTIN, J.A.: This appeal raises a very unusual and difficult question because the jury on further direction changed their answer to the sixth question, originally submitted to them, from an affirmative to a negative, whereby the deceased son of the plaintiffs was acquitted of ultimate negligence originally found against him, with the consequence that the plaintiffs on that changed answer recovered judgment against the defendant based upon the Contributory Negligence Act.

When the original verdict was brought in the plaintiffs' counsel submitted that the said answer to Question 6 was inconsistent with the answer to Question 7, based on said Act, and that the jury had not understood that the effect of their answer to 6 would be to "debar the plaintiffs from succeeding," and therefore he moved the learned trial judge to redirect them. This motion was opposed by defendant's counsel on the ground that there was no inconsistency in the answers or room for misunderstanding on the original charge, but after much discussion the learned judge did redirect the jury because, as he put it:

It seems to me the jury did not appreciate Question 6. I think we will leave it right there. It would be so indefinite that it would probably result in a new trial. I think my duty is, as pointed out by Mr. Justice MARTIN in *McTavish* v. *Langer* (1929), 41 B.C. 363 at p. 370, to send the jury back to make their meaning plain. I propose to bring them in and recharge them upon this particular question of ultimate negligence, and then send them back to answer 6.

Farris: Of course, my Lord, I am opposing that.

THE COURT: Oh! yes.

He then proceeded to charge them in a way which did not differ substantially from his original charge, but just before the jury retired to reconsider the question their foreman said that the jury thought its wording was "ambiguous" and they could not understand the presence or meaning of the word "thereafter"

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in it, and the learned judge, after saying that the question was "not ambiguous at all" gave them further direction upon the word "thereafter" but which did not, to my mind, really differ in substance from what he had already said, and it would, with every respect, have been better to have eliminated that word in redirecting because it was not only out of place in law but tended to continue to confuse the jury upon the exact issue. The defendant's counsel also took objection to the conclusion of that redirection as follows:

THE COURT: . . . If he [deceased] was so close to it [the stationary work-car] that when he first saw it he had no opportunity of avoiding it, then he did not have a last chance. Now, just take this out with you.

Farris: My Lord, I am sorry, it is not a question of when he saw it, it is when he saw it or should have seen it.

THE COURT: I think that is plain. I will stand on it the way it is.

Farris: I am sorry. I didn't hear your Lordship's observation.

THE COURT: I said I will stand on what I said.

In my opinion, with every respect the request of counsel should have been granted, because the limited direction was erroneous under the circumstances and would mislead the jury, particularly in a very unusual situation. Undoubtedly the learned judge was properly endeavouring to avoid a new trial by making clear something "indefinite" or not "appreciated" by the jury in Question 6, which very laudable object is in accordance with the practice of this Court in numerous cases, a long list of which I recently gave in *Warren* v. *Grinnell Co. of Canada Ltd. and Leggatt* (1936), 50 B.C. 512, at 521, and I am very reluctant to interfere with the exercise of such a discretion by a trial judge, placed suddenly in a difficult position, who has a far better opportunity to form an opinion of what is passing in the jury's mind and of the proper course to take, than we have, and hence, under present circumstances, I cannot bring myself to say that he should not have redirected this jury even though, as I view the matter from the different atmosphere of an appellate bench, I might now think here that I would not have done so then and there.

Nevertheless the position was one of very rare occurrence (unique in my very long experience) and of unusual delicacy, and there was the particular and obvious danger, resulting largely from the lead that was given by the remarks of plaintiff's counsel

hereinbefore cited, and of one juror following immediately thereupon, that they would improperly return a new answer to bring about a verdict which would not be properly based upon the facts they ought to find regardless of legal consequences (which was the prime object of the questions), but upon their conception, right or wrong, of the legal consequences that should flow therefrom, and from an intention, good or bad, to assist the plaintiffs in recovering damages on that conception. The presence of this unusual danger called for a corresponding redirection of unusual care (if there was to be a redirection at all) and one that would be adequate under all the special circumstances which I have related (apart, also, from the said misdirection and uncertainty arising out of the misuse of the word "thereafter") required at least that they should have been warned of this unusual danger and given a clear and definite caution that their sole duty was to find the facts in answer to the specific questions and leave it to the Court to determine the legal consequences of their finding.

It follows that, in my opinion, a mistrial has unhappily resulted from this inadequacy, and therefore a new one must be directed: I am not prepared to go the length of saying that the jury acted perversely, because upon an adequate direction there was, in my opinion, some, though slight, evidence upon which they could reasonably have found as they did find.

McPHILLIPS, J.A. would allow the appeal and order a new trial.

MACDONALD, J.A.: This is an appeal from the verdict of a jury arising out of the death of respondents' son in a collision between the deceased's motor-car and a work-car owned by the appellant company, stationary at the time, on street railway tracks on Granville Street, City of Vancouver. It was about to make a turn to 41st Avenue involving a few minutes' preparatory work to enable it to do so.

To questions outlined submitted to the jury the following answers were given: [already set out in the judgment of MACDONALD, C.J.B.C.].

The deceased, with a friend seated beside him, was driving north on Granville Street at the time of the accident. A few

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minutes before while driving south to discharge two lady passengers he saw this work-car proceeding southerly on Granville Street. The collision occurred on the return journey because the deceased driver of the motor-car failed to maintain a position on his own side of the roadway; instead, contrary to the provisions of a city by-law, he invaded the other side of the street lawfully occupied at that moment by the work-train he saw a few minutes before, now stationary on the westerly street-car tracks. He had to cross the greater part of the devil strip in the centre of the roadway to hit the work-car.

Whatever may be said of the jury's finding (and I accept it) that the appellant railway company's servants were negligent because of the position of the lights on the work-car and their inadequacy it is not surprising that they also found the deceased negligent in driving into an obstruction on the other side of the street—an object so large and ungainly that it ought to be revealed by the head-lights on his own car if he was paying the slightest attention. The deceased therefore was found negligent because of "insufficient caution."

The appellant on its part was properly acquitted by the jury of ultimate negligence as it was a stationary object; while the deceased was properly found guilty of failing to avert the accident as he had the last chance to do so. He could have avoided it by turning back to his own side of the highway when he found (or should have found) that he was in a forbidden area with an immovable object almost directly in front of him occupying the street-car tracks. I mean of course immovable at that time as two minutes' preparatory work was necessary before the work-car could be moved. Hence the jury returned the answer to Question 6 already referred to. Mr. *Wismer*, I think, conceded—at all events, it is true—that notwithstanding the similarity in the answers to Questions 4 and 6, the answer to the latter question constitutes a good finding of ultimate negligence on the part of the deceased.

With the foregoing answers returned in the ordinary course the respondent's action would have been dismissed. That did not take place. The respondent's counsel at once addressed the Court as follows:

Murphy: My Lord, I would like to point out that by the answer to Question 6 the jury seem to have found ultimate negligence, that that answer is inconsistent with apportioning damages or finding damages and also finding the amount to which the two parties were negligent. I do not think the jury understood, my Lord, that in answering Question 6 they were debarring the plaintiffs from succeeding. It is, I submit, inconsistent with the other answers which they gave. I would ask your Lordship to put it to them whether—at least, pointing out to them that the answer to Question 6 means ultimate negligence in the boy, and means that the other negligence cannot be considered, and that no damages can be recovered because that is so inconsistent with the other findings.

Farris: My Lord, I must object to that because . . . the jury are not concerned with any consequences.

Murphy: No it is not a question of consequences; it is a question that they obviously did not understand the effect of the answer to Question 6.

The purpose of submitting questions to the jury is to ascertain the facts. With the effect of the answers or legal implications they are not concerned. When the jury consider (or are permitted to consider) consequences they are assuming the functions of the Court. The fact that they also answered questions submitted in respect to degrees of fault did not indicate confusion; nor was inconsistency shown in answering the other questions outlined. Answers to questions are often asked for and given, only to be utilized by the Court if the occasion for doing so arises. Nor is it, of course, sound to say that because the jury did not understand the legal effect of their answers—a point of law—they therefore did not understand the purport of the questions asked or the responsive answers that ought to be given—a point of fact. Certainly a jury can best perform its fact-finding functions when not disturbed by, or concerned with, legal implications.

It is also obvious that the evidence justified the answer to Question 6. Can it be said that the driver of a motor-car with proper head-lights acting reasonably could not "pick up" this large work-car with or without lights on it, in time to turn back to his own side of the street? I think not. To hold otherwise would mean a refusal by Courts and juries to place upon drivers of motor-cars generally a fair share of responsibility for their actions and to excuse in this case the clearest kind of final negligence on the part of the unfortunate deceased. That, at all events, with deference to other views, is my opinion. Such a

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course would not be in the interests of safety on the public highways. His head-lights, I repeat, would reveal the truck in ample time to turn aside if he was keeping a proper look-out. If that is not obvious as a general proposition from ordinary observation, there is ample evidence to establish it in the respondents' case.

One of their witnesses (Lea) saw the work-car 100 feet away as he approached it in a motor-car from the other side. He was approaching the rear end of the work-car on which there were no lights. True he was looking for it but all drivers of motor-cars must constantly be on the alert for possible obstructions, animate on inanimate, while driving a car. As said in *Pipe* v. *Holliday* (1930), 42 B.C. 230 at 240:

> The first requirement of motor-car drivers is to be alert; to keep a sharp look out for possible danger. The object is to put the driver in a position to take steps to meet any emergency suddenly arising.

Even passengers in the car (respondents' witnesses) a few minutes before the accident (passing the truck as it travelled southerly on Granville Street) saw it, when it was at least 20 feet away. I am satisfied they could see it at a much greater distance. If these passengers in the back seat, without any obligation to maintain a look-out could see it at that distance so also should the driver of the motor-car who was under that obligation. Further, as intimated, the deceased driver had the assistance of head-lights; the passengers in the back seat saw the work-car through the rear window as they passed without that assistance. Even a distance of 20 feet would (as the motor-car collided with the corner of the work-car nearest to it) enable the driver to swerve in time to avoid the impact. An automobile, as its name implies, is very mobile and its course can be changed in a fraction of a second and in a limited space. He could, of course (or should), see it at a much greater distance as the jury doubtless believed. If these head-lights could not reveal an object of this size at a greater distance than 20 feet they were not efficient and that was not suggested.

Another witness for respondents (Jessie McDonald) "saw the whole thing." She meant that the whole work-car was visible to her as she looked back through the rear window of the motor-car after passing it travelling south as aforesaid. It was, as

stated, a few minutes later on a return journey, after discharging the passengers in the rear seat, that the deceased ran into it. He had therefore the advantage of seeing it before the impact. I may add that there were street lights in the vicinity.

I refer to the facts to show that there was no inconsistency in the answers given by the jury; no confusion evident therein, nor any justification, in my view, for the request by counsel for respondents to the trial judge to resubmit the case to the jury; certainly not on the ground that the effect of their answers was that "no damages can be recovered" unless they were given another chance to reconsider question number 6. On reconsideration the jury would face its task, not in an untrammelled way, as before, but with the suggestion that their answer to one question should be framed to bring about a certain result. It would be bad practice to permit such a course to be taken in the many similar cases of this nature that doubtless will arise in the future.

The jury, however, were willing to assume functions properly reserved for the Court, as would appear by a statement of one of their number. When counsel for respondents said "they did not understand Question 6," a juror replied "that is quite evident, my Lord, if there is anything we have said that would debar the plaintiff from damages." It is hardly necessary to repeat that this concern about consequences does not show that the jury did not understand the purport of question number 6. Failure to appreciate the law does not indicate inability to appreciate the facts.

In my opinion nothing occurred up to this stage (or later) to warrant the resubmission of the case to the jury. I say so with the greatest respect for the contrary opinion of the learned trial judge. They were given an opportunity to consider (not the whole case) but only the answer to Question 6, and it is obvious from the discussion that they wished to reconsider it on an improper basis, *viz.*, to find an answer, as one juror expressed it, that "would [not] debar the plaintiffs from damages." That, at all events, is my firm conviction and holding that view I think I ought to express it. I may add that a further charge was given in terms almost identical with the original charge. It was not

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directed to clearing up any alleged confusion as to facts for the reason, I assume, that there was no difficulty, on that score.

The only incident that might possibly support the course taken in resubmitting Question 6 was indicated by the foreman of the jury. Not at the commencement of the discussion (or during it) but after the second charge was given he said, feeling no doubt the need for justification, that "the wording of Question 6 was ambiguous." The trial judge stated in reply (I think correctly) "I do not think Question 6 is ambiguous at all: it is clear," whereupon the foreman said "Why is 'thereafter' there, what does 'thereafter' mean?" This after-thought as I regard it came too late, in my opinion, in view of the discussion already outlined, to lead one to the conclusion that the jury, notwithstanding all that occurred, were not solely concerned about the "effect" or "consequences" of their answers. They were not really troubled with the meaning of the word "thereafter." When the jury returned they answered Question 6 with the word "No."

I would allow the appeal and dismiss the action. I do so the more readily because I think in any event the jury were perverse in finally finding in effect on the admitted facts that the deceased could not (exercising proper care) have seen the work-truck in time to avoid hitting it. His carelessness in failing to see it was the sole and final cause of the accident.

MCQUARRIE, J.A.: I agree that the appeal should be allowed and a new trial granted.

Appeal allowed and new trial ordered; Macdonald, J.A. would dismiss the action.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondents: *G. S. Wismer.*

THE KING v. SHIN SHIM.

C.A.
1937
Mar. 15, 16.

Chinese Immigration Act—Chinese girl—Claim of birth in Victoria—Examination by controller—Order for deportation—Dismissal of appeal—Habeas corpus—Order for examination by Court to determine place of birth—Appeal—56 Geo. III., Cap. 100, Sec. 3 (Imp.)—R.S.C. 1927, Cap. 95, Sec. 37.

A Chinese girl seeking admission into Canada, and claiming that she was born in Canada, was examined by the Controller of Chinese Immigration who then ordered that she be deported. An appeal from the order was dismissed. On an application for a writ of *habeas corpus* with *certiorari* in aid, an order was made that an examination do proceed before a judge of the Court to determine whether the applicant was in fact born in Canada. On appeal from the order:—

Held, that this appeal should not now be heard because it is premature. The application before the learned judge should be proceeded with in accordance with the ruling that he has given to admit evidence of the Canadian citizenship of the respondent under section 37 of the Chinese Immigration Act, and "in a summary way" pursuant to section 3 of the Habeas Corpus Act of 1816, Cap. 100.

APPEAL by the Crown from the order of McDONALD, J. of the 8th of January, 1937, on an application for a writ of *habeas corpus* with *certiorari* in aid, directing that the Court do proceed to examine into the fact as to whether the applicant was born in Canada. The applicant claims she was born on Vancouver Island on October 31st, 1915, that her parents took her to China in September, 1918, that she was married in China in January, 1934, to one Yen Goon Tong, who is now lawfully resident and domiciled in the City of Vancouver. She returned to Canada on the 8th of September, 1936, and upon being examined, the Controller of Chinese Immigration made an order for her deportation on the 23rd of September, 1936.

The appeal was argued at Vancouver on the 15th and 16th of March, 1937, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Elmore Meredith, for the Crown: There was an inquiry before the Controller of Chinese Immigration to determine the citizenship of this Chinese woman. She presented a birth certificate but

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the controller concluded the applicant was not the person referred to in the certificate, and he ordered that she be deported. She appealed from this order and the appeal was dismissed. The learned judge ordered that there be an examination before a judge of the Court to determine whether the applicant was in fact born in Canada. We submit that the Controller of Chinese Immigration has the sole right to determine whether she was born in Canada: see *In re Immigration Act and Lee Chow Ying* (1927), 38 B.C. 241; *In re Chinese Immigration Act and Lee Chow Ying* (1928), 39 B.C. 322.

C. F. MacLean, for respondent, referred to *In re Chinese Immigration Act and Lee Chow Ying* (1928), 39 B.C. 322, and Habeas Corpus Act, 56 Geo. III., Cap. 100; R.S.B.C. 1911, Vol. IV., at p. 79.

Meredith, replied.

The judgment of the Court was delivered by

MARTIN, J.A.: We are all of opinion that the only course open to us in accordance with our practice established by repeated decisions is that this appeal should not be heard at the present moment because it is premature, and the proper course to adopt below is that the application before the learned trial judge should be proceeded with and that he should not be interfered with but allowed to continue to hear it in accordance with the ruling that he has given to admit evidence of the Canadian citizenship of the respondent under section 37 and "in a summary way" pursuant to section 3 of the Habeas Corpus Act of 1816, Cap. 100. As to whether or no that ruling is right or wrong, that is something that will be open for review after his decision on the application as a whole is finally arrived at.

Solicitors for appellant: *McCrossan, Campbell & Meredith.*

Solicitors for respondent: *Fleishman & MacLean.*

IN RE INTENDED ACTION. KNOX v. VENNING.

S. C.
In Chambers
1937
Aug. 11, 18.

Statutes—Revised Statutes of 1936—Mortgagors' and Purchasers' Relief Act, 1934—Not printed in extenso in Revised Statutes—Listed in table of private and local Acts in revision—Validity—B.C. Stats. 1934, Cap. 49—B.C. Stats. 1936, Cap. 52, Sec. 6.

The Mortgagors' and Purchasers' Relief Act, 1934, was not printed *in extenso* in the Revised Statutes of British Columbia, 1936, but was listed in a table of private and local Acts in the fourth volume of the revision.

Held, that the Act is still in force as it cannot be said to come within section 6 of the Revised Statutes Act, 1936, as being repugnant to the Supreme Court Act or the Rules, and the fact that it has been included among the statutes listed in volume 4 of the Revised Statutes, 1936, negatives the view that it has been repealed.

APPLICATION for leave to issue and serve *ex juris* a writ of summons in a foreclosure action. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 11th of August, 1937.

E. Lando, for the application.
Dickie, contra. *Cur. adv. vult.*

18th August, 1937.

MANSON, J.: Knox, the intended plaintiff, asks leave to issue and serve *ex juris* a writ of summons pursuant to Order II., r. 4 of the Supreme Court Rules. The action is one for foreclosure upon a mortgage. No preliminary proceedings under the Mortgagors' and Purchasers' Relief Act, 1934, B.C. Stats. 1934, Cap. 49 have been taken. Counsel contends that the Act mentioned is no longer in effect because it has not been printed *in extenso* in the Revised Statutes of British Columbia, 1936, which came into effect by Proclamation on 30th June, 1937. Reference is made to section 6 of the Revised Statutes Act, 1936, passed as chapter 52 of the Statutes of 1936 and now to be conveniently found at p. 4695 of Vol. IV. of the Revised Statutes which section is quoted hereunder:

6. On, from, and after the day so declared, the "Revised Statutes of British Columbia, 1924," and the several public Acts and parts of Acts of the Province passed since the coming into force of the "Revised Statutes of British Columbia, 1924," including those passed during the present session

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or which may be passed during any other session of the Legislature held in the year 1936, shall, so far as the same are within the legislative authority of the Legislature, stand repealed to the extent that they are incorporated in the "Revised Statutes of British Columbia, 1936," or are repugnant thereto; and the several private Acts of the Province passed since the coming into force of the "Revised Statutes of British Columbia, 1924," shall stand repealed to the extent that they are incorporated in the "Revised Statutes of British Columbia, 1936."

It is contended that the Mortgagors' and Purchasers' Relief Act, 1934, is repugnant to the Supreme Court Act and the Supreme Court Rules, which latter have the force of statute, by reason of the fact that it derogates from the absolute right given to a mortgagee by virtue of section 9 of the Supreme Court Act and the Rules to issue a writ for foreclosure or to proceed by way of originating summons. The Supreme Court Act is now Cap. 56 of the Revised Statutes. The Mortgagors' and Purchasers' Relief Act, 1934, Cap. 49, Sec. 18 (2), as amended by Cap. 35 of 1936 (Second Session), Sec. 2, reads as follows:

Subject to such Proclamation, this Act shall remain in force until the expiration of thirty days from the close of the first session of the Legislative Assembly to be held in the year 1937.

No Proclamation has been made repealing the Act and the Act has not expired by effluxion of time. In volume IV. of the Revised Statutes, at p. 4765, the Mortgagors' and Purchasers' Relief Act, 1934, is listed under the caption "Table of Private and Local Acts of the Province of British Columbia, 1872 to 1936 (2nd sess.)." There is a sub-caption under the general caption, at p. 4745, which reads in part:

Including references to certain public Acts of general application which have not been consolidated in any revision of the statutes, . . ."

The Mortgagors' and Purchasers' Relief Act, 1934, falls fairly within the class of statute covered by the sub-caption.

One readily understands that the Act was not printed *in extenso* in the revision by reason of its temporary character. The practice of not printing *in extenso* in the Revised Statutes Acts of a temporary character was followed in the revision of 1924. The Act itself provides specifically as to the mode of ending its operation. An Act is not to be repealed except by express enactment or by necessary implication and repeal by implication is never to be favoured—*Dobbs* v. *Grand Junction Waterworks Company* (1882), 9 Q.B.D. 151 at 158; (1883), 9 App. Cas.

49. There is no express repeal here and, in my view, there is no repeal by necessary implication. The statute can scarcely be said to be repugnant to the Supreme Court Act and Rules. It does no more than to establish certain conditions precedent to the right to proceed under the Supreme Court Act and Rules. Furthermore the Legislature negatives the view that the statute has been repealed by listing it in volume IV. (*supra*) as it has done. Volume IV. is part of the Revised Statutes of British Columbia, 1936.

I think Mr. *Lando* was well justified in bringing his application in view of the fact that there was no reference in the Revised Statutes Act, to the omission of Acts of temporary application. The application will be dismissed but without costs.

Application dismissed.

LEIGH v. LUTZ.

C.A.
1937
Mar. 18, 19;
April 13.

Families' Compensation Act—Automobile accident resulting in death of person injured—Action by parents—Compensation in respect of death—Measure of damages—R.S.B.C. 1924, Cap. 85.

In an action for damages by a father for the death of his son, who died from injuries received when run into by an automobile driven by the defendant, the defendant admitted liability and paid $2,000 into Court as compensation to all persons entitled to recover damages from him under the Families' Compensation Act. The plaintiff was awarded $3,500 and the defendant appealed, claiming that this sum was excessive. Deceased was a school-teacher, unmarried, 24 years of age and in good health. He was survived by his father, 60 years old and in good health, and his mother, 66 years old and suffering from shaking palsy. They were in poor financial circumstances, the father being on relief since 1933, but received $12 per month for operating a stall in a meat market. Deceased contributed $10 per month to the parents for two years prior to his death, and made them other irregular payments, the net contributions for the first year being about $255 and for the second year $190. Deceased earned in the first year as a teacher $800 and in the second year $1,000. He had prospects of future increases up to $1,400 a year. His estate at his death was about $200.

Held, on appeal, affirming the decision of McDONALD, J. (MARTIN, C.J.B.C. dissenting and would allow $2,500 in damages), that the learned judge

has allowed $3,500 to be apportioned equally between the father and the mother, and upon a full consideration of the facts and the law bearing on the case, it can in no way be said that the amount fixed by the trial judge is in any way excessive, and the appeal should be dismissed.

APPEAL by defendant from the decision of McDONALD, J. of the 28th of January, 1937, whereby he awarded the plaintiff damages in the sum of $3,500 in respect of the death of Frederick C. Leigh, who died as a result of injuries received in an automobile accident on June 27th, 1936. The plaintiff brought the action as administrator of the estate of Frederick C. Leigh on behalf of himself (father) and his wife (mother) of the deceased. The defendant admitted liability to the plaintiff. The sole question is the amount of damages recoverable under the Families' Compensation Act. The deceased was a schoolteacher, unmarried, 24 years of age and in good health. He was survived by his father and mother. His father was 60 years of age in good health, and the mother was 66 years of age and suffering from shaking palsy. The parents were in poor financial circumstances. The father was on relief since 1933, but received $12 per month for operating a stall in the city market. Deceased contributed $10 per month to the parents for two years prior to his death and additional contributions at irregular times. The net contribution for the first year was about $255, and for the second year $190. Deceased earned in the first year as a teacher $800 and during the second year $1,000. He had prospects of future increases up to $1,400 a year. His estate at the time of his death was about $200.

The appeal was argued at Vancouver on the 18th and 19th of March, 1937, before MARTIN, MCPHILLIPS and MCQUARRIE, JJ.A.

Craig, K.C., for appellant: The only question at issue is the amount of damages. The damages awarded are excessive and the learned judge proceeded on a wrong principle in that he awarded damages practically equivalent to the cost of a Dominion Government annuity of $300 per year payable during the lifetime of the father, who was six years younger than the mother. The defence called no evidence so there is no dispute

as to the facts. The damages must be confined to the pecuniary loss sustained by the death of deceased: see *Gillard* v. *The Lancashire and Yorkshire Railway Company* (1848), 12 L.T. Jo. 356; *London and Western Trusts Co.* v. *Grand Trunk R.W. Co.* (1910), 22 O.L.R. 262. He contributed for two years before his death, the first year from $253 to $275, the second year from $175 to $190 and although he got $200 more in his second year his contribution was less than in the first year. The judgment gives them $300 a year certain as long as they live. The evidence does not justify this and he applied a wrong principle: see *Johnston* v. *Great Western Railway,* [1904] 2 K.B. 250 at 258. The general principle is to take into consideration all the uncertainties of the situation and strike a fair average. The deceased if he had lived was subject to illness or losing his position: see *Rowley* v. *London and North Western Railway Co.* (1873), L.R. 8 Ex. 221; *Moffitt* v. *Canadian Pacific R.W. Co.* (1910), 13 W.L.R. 244; *Runciman* v. *The Star Line Steamship Company* (1900), 35 N.B.R. 123; *Renwick* v. *Galt, Preston, and Hespeler Street R.W. Co.* (1906), 12 O.L.R. 35; *Wallace* v. *Grand Trunk R.W. Co.* (1921), 64 D.L.R. 75. An award of damages based on the cost of an annuity is erroneous: see *Schwartz* v. *Winnipeg Electric Ry. Co.* (1913), 23 Man. L.R. 483; *Dame Lasalle* v. *Melle Rivest* (1923), 62 Que. S.C. 26. A jury must not attempt to award the full amount of a perfect compensation for a pecuniary injury but must take a reasonable view and give what they consider a fair compensation: see *Sheahen* v. *Toronto R.W. Co.* (1911), 25 O.L.R. 310; *Anderson* v. *Forrester* (1914), 7 W.W.R. 1039. All the chances are eliminated and they are receiving a sure thing by getting $3,500.

Mahon, for respondent: We are not limited to the last year's earnings. On the question of increase of salary see *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800. We are entitled to recover the actual pecuniary benefit which the parents might reasonably have expected to enjoy had the son lived: see *Royal Trust Co.* v. *Canadian Pacific Ry. Co.,* [1922] 3 W.W.R. 24 at p. 26; *Day* v. *Canadian Pacific Ry. Co.* (1922), 30 B.C. 532; *Kuproski* v. *North Star Oil Co.,*

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Ltd., [1934] 2 W.W.R. 7; affirmed; [1935] S.C.R. 13; *Giddings* v. *Canadian Northern Ry. Co.*, [1920] 2 W.W.R. 849; *Mayor, &c., of Montreal* v. *Hall* (1885), 12 S.C.R. 74 at p. 110; *Atcheson* v. *Grand Trunk Railway Co.* (1901), 1 O.L.R. 168 at p. 170; *Praed* v. *Graham* (1889), 24 Q.B.D. 53 at p. 55; *Powell* v. *Canadian Pacific Railway* (1914), 7 Sask. L.R. 43.

Craig, in reply: The Court cannot change an uncertainty into a certainty. By the judgment the parents are in a far better position than if the son had avoided the accident: see *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280.

Cur. adv. vult.

13th April, 1937.

MARTIN, C.J.B.C.: With every respect I find myself unable to take the same view of the undisputed facts of this case as my learned brothers, because in my opinion the learned judge below assessed the damages on a wrong principle in that, as Mr. *Craig* submitted on cases cited, he based them on the cost of an annuity, the result of which was to insure a complete compensation for life and wholly disregard the chances, indeed probabilities, of the deceased's illness or accident and unemployment, and of his marriage with its attendant liabilities, and also the inevitable consequences of a decline in earning power and the ultimate cessation of it consequent upon old age: the effect indeed of this judgment is to establish the plaintiffs in an assured financial position for life, which is a much better one than they had before their son had been killed. Bearing in mind these necessary elements in considering the facts of this case, the utmost that could be awarded on the proper basis of pecuniary loss is, in my opinion, $2,500 and I would allow the appeal and reduce the judgment to that amount.

MCPHILLIPS, J.A.: The appellant here has paid $2,000 into Court and submits that that sum is sufficient upon the facts of this case to indemnify the parents for the loss of their son who died consequent upon injuries received in a motor accident owing to the negligence of the appellant. The action is brought under the provisions of the Families' Compensation Act.

It is the pecuniary benefit that would have ensued to the parents had he lived that has to be considered and allowed under the provisions of the Act. In my opinion upon the facts the learned trial judge has not exceeded a reasonable sum for the loss of the son who had exhibited every intention of providing for his parents as time went on and would increase his contribution as his earnings improved and his prospects were bright.

The amount paid into Court would seem to me to be wholly inadequate upon the facts to satisfy the legal requirement provided by the statute law, that is, under the provisions of the Families' Compensation Act. It was evidently the case of the cutting off from life of a very promising young man who would have made very considerable provision for his parents in their declining years judged by his contribution of the past, increasing as they no doubt would have been in the future.

It is submitted by counsel for the respondent that upon the evidence adduced at the trial that to obtain an annuity for even one of the parents of $25 per month it would cost $3,615, so that at once the $2,000 paid into Court is seen to be wholly inadequate. The expectancy of life of the father and mother is respectively thirteen and one-half years and eleven decimal two years. It would take $3,516 to obtain even $25 a month to the father and that would give nothing to the mother. Now what the learned trial judge has allowed is $3,500 to be apportioned and equally divided between the father and the mother and upon a full consideration of both the facts and the law bearing upon the case it is my opinion that it can be in no way said that the amount fixed by the learned trial judge—$3,500—is in any way excessive (*Praed* v. *Graham* (1889), 24 Q.B.D. 53, 55). No doubt the damages are restricted to the actual pecuniary benefit the parents might reasonably have expected to enjoy had the son not been killed (*Baker* v. *Dalgleish Steam Shipping Co.*, [1922] 1 K.B. 361, 371; *Kerley* v. *City of Edmonton* (1915), 30 W.L.R. 553; *Royal Trust Co.* v. *Canadian Pacific Ry. Co.*, [1922] 3 W.W.R. 24, 25, 26; *Kuproski* v. *North Star Oil Co., Ltd.*, [1934] 2 W.W.R. 7; [1935] S.C.R. 13; *Giddings* v. *Canadian Northern Ry. Co.*, [1920] 2 W.W.R. 849, 850; *Mock* v. *Regina Trading Co., Ltd. and McGregor*, [1922] 2 W.W.R.

1241; *Mayor, &c., of Montreal* v. *Hall* (1885), 12 S.C.R. 74, 110; *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800).

I would dismiss the appeal.

McQUARRIE, J.A.: The only question involved in this appeal is as to the amount of damages. The learned trial judge awarded $3,500 to the father and mother of the deceased and the appellant brought into Court $2,000 to which amount his counsel contends the damages should be reduced. The father of the deceased is 60 years of age and the mother 66 years. The deceased was their only son and was a school-teacher, 24 years of age. He had assisted his parents to the extent set out in the factum of the respondent. In giving judgment the learned trial judge found that "the young man, in respect of whose death the action is brought, was both as to his ability and his integrity and his sense of filial obligation far beyond the average." That appears to have been his Lordship's guiding principle in fixing the damages and I must say in my opinion the amount allowed was not at all unreasonable. It is manifestly impossible to arrive at a positively accurate estimate of the pecuniary loss which the father and mother suffered or the exact value of their expectancy from the son if he had not been killed through the negligence of the appellant. A great many elements are involved but, in view of the trial judge's said finding, I feel that a difference of $1,500 between the amount allowed and the amount admitted by the appellant would not justify us in disturbing the judgment. I would, therefore, dismiss the appeal.

Appeal dismissed, Martin, C.J.B.C. dissenting.

Solicitors for appellant: *Craig & Tysoe.*
Solicitor for respondent: *H. S. Mahon.*

REX v. GARRIGAN.

C.A.
1936
Nov. 27, 30.
1937
Jan. 12.

Criminal law—Charge of murder—Accused's drunkenness as a defence—Degree of incapacity—Murder or manslaughter—Directions to jury.

The accused killed his own eighteen-months-old child while in a state of intoxication. The defence was based solely on his alleged condition by reason of intoxication. The jury brought in a verdict of manslaughter, for which he was convicted.

Held, on appeal, affirming the conviction by MANSON, J., that only actual insanity, the outcome of alcoholic excess, can prevent a conviction. If the condition falls short of insanity the jury may find the accused guilty of manslaughter. The learned judge rightly told the jury that only a finding of insanity could justify a verdict of acquittal, and the appeal should be dismissed.

APPEAL by accused from the decision of MANSON, J. of the 4th of June, 1936, on a charge of murder. On the 18th of April, 1936, at about 6 o'clock at night, accused was seen with his child at Ashcroft going towards the back door of a pool-room known as Pete Christie's Pool Room which opens on a wide court-yard. The door had a screen door, and to the right as you enter is a wood-box with a pile of wood alongside. Pete Christie, the proprietor, came out to empty some ashes. He saw Garrigan with the child, spoke to him and then went back in, locked the door as it was time to close the pool-room, and then went to his supper through the front door. Mrs. Turonski, who lived across from the back door of the pool-room saw Garrigan try to get in the pool-room, and when he found the door locked he went away a short distance, then came back, put the child on the wood-box and kicked at the door. He then picked up a piece of scantling and knocked the child down and then hit it with the scantling three or four times. The tragedy was also seen by Mr. Turonski and a Mrs. Peters who lived close by. One John Nordstrom came up when the accused was leaning over the child with the stick. He held the accused until the police came. The witnesses saw that the accused had been drinking.

The appeal was argued at Vancouver on the 27th and 30th of November, 1936, before MACDONALD, C.J.B.C., MARTIN and MACDONALD, JJ.A.

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Carmichael, for appellant: The charge was not in conformity with the evidence in regard to drunkenness and there was misdirection: see *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479 at p. 506; *Rex* v. *Meade,* [1909] 1 K.B. 895. The learned judge confused the jury on the test applicable to the defence of drunkenness and to that of insanity, also as to the distinction that reduces the crime from murder to that of manslaughter. The question is was he so deprived of his senses by the use of alcohol that he did not know what he was doing. He is interfering with the functions of the jury by saying that they cannot bring in a verdict discharging the accused: see *MacAskill* v. *Regem,* [1931] S.C.R. 330. The case of *Reg.* v. *M'Naughton* (1843), 4 St. Tri. (N.S.) 847 was wholly with respect to insanity and not drunkenness: see also *Rex* v. *Payette* (1925), 35 B.C. 81.

Pepler, for the Crown: Taking the charge as a whole there was no misdirection and secondly, even if there was misdirection there was no substantial wrong done the accused. That the charge should be considered as a whole see *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229 at p. 245; *Steinberg* v. *Regem* (1931), 56 Can. C.C. 9 at p. 47. Drunkenness so bad that accused did not know what he was doing reduces the crime from murder to manslaughter: see *Director of Public Prosecutions* v. *Beard* (1920), 14 Cr. App. R. 159; *Rex* v. *Kovach* (1930), 55 Can. C.C. 40; *Reg.* v. *Doherty* (1887), 16 Cox, C.C. 306; *MacAskill* v. *Regem* (1931), 55 Can. C.C. 81. That there was no substantial wrong see *Brooks v. Regem,* [1927] S.C.R. 633.

Carmichael, replied.

Cur. adv. vult.

12th January, 1937.

MACDONALD, C.J.B.C.: The appeal should be dismissed.

MARTIN, J.A.: While I agree with my learned brothers that this appeal must be dismissed, in accordance with *MacAskill* v. *Regem,* [1931] S.C.R. 330, and *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479, yet seeing that the learned trial judge decided, as was his right, to instruct the jury on the

defence of insanity which he thought appeared upon the evidence, though it was disclaimed by the accused's counsel, yet I cannot help feeling that if it was necessary to present that defence to them it would, with every respect, have been better if it had been presented in as strong a way as the evidence justified, and also more clearly so as to avoid the criticism which has not unwarrantably been directed to it; nevertheless I find myself unable, despite these misgivings, to go the length of dissenting from the view taken on the charge as a whole by the majority of this Court, especially in view of the position still firmly adhered to by the appellant's counsel that he does not rely on the defence of insanity.

MACDONALD, J.A.: The accused charged with having murdered his infant child (age 18 months) was convicted of manslaughter. He was intoxicated at the time of the occurrence and in the light of his character and previous record no rational reason can readily be assigned for his act. His drunken wrath, awakened by trivial incidents, spent itself in slaying his own child.

The trial judge told the jury that they must find him guilty of either murder or manslaughter unless they found him to be insane at the time of the commission of the offence in which event a verdict of "not guilty on the ground of insanity" should be returned. Insanity was not pleaded.

Mr. *Carmichael,* for the accused, submitted that his Lordship should have told the jury that if they were satisfied the prisoner, by reason of intoxication, was incapable of forming an intent and incapable of appreciating what he was doing, they might acquit him. I cannot agree with this submission.

As in *MacAskill* v. *Regem,* [1931] S.C.R. 330, the case at Bar was presented to the jury on the basis that the accused inflicted the blows causing death. That was not disputed. The defence was based solely on his alleged condition by reason of intoxication and as Duff, J., now Chief Justice of Canada, said, at p. 332:

The real issue was whether or not his condition, at the time of the commission of the offence, was such as to bring the offence within the legal category of manslaughter.

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Macdonald, J.A.

The decision of the House of Lords in *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479 reveals the principles applicable. No useful purpose would be served by a detailed discussion of the late Lord Birkenhead's judgment. It is enough for our purpose to quote from his conclusions a single passage:

> The law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

Only actual insanity, the outcome of alcoholic excess, can prevent a conviction. If the condition falls short of insanity the jury may find the accused guilty of manslaughter. Lord Birkenhead pointed out the distinction between defences based upon insanity on the one hand and drunkenness on the other.

As stated insanity was not pleaded. Without expressing an opinion as to whether or not in view of that fact and the facts of the case generally it was necessary to introduce that question into the case, it is in any event true that the learned trial judge rightly told the jury that only a finding of insanity could justify a verdict of acquittal. Having introduced it, it was necessary, as in all cases where a possible defence is left to the jury, to place it fairly before them. That, I think, was done. The trial judge expressed, or at all events intimated his own views. That is not objectionable in law, whatever may be said of it as a matter of practice, so long as the facts are left to the jury to decide.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. B. Colvin.*
Solicitor for respondent: *C. Carmichael.*

REX v. CANNING.

C.A.
1937
Feb. 1, 2, 3; *March* 2.

The Opium and Narcotic Drug Act, 1929—Conspiracy to distribute morphine —Evidence of an accomplice—Corroboration—Charge—Can. Stats. 1929, Cap. 49, Sec. 4 (f).

The accused was charged that he unlawfully did conspire, combine, confederate and agree with Shenichiro Hikida, Tadayoski Furumoto, Joe Ferraro and others, to commit an indictable offence, to wit, to distribute a drug, to wit, morphine, contrary to section 4 (*f*) of The Opium and Narcotic Drug Act, 1929. The three above-mentioned conspirators had been convicted and sentenced to imprisonment. The accused was not charged with them. The above named Furumoto turned King's evidence and stated that he sold a pound of morphine to accused in half-pound lots. The only evidence to corroborate Furumoto was that of an agent of the police, to the effect that he had seen Furumoto and the accused talking together one night, but out of earshot, in the house of the above-mentioned Ferraro, which was a boot-leggers' drinking place, resorted to by criminals and others, including operators in the opium traffic. The accused admitted he conversed with Furumoto on the night in question, but denied that the conversation was with respect to narcotics. The trial judge in his charge intimated that he was favourably impressed with the evidence of Furumoto and he told the jury that if they believed him they had the right to convict the prisoner without corroboration of Furumoto's evidence, but that it was highly dangerous in some cases to do so. The accused was convicted.

Held, on appeal, affirming the decision of MANSON, J. (MARTIN, J.A. dissenting), that the charge was sufficiently given by the trial judge and the jury were entitled to found their verdict upon it, further that there was corroboration in the evidence of the agent of the police who saw accused talking to Furumoto in Ferraro's boot-legging premises, and if the jury decided the case on corroborative evidence they were justified in doing so.

APPEAL by accused from his conviction on the 27th of October, 1936, on the charge that he conspired with Shenichiro Hikida, Tadayoshi Furumoto and Joe Ferraro to distribute a drug, to wit, morphine to persons contrary to section 4 (*f*) of The Opium and Narcotic Drug Act, 1929. Hikida lived with his family on Georgia Street East where he had a ship chandler's store and he contacted with Furumoto with a view to getting a connection for distributing drugs. Furumoto's mother lived with the Hikida family. He also contacted with one Ferraro

who lived at 532 Nelson Street, known as a boot-legging house. between them they got quantities of drugs off the Japanese boats and distributed them. The accused Canning was approached by Ferraro to undertake a portion of the distributing. Furumoto turned King's evidence and swore that Canning purchased two lots of eight ounces each on two occasions at $55 per ounce and paid $440 for each lot. He was convicted and sentenced to seven years' imprisonment and to a fine of $500.

The appeal was argued at Victoria on the 1st, 2nd and 3rd of February, 1937, before MACDONALD, C.J.B.C., MARTIN and MCQUARRIE, JJ.A.

Donnenworth, for appellant: Furumoto turned King's evidence and said there were two sales to Canning of half a pound of morphine each. There is no corroboration of Furumoto's evidence. Fisher, a stool pigeon and former criminal, who acted as a detective, said that at Ferraro's house he heard Canning say to Furumoto "Come upstairs I want to talk to you." They then went upstairs where they stayed a short time and then came down again. We say this is not corroboration of anything. There is no evidence of what their conversation was. Howe's evidence as to what took place at the boundary in January should not have been allowed in at all, and the cross-examination of the accused was nearly all inadmissible. In the charge the learned judge said "If you find Furumoto was an accomplice." This was misdirection as Furumoto admitted he was an accomplice. The words "the identity of the prisoner" were used, which had nothing to do with the case. That evidence of the Seattle trip was substantially wrong see *Thomas* v. *David* (1836), 7 Car. & P. 350; *Harris* v. *Tippett* (1811), 2 Camp. 637; *Attorney-General* v. *Hitchcock* (1847), 1 Ex. 91. That Howe was not a competent witness see *Rex* v. *Finnessey* (1906), 11 O.L.R. 338; *Rex* v. *Cargill,* [1913] 2 K.B. 271. There has been no corroboration in any material particular: see *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Steele* (1923), 33 B.C. 197. There is not a tittle of evidence that drugs passed from Furumoto to Canning: see *Rex* v. *Auger* (1930), 65 O.L.R. 448; *Gouin* v. *Regem,* [1926] S.C.R. 539. There was error in saying Furumoto was corroborated by Fisher. There was no corroboration at all and

there was misdirection: see *Rex* v. *Ellerton* (1927), 49 Can. C.C. 94; *Hubin* v. *Regem* (1927), 48 Can. C.C. 172 at p. 173; *Brunet* v. *Regem*, [1928] S.C.R. 375; 50 Can. C.C. 1 at p. 5; *Bigaouette* v. *Regem*, [1927] S.C.R. 112; *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22 at p. 26; *Rex* v. *Davidson* (1925), 44 Can. C.C. 311; *Rex* v. *Clive* (1930), 22 Cr. App. R. 19; *Rex* v. *Mahadeo*, [1936] 3 W.W.R. 443.

Wismer, for the Crown: We submit there was corroboration in Fisher's evidence. The conspirators came together at Ferraro's place. Fisher heard Canning say to Furumoto "Come on upstairs I want to talk to you." They went upstairs and a short time after came back. We say this is part of the conspiracy. Ferraro's house was a boot-legging place and was more than that. All the men connected with the conspiracy congregated there. Howe's evidence of the conversation at the boundary with Canning is substantial corroboration of the offence. That there may be a charge of conspiracy against one person see Harrison's Law of Conspiracy, 75; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 48; *Rex* v. *Duguid* (1906), 75 L.J.K.B. 470. In this case it was only a purchase. "Buying" is an overt act. Because he "bought" he took part in the conspiracy. There was corroboration in Fisher's evidence: see *Rex* v. *Baskerville*, [1916] 2 K.B. 658 at p. 665. You cannot bring evidence to contradict a witness on a collateral issue: see *Rex* v. *Gregg* (1932), 24 Cr. App. R. 13.

Donnenworth, replied.

Cur. adv. vult.

2nd March, 1937.

MACDONALD, C.J.B.C.: This man was charged

That at the City of Vancouver in the County and Province aforesaid, between the 15th day of August, 1934, and the 1st day of March, 1936, he, the said Patrick Canning, unlawfully did conspire, combine, confederate and agree with Shenichiro Hikida, Tadayoshi Furumoto, Joe Ferraro and with other persons unknown to commit an indictable offence, to wit, to distribute a drug, to wit, morphine, to persons, contrary to section 4 (*f*) of The Opium and Narcotic Drug Act, 1929, and amendments thereto, and against the peace of our Lord the King his Crown and Dignity.

Several conspirators including those named above had been convicted and sentenced to imprisonment. Canning was not charged with them and is indicted alone in this case and objection

has been taken that the indictment is not legal because one or more of the other conspirators were not indicted with him. I dispose of this objection at once by saying that I think the indictment was perfectly good. For instance he might have been indicted as it is for conspiracy with persons unknown and there would then be no valid objection to his conviction, the authority for this being cited by Mr. *Wismer* as *Rex* v. *Duguid* (1906), 75 L.J.K.B. 470.

Two or three other trivial objections were taken during the argument but I shall not trouble myself to consider them here. There is no merit in them. There were two principal questions to be decided in the charge, the first turned on the evidence of Furumoto one of the conspirators already convicted who offered in this case to give evidence for the Crown and was accepted as a Crown witness. There is a question as to whether his evidence as an accomplice was corroborated and secondly whether the jury believed his evidence without corroboration.

I would deal with this question first. The learned judge intimates that he was favourably impressed with the evidence of Furumoto and he instructed the jury that it was their right if they believed his evidence to convict the prisoner without corroboration. He took particular pains to inform the jury upon this question citing and quoting from *Rex* v. *Zimmerman* (1925), 37 B.C. 277. There was a question raised about this, which I shall now refer to. The learned judge told the jury that if they believed Furumoto they had the right to convict the prisoner without corroboration of Furumoto's evidence but that it was highly dangerous in some cases to do so. Objection was taken to the word highly but I can see no objection at all to that as it merely emphasized the properly-used word "dangerous" not as against the prisoner but, if anything, in his favour. Moreover, the judge directed them in two other subsequent places in his charge leaving out the word highly. However, the charge was sufficiently given by the learned trial judge and who shall say that the jury were not entitled to found their verdict upon it? There is nothing in the law requiring a jury to satisfy the Crown of grounds of their judgment. There is the bare statement that the jury may act upon uncorroborated evidence of an accomplice

if they are satisfied he was telling the truth. This is *Zimmerman's* case by which we are bound.

Now I come to the question of corroboration, although it may be unnecessary to do so, I am satisfied that there was corroboration in this case of Furumoto's evidence. On a certain night the prisoner was in Joe Ferraro's house where drug pedlars and boot-leggers were wont to congregate. There were many there of all descriptions including the prisoner and Furumoto. The witness Fisher, agent of the Crown, was also present and heard the prisoner call to Furumoto "I want to talk to you." Thereupon both got up and left the kitchen which was crowded with people and Furumoto says they went upstairs to the bathroom. This is denied by the prisoner. That is, he denies that they went upstairs but does not deny that they left the kitchen and went into the hall and perhaps some other part of the house. There the two of them, the prisoner and Furumoto entered into a bargain for the purchase from Furumoto by Canning of one pound of morphine—one-half pound to be taken at once and the other in a few days. This morphine was delivered to Canning at Hikida's store, another of the conspirators, shortly afterwards. This transaction was actually completed. Now it seems to me that Furumoto's evidence of that transaction is corroborated in a material way by the evidence of Fisher to which I have just referred—see *Rex* v. *Steele,* [1924] 4 D.L.R. 175.

There is other evidence which has been put forward as corroboration by the Crown which does not satisfy me as well as the evidence which I have just referred to. There is no doubt the prisoner was a pedlar of drugs. He had been an addict of opium at one time. It cannot be suggested, I think, that he would buy a pound of morphine at the price of $880, or half a pound at half that price, although that suggestion was put forward in argument.

Therefore I think there was corroboration in a material particular and if the jury decided the case on corroborative evidence they were justified in doing so and the prisoner's conviction must be sustained either with or without corroboration.

Martin, J.A.: After giving this case very careful consideration the appeal should, in my opinion, with all due respect to

contrary views, be allowed and a new trial ordered because there is no evidence corroborating the testimony of the principal witness for the Crown, Furumoto, who had been convicted, on a separate trial, as a conspirator with the appellant in the sale of narcotic drugs. The only evidence to corroborate Furumoto was that of an agent of the police to the effect that he had merely seen Furumoto and the appellant talking together one night, but out of earshot, in the house of one Ferraro which was a "bootleggers' " drinking place, with musicians in attendance, resorted to by criminals and others, including "operators" in the opium traffic: the appellant admitted that he had been at Ferraro's that night but denied that he had any conversation with Furumoto respecting the sale of narcotics. No case was cited that, in my opinion, goes so far as this, or would justify our holding that the mere meeting of the appellant and Furumoto under such circumstances constituted corroboration of the latter's evidence of the nature of a conversation between them that no one else heard; and therefore I think the learned trial judge misdirected the jury in a manner most prejudicial to the appellant when he directed them that it was corroborative evidence that they should consider against him.

Other grounds of appeal were argued but they are not of substance, in my opinion.

McQUARRIE, J.A.: I agree with the learned Chief Justice that the appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *F. M. Donnenworth.*
Solicitor for respondent: *Gordon S. Wismer.*

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. PARKER *ET AL.*

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1936
Sept. 29, 30.
1937
Jan. 12.

Real property—Sale of small portion of a block of land for school site—Deed not registered—Subsequent agreement for sale of whole block—Agreement registered—Knowledge of former sale—Fraud—R.S.B.C. 1924, Cap. 127, Secs. 36, 37 (2), 38 and 43.

Thomas Parker, the registered owner of 203 acres of land at Rocky Point on Vancouver Island, conveyed one acre of the land to Her Majesty The Queen in the right of the Province for a school site on the 30th of June, 1888. The deed was absolute in form but was not registered in the Land Registry office. In 1928 Thomas Parker entered into a written agreement to sell the whole 203 acres to his son Alfred and his wife Lillian for $15,000, with a cash payment of $4,000, and the agreement was registered in the charge book in the Land Registry office on the 26th of July, 1928. At the time of this sale the defendants claim Thomas Parker represented to his son that the title of the Crown to the one acre would expire when the school ceased to be carried on. On February 6th, 1931, the holding of school in the school-house was discontinued on account of lack of pupils attending. Thomas Parker died on January 14th, 1934, and on the 12th of April following a certificate of indefeasible title was issued to his executors for the whole 203 acres. This action was brought by the Crown on August 2nd, 1935, to recover possession of the school site, and judgment was given for the plaintiff.

Held, on appeal, affirming the decision of MURPHY, J. (MACDONALD, C.J.B.C. dissenting), that on the evidence the learned trial judge properly found that the appellants knew of the title of the Crown, that they were guilty of fraud, and the appeal should be dismissed.

APPEAL by defendants Alfred Parker and Lillian Parker from the decision of MURPHY, J. of the 24th of June, 1936, awarding the Crown title to a one acre school site at Rocky Point in the Metchosin district. One Thomas Parker was the registered owner of 203 acres of land at Rocky Point, and on June 30th, 1888, he conveyed to the Crown in the right of the Province a one-acre parcel forming part of the said 203 acres for the purpose of a school site. The deed was deposited in the Department of Lands but was never registered. A school-house was built on the one-acre lot and school was held in the building until 1931. On July 28th, 1928, Thomas Parker entered into an agreement to sell the whole 203 acres (including the school

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site) to his son and his son's wife for $15,000. The agreement for sale was registered in the charge book as a charge against the absolute fee. The case turned on the question whether the Crown's unregistered conveyance of 1888 could prevail against the appellants' registered right to purchase. The holding of school in the school-house was discontinued in 1931 owing to the small number of pupils attending. Thomas Parker died in 1934.

The appeal was argued at Victoria on the 29th and 30th of September, 1936, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MCQUARRIE, JJ.A.

Whittaker, for appellants: There was an order made vesting the school site in the Crown. It was held that it was fraudulent on the part of the appellants to seek advantage of prior registration of their contract after they had learned of the unregistered conveyance to the Crown. The appellants swore their father had told them he had only loaned the property to the Crown for school purposes. After the school closed in 1931 the appellants exercised acts of ownership over the site by pulling down the fence and doing some planting. Thomas Parker was assessed and paid the taxes on the property until he died: see *Peebles* v. *Hyslop* (1914), 30 O.L.R. 511. They must first prove actual fraud: see *Royal Bank of Canada* v. *Pound* (1917), 24 B.C. 23. On the question of possession see *Sherren* v. *Pearson* (1887), 14 S.C.R. 581. Although occupation of land has been held to be constructive notice of occupant's rights, it is not actual notice: see *Sherboneau* v. *Jeffs* (1869), 15 Gr. 574; *Roe* v. *Braden* (1877), 24 Gr. 589; *The New Brunswick Railway Company* v. *Kelly* (1896), 26 S.C.R. 341 at p. 343; *Re Match* v. *Clavir* (1912), 23 O.W.R. 279; *Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536. On the question of partial payment of purchase price without notice see *Webb* v. *Dipenta*, [1925] S.C.R. 565 at p. 572; *Wallace* v. *Smart* (1912), 22 Man. L.R. 68. The English law is altered by registration: see *Cooper* v. *Anderson* (1912), 1 W.W.R. 848.

Pepler, for respondent: They acquired the indefeasible fee after they knew of our claim. There was actual fraud and it was

so found: see *Assets Company, Limited* v. *Mere Roihi,* [1905] A.C. 176 at p. 210; *Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536; *Ruthenian Greek Catholic Church* v. *Fetsyk*, [1922] 3 W.W.R. 872 at p. 880. We rely on the doctrine of possession under section 37 (2) of the Land Registry Act. The school was closed in 1931 but we still exercised control in holding annual meetings and church meetings. The sections of the Act referred to do not refer to the Crown and do not apply: see *In re Silver Brothers Ld.*, [1932] A.C. 514.

Whittaker, replied.

Cur. adv. vult.

12th January, 1937.

MACDONALD, C.J.B.C.: One Thomas Parker was the registered owner of some 203 acres of land at Rocky Point, Metchosin District, Vancouver Island, British Columbia, and by agreement dated 30th June, 1888, conveyed to Her Majesty Queen Victoria, her heirs, successors, and assigns one acre of the land forming part of the said 203 acres for the purpose of a school site. The deed was absolute in form but was not registered in the Land Registry office. In 1928 Thomas Parker entered into a written agreement to sell the whole of the 203 acres including the school site to his son Alfred Ernest Parker and his wife Lillian Parker for the sum of $15,000 with a cash payment of $4,000. Thomas Parker's title was registered under the old absolute fees law. Thomas Parker at the time of the sale represented to his son that the title of the Crown to the acre would expire when the school ceased to be carried on and I think there is nothing to show that the grantees in the agreement had any other knowledge of the facts. On the 6th of February, 1931, the holding of school in the said school-house was discontinued by the Department of Education owing to the small number of pupils attending school at the time and since that time the small number of pupils left, some four or five, were by arrangement of the Rocky Point School Board to be educated at the rural school at Metchosin. The parties claiming under the said agreement did not become aware of the said deed until about the 28th of October, 1932, when they were shown the deed. Thomas Parker died on the 14th of January, 1934, and on the 12th of

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Macdonald, C.J.B.C.

April, 1934, a certificate of indefeasible title was issued to the executors of Thomas Parker covering the 203 acres, including the school site. This action was commenced by the Crown on the 2nd of August, 1935, to recover possession of the said school site and the action was tried on the 24th of June, 1936, when judgment was given for the plaintiff. The certificate of indefeasible title takes precedence of the unregistered deed, no application to register it having been made until October 28th, 1932. The learned judge's decision in favour of the plaintiff was based on the *bona fides* of the plaintiff and his ignorance of the unregistered deed. Now it appears by the evidence that the agreement for sale to the defendants was made at a time when the said conveyance to the Crown remained unregistered. Registration of it was afterwards refused because of the said registered agreement. The charge alleged is that the defendants were guilty of fraud in the circumstances above stated. They acted on the statement of Thomas Parker who said that the deed was granted on the understanding that it was only for school purposes and that the property would come back to them or him when the school ceased to occupy it.

If the purchaser *bona fide* believed this statement of their father that the land should revert to him or them when the school ceased to be held there, then there was no fraud and the appeal should be allowed.

MARTIN, J.A.: This appeal raises some difficult questions but after giving it full consideration I do not feel justified upon its unusual facts, despite able argument of Mr. *Whittaker,* in disturbing the conclusion reached by the learned trial judge below and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.: The action was one asking for a declaration that the land in question was in law vested in the Crown and alleging that nothing had taken place to oust that title. The Crown obtained title to the school site many years ago when there was no requirement to register title in the Land Registry office. As it has now developed the appellants claim title and the right to insist upon title by reason of the title to the land being registered in the Land Registry office in the name

of a predecessor of title in the books of the Land Registry, that title was acquired without any notice to the Crown and at the time the applicant for title well knew of the title of the Crown to the school site. The active parties now are those defendants who claim the right to acquire the title under an agreement for sale and counsel on their behalf denies that there is any title in the Crown. Undoubtedly at the outset a portion of the land was conveyed to the Crown and that was many years ago by the then owner without any provision that the title would revert to the vendor if the land was not used for school purposes. The Crown erected a school-house upon the property and for years a school was there maintained. At the present time the school is closed but the School Board continues and it will be reopened when the requisite number of pupils are forthcoming which may be at any time in the near future. The Crown has to maintain schools in certain areas and has to be always ready to accord school accommodation and teaching in accordance with the provisions of the Public Schools Act. The learned trial judge Mr. Justice MURPHY had before him all the facts and after a full consideration of them held that if it could be said that there was no express notice to the active claimants for title under the agreement for sale until after that agreement for sale was executed; that still persisting against what was the overwhelming state of the facts as against their contention that the Crown was now without title amounted to fraud, and the learned judge held against them. It is to be remembered that no provision in any Act is to affect the Crown unless it is expressly stated therein that the Crown is to be bound thereby: see *In re Silver Brothers, Ld.*, [1932] A.C. 514, 523; also see *Re W.* (1925), 56 O.L.R. 611; *Theberge* v. *Laudry* (1876), 2 App. Cas. 102; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409, 419; here the appellants claim under the provisions of the Land Registry Act. There was existent at all times title in the Crown and no requirement to register it, and no notice went to the Crown of the application to obtain title. The land was conveyed absolutely to the Crown as early as the 30th of June, 1888, without even any provision that the land was for school purposes and without the Crown being called upon to register under the provisions of the Land

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Registry Act and the Crown has been in possession ever since the school building has been on the land. The appellants claim that by registration in the Land Registry office there was the right in Thomas Parker to agree to sell the entire land on the 20th of July, 1928, to the appellants Alfred Ernest Parker and Dorothy Lillian Parker; that these purchasers did not know of the title of the Crown is inconceivable. The learned judge was lenient enough though to not hold that they were not aware of this and that only at the trial did they become aware of it and not until then, but in persisting in their claim the learned judge held they were guilty of fraud and so found against them. The evidence disclosed that Thomas Parker, the vendor, long before he executed the agreement for sale, took legal advice from a very well known and highly thought of practitioner in Victoria, Mr. *J. Stuart Yates,* who advised that what he should do was to convey the school site to the Crown now that he had got title to the whole of the land in the Land Registry office, but Thomas did not choose to do this. This throughout was no doubt a family matter and known to them all and cannot receive the approval of any Court. In my opinion possession was always in the Crown and that was known full well by all the appellants. It is idle for them to contend otherwise: see *Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536, and see DAVIE, C.J. at p. 552:

> In other words, if B., with knowledge of facts which would render a purchase a fraud upon A., deliberately carries out the purchase, which without the aid of a statute aimed at the suppression of fraud would be null and void, a Court of Equity will hold B. estopped from setting up the provisions of such statute when to permit him to set it up would be to enable him to commit a fraud. As remarked in the case above quoted, the Court does not set aside the statute; it merely, acting in equity and good conscience, enjoins a person from perpetrating a fraud by means of a statute aimed at the prevention of fraud.

I would also refer to the case of the *Ruthenian Greek Catholic Church* v. *Fetsyk,* [1922] 3 W.W.R. 872, Cameron, J.A., at p. 880:

> But if there is present the element of intention to deprive others of their just rights, that constitutes the essential characteristic of actual—as distinguished from legal fraud—Hogg, Australian Torrens System, 834-5.

The Crown counsel also in relying on possession refers to the

Land Registry Act, R.S.B.C. 1924, Cap. 127, Sec. 37, Subsec. (2), which reads as follows:

(2) Every certificate of indefeasible title issued under this Act shall be void as against the title of any person adversely in actual possession of and rightly entitled to the land included in the certificate at the time of the application upon which the certificate was granted under this Act, and who continues in possession.

I would further refer to a case in this Court which was not referred to in the argument which well supports the judgment of the learned trial judge—the case of *Powell* v. *City of Vancouver* (1912), 17 B.C. 379. The head-note reads as follows:

In an action for a declaration that certain lots conveyed to a Municipality for the purpose of a city hall site had reverted to the plaintiff on account of the Municipality having ceased to occupy the property for the purposes for which it was given, it was in evidence that the defendants had erected buildings and used them as a city hall on the property for about eleven years, but owing to the general progress the building and locality became unsuitable for the original purpose. The deed of conveyance, except for a reference to an agreement to give the property, was an absolute gift.

Held (affirming the judgment of CLEMENT, J. at the trial), that there was no condition subsequent to be deduced from the language of the conveyance, and that there was nothing in the evidence on the trial to warrant reforming the deed by inserting a clause. There was to a substantial degree a performance of the agreement, the expressed consideration for the grant, and there was no ground for suggesting an illusory performance to secure the property so as to give jurisdiction to declare a resulting trust on the ground of fraudulent acquisition of the legal estate.

The present case is even a stronger case than that of the City of Vancouver; here the conveyance makes no mention of the purposes for which the conveyance was made. IRVING, J.A., at pp. 383-4, said this:

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.

As to the land in question, that is to say, the school site, as described in the deed of June 30th, 1888, Thomas Parker to Her Majesty the Queen, the title at present is in the executors and the executors have not appealed. The agreement for sale will only be effective as to the rest of the land, that is, the Crown is rightfully entitled to the land called in question here. It follows that the judgment as entered in the Court below should stand and the appeal be dismissed with costs.

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

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

Solicitors for appellants: *Whittaker & McIllree.*
Solicitor for respondent: *H. Alan Maclean.*

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March 9, 10, 11, 12; *April* 13.

DALLAS v. HINTON AND HOME OIL DISTRIBUTORS LIMITED.

Negligence—Employee as salesman—Automobile accident—Driving home in evening—Liability of employer—"Arising out of and in course of employment"—Interpretation.

The defendant Hinton, a salesman whose home was in New Westminster, was returning from the head office of his employers (the defendant company) in Vancouver in a motor-car at 9 o'clock in the evening of the 30th of May, 1935, after attending a meeting of salesmen. Driving south on Main Street, Vancouver, and approaching the intersection of 4th Avenue, he overtook a street-car going in the same direction. He speeded up to pass the street-car (from 25 to 30 miles an hour) and when the front of the street-car reached the intersection he was about 12 feet behind the front of the street-car. At this time the plaintiff was crossing the intersection from east to west and she had cleared the tracks just in front of the street-car when she first saw the motor-car about 12 feet away. She then ran south-westerly, trying to get across in front of the motor-car. On seeing her Hinton swerved sharply to the right, trying to avoid her, but she ran into the front left fender of the motor-car and was very severely injured. The motorman of the street-car did not intend to stop at the intersection, but he did stop either because the plaintiff was so close to him when passing in front or because he saw an accident was about to occur. In an action for damages the plaintiff recovered judgment against both defendants.

Held, on appeal, affirming the decision of MANSON, J., that the accident was caused solely by the negligence of Hinton in not driving at a slower rate of speed on approaching an intersection.

Held, further, reversing the decision of MANSON, J. (McPHILLIPS, J.A. dissenting), that under his employment Hinton was not compelled to work after 5 o'clock except in cases of emergency, and he was not engaged in work of that character at that time. He had attended a meeting of salesmen in the evening, and when it was over at 9 o'clock started for home, when he was not performing any duty under his contract of service, therefore the accident did not arise in the course of his employment, and his employers, the Home Oil Distributors Limited, are not liable.

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APPEAL by defendants from the decision of MANSON, J. of the 17th of December, 1936 (reported, 51 B.C. 327), in an action for damages for negligence. The defendant Hinton was employed as a salesman for the defendant company in New Westminster and Fraser Valley. He lived in New Westminster. On the night of the 30th of May, 1935, he had been summoned to a meeting at his employer's office in Vancouver, and immediately after the meeting was driving back to his home in New Westminster. He drove south on Main Street, and shortly after 9 o'clock, when approaching the intersection of 4th Avenue at a speed of from 20 to 25 miles per hour, and overtaking a street-car going in the same direction, which would not have stopped at 4th Avenue but for the fact that the female plaintiff suddenly appeared in front of the moving street-car, having crossed Main Street from east to west. When in front of the street-car she saw Hinton's motor-car for the first time, and began to run towards the southwest corner of the intersection, colliding with Hinton's motor-car, Hinton having turned sharply to the west in attempting to avoid her. She suffered severe injuries.

The appeal was argued at Vancouver on the 9th to the 12th of March, 1937, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Bull, K.C., for appellant Hinton: There is no answer to the charge that the plaintiff was guilty of negligence. This was an emergency stop by the street-car and not a stop under the Act: see *Shanahan* v. *Toole Peet Trust Co. Ltd.*, [1936] 2 W.W.R. 540; *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571. After the plaintiff got across the track she should have looked to her right, but she did not look and ran into the side of the defendant's car. The husband was allowed $2,560 for *consortium* and $2,500 for *servitium*. He cannot have both, and in addition it is very excessive. The husband was unemployed and they had eight children. There is no right for *consortium*: see *Corkill* v. *Vancouver Recreation Parks Ltd.* (1933), 46 B.C. 532; *Lynch* v. *Knight and Wife* (1861), 9 H.L. Cas. 577 at p. 597; Pollock on Torts, 13th Ed., 232. One thousand two hundred and fifty

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dollars damages for loss of services is outrageously high: see *Attorney-General* v. *Valle-Jones,* [1935] 2 K.B. 209.

Locke, K.C., for appellant company: When driving home that night Hinton was not acting in the course of his employment. He was coming away from a sales meeting at the Vancouver office of the company. His day's work was finished previous to the meeting and there was not a particle of evidence that he could make a sale that night: see *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece* (1936), 50 B.C. 494; *St. Helens Colliery Co., Lim.* v. *Hewitson* (1923), 93 L.J.K.B. 177; *Philbin* v. *Hayes* (1918), 87 L.J.K.B. 779; *Davidson & Co.* v. *Officer* (1918), 87 L.J.P.C. 58 at pp. 64 and 66; *Butler and O'Laughlin* v. *Breen,* [1933] I.R. 47; *Alderman* v. *Great Western Railway Company* (1936), 52 T.L.R. 404; Macdonell on Master and Servant, 2nd Ed., 231; *Gilbert* v. *Owners of Steam Trawler Nizam,* [1910] 2 K.B. 555. It does not affect the matter that the employee was going to or returning from employment after his usual work hours; there is no distinction between ordinary and emergency employment: see *Blee* v. *London and North Eastern Ry. Co.,* [1936] 3 All E.R. 286. The case of *London & North Eastern Ry. Co.* v. *Brentnall,* [1933] A.C. 489, cited by the respondent, is distinguishable, and *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144, referred to by the learned judge below has no application to the facts here in issue. On the evidence it should have been found that Hinton was not guilty of negligence: see *Black* v. *Veinot,* [1934] 1 D.L.R. 803. The by-law is of no effect as it is contrary to section 61 of the Motor-vehicle Act. The city cannot give the right of way to one person over another: see *Pipe* v. *Holliday* (1930), 42 B.C. 230. The plaintiff contributed to the accident in any case. The damages were excessive.

McAlpine, K.C., for respondents: When the plaintiff cleared the tracks she looked north and saw Hinton about 40 feet away. She assumed she had time to get across the road. It is the duty of a motor-car, when overtaking a street-car about to stop at an intersection, to stop: see *Stanley* v. *National Fruit Co., Ltd.,* [1931] S.C.R. 60 at p. 66. Irrespective of the by-law we had a right to do what we did: see *James* v. *Piegl* (1932), 46 B.C.

285; *Rainey* v. *Kelly,* [1922] 3 W.W.R. 346. A pedestrian has a paramount right to cross. The case of *Black* v. *Veinot,* [1934] 1 D.L.R. 803, does not apply, as the facts are different. On damages we are entitled to recover both for *consortium* and for *servitium*: see Salmond on Torts, 9th Ed., 319-20; *Fox* v. *The Mayor, &c., of Saint John* (1883), 23 N.B.R. 244; *The St. Lawrence & Ottawa Railway* v. *Lett* (1885), 11 S.C.R. 422; *Guy* v. *Livesey* (1618), Cro. Jac. 501; 79 E.R. 428; *Hyde* v. *Scyssor* (1619), Cro. Jac. 538; 79 E.R. 462; Bullen & Leake's Precedents of Pleadings, 8th Ed., 407; *Brockbank* v. *Whitehaven Junction Railway Co.* (1862), 7 H. & N. 834; *Jackson* v. *Watson & Sons,* [1909] 2 K.B. 193; *Butterworth* v. *Butterworth and Englefield,* [1920] P. 126; *Berry* v. *Humm & Co.,* [1915] 1 K.B. 627; *Ballard* v. *Money* (1920), 47 O.L.R. 132; *Bannister* v. *Thompson* (1913), 29 O.L.R. 562; *Selleck* v. *City of Janesville* (1899), 80 N.W. 944. He says damages are excessive, but see *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; *Rider* v. *Rider and Maynard* (1925), 19 Sask. L.R. 384; *Place* v. *Searle,* [1932] 2 K.B. 497. Hinton was in the course of his employment when going home from the main office of the company: see *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150 at p. 153; *Irwin* v. *Waterloo Taxi-Cab Company Limited,* [1912] 3 K.B. 588; *St. Helens Colliery Co., Lim.* v. *Hewitson,* [1924] A.C. 59 at pp. 74-5; *Nightingale* v. *Cockeo,* [1917] N.Z.L.R. 433 at pp. 435-6; *West and West* v. *Macdonald's Consolidated Ltd. and Malcolm,* [1931] 2 W.W.R. 657; *Dickinson* v. *"Barmak" Limited* (1908), 124 L.T. Jo. 403; *Drulak* v. *Harvey and General Steel Wares, Ltd.,* [1935] 3 W.W.R. 65; *Lawrence* v. *George Matthews (1924), Ld.,* [1929] 1 K.B. 1; *London and North Eastern Ry. Co.* v. *Brentnall,* [1933] A.C. 489. Where a master can make an order that he can enforce a request is sufficient: see *Duffield* v. *Peers* (1916), 32 D.L.R. 339; *Battistoni* v. *Thomas,* [1932] S.C.R. 144; *Harrington* v. *W. S. Shuttleworth and Co. Limited* (1930), cited in 171 L.T. Jo. 71; *John Stewart and Son (1912) Limited* v. *Longhurst,* [1917] A.C. 249; *Banque Provinciale* v. *Ricciardi,* [1935] 4 D.L.R. 699; *Dunning* v. *C. E. Binding (trading as Globe Carrier Bag. Co. (No. 2)* (1932), 148 L.T. 378; *Dillon* v. *Pruden-*

tial Ins. Co. (1926), 242 Pac. 736; *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476. On the question of *consortium* see *Place* v. *Searle* (1932), 101 L.J.K.B. 465; *Cremins* v. *Guest, Keen & Nettlefolds, Limited,* [1908] 1 K.B. 469.

Bull, in reply: That there was contributory negligence see *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304. That the learned judge had no right to give damages to the husband for both loss of society and loss of services see Salmond on Torts, 8th Ed., 393. Loss of *consortium* includes both.

Locke, in reply: When Hinton went to the meeting at the defendant company's office he was not going on the company's business. His business hours were from 9 a.m. to 5 p.m. and his home is not his place of business. It was no part of his contract where he lived.

Cur. adv. vult.

13th April, 1937.

MARTIN, C.J.B.C.: So far as the defendant (appellant) Hinton is concerned there is, to my mind, no good reason for saying that the learned judge below was clearly wrong in the view he took of the evidence and the circumstances, and therefore his appeal should be dismissed; and in my opinion the damages are not excessive and the assessment of them for *consortium* and *servitum* is not, on the authorities cited, objectionable in law, though it is the better practice not to sever them unless for some special reason, not here present.

As regards the defendant company a question, almost always difficult in cases of this kind, arises as to whether or no Hinton was acting in the course of his employment by that company when he injured the plaintiff, and we have had the benefit of long and able arguments upon the particular facts herein and many cases have been cited, on ever varying circumstances, which have received my careful attention, but, as was to be expected, none of them is on all fours with this, and every case must be decided on its particular facts—*Ellison* v. *Calvert and Heald* (1936), 106 L.J.K.B. 74 (H.L.). The result of my consideration of them, in the light of the latest and most applicable decisions, is that I find myself unable, with respect, to reach the

same conclusion upon the facts (which, fortunately, are in essentials not in dispute) as the learned judge below did, and in doing so I refer particularly to the recent cases of *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece* (1936), 50 B.C. 494; *Alderman* v. *Great Western Ry. Co.*, [1936] 2 K.B. 90; 1 All E.R. 571; 105 L.J.K.B. 580, affirmed by the House of Lords [1937], W.N. 168; A.C. 454; and *Blee* v. *London and North Eastern Ry. Co.*, [1936] 3 All E.R. 286; 80 Sol. Jo. 975. It follows that, in my opinion, the appeal of the company should be allowed.

McPHILLIPS, J.A.: In my opinion the learned trial judge arrived at a proper conclusion in holding both defendants in this case liable for the very serious results following upon the gross negligence of the defendant Hinton in driving the automobile whereby the plaintiff Mabel Dallas was seriously injured and rendered, as the evidence shows, a mental defective, admittedly unable to give any account of the incidents of the accident. Both appellants are in agreement as to this condition, hence she was not called as a witness. I hardly think it necessary to go on and cite the evidence with any detail as I am in so complete accord with the learned trial judge's judgment in which I wholly agree. I might content myself by saying in the way of a summary of the evidence that Hinton the driver of the automobile an employee of the defendant company did on the occasion of the accident drive the automobile in such a reckless fashion that it is a case of gross negligence in the highest degree. Shortly, the street-car proceeding up the street and approaching an intersection had slowed down in speed and was at the moment upon an up-grade. Hinton driving the automobile had been driving directly behind the street-car; that is, his vision ahead was blocked. When he turned out from behind the street-car the plaintiff Mabel Dallas was out some ten feet from the street-car tracks having passed in front of the street-car at the intersection crossing. Hinton was then proceeding at a speed of 20 to 30 miles an hour and he failed to avoid hitting the plaintiff Mabel Dallas owing to the speed at which he was going, and it is to be remarked that he did not even sound his horn to give warning

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of his approach. The truth is that he had negligently incapacitated himself from it being possible for him to pull up and avoid striking the plaintiff Mabel Dallas, whereby she was seriously and almost fatally injured. In this Hinton committed a breach of the statute law, *viz.*:

> . . . every person who drives or operates on any highway a motor-vehicle going in the same direction as and overtaking a street-car which is stopped, or is about to stop, for the purpose of discharging or taking on passengers shall also stop the motor-vehicle at a distance of at least ten feet from and in the rear of the passenger exit of the street-car, or of the rear passenger exit if more than one such exit, and shall keep the motor-vehicle at a standstill until the street-car has been again set in motion and all passengers who have alighted have reached the side of the highway or are otherwise safely clear of the motor-vehicle:

Motor-vehicle Act, B.C. Stats. 1935, Cap. 50, Sec. 55 (1).

Further the plaintiff Mabel Dallas had the right of way upon the facts in the present case under By-law 2234—Traffic and Parking By-law—section 10 (1) reading as follows:

> The driver of every vehicle shall give the right of way to any pedestrian crossing the roadway within any marked or designated cross-walk, or within any unmarked cross-walk at the end of any block, except at such intersections where the movement of traffic is regulated by police officers or traffic-control signals.

I would in this connection draw attention to Barron's Canadian Law of Motor Vehicles, pp. 325-6, where we find this said:

> Pedestrians are not compelled to scurry out of the way on the sound of the horn, at the peril of being run down, but the drivers must exercise necessary care and prudence to avoid an accident, and must not violate the rights which pedestrians and others have under the common law.

See also *James* v. *Piegl* (1932), 46 B.C. 285.

To fully understand why it was that Hinton was on the road at the time the accident took place it is well to remember what Hinton's position was with the defendant company and his duties and what he was required to do. At the time the accident took place, in my opinion he was about his master's business, that is to say he was in the course of his employment. I admit that it can be said that the law is unsatisfactory upon the point. It is pertinent to note when considering this case what Lord Shaw said at p. 617 in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited,* [1915] A.C.: "The law must adapt itself to the conditions of modern society and trade." The cases are myriad and conflicting, but yet certainty

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must be arrived at wherever possible, and upon the special facts of this case I feel prepared to hold that there is liability upon the defendant company. The automobile upon the special facts of the case must be looked upon as being operated by Hinton, the employee of the company at the time of the accident, when he (Hinton) was engaged upon and in the course of his employment and in connection with the business of the defendant company. It was the agency used and provided by the defendant company in carrying on and carrying out the duties of the employee, and it was in connection therewith that the accident happened. If the case was this: some other employee of the defendant company at the close of the lecture was told by some responsible officer of the company "Drive Hinton home" and he was being driven home in an automobile of the company, would there not be liability upon the company if there was like negligence as took place in the present case? I would think so. It will not do to admit of large companies carrying on great business undertakings and not be liable for negligence ensuing from the operation, say, of motor-cars, by merely saying it was not the company's automobile (although the upkeep thereof was provided by the company), and further the employee of the company was not at the time in the course of his employment and not engaged in and about his master's business. Here we have facts which I am not disposed to construe differently from the construction put upon them by the learned trial judge. The facts may be stated as follows:

The defendant Hinton was a salesman on salary for the Home Oil Distributors Limited. His district was New Westminster District and Fraser Valley. He was required by the terms of his employment to have a motor-car and the defendant company maintained the car with gas and oil, effected all repairs and bought the Provincial licence. Hinton lived in New Westminster for his own convenience. He was required to report at the head office of the company in Vancouver at 8.30 o'clock on Tuesday mornings to attend a sales meeting which usually lasted an hour and a half. He was supposed to work from 8.30 to 5 but his hours were more or less at his own discretion. His business was to sell lubricating oil, fuel-oil, greases, furnace-oil,

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industrial oil and gasoline to service stations, homes, office buildings and stores. The company had no office in New Westminster and for Hinton's own convenience and the convenience of his employer he arranged to receive telephone calls at a service station in the City of New Westminster. Ordinarily, when Hinton started out for work he started from his home and when his business was finished he returned to his home. Some time early in May he received in a pigeon-hole at the head office of the company in Vancouver a notice, which required him to attend a series of lubricating lectures. He considered it a part of his duty to attend the lectures and he treated it as an order. One of these lectures was held on May 30th, at 7 o'clock at the head office in Vancouver.

Counsel for the respondents pressed strongly that the journey here was the result of a special order and that Hinton was in the course of his employment from the time he started to go to Vancouver in pursuance of the order until he returned to the place from which he started, namely, New Westminster, citing 1 Sm. L.C. 403, 404; *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422, 424-5; *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150, 153; *Irwin* v. *Waterloo Taxi-Cab Company, Limited,* [1912] 3 K.B. 588.

It may well be said that the test is laid down in *St. Helens Colliery Co.* v. *Hewitson,* [1924] A.C. 59, at 71, where Lord Atkinson says:

> A workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other and I think better words, in effect the same thing—namely, when he is doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service.

This test was approved by the Supreme Court of Canada, in *Consolidated Mining & Smelting Co. of Canada* v. *Murdoch,* [1929] S.C.R. 141, 144.

Then as to when a servant is in the course of his employment we have *Nightingale* v. *Cockeo,* [1917] N.Z.L.R. 433, 435, 436; *West and West* v. *Macdonald's Consolidated Ltd. and Malcolm,* [1931] 2 W.W.R. 657, 660; *Armstrong, Whitworth & Co.* v. *Redford,* [1920] A.C. 757; *Cane* v. *Norton Hill Colliery Company,* [1909] 2 K.B. 539.

It may be said there is a difference between the beginning of a man's employment and the beginning of his work. *Holmes* v. *Great Northern Railway,* [1900] 2 Q.B. 409, 411; *Cremins* v. *Guest, Keen & Nettlefolds, Limited,* [1908] 1 K.B. 469.

The cases which may be said to be most analogous to the facts of this case are: *Duffield* v. *Peers* (1916), 32 D.L.R. 339; *Boyle* v. *Ferguson,* [1911] 2 I.R. 489; *London & North Eastern Ry. Co.* v. *Brentnall,* [1933] A.C. 489; *Drulak* v. *Harvey and General Steel Wares, Ltd.,* [1935] 3 W.W.R. 65; *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144; *Battistoni* v. *Thomas* (1931), 44 B.C. 188; [1932] S.C.R. 144, 147. In *Drulak* v. *Harvey and General Steel Wares, Ltd.*, [1935] 3 W.W.R. 65, a salesman had been in Kenora, Ontario, and while returning in his motor to Winnipeg to keep an appointment with his manager in Winnipeg, the next morning, he negligently injured the plaintiff. The company made him allowances for depreciation, oil and gas. He would have arrived in Winnipeg the night before his appointment. He was held to be in the course of his employment.

Upon full consideration of the facts and the law I am of the opinion that the judgment of the learned trial judge should not be disturbed. I would therefore dismiss both appeals.

MACDONALD, J.A.: This is an appeal from a judgment of MANSON, J. awarding $10,677 damages against both defendants, the appellants herein, in respect to injuries received by the respondent, Mabel Dallas, wife of the respondent Herbert Dallas. She was hit and severely injured by a motor-car driven by appellant Hinton, a salesman in the employ of Home Oil Distributors Ltd. In addition to the special damages the husband was awarded $1,250 for the loss of his wife's companionship and society and $1,250 for loss of services by reason of her inability to perform household duties.

Three points were raised on this appeal.

(1) That the female respondent was the sole author of her own injuries or in the alternative jointly negligent with Hinton. (2) That her husband could not in law receive damages for both loss of *consortium* and loss of services and that the total sum of

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$2,500 awarded in respect thereto should be reduced by $1,250. (3) That because Hinton, in appellant's view, was not engaged on the business of the company when the accident occurred the appellant Home Oil Distributors Ltd., should be relieved of liability. I will deal with these points in that order.

(1) On the question of liability as it was forcibly urged by counsel that the judgment for damages should be set aside or that in any event the respondent, Mabel Dallas, should be found to be clearly guilty of contributory negligence I will refer to the evidence in some detail.

Hinton was returning from the head office of his employers in Vancouver in a motor-car at 9 o'clock in the evening of May 30th, 1935, after attending a meeting of salesmen. Driving south on Main Street, Vancouver, and approaching the intersection of 4th Avenue (running east and west) he overtook a street-car going slowly in the same direction. The respondent, Mrs. Dallas, at this time crossed the intersection on foot travelling from east to west passing in front of the approaching southbound street-car. When nearly across (a few feet beyond the street-car tracks placed in the centre of the street) she was hit by the motor-car driven by Hinton.

The appellants' case is that she negligently hurried across the intersection in front of the approaching street-car, for the moment obscuring her view, without keeping a proper look-out at a time when it was close to the intersection. It is always dangerous to pass closely in front of a moving street-car. There may be, as in this case, traffic beyond it moving in the same direction. When clear of the street-car and beyond the tracks, seeing Hinton's car approaching, she ran in a south-westerly direction to avoid it. Hinton by his own and other evidence applied the brakes and turned sharply to the right. He hit her however with the left-hand fender of his car.

The motorman on the street-car had not intended to stop at this point to discharge or to take on passengers. Therefore, it was said Hinton was not obliged to stop (B.C. Stats. 1935, Cap. 50, Sec. 55 (1)) 10 feet behind the street-car. However, the street-car did in fact stop at the intersection. It is important to know therefore whether the motorman did so to avoid hitting

Mrs. Dallas, as appellants' counsel submitted, or on the other hand, because he saw that an accident was likely to occur or in fact had occurred. If he stopped for the former reason it would appear that she should not have attempted to cross.

The trial judge negatived contributory negligence on her part. This is all he said on that point:

It has been suggested that there was contributory negligence on the part of Mrs. Dallas. I cannot so find. If she showed some excitement at the last moment, it was at a time when she was some feet off the street-car tracks and in the agony of collision, so to speak.

He is here referring to her actions after she passed over the street-car tracks in the centre of the roadway. On the question of her negligence however we are not concerned with what she did "at the last moment." I agree that she was then *in periculo*. Her negligence, if any, depends upon her conduct before she reached the point referred to by the trial judge. Had she a right to cross at all because of the proximity of the street-car? That is the question. She could only do so, it was submitted, by running or at least by "hurrying" as a considerable part of the evidence indicates. I agree therefore that there is no explicit finding directed to this point.

It follows that we are free to review the question of her contributory negligence, if any, unembarrassed by a finding. I will assume (without deciding it, as the event does not make it necessary) that it is a negligent act to cross an intersection in front of a moving street-car so close to the crossing that the pedestrian must either hurry to get across or compel the street-car to stop to avoid a collision. Street-cars do not stop at all intersections and it is unsafe for pedestrians to attempt to cross when on-coming traffic on the other side may be hidden from view.

The alternative submission by respondents' counsel was that when Mrs. Dallas entered upon the intersection for the purpose of crossing she had a right to do so and did not hurry unduly as the street-car was not then close to the intersection. She should therefore have been permitted to cross in safety. Section 10 (1) of a city by-law provides that

The driver of every vehicle shall give the right of way to any pedestrian crossing the roadway within any marked or designated cross-walk, or

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within any unmarked cross-walk at the end of any block, except at such intersections [not so here] where the movement of traffic is regulated by police officers or traffic-control signals.

She would have that right apart from the by-law.

The motorman on the street-car (Morrison) was a witness for respondents. He gave a statement of the facts shortly after the accident and, it was said, it differed from his evidence at the trial. He said at the trial that when he first noticed Mrs. Dallas "she was in the devil strip on the east side of Main Street" (really in the centre of the roadway). Later he qualified this by saying "She was just approaching the devil strip." The difference is not very material. He also said at the trial "she was walking across the street slowly." At that time (*viz.*, when she had either entered upon the devil strip or was "just approaching it") his street-car was 40 feet distant from that part of the intersection over which she was crossing. He was travelling at about ten miles an hour. If this evidence ought to be accepted, having regard to the fact that she was half way across the intersection (or nearly so) when the street-car was still 40 feet away (and moving slowly) she had a right to cross to the other side and should have been permitted to do so in safety. She was not obliged to wait until the street-car passed by before attempting to cross. The motorman agreed with the suggestion of counsel that she had plenty of time to cross without worrying about the street-car.

He also said "when she saw me there" (*i.e.*, 40 feet away) "she put in an extra step." He doesn't necessarily mean by that expression that she ran because, in contradistinction he added that "just as she got past the street-car she started to run." That was because of the approaching motor-car driven by Hinton at 25 or 30 miles an hour. He later said that she was 8 feet west of the street-car (meaning beyond the street-car tracks) when she started to run for the first time. I would not say therefore, because Morrison said she put in an extra step when she saw him 40 feet away that she was hurrying unduly to avoid the street-car. Doubtless she walked a little faster at that moment but the incident should not necessarily be taken as proof that she was compelled to do so because the street-car was upon her.

As already intimated, the motorman did not have to stop to

discharge or take on passengers yet in fact did so. Mr. *Bull* submitted that the only reasonable inference from the evidence is that he stopped because Mrs. Dallas passed so close in front that it was necessary to do so. By oversight or design however Morrison was not asked directly why he stopped. The fact may be that he saw as he approached that an accident was clearly imminent and naturally stopped to assist.

We turn now to the statement, given by Morrison, shortly after the accident, upon which the submission was made that his evidence at that trial should have been rejected. It was read over to him at the trial and he admitted that the statements contained therein were substantially true. In it he said: "As I approached 4th Avenue, I saw the woman walking from east to west about the centre of the intersection." He then said "When I got nearer she saw me and started to run towards the southwest corner." This it was submitted, with some justification, meant that it was because she saw the street-car approaching in close proximity to her that she started to run. However, that may not be so. He is not referring to the time he first saw her on or near the devil strip. He said "When I got nearer," *viz.*, nearer than 40 feet away. He is speaking of the moment not when he first saw her but when she saw him. The fact too that he said "she started to run towards the southwest corner" shows in the light of other evidence, that he was referring to her actions after she passed over the street-car tracks. It was when she was almost directly in front of the motor-car that she changed her course and ran heading to the south. Of course he should have said not "when she saw me" (as that suggests the reason for her action) but when she saw Hinton's car approaching she "started to run." Again, the statement as to the direction in which she ran is important, *viz.*, "towards the southwest corner." That took place when there was no danger from the street-car. My conclusion is that a general carelessly prepared written statement, such as this, without any details on highly essential points should not be taken as displacing his evidence at the trial, more particularly when in substance it can be reconciled with that evidence. Morrison explained at the trial that he meant by this

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statement that "after she cleared the street-car she started to run." It is open to that interpretation.

Again, to quote from his written statement, he said:

When I saw her crossing the street I threw off my power and as it is an up-grade the car slowed up of itself, and that is about the time the auto went past.

It was urged that he threw off the power to stop because he saw her "crossing the street" and that it was necessary for her safety to do so. Again it is not specific. He simply tells "when" he threw off the power not "why" he did so. It is not necessary to refer to other parts of the statements. It is too fragmentary to be a useful indication of the true facts.

The evidence most favourable to appellants' submission was given by Hambleton (a constable who was riding in the street-car) in his examination-in-chief. As the street-car approached 4th Avenue, he said "I saw this woman hurrying across the road." If she was not running at least "she was walking quite fast." He then made the important statement that when he first saw her she was "right in front of the street-car." Asked as to her distance from the street-car when he first saw her "hurrying across" he said "she would be maybe 10 feet—8 or 10 feet perhaps." If that is true it was not safe to hurry across. This evidence given by another witness for the respondents, is, so far, very different to Morrison's testimony. In cross-examination, he said, that just as he saw her 8 or 10 feet in front Hinton's automobile was passing the street-car "coming up along side" and "behind where he was sitting" near the front of the street-car. He could tell the auto was there by its lights. This evidence shows therefore that she was hurrying across in front of a street-car, not intending to stop, only 8 to 10 feet away with the danger—as the event proved—of running directly into the Hinton car going in the some direction and for the moment hidden by the street-car. If she retreated, on seeing the motor-car approaching, the street-car might hit her while a forward movement would be equally dangerous. Hambleton further said "what drew my attention to the motor-car was seeing this woman passing in front and it looked dangerous to me."

In cross-examination, however, a written statement given by him on the day following the accident was submitted to him.

It changed the whole complexion of his evidence in chief. In it he said:

I was sitting in the right front of the street-car. The street-car was about two street-car lengths from the intersection when I saw a woman crossing Main Street, and then actually on the south-bound street-car track.

The south-bound street-car track was nearest to her intended destination. A street-car, we were told, is about 45 feet in length. From this statement, therefore, she would appear to be 90 feet away from the street-car (not eight or ten feet) when he first saw her. She was then more than half way across the intersection. This corroborates Morrison's evidence at the trial with the exception that the distance is doubled. It is more favourable to the respondents' case. If Hambleton's evidence as contained in the written statement ought to be accepted, with a car moving slowly and even decreasing its speed, Mrs. Dallas was clearly justified in crossing. She should have been permitted to complete the journey in safety.

He continued in his statement:

At the same time [*i.e.*, when she was on the south-bound street-car track] I noticed a south-bound auto passing on the right of the street-car, and then [*i.e.*, when 90 feet from the intersection] level with my seat.

Having in view respective speeds it is obvious that if this is approximately correct the accident occurred an appreciable time before the street-car reached the intersection. If that is so, the rights of the parties should be regarded apart altogether from the fact that a street-car was in the neighbourhood. True this witness said further:

The driver of the car then apparently saw the woman, and applied brakes, which I heard, and swerved to his right to try and avoid the woman, but she was struck by the left side of the car.

This indicates that in his view Hinton did everything possible to avoid the accident. It is for the Court to say, however, whether or not he should, in view of the possibility that pedestrians would be exercising their right to cross the intersection, have his car under such control that he could stop in ample time. I think the evidence of the witness Hambleton, as contained in his statement, ends the inquiry. His original evidence at the trial in respect to a space of eight or ten feet was displaced. It was no doubt honestly given from recollection many months after the occurrence. On the other hand, the facts in his statement were fresh in his memory at the time it was given.

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The foregoing evidence was given by respondents' witnesses. Mrs. Alice Brigham, a witness for appellants, who saw the accident, "really couldn't say" how far the street-car was away from the female respondent when the latter was on the south-bound track. She did say in support of appellants' view that she "seemed to be hurrying out of the road of the street-car." In cross-examination, however, she gave this evidence:

All I asked you was when you saw her in front of the street-car did you expect an accident? No, I did not.

You didn't. So at that time the street-car was sufficiently far away from her to get in front of it with perfect safety? Yes.

This again supports respondents' case. I do not refer to other evidence where respective distances and time factors are considered. It does not necessarily displace the conclusive evidence referred to.

In my opinion, therefore, although the trial judge did not make a finding on the facts upon which her negligence, if any, should be based, there is enough evidence to support his general conclusion of sole liability on Hinton's part. The street-car was so far distant at the time she entered the intersection that she was justified in attempting to cross and was not guilty of any negligence. It cannot be said, therefore, that the learned trial judge was clearly wrong in holding that the accident was caused solely by the negligence of Hinton in not driving at a lower rate of speed on approaching an intersection with his car under such control that he could stop it in time to permit the female respondent to exercise her undoubted right to cross in safety.

(2) On the second point in respect to damages I think the trial judge was right, in law, in awarding separate amounts for (1) loss of services and (2) loss or impairment of the husband's right to the society and companionship of his wife. In practice, however, if I may, with deference, be permitted to express an opinion, it would be better to award a single sum to cover losses under both heads. *Consortium* is really a form of service and by confining the amount awarded to one item for loss of service in that broad sense the danger of juries awarding excessive amounts in respect to the invasion of a right that is difficult to measure with any degree of accuracy will be avoided. In the judgment of MURPHY, J., in *Corkill* v. *Vancouver Recreation*

Parks Ltd. (1933), 46 B.C. 532, followed by MANSON, J., herein, while his Lordship assessed damages separately for loss of *servitium* and *consortium* he did so as stated in his reasons in case a higher tribunal should decide that one item only should be allowed.

I do not think the condition of the wife from the standpoint of *consortium* was overstated in this case. Injuries to the head caused loss of memory. A comparatively young wife, formerly of normal mentality, is now, because of the injuries, irrational and erratic. The danger, however, of making extravagant claims in a field so speculative exists and should be guarded against because not always would the society and companionship of a wife be impaired by merely physical injuries.

Mr. *Bull* submitted that the decision of MURPHY, J., and the views expressed by Salmond, relied upon and quoted by the learned judge, are erroneous. He also stated that the foot-note references in Salmond do not support the author's statement. I cannot agree. The author refers at p. 392 of the 9th edition of 3 Bl. Comm. p. 139, and to *Baker* v. *Bolton* (1808), 1 Camp. 493. In the latter case where the wife died of injuries received a month after the accident it was assumed by Lord Ellenborough that the husband might recover "for the loss of his wife's society and the distress of mind he had suffered on her account" but only for the period from the time of the accident to the date of her death.

Nor are damages for loss of *consortium* merely sentimental. It is compensation for the invasion of a right or the impairment of an interest in the society of another. Enticement of a wife (similar in principle) is a case, not of impairment, but of full deprivation of the wife's society and companionship. It affords a good cause of action. As pointed out by Lord Darling in *Gray* v. *Gee* (1923), 39 T.L.R. 429 at 431, "in former days, the wife was the property of her husband, who owned her just as he did any other chattel." Now, fortunately, the only right is one of *consortium;* that it is a legal right cannot I think be questioned. There is a legal duty on the wife to live and consort with her husband and a right on the latter's part to its enjoyment and if it is an actionable wrong against the husband, for which

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damages may be recovered for a third party without justification to persuade her to violate that duty and to entice her away (*Place* v. *Searle,* [1932] 2 K.B. 497) an action will lie at the suit of the husband against a wrong-doer who by his negligence impairs the full enjoyment of the right. That I think follows.

Apart from the decision of MURPHY, J., and the judgment under review we were not referred to any cases in the English or Canadian Courts, with one possible exception, where rights to *consortium* were invaded or impaired, not by abduction, enticement, alienation of affections, etc., but by physical injuries in civil cases. It is not material that such damages, as in the case of *servitium,* are not of a strictly pecuniary nature. Cases may be referred to (*e.g., Butterworth* v. *Butterworth and Englefield, &c.* (1920), 89 L.J.P. 151) where damages were obtained by the husband for injury to his feelings, wounded pride, etc.

It is of some value to observe that in Bullen & Leake's Precedents of Pleadings, 9th Ed., 407, in a model statement of claim in an action by husband and wife for damages, the husband claiming in respect of damages for himself, a proper plea is that "the plaintiff *A. B.* [husband] lost the plaintiff *C. B.'s* [wife's] society and services for —— weeks," etc. Some assistance too may be obtained from *The St. Lawrence & Ottawa Railway* v. *Lett* (1885), 11 S.C.R. 422. Although a statute was under consideration it is true that a pecuniary interest is not so limited "as only to embrace loss of money or property." On the contrary "as in the case of a husband in reference to the loss of a wife, so, in the case of children the loss of a mother may involve many things which may be regarded as of a pecuniary character." It is not "applicable only to an immediate loss of money or property." (p. 426). In that sense the right to *consortium* may be regarded as a pecuniary interest.

Lynch v. *Knight and Wife* (1861), 9 H.L. Cas. 577, was referred to. This case is discussed by Knox, C.J., and Gavan Duffy, J., in *Wright* v. *Cedzich* (1930), 43 C.L.R. at p. 493. I refer to it only for the reference at p. 498 to a statement that a husband may "unquestionably maintain" an action for an injury to the wife *per quod consortium amisit.* In *Fox* v. *The Mayor, &c. of Saint John* (1883), 23 N.B.R. 244 in an action similar

in principle to the one at Bar damages, in part, were given to the husband (p. 245) on the ground that he "was deprived of the comfort, benefit and assistance of his wife in his domestic affairs." This was confirmed on appeal although in the reasons the point is not squarely dealt with.

I think this ground of appeal fails.

(3) On the final point raised as to the liability of appellant Home Oil Distributors Ltd., based on the view that Hinton was driving the automobile in the course of (and within the scope of) his employment, I cannot, with the greatest deference, agree with the conclusion of the trial judge. I was of that opinion at the hearing but in deference to the submission of Mr. *McAlpine* I have reconsidered the cases he referred to. The material facts in part have already been stated and subject to exceptions taken herein will be found in the judgment under review.

We discussed the principles applicable recently in *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Pettipiece* (1936), 50 B.C. 494. The governing principles, after constant repetition, in a vast variety of cases, should be well known. The only difficulty arises in their application, each decision being dependent on its own facts.

This is the ordinary case of a workman (a salesman) going home at night for sleep and rest. He was doing that for his own refreshment, not for his employer's benefit and detailed discussion as to the nature of his work, its ramifications and special features does not alter that fact. He was not going home to his business headquarters as found by the learned trial judge. There is no evidence that he turned his private residence into business headquarters. It may be conceded that it was his duty to attend the meeting for salesmen (to receive instructions in the art of salesmanship) to which he was summoned and that it was in his own interest and in his employer's interest that he should attend. That meeting came to an end and by the only evidence on the point, after it ended he started to go directly home about 9 o'clock at night. Far from going to his headquarters (although I do not say whether or not that would make any difference) he was leaving his headquarters where the meeting was held. His usual day's work (8.30 to 5) was over. He was not compelled to work

after 5 except in cases of emergency or for special services and he was not engaged in work of that character at that time. He was simply going home and going there directly without any obligation to perform duties for his master on the way. He might have spent the night elsewhere if more convenient to do so. His employer could not object. There was no material difference between going home to lunch in the *Gibson* case (*supra*) and going home to rest in his case. Any difference, in fact, militates against Mr. *McAlpine's* submission because in the *Gibson* case the employer exercised, for his own benefit, some control over the luncheon hour of the employee.

Mr. *McAlpine* submitted that if (as we may for the purpose only of this discussion concede) Hinton left his home on the company's business to attend a meeting appertaining to the business of the company he was also in the course of his employment on the return journey. The act of returning, however, was not for his employer's benefit nor was it incidental to his employment as in the case of the incident referred to in *Nightingale* v. *Cockeo,* [1917] N.Z.L.R. 433. The servant, temporarily turning aside to recover his overcoat, was on the facts, doing an act incidental to the performance of his duty.

In *Blee* v. *London and North Eastern Railway Co.,* [1936] 3 All E.R. 286, the servant was called for emergency night work, after business hours. He was injured, not on the return journey but on his way to perform that work. In the case at Bar the servant was returning from night work to which he was summoned. The Court of Appeal held that he was not in the performance of a duty to his master under his contract of service when the accident occurred. This would be equally—and with greater force—true if instead of going to work he was returning from it.

> How he got to those premises seems to me entirely his own affair; his duty was, and his duty started when he reached his employers' premises:

p. 289. Slesser, L.J. at p. 288 quoted the test laid down by Lord Wrenbury in *St. Helens Colliery Co.* v. *Hewitson,* [1924] A.C. 59 at p. 95:

> The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs.

If one asks the question—was Hinton at the corner of 4th Avenue and Main Street, when the accident occurred, in the performance of a duty to his employer under his contract of service, the answer must be in the negative.

Jarvis v. *Southard Motors Ltd.* (1932), 45 B.C. 144, was treated by the learned trial judge as analogous. There the servant was using the car when the accident happened pursuant to general authority for the master's benefit and in the course of his employment. It was his business on behalf of his employer to drive it and to attract attention to that type of car by driving it about the city. That is what he was doing at the time of the accident. As I said at p. 151, he "might demonstrate to respondent and to the friend with her, the value of the car, possibly leading to a sale."

It was further submitted that in going from his home in New Westminster to business headquarters in Vancouver to attend the meeting of salesmen and in returning home Hinton in principle was in the same position as a commercial traveller (travelling being part of his business). *Dickinson* v. *"Barmak" Limited* (1908), 124 L.T. Jo. 403, was referred to. There the deceased had been out canvassing for his employer, just as Hinton was out to attend a business meeting and, on returning home, took a wrong turning, fell into a canal and was drowned. If the accident arose out of and in the course of his employment his widow would be entitled to compensation. This, if good law, would, to some extent at least, be helpful to the respondents. I say, to some extent only, because stress was laid on the fact that the deceased was a commercial traveller: travelling was part of his business duties. However, as Mr. *Locke* pointed out, it can no longer be considered good law as stated in the reasons for judgment in *Dunning* v. *Binding* (1932), 147 L.T. 520. There the County Court judge held on the authority of *Dickinson* v. *"Barmak" Limited* (*supra*) that the work of a commercial traveller began when he left home and ended only when he had returned home. But in the Court of Appeal it was held that since the decision in *St. Helens Colliery Co.* v. *Hewitson, supra,* the case of *Dickinson* v. *"Barmak" Limited* could no longer be considered good law and the appeal was allowed. At p. 523, Lord Hanworth, M.R., in referring to the decision of the County Court judge under review, said:

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That issue being got rid of, the learned judge then says there are two other questions: "Did the accident arise, one, out of, and two, in the course of, the employment." Then he misdirects himself by referring to the case of *Dickinson* v. *"Barmak" Limited* (1908, 124 L.T. Jo. 403) as an authority for saying that, speaking generally, the employment of commercial travellers extends from the time they leave their home to commence their duties until they get back again. If that case had justified such a statement, I think it cannot be now held to be good law. The test one has to apply in all these cases is this: Did the accident happen while the workman was "engaged in doing something he was employed to do, or what is, in other and I think better words, in effect the same thing, namely, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment." Those are the words of Lord Atkinson in *St. Helens Colliery Company Limited* v. *Hewitson* (130 L.T. 291, at p. 294; [1924] A.C. 59, at p. 71). That is the rule which has to be applied and that rule applies to commercial travellers as well as to other persons in employment.

And on the same page Slesser, L.J., said:

I agree. The learned County Court judge in this case appears to me to have felt himself bound by the decision of this Court in the case of *Dickinson* v. *"Barmak" Limited* (1908, 124 L.T. Jo. 403), which is a case reported only in the Law Times newspaper as long ago as 1908. That case was one in which there was a finding of the County Court judge, as I read it, in general terms that a commercial traveller is acting in the course of his employment from the time he leaves his house on his employer's business whilst engaged thereon until he returns to his home; and there is a passage in a Scottish case of *McCrae* v. *Renfrew Limited*, [1914] S.C. 539; 7 B.W.C.C. 898), in which the Lord Justice Clerk said, *obiter*, this, speaking of a commercial traveller: "On the day in question he went out by train from Glasgow in the course of his employment, and if after completing his business work he had gone to a station to make his way home, he would still have been in the course of his employment."

In fact in that case the Court of Session came to the conclusion that, in so far as the man was intoxicated at the time when he met with the accident, that case had no application.

In my view those two decisions were both given at a time when the law on this matter had not fully been clarified.

It follows I would dismiss the appeal of Hinton and allow the appeal of the Home Oil Distributors Ltd.

Appeal dismissed as to defendant Hinton and appeal allowed as to defendant company, McPhillips, J.A. dissenting.

Solicitor for appellant Hinton: *W. W. Walsh.*
Solicitor for appellant company: *W. S. Lane.*
Solicitor for respondents: *W. H. Campbell.*

THE ROYAL TRUST COMPANY v. BAINBRIDGE LUMBER COMPANY LIMITED.

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March 3, 4; *May* 18.

Practice—Order of Court—Failed to include a provision intended by the Court—Application to vary the order—Jurisdiction.

If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court has jurisdiction to correct it.

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 11th of January, 1937, varying an order made by himself on the 31st of March, 1932, so that it would correctly declare the intention and express the meaning of the Court at the time when the order was made. The plaintiff as trustee of a mortgage trust deed to secure an issue of bonds of the defendant company, brought action in March, 1930, to have accounts taken as to what was due by the defendants under the covenants contained in the trust deed, to have the security created by the trust deed enforced by foreclosure or sale, and for the appointment of a receiver. When the order of the 31st of March, 1932, was made, certain assets of the defendant had been sold under orders of the Court to realize under the security of the mortgage trust deed mentioned in the pleadings, moneys owing to the bondholder as found and certified by the registrar. There remained subject to the said security the parcel of land known as lot 27, Alberni District. The defendant had not appeared in the action. Its operation had been closed down for five years and the security was in very poor condition. The trustee and the receiver wished to be relieved of their respective posts. There was still a large sum owing by the defendant to the bondholder, a sum in excess of $50,000. The bondholder was willing to meet the wishes of the trustee and receiver, but owing to the amount still owing him, was unwilling that the remaining parcel of land should be restored to the defendant, freed and discharged from the indebtedness to him. By the order of the 31st of March, 1932, it was ordered that the receiver pass his accounts and pay the balance of money on hand to the owner of the outstanding bonds, and that he be discharged and released and that the

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plaintiff be at liberty to execute a release of the remaining lands of the defendant comprised in the trust deed, and deposit same with the registrar of the Court in Victoria, the same to be delivered to the defendant upon application accompanied by proof that the time for removal allowed the respective purchasers of the machinery and rails on the lands of the company had expired, or that all the machinery and rails had been removed and that upon the release being executed and so deposited the plaintiff be released and discharged as trustee of the trust deed. After the order was made the plaintiff destroyed the bonds that had been placed in its hands as trustee under the mortgage trust deed. The order did not provide for a trustee to manage and administer the remaining trust property, but it was intended that provision be made for the management and administration of such remaining property, and it was mentioned at the time that the bondholder should be enabled to take such steps as he might see fit for this purpose, pending further application to the Court. By the order of the 11th of January, 1937, amending the above order, and from which this appeal is taken, it was ordered that the owner of the outstanding bonds of the defendant be relieved from the cancellation and destruction of such bonds, and that he be released from the release dated April 18th, 1932, executed by the plaintiff and filed in the Registry office at Victoria, and it was further ordered that in addition to the directions in the order of the 31st of March, 1932, that the bondholder be authorized and empowered to take such steps as he may see fit to provide for the management and administration of the remaining trust property charged by the mortgage trust deed, including the sale thereof with liberty to apply for further directions, and that the order passed and entered herein of the 31st of March, 1932, be corrected accordingly.

The appeal was argued at Vancouver on the 3rd and 4th of March, 1937, before MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Higgins, K.C., for appellant: The order of the 31st of March, 1932, was made at the instance of the plaintiff, and the plaintiff cannot now vary it: see *Rex* v. *Iaci* (1925), 35 B.C. 403 at p.

404; *Powell* v. *Smith* (1872), L.R. 14 Eq. 85 at p. 91. The application to vary is made four and one-half years after the order was made: see *Hatton* v. *Harris,* [1892] A.C. 547 at p. 558; *Stewart* v. *Rhodes,* [1900] 1 Ch. 386 at p. 394; *Vandepitte v. Berry* (1928), 40 B.C. 408; *Andler v. Duke* (1932), 45 B.C. 256; *May* v. *Roberts (No. 3),* [1936] 1 W.W.R. 465; *Preston Banking Company* v. *William Allsup & Sons,* [1895] 1 Ch. 141 at p. 143; *Wills* v. *Luff* (1888), 38 Ch. D. 197. A release was given of part of the property and other interests have intervened: see *Gronlund* v *Curlette,* [1924] 2 W.W.R. 337; *Palmer* v. *Hendrie* (1859), 27 Beav. 349; *Zwicker* v. *Zwicker* (1899), 29 S.C.R. 527 at p. 532.

Finland, for respondent: The order of the 31st of March, 1932, failed to provide directions for the management and administration of the balance of the trust property. The intention of the Court was not wholly included in the order.

Per curiam: That the argument should be adjourned and counsel should ask the learned trial judge to make a report as to in what respect the order of the 31st of March, 1932, failed to express the intention of the Court.

The appeal was further argued at Victoria on the 16th of April, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and MACDONALD, JJ.A.

Finland, read the report of the trial judge, which recited that the order of the 31st of March, 1932, as drawn, did not provide for a trustee to manage and administer the said remaining trust property, and that the Court intended that provision be made for the management and administration of such remaining property, and it was mentioned at the time that the bondholder should be enabled to take such steps as he might see fit for this purpose pending further application to the Court, and that there is inherent in the Court power to vary that order in such a way as to carry out its meaning at the time.

Higgins: This is a representative action under rule 130, and the bondholder must be made a party before an order varying the original order can be made: see *Marshall* v. *Canadian Pacific Lumber Co.* (1922), 31 B.C. 363; *In re Lart. Wilkinson* v. *Blades,* [1896] 2 Ch. 788 at pp. 794-5; *Watson*

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v. *Cave (No. 1)* (1881), 17 Ch. D. 19. He took a benefit under the first order and cannot now have it varied; further the rights of third parties have intervened: see *Peters* v. *Perras* (1909), 42 S.C.R. 244. Evidence not contradicted and not examined upon must be accepted: see *Begley* v. *Imperial Bank of Canada,* [1934] 1 W.W.R. 689 at p. 694.

Finland: The report of the learned Chief Justice below concludes the matter. It was the intention that the order of the 31st of March, 1932, should provide for directions as to the management and administration of the property. There are no intervening interests whatever, as Hoard who was managing director of the defendant company could not possibly carry on the business of the company as the machinery and rails were sold and the taxes were mounting up against the property. The bondholder need not be a party as the trust company as trustee under the trust deed represented the bondholder.

Cur. adv. vult.

On the 18th of May, 1937, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: In view of the report, which we were favoured with by the kind attention of the learned judge appealed from, it is now apparent that no objection can be taken to his order of the 11th of January last on the ground that he had no authority thereby to vary his prior order of the 31st of March, 1932, because it now appears that his intention was not carried out by the latter order in the form in which it was entered.

But it was further objected that, on the facts herein, he was precluded from making the said original order (in the form wherein it now stands) in the absence of the bondholder as a party, and certain cases were cited by appellant's counsel in support of that submission. Suffice it to say that we have considered those cases and are of opinion that under the circumstances they do not afford a ground for disturbing the said original order, and therefore the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Frank Higgins.*
Solicitor for respondent: *E. V. Finland.*

DeLANOIS AND JOHNSON v. FLESH.

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March 5, 8; *April* 13.

Negligence—Damages—Automobile turns over in ditch—Defective steering-gear—Owner auto mechanic—Repairs—No inspection or enquiry as to —Liability.

The defendant purchased a second-hand car in August, 1935. A few days after he found the steering-gear was defective and brought it back to the vendor for repairs. He got it back but a few days later the same trouble developed and he brought it back to the vendor, telling him the repairs should be done by another firm who were experts at that work. The car was sent to the experts for repairs, and when he got it back he drove it for about seven months. The defendant was an auto mechanic but had not followed his trade for three years and did not make any enquiries as to the nature and extent of the repairs. On the 25th day of April, 1936, the defendant with his wife and two children attended a wedding reception in New Westminster, and at about 2 o'clock on the following morning he volunteered to drive the plaintiffs home. He with his wife and son sat in the front seat and his daughter and the plaintiffs sat in the back seat. On the journey back the car struck a small stone or some obstruction which caused it to swerve, and in endeavouring to right the car it passed from the highway and overturned in a ditch at the side and the plaintiffs suffered injuries. It was found later that the steering-gear was defective, because the king-pins and bushings on the front axle were worn, causing the car to get out of control, the tendency of the car in that condition being to turn aside suddenly without warning. It was held on the trial that because the defendant was a motor mechanic himself he should have inspected the repair work before accepting the car as fit for use, and as he did not do so he was liable in damages for driving a defective machine.

Held, on appeal, reversing the decision of McDonald, J., that negligence should not be attributed to the defendant in driving the car when he knew it was placed with experts for correction by a reliable dealer under contract with him to return the car in good running condition. He had a right to believe that the trouble that caused him to return it for the second time was removed. The burden should not be placed upon the owner of a car to investigate the work of auto experts, and the fact that he has knowledge of mechanics or even is an expert does not alter the situation.

APPEAL by defendant from the decision of McDonald, J. of the 31st of December, 1936, in an action for damages resulting from the negligent driving by the defendant of his motor-car. The plaintiffs were gratuitous passengers in the

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defendant's motor-car at about 2 o'clock on the morning of the 20th of April, 1936, then being driven by him northward on Grandview Highway, in the City of Vancouver. As he approached the intersection of Renfrew Street at the rate of about 35 miles an hour, the car suddenly swerved to one side. He straightened it up two or three times as it veered from side to side but eventually it went off the road and upset in the ditch. After the accident it was found that the car had loose king-pins and worn bushings. The defendant, who was an automobile mechanic, purchased the car in August, 1935, from a second-hand dealer. He immediately found the steering-gear was defective and brought it back to the vendor for repairs. He got it back but it again failed to operate properly and he again took it back for repairs. There is no evidence of what was done in the way of repairs, but having got it back he drove it for about seven months before the accident. It was found at the trial that the car required new king-pins and new bushings and the defendant being an automobile mechanic was negligent in not taking proper care to see that his car was in a safe condition for driving.

The appeal was argued at Vancouver on the 5th and 8th of March, 1937, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Locke, K.C. (*Nicholson,* with him), for appellant: Flesh offered to take the plaintiffs home from a party in New Westminster. It was a second-hand Durant car and the accident resulted from the loose condition of the king-pins and worn bushings. They were gratuitous passengers. The defendant, after taking his car for repairs, found that it functioned properly for seven months. He took reasonable care: see *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925), 95 L.J.K.B. 237 at p. 239; *Armand* v. *Carr,* [1926] S.C.R. 575 at p. 581; *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65; *Moffat* v. *Bateman* (1869), L.R. 3 P.C. 115; *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; Beven on Negligence, 4th Ed., 13; *Phillips* v. *Britannia Hygienic Laundry Co.* (1923), 92 L.J.K.B. 389; *Karavias* v. *Callinicos,* [1917] W.N. 323. The case of *Readhead* v. *Midland Railway Co.* (1869), L.R. 4 Q.B. 379 does not apply.

Lucas, for respondents: This vehicle was in a dangerous condition and the defects were readily discoverable on inspection: Terrell's Running Down Cases, 2nd Ed., 25; *Fraser* v. *Children's Aid Society,* [1935] 1 W.W.R. 667; *The European* (1885), 10 P.D. 99; *The Merchant Prince,* [1892] P. 179 at p. 187; *Wilson* v. *Brett* (1843), 11 M. & W. 113. The degree of care required in carrying a gratuitous passenger is the same as one paying a fare: see Terrell's Running Down Cases, 2nd Ed., 30. There is no recognition of different degrees of care: see Salmond on Torts, 9th Ed., 464. As to review of decisions by this Court see *S.S. Hontestroom* v. *S.S. Sagaporack,* [1927] A.C. 37.

Locke, replied.

Cur. adv. vult.

13th April, 1937.

Martin, C.J.B.C.: I agree with my learned brothers that the evidence, which in essentials is not in dispute, fails to establish negligence on the part of the defendant (appellant) with respect to the condition of the steering-gear of his motor-car, and therefore the appeal should be allowed and the judgment vacated.

McPhillips, J.A.: This is an appeal from a judgment of Mr. Justice McDonald upon a trial had without a jury, the action being one for alleged negligence in the driving of a motor-car the property of the defendant, now appellant. The learned trial judge in his reasons for judgment said:

With some hesitation I have reached the conclusion that under the particular facts of this case this defence cannot prevail.

Following the arguments and with a close study of the facts of the case I am impelled to say with the greatest respect to the learned trial judge that I fail to find in the evidence that it was established that the appellant was in any way negligent. Shortly the facts as disclosed in the evidence set forth that the motor-car in which the respondents were riding (the plaintiffs in the action) was the property of the appellant, a second-hand motor-car which the appellant had purchased from a well-known dealer and shortly after its purchase the appellant not being satisfied with the steering-gear took it back to the company and

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pointed this out. The car was gone over and redelivered to the appellant. Later again some defect seemed to be present in the steering-gear when it was again taken back and it was requested it be gone over, and at this later time the appellant suggested it be taken to another business concern that specialized in repairing cars and this was done and following this the car was operated by the appellant for some seven months and had been driven some 7,000 miles without exhibiting any defect as to its steering-gear.

The occasion of the accident was this—the respondents were guests at a social party and there meeting the appellant and his wife and two young children, the appellant said to the respondents that he would drive them home. Their home being in the same direction as his the invitation was accepted so that the respondents were gratuitous passengers. It was pressed that as the appellant was a motor mechanic that he must have known or should have known of the defect in the steering-gear which later developed as the cause of the accident, the overturning of the motor-car when being driven having therein the respondents, the appellant, his wife and two young children. The mere fact that he was a motor mechanic in itself proves nothing. It was not shown that he had any special knowledge whatever as to the mechanism of motor-cars and was not engaged in that pursuit at the time. Further the appellant had taken the precaution when the car was last overhauled to have the work done by the Auto Metal and Radiator Works, specialists in this class of business. Where can it be said that upon these facts there was even a scintilla of negligence existent in the case? Was there anything to put the appellant on guard or can it be in any way reasonably said he was guilty of negligence? And it is not to be forgotten that the appellant had with him at the time not only the respondents, these gratuitous passengers, but his wife and two young children. Is it conceivable that the appellant had any knowledge or could it be said that he should reasonably have had knowledge that there was danger in operating the car? What happened was this—that evidently the motor-car, after some miles of travel, struck some obstacle; it might have been even a small stone or something of the kind

on the road which caused the motor-car to swerve and in the attempt to right the car it passed from the highway and capsized into the ditch and consequent upon this the respondents suffered the injuries complained of and for which they have been given damages. Now there is no contention at all that the appellant was in any way negligent in the driving of the car. When it is considered that the motor-car had been in use some seven months without the recurrence of the previous trouble, it is reasonable to say and would indicate to any ordinary reasonable person that the previous defect in the steering-gear was remedied and that the car could be said to be in good running order and in proper condition for use upon the road. In view of all this can the case be said to be one where any breach of duty existed towards the gratuitous passengers in the car—the respondents? I would unhesitatingly say not. It is apparent that the cause of the accident, now being known, a defect in the steering-gear, the doctrine of *res ipsa loquitur* does not apply (*Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925) 95 L.J.K.B. 237). It is unthinkable that the appellant knew or had any doubt as to the efficiency of the steering-gear when he would be exposing the lives of his wife, his two young children, and his own life, as well as the lives of his gratuitous passengers. The duty owed by the appellant to the respondents, gratuitous passengers, was to take reasonable care under the circumstances (*Armand* v. *Carr,* [1926] S.C.R. 575; *Lechtzier* v. *Lechtzier. Levy* v. *Lechtzier* (1931), 43 B.C. 423; *Membery* v. *Great Western Railway Co.* (1889), 14 App. Cas. 179 at pp. 190-1).

In my opinion there was no absence of reasonable care, under the circumstances of the present case. It therefore follows in my opinion that the judgment under appeal should be set aside and the appeal allowed.

Macdonald, J.A.: This is an appeal from a judgment awarding damages against the appellant. The respondents were gratuitous passengers riding in appellant's motor-car. Usually the alleged negligent act upon which an action is based is committed at the time of the mishap. Here it occurred over

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six months previously continuing however up to the time of the accident.

Appellant, returning from a wedding reception had his wife and child with him in his car, in addition to the respondents. On the journey it suddenly ran off the road injuring the respondents who were thrown from the car. It was found later that the steering-gear was defective because the king-pins and bushings in the front axle were worn and unfit for use causing the car to get beyond the control of the driver and to turn sharply aside. The tendency of a car in that condition was to "wander," *i.e.*, turn aside suddenly without any warning particularly if a wheel of the car came into contact with a small object on the road.

The short point is this—on the facts following did appellant know (or should he have known) that he was driving a defective machine likely to cause an accident? He was an auto mechanic but did not follow that trade for three years prior to the accident. He purchased the car from A. W. Carter Ltd., reputable dealers in used cars, and was given a warranty for 30 days. It was a 1931 Durant car.

A few days after the purchase he found that "it didn't steer just right." Thereupon he returned it to his vendors because, as he stated "I bought it from them with a 30-day warranty and it was up to them to repair it." He made no enquiries as to the extent of repairs made, if any, and because of the warranty did not pay for this work.

Shortly afterwards (but within the 30-day period) the same trouble developed and he again returned the car to the vendors. On this occasion he said:

> I insisted on them [*i.e.*, A. W. Carter Ltd.] taking it down and having it put . . . on the machine for lining the front wheels and axle up.

Asked what he meant by that he said:

> That would be to put it on a wheel-lining machine, and check the front axle and all the steering-gear . . . . If there were worn bearings or worn king-pins they would see it . . . . and it would be corrected.

He also told his vendors that the Auto Metal Company should be asked to do the work because "they are experts at that and had the special equipment for doing that line of work." These were careful instructions and he was justified in assuming that

they were carried out. One, acting with ordinary prudence would not think it necessary to distrust a reputable dealer to the extent that he should accompany its representative to the premises of the Auto Metal Company to see that proper instructions were given. He knew the car was sent by his vendors to the Auto Metal Company, a company specializing in front axle work, body repairs and wheel alignment because he took delivery of it from their premises. When he "picked it up there" he made no enquiries as to the nature and extent of the repairs made by the mechanics. He assumed that "they went over the steering-gear." That is the usual attitude of a layman at all events. He feels that he has done his full duty when he explains to the mechanic or to the proprietor the nature of the trouble with his car and when it is returned to him he assumes, reasonably enough that it received proper attention.

The learned trial judge was of opinion, however, with some hesitation, that because appellant was a motor mechanic himself he should have inspected the repair work before accepting the car as fit for use and as he did not do so was liable in damages for driving a defective machine. I do not, with deference, think it reasonable to hold that because the owner of a car may be a mechanic he is under a legal obligation to inspect repairs or supervise the work after completion by the mechanics before he uses the car. It is enough if the work is entrusted to competent men. True appellant did not know what instructions A. W. Carter Ltd., gave to the Auto Metal Company, but a reasonable man might assume that the mechanics were told of the trouble and asked to rectify it. It is, I think, difficult to assign negligence to the appellant in later driving the car, when he knew it was placed with experts for correction by a reliable dealer under contract with him to maintain the car in good running condition. He had a right to believe that the trouble that caused him to return it for the second time was removed. The burden should not be placed upon the owner of a car to investigate the work of auto experts before he ventures to drive it and I do not think because one may have some knowledge of mechanics, or may even be an expert that it alters the situation.

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It is in this respect with the greatest deference that I disagree with the trial judge. He found that appellant was obliged to make use of his own ability as a mechanic to check the work of the repair men. If such a rule is proper the question of the precise degree of mechanical skill the owner should possess to make him responsible for failure to supervise would arise in every case.

I do not think it necessary to discuss cases as to the degree or standard of care necessary where gratuitous passengers are concerned. It is enough for our purposes to say that,—

> The driver of a motor-vehicle, taking passengers gratuitously must use reasonable care in driving the vehicle, and if as a result of a failure in this duty a passenger is injured, the driver will be liable:

Terrell's Law of Running-Down Cases, 2nd Ed., p. 27.

I feel, whatever standard of care should be applied, it was satisfied in this case.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *W. S. Lane.*
Solicitor for respondents: *R. W. Ellis.*

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April 13, 14; *May* 18.

REX v. CHOW WAI YAM.
REX v. JAY SONG.
REX v. GEE DUCK LIM.

Criminal law—Charge of possession of opium—Conviction—Habeas corpus—Certiorari in aid—Release of accused—Appeal—Jurisdiction.

Accused was convicted in the County Court Judge's Criminal Court on a charge of having opium in his possession. On the return of a writ of *habeas corpus* with *certiorari* in aid, the conviction was quashed and the accused was released.

Held, on appeal, that there is jurisdiction to hear the appeal, that the writ of *habeas corpus* be set aside and the accused be apprehended and forwarded to the custody of the warden of the gaol from which he was taken.

APPEALS by the Crown from the decision of Manson, J. of the 13th of February, 1937, ordering the release of accused on an application by way of *habeas corpus* with *certiorari*

in aid. The accused were arrested and charged for having opium in their possession, contrary to The Opium and Narcotic Drug Act, 1929. They were tried by ELLIS, Co. J. and acquitted on the 11th of December, 1935. On appeal to the Court of Appeal a new trial was ordered. On May 19th, 1936, they were tried by HARPER, Co. J. without election, and were convicted. An application on behalf of the accused by way of writ of *habeas corpus* with *certiorari* in aid heard by MORRISON, C.J.S.C., was dismissed. A new application was then made by way of *habeas corpus* with *certiorari* in aid to MANSON, J.

The appeals were argued at Victoria on the 13th and 14th of April, 1937, before MARTIN, C.J.B.C., MACDONALD and McQUARRIE, JJ.A.

Maitland, K.C., (*Owen,* with him), for appellant.

Ian Cameron, for accused, raised the preliminary objection that as this was a criminal matter there was no jurisdiction to hear the appeals. *Habeas corpus* proceedings were taken before the sentence expired: see *Rex* v. *McAdam* (1925), 35 B.C. 168; Clement's Canadian Constitution, 3rd Ed., 551; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 736, sec. 1256; *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175 at p. 178. The right to review County Court proceedings in criminal matters by *habeas corpus* with *certiorari* in aid was approved in *Rex* v. *Chow Chin* (1921), 29 B.C. 445; see also *Rex* v. *Gustafson* (1929), 42 B.C. 58 at p. 61. As the order quashing the conviction wiped out the sentence, the sentence then could not expire so as to permit deportation: see *The Queen* v. *Whitchurch* (1881), 7 Q.B.D. 534. *Habeas Corpus* proceedings may be renewed from judge to judge: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 727, sec. 1239; *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, [1928] A.C. 459 at p. 468.

Maitland, contra: Form F of the Immigration Act was issued by the Minister of Justice for the custody of accused with a view to deportation. They were then kept in custody for deportation under section 26 of The Opium and Narcotic Drug Act, 1929. There is no jurisdiction to review or interfere with

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the order: see *In re Wong Shee* (1922), 31 B.C. 145; *Rex* v. *Jeu Jang How* (1919), 59 S.C.R. 175; *Rex* v. *Sue Sun Poy* (1932), 46 B.C. 321; *In re Immigration Act and Pong Fook Wing* (1923), 33 B.C. 47; *Rex* v. *Chang Song* (1923), *ib.* 176; *Rex* v. *Wong Cheu Ben* (1930), 43 B.C. 188. The case of *Rex* v. *McAdam* (1925), 35 B.C. 168, was on a charge of rape and a purely criminal matter.

Cameron, in reply: The cases referred to by appellant are where the accused was in the custody of the immigration officials.

Judgment was reserved on the preliminary objection.

Maitland, on the merits: When the case came back before Harper, Co. J. they did not elect. Where there is the right of appeal you cannot have *certiorari.* A prisoner under sentence of the County Court is not entitled to *habeas corpus:* see Bench and Bar (December, 1936), p. 5; *Regina* v. *Murray* (1897), 28 Ont. 549; *Rex* v. *Martin* (1927), 60 O.L.R. 577 at p. 581; *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at pp. 514-5, 517 and 522; *Rex* v. *Goldberg* (1919), 54 D.L.R. 559; *Ex parte Burns (No. 2)* (1932), 4 M.P.R. 564; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140; *Rex* v. *Simpson,* [1923] 3 W.W.R. 1095; *Rex* v. *Chow Chin* (1921), 29 B.C. 445. Harper, Co. J. took the new trial and the trial went on without objection. They did not have the right of election: see *Rex* v. *Gee Duck Lim* (1936), 51 B.C. 61; *Rex* v. *Deakin* (1911), 16 B.C. 271; (1912), 17 B.C. 13.

Cameron: On the application for a writ previous judgments in the same matter need not be considered: see *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering),* [1928] A.C. 459. The accused served part of their sentence. The County Court Judge's Criminal Court is a Court of limited jurisdiction and section 827 of the Criminal Code shows an election is necessary: see *The Queen* v. *Lefroy* (1873), L.R. 8 Q.B. 134; *Stewart* v. *Taylor et al.* (1891), 31 N.S.R. 503; *Rex* v. *Wong Cheu Ben* (1930), 43 B.C. 188. This is not a superior Court of criminal jurisdiction so *habeas corpus* will lie. Not objecting to proceeding with the case when called has no effect, as the right of election cannot be disposed of by waiver or consent: see Halsbury's Laws of England, 2nd Ed., Vol. 8,

p. 532, sec. 1178. The same principles apply in the case of *habeas corpus* as in *certiorari*: *Rex* v. *Morn Hill Camp Commanding Officer. Ex parte Ferguson,* [1917] 1 K.B. 176 at p. 180; *Rex* v. *Mattens* (1928), 50 Can. C.C. 285.

Maitland, in reply, referred to *Rex* v. *Dean* (1913), 18 B.C. 18; 598; Halsbury's Laws of England, 2nd Ed., Vol. 8, p. 528, sec. 1170; *Rex* v. *Wong Cheu Ben* (1930), 43 B.C. 188 at p. 191.

Cur. adv. vult.

18th May, 1937.

MARTIN, C.J.B.C.: These three cases, which are of the same nature, and which abide by the decision practically of the first one, are all allowed; and we make the direction, following that which was made by the Supreme Court of Canada in the celebrated and leading case of *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 250, and followed by the Court of Appeal in Quebec in *Rex* v. *Labrie* (1920), 35 Can. C.C. 325 at p. 338—the direction, that is to say, that we quash and set aside the order for the writ of *habeas corpus* and quash the writ itself and direct that the respondents be forthwith apprehended and forwarded to the custody of the warden of the gaol from which they were taken improvidently, we are of opinion; the consequence being, of course, that all the proceedings—to use the language of the cases mentioned—that all the proceedings of and having consequence upon the issuance of the aforesaid improvident order and writ of execution thereupon founded are also quashed and set aside.

In this relation, pending the handing down of our full reasons in a case of very exceptional difficulty and importance, which has given us a great deal of variety, we adopt the language of Mr. Justice Taschereau, in the *Sproule* case, which we think particularly appropriate to the one in question, that is to say:

> I am not sorry to have been able to reach this conclusion, perfectly satisfied, as I am, that the prisoner in this case has had a fair and legal trial. I duly appreciate the highly beneficial character of the writ of *habeas corpus* as one of the most effective safeguards of the liberty of the subject, but I cannot forget that society has also its rights, and that the courts of the country are bound to see that the writ is not taken advantage of for the protection of felons and convicts.

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Macdonald, J.A. agreed with Martin, C.J.B.C. in allowing the appeals.

McQuarrie, J.A.: This is an appeal by the Crown from the decision of Manson, J., dated February 13th, 1937, whereby a conviction of Harper, Co. J., dated May 19th, 1936, was quashed and an order, dated June 18th, 1936, directed to the warden of the Prison Farm, Oakalla, B.C., by the Minister of Justice under the Immigration Act and The Opium and Narcotic Drug Act, 1929, dated June 18th, and a warrant of commitment by the deputy police magistrate of the City of Vancouver, dated October 30th, 1935, were each declared and adjudged to be a nullity and further providing for the release of the respondents. The said judgment was made on the petition of the respondent, a prisoner in the custody of the warden at Oakalla Prison Farm, brought before the learned judge by way of a writ of *habeas corpus* with *certiorari* in aid thereof, issued the 11th day of December, 1936, and for an order for the discharge of the respondents upon the return being made without the necessity of the writ actually issuing.

On the hearing of these appeals a preliminary objection was raised by counsel for the respondents, that these were criminal proceedings and no appeal lies from the said judgment. The said objection was argued at length and with the consent of counsel the Court allowed the appeal to proceed subject to the preliminary objection. The preliminary objection should now be disposed of because if it be held to have been well taken the appeal necessarily fails.

Counsel for the Crown submitted that by reason of the said judgment purporting to go beyond the quashing of the conviction of Harper, Co. J., and dealing with the order of the Minister of Justice under the Immigration Act and The Opium and Narcotic Drug Act, 1929, it thus became a civil matter and therefore an appeal unquestionably lay.

Counsel for the respondents relied principally on *Rex* v. *McAdam* (1923), 35 B.C. 168. It may be debatable whether even in strictly criminal proceedings an appeal to the Court of Appeal does not lie on *habeas corpus* judgments and counsel for

the appellant did not abandon that contention, but argument was largely confined to the somewhat unusual provisions of the judgment from which this appeal is brought.

Counsel for the appellant submitted that *Rex* v. *McAdam* dealt with a purely criminal proceeding and does not apply here. I am of opinion that the appellant's contention is well founded and I would dismiss the preliminary objection.

As to the appeal, the learned trial judge in his reasons for judgment dealt at some length with the question of there having been delay in holding the second trial but he finally concluded that he did not think that "it can be said, upon this ground that the Court had no jurisdiction."

That narrows the matter down to the submission "That His Honour Judge HARPER was without jurisdiction by reason of the fact that the Court of Appeal did not direct in its judgment as to whether the new trial should be before a judge or before a jury," and incidentally that the County Court Judge's Criminal Court was *functus officio* after the first trial when the accused were acquitted. And further that HARPER, Co. J., was without jurisdiction to try the respondents because there had been no re-election or consent by the accused to the retrial as held by the said HARPER, Co. J. It was also submitted that the "Form of Record" was bad on its face in that it did not disclose jurisdiction or a recital of election upon which the jurisdiction of the Court was dependent.

With due deference to the learned judge, from whose decision this appeal is brought, I am of opinion that he misconceived the procedure entailed by the judgment of the Court of Appeal referred to by him. The effect of that judgment I think was that a new trial should be held and in the absence of any provision therein to the contrary such new trial would necessarily be in the County Court Judge's Criminal Court without any re-election by the accused or any further consent by him to such a new trial. I cannot see why the Court should be *functus officio* by reason of the acquittal of the accused on the 1st of April if the judgment of the Court of Appeal is effective as it undoubtedly is. I am further of opinion that the record of the second trial is in order and that the trial before HARPER, Co. J.,

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was regular in every respect. I would allow the appeal and the motion, set aside the judgment of MANSON, J., and confirm the conviction made by HARPER, Co. J. The respondents should be remanded to the custody of the warden of the Oakalla Prison Farm.

Appeals allowed.

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S. C.
1937
Sept. 11.

Criminal law—Certiorari—Summary trial—Indecent assault upon female —Jurisdiction of magistrate—Punishment—Conviction amended as to —Criminal Code, Secs. 292, 583, 773, 774, 777, 779 and 781.

Where a person is charged before a magistrate in British Columbia with indecent assault upon a female, the magistrate has jurisdiction under section 777 of the Criminal Code, to try the accused without the accused's consent, unless in his opinion the assault charged was with intent to commit rape. The magistrate may base his opinion as to this upon such an inquiry as is indicated by section 781 of the Code, *i.e.*, by an informal examination of Crown witnesses before calling upon the accused. The conviction need not set forth the magistrate's opinion that the assault was not with intent to commit rape.

The magistrate is restricted in the punishment which he may impose upon conviction by the provisions of section 779 of the Criminal Code, and the conviction was amended by deleting therefrom the words "Three months and to be whipped twice with four lashes at each whipping" and inserting in lieu thereof the words "six months."

APPLICATION on *habeas corpus* proceedings with *certiorari* in aid. The facts are set out in the reasons for judgment. Heard by MANSON, J. at Vancouver on the 4th of September, 1937.

Soskin, for the Crown.
Mellish, for accused.

Cur. adv. vult.

11th September, 1937.

MANSON, J.: *Habeas corpus, certiorari* in aid upon the application of the Crown upon the conclusion of argument.

The warden of Oakalla Prison Farm returns the warrant of commitment. It discloses that the prisoner was charged before the deputy police magistrate of the city of Vancouver for that he at the said city on July 24th, 1937, unlawfully did indecently assault a female, and that the said prisoner consented to the charge being tried summarily by the deputy police magistrate and further that, the prisoner having been found guilty, he was convicted and by the magistrate adjudged to be imprisoned at Oakalla and there kept at hard labour for the term of three months and to be whipped twice with four lashes at each whipping.

The pertinent portions of the sections of the Code, R.S.C. 1927, Cap. 36, which require consideration are set forth hereunder:

292. Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who

(*a*) indecently assaults any female; . . .

583. No Court mentioned in the last preceding section [*i.e.*, Courts of general or quarter sessions of the peace] has power to try any offence under sections, . . .

(*f*) . . . three hundred, attempt to commit rape;

2. No such Court has power to try any person

(*a*) for . . . attempting to commit, . . . any of the offences in this section before mentioned; . . .

773. Whenever any person is charged before a magistrate,—

(*d*) . . . , or with indecent assault upon a female, not amounting, in the magistrate's opinion, to an assault with intent to commit a rape; . . . the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way, but only with the consent of the party so charged, subject to the exceptions provided in section seven hundred and seventy-seven.

774. When any person is charged . . .

(*b*) in the Provinces of . . . , British Columbia, . . . before a police magistrate;

(*c*) in any city or incorporated town, having a population of not less than 2,500, . . . , before any police . . . magistrate, . . . with having committed any offence (except culpable homicide or any of the offences mentioned in section five hundred and eighty-three) . . . , such person may, with his own consent, be tried before such . . . magistrate, as the case may be, and may, if found guilty, be sentenced to the punishment for such offence.

2. Where the offence is one of those mentioned in section seven hundred and seventy-three, the provisions of section . . . seven hundred and seventy-nine . . . shall apply thereto.

777. The jurisdiction of the magistrate is absolute, and does not depend

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on the consent of the person charged to be tried by such magistrate, in the following cases: . . .

(c) In the Provinces of British Columbia, . . . where any person is charged with an offence mentioned in any of the paragraphs of section seven hundred and seventy-three, except paragraph (h).

779. In any case summarily tried under paragraphs . . . (d), . . . of section seven hundred and seventy-three, if the magistrate finds the charge proved, he may, . . . , convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, two hundred dollars, or to both fine and imprisonment not exceeding the said sum and term.

781. Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this Part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him.

. . .

The application for *certiorari* in aid was made only at the conclusion of the argument of counsel for the Crown. There were no such irregularities in the trial as were present in *Rex* v. *Avon* (1919), 45 O.L.R. 633; 32 Can. C.C. 79. I deemed it proper to grant the application in order that the conviction and warrant might be amended under section 1124 of the Code if need be.

Upon the face of the warrant it would appear that the learned magistrate proceeded, with the consent of the accused, under section 773 or under section 774, but, upon examination of the proceedings brought up, it appears that the magistrate took the formal election of the accused under section 781 (2) (*b*) and that the accused through his counsel elected to be tried by the magistrate.

The magistrate had absolute jurisdiction under section 777 to try the accused—that is, without his consent—unless in his opinion the assault charged was with intent to commit a rape. In my view the magistrate is to arrive at an opinion after such an inquiry as is indicated by section 781, *e.g.*, by an informal examination of Crown witnesses and, in any event, before calling upon the accused. The point is discussed by Stuart, J.A. in *Rex* v. *Kramer,* [1924] 1 W.W.R. 714, at 718; 20

Alta. L.R. 244; 41 Can. C.C. 403. Had the magistrate arrived at the conclusion that the assault was with intent to commit a rape the charge in effect would have been attempted rape: *Rex ex rel. Binda* v. *County Court Judge* (1924), 57 N.S.R. 323; 42 Can. C.C. 351; and *Rex* v. *MacIntyre* (1925), 58 N.S.R. 130; 43 Can. C.C. 356. I think it was unnecessary that the magistrate should have set forth in the conviction a negative—namely, that his opinion was that the assault charged was not with intent to commit a rape. In this view I am in accord with that expressed by Stuart, J.A. in the *Kramer* case, *supra*. My conclusion on the point is that the magistrate tried the accused upon the simple charge of having indecently assaulted a female.

The charge is one of those mentioned in section 773 (*d*). The opposite view was urged by Mr. *Soskin* of counsel for the Crown but his submission in this respect is one to which I cannot accede. The point is discussed in the *Kramer* case, *supra*, at pp. 717-8.

The charge was triable by the magistrate under sections 773 or 774 with the consent of the accused and, without the consent of the accused, under section 777. Despite the language of the warrant it would appear that the magistrate proceeded under section 777. Where there is jurisdiction in the magistrate to try under more than one section it would appear wise that it should be definitely stated under what section the magistrate proposes to proceed.

Question arises as to whether the magistrate was restricted in the punishment which he might impose upon conviction by the provisions of section 779. That section specifically enacts that if the accused be tried under paragraph (*d*) of section 773 the magistrate shall be restricted as to the punishment which he may impose and section 774 (2), *inter alia*, makes the restrictions of section 779 applicable "when the offence is one of those mentioned in section 773." The opening language of section 779 is to be noted: "In any case summarily tried under paragraphs . . ." This language, it may be urged, carried a different meaning than that which would have been conveyed had the words been "Upon summary trial of any offence mentioned in paragraphs . . ." But in *Rex* v. *Fuyarchuk*,

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[1920] 1 W.W.R. 783; 32 Can. C.C. 312, Walsh, J. takes the view that despite the absolute jurisdiction of the magistrate under old section 776 (now part of section 777) the provisions of old section 781 (now section 779) apply—in other words, he would read the opening words of section 779 as equivalent to the words "upon the summary trial of any offence under paragraphs . . ." In *Rex* v. *Blackman and Smith,* 44 B.C. 115; [1931] 2 W.W.R. 111, the trial magistrate (the police magistrate of the City of Victoria) proceeded exactly as did the magistrate here—so I am advised by the counsel who appeared for the appellant. (He was good enough to look up his copy of the appeal book.) MARTIN, J.A. (now C.J.B.C.) took the same view as did Walsh, J. and although other members of the Court differed from that learned judge upon another point they seem to have been in accord with him upon the point under discussion. Middleton, J. took an opposite view in *Rex* v. *Avon, supra,* but while he was reversed on appeal the Appellate Division did not discuss his observations in this connection which will be found at p. 82 of the report cited (32 Can. C.C.). The *Blackman* case, *supra,* is a binding authority upon me and, with respect, having in mind the contrary view of Middleton, J. I would say that I agree with the view pronounced in the *Blackman* case. It follows that the punishment imposed was in excess of jurisdiction.

The course to be pursued in the circumstances is fully discussed in *Rex* v. *Avon, supra.* The conviction will be amended by the deletion therefrom of the words "three months and to be whipped twice with four lashes at each whipping," and by the substitution of certain words hereinafter indicated. The conviction otherwise seems to be in order and I cannot say upon the evidence that it was not justified. In lieu of the words deleted from the conviction there will be substituted the words "six months." The warrant will be amended to conform to the amended conviction. A true copy of the order herein will be served upon the warden.

Application granted.

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Aug. 13.

Aliens—Convictions under The Opium and Narcotic Drug Act, 1929—Deportation—Effect of section 26 thereof—Applicability of section 43 of the Immigration Act—Signature of acting deputy minister—Sufficiency—R.S.C. 1927, Cap. 93, Secs. 42 and 43—Can. Stats. 1929, Cap. 49, Secs. 4 and 26—R.S.C. 1927, Cap. 22, Secs. 2 (c) and 8.

Before one convicted under The Opium and Narcotic Drug Act, 1929, can be detained in custody for deportation, an inquiry must be held to determine, first, that the convict has been convicted under one of the clauses of section 4 as specified by section 26 of said Act, and secondly that he is an alien. This inquiry may be entered upon only after the determination of sentence.

Before section 43 of the Immigration Act can become operative it must be established that the inmate is an alien. The only machinery for enabling that to be done is that provided in section 42 of said Act. Section 43 cannot therefore become operative until after sentence determined and until the Board has made its finding and order for deportation. As the applicant is held under an order of the Minister of Justice issued under section 43 before said section became operative, he is illegally held and must be discharged.

The acting Deputy Minister of Immigration has the capacity to sign an order under section 42 of the Immigration Act.

MOTION for the discharge of the prisoners on *habeas corpus* proceedings with *certiorari* in aid. Heard by MANSON, J. in Chambers at Vancouver on the 7th of June, 1937.

Bray, for the motion.
J. A. McGeer, for the Crown.

Cur. adv. vult.

13th August, 1937.

MANSON, J.: This is a motion for the discharge of the prisoners upon returns made to writs of *habeas corpus* with *certiorari* in aid. The facts are identical in both cases. They were argued together. I shall, for purposes of convenience in the writing of my reasons, deal only with the *Low Kee* case. My conclusions will of course apply in the *Wong Kit Chow* case. Kee will be referred to throughout as the applicant.

The applicant was convicted on September 9th, 1936, under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929,

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Can. Stats. 1929, Cap. 49, upon a "possession" charge. On February 19th, 1937, his sentence expired.

In The Opium and Narcotic Drug Act, 1929, there is the following section:

26. Notwithstanding any provision of the Immigration Act, or any other statute, any alien, whether domiciled in Canada or not, who at any time after his entry into Canada is convicted of an offence under paragraphs (*a*), (*d*), (*e*) or (*f*) of section (4) of this Act, shall, upon the expiration or sooner determination of the imprisonment imposed on such conviction, be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation.

This *non obstante* section has application to aliens only. Before one convicted under The Opium and Narcotic Drug Act, 1929, can be detained in custody for deportation, an inquiry must be held to determine, first, that the convict has been convicted under the specified clauses of section 4 of The Opium and Narcotic Drug Act, 1929, and secondly that he is an alien. This inquiry may be entered upon only after the determination of sentence (*vide Rex* v. *Sue Sun Poy* (1932), 46 B.C. 321).

Section 26 is to be read with the Immigration Act, R.S.C. 1927, Cap. 93, and its provisions prevail over those of the Immigration Act where there is conflict. For convenience of reference I quote hereunder the relevant provisions of the Immigration Act:

3. No immigrant, passenger, or other person, unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes":—

. . . .

(*d*) Persons who have been convicted of, . . . , any crime involving moral turpitude.

. . . .

DEPORTATION OF PROHIBITED AND UNDESIRABLE CLASSES.

40. Whenever any person, other than a Canadian citizen or person having Canadian domicile, . . . has been convicted of a criminal offence in Canada . . . , it shall be the duty of any officer cognizant thereof, . . . , to forthwith send a written complaint thereof to the Minister, giving full particulars.

42. Upon receiving a complaint from any officer, . . . against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an

investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.

2. Such Board of Inquiry or officer shall have the same powers and privileges, and shall follow the same procedure, as if the person against whom complaint is made were being examined upon application to enter or land in Canada and such person shall have the same rights and privileges as he would have if seeking to enter or land in Canada.

3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the last two preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.

43. Whenever any person other than a Canadian citizen, or person having Canadian domicile, has become an inmate of a penitentiary, gaol, reformatory or prison, the Minister of Justice may, upon the request of the Minister of Immigration and Colonization, issue an order to the warden or governor of such penitentiary, gaol, reformatory or prison, which order may be in the form F in the schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Deputy Minister, which warrant may be in the form G in the schedule to this Act, with a view to the deportation of such person.

2. Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, gaol, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Deputy Minister as aforesaid, and such warden or governor shall obey such order, and such warrant of the Deputy Minister shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

By reason of the *non obstante* character of section 26 of The Opium and Narcotic Drug Act, 1929, the words "or person having Canadian domicile" where they occur in sections 40 and 43 have no effect to protect, as against deportation, an alien convict under clause (*d*) of section 4 of that Act. The sections (40 and 43) are to be read as if the words were deleted therefrom.

On October 15th, 1936, an immigration officer made written complaint to the minister with respect to the applicant pursuant to section 40 of the Immigration Act and requested that an order for his examination be issued. On October 20th, 1936, Mr. F. C. Blair, acting Deputy Minister of Immigration, issued an order pursuant to section 42 of the Act directing that

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the applicant be taken into custody and detained at an immigrant station for examination and investigation of the facts alleged in the letter of complaint. On October 26th, 1936, the Minister of Justice issued an order under section 43 of the Act directed to the warden of Oakalla Prison Farm directing the warden to detain the applicant after the expiration of his sentence and to deliver him to the officer named in the warrant of the Deputy Minister of Immigration with a view to deportation. On February 22nd, 1937 (that is, on the third day after expiry of sentence) an examination of the applicant was conducted by Mr. H. Crump who purported to be duly authorized for that purpose by the Minister of Immigration and Colonization. He found the applicant an alien; that he had been convicted as above set out; that his sentence had expired and he ordered him deported to China under section 42 (3) of the Immigration Act, "in accordance with section 26 of The Opium and Narcotic Drug Act, 1929." It appears upon the face of Mr. Crump's order that he was "an immigration officer appointed under the provisions of section 22, subsection 2 of the Immigration Act to exercise the powers and discharge the duties of Board of Inquiry at any place in Canada other than a port of entry." On March 11th, 1936, the warrant of the Deputy Minister of Mines and Resources in form G of the schedule to the Immigration Act was signed and sealed. It reached Vancouver about March 16th, 1937.

The applicant was and is of Canadian domicil. Canadian domicil was acquired prior to the commission of the offence. The applicant was nevertheless subject to deportation under section 26 of The Opium and Narcotic Drug Act, 1929.

The question arises as to the capacity of an acting deputy minister to sign an order under section 42. Under section 2 (*c*) of the Civil Service Act, R.S.C. 1927, Cap. 22, " 'deputy' . . . means and includes the deputy of the Minister of the Crown presiding over the department," and under section 8 of the said Act,

in the absence of any deputy head, the assistant deputy head, or if there is no assistant deputy head, or the assistant deputy head is absent, an officer or clerk named by the head of the department shall have the powers and perform the duties of such deputy head.

I think the order signed by Mr. Blair was sufficiently signed. (*Vide Re Pappas* (1921), 29 B.C. 318).

Counsel for the applicant submits that section 42 applies only to cases where the person complained of is at large. That the section applies to persons already in custody as well as to persons not in custody is amply clear for in terms it extends to "persons alleged to belong to any prohibited or undesirable class." Certain persons at large and certain persons in custody are brought within the "prohibited classes" by section 3. Certain persons at large and certain persons in custody referred to in section 40 obviously belong to the prohibited or undesirable classes for two reasons: (1) The section falls under the heading "Deportation of Prohibited and Undesirable Classes," and (2) section 42 (3) contains this language, "belongs to any of the prohibited or undesirable classes in the last two preceding sections of this Act." The phrase "prohibited or undesirable classes," it will be observed, is not used in section 40. It is used in section 42.

The section applying, as it does, to both persons in custody and persons at large as against whom complaint is made, it would seem clear that the order of the minister or deputy minister that the person against whom complaint is lodged be taken into custody and detained at an immigrant station for examination and investigation of the facts alleged in the complaint must be postponed in operation in the case of a person already in custody until determination of sentence. Two different persons cannot well have custody at the same time. It may be that the gaol or prison is not an immigrant station as Oakalla Farm is by designation of the minister. Furthermore there is nothing in the enacting words of the section to indicate that the order must be given effect to forthwith.

It was contended by counsel for the Crown that the words in section 42 "for examination . . . such" are unnecessary and surplusage. The contention was not supported, nor do I accept it. The words are both necessary and logical. But when the Board of Inquiry has made its examination and investigation under section 42 (2) the order has no longer any efficacy. If the person complained of is not found to belong to any of

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the prohibited or undesirable classes mentioned in sections 40 and 41, as amended by section 26 of The Opium and Narcotic Drug Act, 1929, he, his sentence having terminated, must be set at large. If the Board finds him within the classes mentioned he is ordered for deportation forthwith by the Board. In the latter event we must look elsewhere to find authority for his further detention and physical deportation—section 42 carries the matter no farther than the order for deportation.

In considering section 43, it is to be remembered that the Board's inquiry in the case of a person in custody under sentence cannot be had until after determination of sentence. So too in the matter of the order for deportation. The effect of section 26 of The Opium and Narcotic Drug Act, 1929, in the matter of the deportation of those to whom it applies is to cause section 43 to read in its opening lines "Whenever any person other than a Canadian citizen has become an inmate of a penitentiary . . ." Before section 43 can become operative it must be established that the inmate is an alien. The only machinery for enabling that to be done is that provided in section 42. Section 43 cannot therefore become operative until after sentence determined and until the Board has made its finding and order for deportation. It would be strange indeed if the deputy minister could issue the warrant in form G provided for in section 43 prior to the finding of the Board. The form of warrant (form G) recites that "an order has been issued for the deportation of the said ——— and an application has been made to the Minister of Justice for an order" (*i.e.*, under section 43). It would be equally strange if the Minister of Justice could issue under section 43 the order for detention and delivery with a view to deportation in anticipation of the order for deportation. The order of the Minister of Justice must follow in point of time not only the order for deportation but the warrant of the deputy minister. The order is made upon the request of the Minister of Immigration. Obviously such a request will not be made until the latter minister has before him the finding of the Board.

In the final analysis one can only conclude that Parliament gave its approval to section 43 in the belief that the Board

might hold its inquiry prior to determination of sentence. Since the decision in *Rex* v. *Sue Sun Poy, supra,* section 43 cannot be applied. Adamson, J. in *Rex* v. *Stachow,* [1932] 2 W. W. R. 698, held, as I do, that the order of the Minister of Justice may not issue until after the warrant of the Deputy Minister of Immigration under section 43 and although he does not say that section 43 has become impossible of application, that I think is the effect of his decision in the last line.

In the case at Bar it suffices to say that the applicant is held under an order of the Minister of Justice under section 43 and that he is therefore illegally held. It was not argued, nor could it be, that the applicant was to be deported otherwise than "in accordance with the provisions of the Immigration Act relating to inquiry, detention and deportation." As pointed out above, the order of the Minister of Justice was made in October, 1936, while the Board's order for deportation was made in February, 1937, and the warrant of the Deputy Minister of Immigration under section 43 was issued in March, 1937. The order for deportation does not in itself suffice. The deportation must be, pursuant to section 26 of The Opium and Narcotic Drug Act, 1929, in accordance with the provisions of the Immigration Act. As matters stand, section 43 being impossible of application, the applicant must be discharged.

It is to be noted that the proceedings herein were taken prior to the passing of Cap. 34 of the statutes of Canada, 1937.

Motion granted.

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1937

Aug. 10, 17.

REX v. YUEN YICK JUN.

Criminal law—Habeas corpus—Certiorari—Pleaded guilty to charge of having opium in his possession—Interpreter—Misunderstood charge—Thought the charge was for smoking opium.

The accused pleaded guilty to a charge of having opium in his possession, but on *habeas corpus* proceedings he deposed that he understood he was pleading guilty to a charge of smoking opium, and the doubt as to whether he fully understood the charge laid was not resolved by the affidavits of the Crown, which included one by the interpreter employed on the trial.

Held, that it is incumbent on the Crown to make certain that an accused understood fully the charge against him, and if there is any doubt on the point he must have the advantage of it. The conviction is quashed and the applicant is discharged.

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The accused pleaded guilty to a charge of having opium in his possession before a stipendiary magistrate at Ashcroft in the County of Cariboo, and was sentenced to imprisonment at Oakalla Prison Farm. He now states he understood he was pleading guilty to a charge of smoking opium. Heard by MANSON, J. in Chambers at Vancouver on the 10th of August, 1937.

Ian Cameron, for applicant.
Hurley, for the Crown.

Cur. adv. vult.

17th August, 1937.

MANSON, J.: *Habeas corpus, certiorari* in aid.

The applicant pleaded guilty before a stipendiary magistrate at Ashcroft in the County of Cariboo, B.C., on January 28th, 1937, to a charge of having opium in possession contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1929. Under the sentence of the magistrate he is imprisoned at Oakalla Prison Farm. The Minister of Justice under section 43 of the Immigration Act, R.S.C. 1927, Cap. 93, has issued an order for his detention and delivery to the officer authorized by warrant of the Deputy Minister of Mines and Resources

with a view to his deportation under the provisions of the Immigration Act and The Opium and Narcotic Drug Act, 1929. The warrant of the Deputy Minister of Mines and Resources has not yet issued.

A young Canadian-born Chinese was employed at the trial as an interpreter. The applicant now says that he did not understand that he was pleading guilty to a charge of opium in possession. In his affidavit he states that he understood he was pleading guilty to a charge of smoking opium. The applicant is an old-timer in British Columbia and has been an hotel cook for many years past. His native tongue was Chinese of the Cantonese dialect. In the course of the years he apparently acquired some "pigeon" English, logically enough, living as he was at Ashcroft where there are possibly not many of his fellow-countrymen. It would be reasonable to suppose too that he had forgotten some of his native tongue and equally reasonable to suppose that the young Chinese interpreter was not as accurate an interpreter into the Cantonese dialect as he apparently thought himself. In any event the applicant makes oath categorically that he did not understand the charge to which he was pleading and he believed it was one of smoking. Crown counsel admitted that the Crown had no evidence that he was other than a smoker. It appears he did have two decks of opium, rather more than the amount necessary for one smoke, but it does not follow because he had enough for more than one smoke that he was a trafficker. The material and the statement of Crown counsel make it readily understandable that the applicant would not realize that he was being charged with opium in possession, a very serious charge having regard to the penalty. The affidavit of the applicant is met by that of the interpreter and that of the local police officer. Paragraph 2 of the affidavit of the interpreter states that the deponent has read "what purports to be a copy of paragraphs 4, 5, 6 and 12 of an affidavit herein sworn on the 8th day of January, 1937, by the said Yuen Yick Jun *alias* Wah Kee, the said prisoner." I do not know what the deponent read. We may look at his affidavit, however, in so far as the statements sworn to are in themselves an answer to the affidavit of the prisoner. The

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affidavits filed by the Crown raise a doubt as to the truth of the affidavit of the applicant but I cannot say that the doubt, as to whether the applicant fully understood the charge laid against him, has been resolved by the affidavit filed by the Crown. It is incumbent upon the Crown to make certain that an accused fully understands the charge. When there is doubt the accused, in accordance with our well-established criminal law, must have the advantage of it. The conviction in the circumstances must be quashed and the applicant discharged from custody.

The warden of the Oakalla Prison Farm in his return says that the applicant is additionally held under the order of the Minister of Justice in form F under the Immigration Act. The conviction having been quashed that order cannot stand but even had the conviction stood the order of the minister could not stand for the reasons given by me in *Rex* v. *Low Kee. Rex* v. *Wong Kit Chow* [*ante,* p. 151].

Conviction quashed.

HEMMINGSEN v. BERGEN.

C. C.
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1937
May 28;
Sept. 7.

Practice—Parties — Trade union — Unincorporated body — Representative action — Persons having same interest in cause or matter — Order authorizing one or more to defend on behalf of all.

In an action for damages arising from a collision between the motor-car of the plaintiff and a car driven by the defendant, the examination of the defendant for discovery disclosed that the car driven by him at the time of the collision was the property of a trade union known as the Lumber and Sawmill Workers Union Local 2782, and that he was then engaged in the performance of his duties as an official of such union, that the union is not a registered trade union and is not incorporated, and that the trustees of such union at the time of the collision were two men named E. Anderson and Clayton Aitken. On an application to add E. Anderson and Clayton Aitken as defendants, to be sued on their own behalf and on behalf of all other members of said trade union as trustees thereof, and authorizing them to defend on behalf of all such other members and to amend the plaint in conformity thereto:—

Held, that the evidence discloses that men sought to be added as defendants are in fact the trustees of this union though unregistered, and they can fairly be said to represent the members of the union as "people proper to be authorized to defend" and the order will be granted.

APPLICATION by plaintiff to add E. Anderson and Clayton Aitken as defendants on their own behalf as well as all other members of a trade union known as the Lumber and Sawmill Workers Union Local 2782, as trustees thereof, and authorizing them to defend on behalf of all such other members. The action is for damages arising out of a collision between the motor-car of the plaintiff and one driven by the defendant Bergen, the motor-car driven by him being the property of the above-mentioned union, the plaintiff claiming that Bergen was then engaged in the performance of his duties as an official of said union. The facts are set out in the reasons for judgment. Heard by McINTOSH, Co. J. in Chambers at Duncan, on the 28th of May, 1937.

Manzer, for the application.
No one, for defendant.

Cur. adv. vult.

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HEMMINGSEN
v.
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7th September, 1937.

McINTOSH, Co. J.: Application by plaintiff to add E. Anderson and Clayton Aitken as defendants to be sued on their own behalf, and on behalf of all other members of the trade union being the Lumber and Sawmill Workers Union Local 2782, as trustees thereof, and authorizing them to defend on behalf of all such other members, and to amend plaint in conformity thereto.

Action is for damages arising from a collision between the motor-car of the plaintiff and that driven by the defendant. It developed on examination of the defendant for discovery that the motor-car operated by him at the time of the collision was the property of the above trade union, and that he was then engaged in the performance of his duties as an official of such union, which is not a registered trade union and is not incorporated, and that the trustees of such union at the time of the collision were, and are the said E. Anderson and Clayton Aitken, here sought to be added as party defendants.

As against the defendants sought to be added personally the application presents no difficulty and the order must go, but as to their representative capacity it is somewhat otherwise. Trade unions may be registered or incorporated but the union in question is neither registered nor incorporated. Registration of trade unions and the names of the trustees thereof is provided for by the Trade Unions Act, R.S.C. 1927, Cap. 202, but it is specifically provided by section 5 that the Act shall not apply to "Any trade union not registered under the Act," so that this Act is not helpful in the present case. The Trade Unions Act, R.S.B.C. 1924, Cap. 258, being the only British Columbia statute relevant to trade unions, does not deal with procedure generally, and bars certain actions, but not one of the nature of the present action. It would seem by implication that this statute recognizes that the trustees of an unregistered union in their representative capacity would, and could be sued in a case not prohibited therein. The trade union in question is clearly not a corporation, a partnership or other "legal entity" but is a "combination of individuals," and in this instance numerous. All of them might be joined as they have a common

interest but they are not known to the plaintiff and the expense of adding them would be great.

Order II., r. 9, of the County Court Rules reads:

> Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

The corresponding Supreme Court Rule is 131. Order II., rr. 12 and 13A provide for amendment of present summons without suing out new summons and is to be served as such. Order II., r. 8 provides:

> Trustees . . . may sue or be sued on behalf of or as representing the property or estate of which they are trustees . . . , without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; . . .

and which corresponds to Supreme Court Rule 130.

Trustee is not defined either under Order XXIV. of the County Court Rules or under the interpretation clause of the County Courts Act or elsewhere in either the Rules or the Act, so that it is safe to assume that "trustee" is to have its ordinary meaning. Wharton's Law Lexicon, 13th Ed., 869, defines "trustee" as "one entrusted with property for the benefit of another, called beneficiary, or *cestui que trust*," and Webster similarly defines it. It is a fair inference that the defendant on his examination, in referring to the trustees of his unregistered union, meant those persons holding its property in trust for the members.

This application causes some difficulty as the Courts of this Province have rendered no decision on this point, and there is conflict of judicial opinion elsewhere.

In the case of *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.), the union concerned was a registered union and objection was taken that this union was "neither a corporation nor an individual, and cannot be sued in a *quasi*-corporate or any other capacity." This was overruled by Lord Halsbury and Lord Macnaghten concurring said at p. 437:

> Parliament has legalized trade unions, whether registered or not . . .

And at pp. 438-9:

> How are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative

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action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body. . . .

See also *Parr* v. *Lancashire at Cheshire Miners' Federation,* [1913] 1 Ch. 366.

The strongest case apparently against the application is a decision of the Supreme Court of Canada being *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees* (1919), 59 S.C.R. 240, which was decided in 1919 by a divided Court and is not mentioned in the editions of text-books on practice since published, as presumably the defendants were not considered to be before the Court in a representative capacity. It was there held *per* Anglin and Brodeur, JJ. p. 241:

No action lies against an unincorporated and unregistered body in an action of tort such as the present one.

The rule of practice by which, when numerous persons have a common interest in the subject-matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one without evidence that the individual appellants could fairly be said to be proper representatives.

In *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America,* [1931] S.C.R. 321, it was held:

An unincorporated labour union has no legal existence and cannot be considered in law an entity distinct from its individual members and is not suable in the common name.

Cannon, J. at p. 327, said:

It is therefore clear that the defendants have not the *status* of *quasi*-corporations to which the decision of the House of Lords in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426, might be applied.

It is not here indicated, however, that the individual members of the union may not be sued or that representative defendants from them may not be appointed.

In the present issue it is admitted that the defendants sought to be added are the trustees of the unregistered union in question.

In *Mercantile Marine Service Association* v. *Toms,* [1916] 2 K.B. 243, on an action for libel against the chairman, vice-chairman and secretary of the guild, an unincorporated society, application for an order that the defendants should be appointed

to represent all the members of the guild leave was refused, but Swinfen Eady, L.J., p. 246, said:

If this were merely an application for leave to add defendants there would, I conceive, be no objection to it. The plaintiffs, however, not only desire to have the three trustees as defendants on the record, but they also ask that the three officers who are defendants on the record may be appointed to represent all the members of the guild.

And at pp. 247-8:

There are, no doubt, *dicta* in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [*supra*] especially in the speech of Lord Macnaghten, which indicate that in a proper case . . . that an order of that kind may be made.

In *Walker* v. *Sur*, [1914] 2 K.B. 930 referred to by Anglin, J., in *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees, supra,* the four defendants were selected as "representative defendants," and were not trustees of the society in question. Vaughan Williams, L.J., said at p. 934:

As I understand the rule, it lies with the judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he purposes to sue as people proper to be authorized to defend in such cause or matter on behalf of or for the benefit of all persons so interested, then the order may be made. That has not happened in the present case. . . .

See also *London Association for Protection of Trade* v. *Greenlands, Limited,* [1916], 2 A.C. 15.

In none of these cases was Supreme Court Rule 130 to which County Court Order II., r. 8 *(supra)* corresponds referred to nor relied upon.

In the present case there is evidence that the defendants sought to be added are in fact the trustees of this union though unregistered, and they can fairly be said to represent the members of the union as "people proper to be authorized to defend," and the order will go as asked. Costs in the cause.

Application granted.

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Negligence—Construction of cement wall causing collapse of adjoining wall —Lack of proper care in construction—Independent contractor— Measure of damages.

The defendant company, deciding to erect on its lot a one-storey building with cement walls, employed the third parties Sharp & Thompson as architects to make plans and supervise the construction. On completion of the plans the company entered into a contract with the third parties Kennett & Son for the construction of the building. This lot adjoined a lot of the plaintiff upon which stood a two-storey brick building. The specifications called for the north wall of the cement building to be built against the south wall of the brick building. Builders erecting concrete walls first construct what is called "forms" made of lumber into which the liquid concrete is poured. When properly erected the inner wall of the form is made rigid by supports and the outer wall is held in place by wires running from the inner wall of the form to its outer wall. This is done to resist the lateral pressure of the liquid concrete as it is poured into the forms. The builder omitted the wires from the lumber forms used in the construction of the north wall of the concrete building, that is the wall which the specifications required to be in contact with the plaintiff's brick building. After one course of pouring concrete into the "forms" was completed and a second was in progress, the south brick wall of the plaintiff's building gave way and fell, making a hole 40 feet long and 28 feet high, and some 12 feet more of the wall was damaged. In an action for damages:—

Held, that an adjoining owner in building a wall on his own property has no right, in the absence of agreement, to borrow support from or exercise pressure upon his neighbour's wall. To do so constitutes a legal wrong for which he would be liable if damages resulted, and if he does work on or near another's property which involves danger to that property, unless proper care is taken, he is liable to the owners for damage resulting to it from failure to take proper care, and he is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him. The plaintiff is entitled to damages.

Held, further, that the damages recoverable is the difference between the money value to the plaintiff of the building before the accident and its money value immediately after the accident.

ACTION for damages resulting from the alleged improper construction of a concrete wall on the property of the defendant, causing the wall on the plaintiff's adjoining property to give

way and fall. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 28th of April, 1937.

Macrae, K.C., and *Clyne*, for plaintiff.
Griffin, K.C., and *McLorg*, for defendant.
J. W. deB. Farris, K.C., and *Eades*, for third party Sharp.
Dickie, for third party Kennett & Son.

Cur. adv. vult.

5th May, 1937.

MURPHY, J.: Plaintiff is the owner of lots 1 and 2, situate on the south-east corner of Granville and Smythe Streets in Vancouver. Upon these lots there stood in 1936 a two-storey brick building. This building had not all been constructed at the same time, the westerly portion fronting on Granville Street, and running back therefrom about 65 feet, being the older. The evidence does not determine when this older portion was constructed. It may have been as long ago as 1893. The easterly half was built in 1910. As part of the same operation steel columns were introduced into the westerly and northerly walls of the lower storey of the old building. There is, I think, no evidence that the upper portion of these walls was rebuilt in 1910. The south wall was left untouched. The accident hereinafter referred to disclosed that this south wall was poorly constructed originally and had much deteriorated by December, 1936. What are called "grounds," being pieces of timber four inches by three inches, were placed in the inner side of this brick wall running horizontally apparently the whole length of the older building at vertical intervals of about three feet presumably for the full height of the wall. The result was that instead of the south wall being a 13-inch brick wall it was only nine inches thick wherever these grounds were introduced, the balance, four inches, being wood. The accident disclosed that a portion at any rate of the first tier of these grounds near the bottom of the wall had crumbled away practically entirely through dry rot and that the other tiers had shrunk to a considerable degree. The evidence shows that this condition would weaken the wall and tend to make it lean towards the north. It would however remain safe for a vertical load unless the north-

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ward leaning became very pronounced. This had not occurred at the time of the accident and the evidence shows that the wall as it then was might have stood indefinitely but for the accident. The accident further disclosed that said south wall was not bonded into the west wall of the old building at the south-west corner as it should have been if properly constructed. The two walls were practically merely brought into contact with each other. This construction tended further to weaken the wall. The accident did not cause the portion of the south wall immediately adjacent to the south-west corner of the building to fall but the reason was that one of the steel columns introduced in 1910 prevented this. In 1930 or 1931 it was discovered that a portion of this south wall of the older building, some 20 by 15 feet in extent, encroached upon lot 3 owned by the defendant, the Yorkshire Company, which adjoined lot 2 on the south. This encroachment ran from nothing to a maximum of 2¾ inches. An agreement was made between plaintiff and the defendant company whereby rent was paid for this encroachment and whereby the plaintiff undertook to remove the encroachment whenever requested by the defendant company so to do should it desire to build on lot 3. The company in the fall of 1936 did decide to erect a building on said lot and accordingly requested the encroachment to be removed. This was done, to the knowledge of the defendant company, by the plaintiff by chipping away that portion of the wall which encroached as aforesaid. The south wall of the newer portion of the building was set back about two inches from the south line of lot 2 though so far as I can see this is not a material fact in the present case. The north wall of the older building was out of plumb; it leaned to the north; in some places as much as about two and one-half inches. There was a northerly bulge in it. The ceiling of the ground floor and the roof were supported on steel posts situate in the interior of the building. These steel posts in the older building at any rate were also out of plumb on both the ground and upper floors and leaned towards the north in varying degrees up to about one and one-half inches in some cases. There were downward deflections in the joists supporting the roof and the foundations, such as they were, were apparently in poor shape.

The joists of the ceiling and upper storey were sunk into the side brick walls and the ends thereof thereby became in time liable to dry rot (see Exhibit 39). Whilst the building might have stood for an indefinite time yet again it might not, and had its true condition been known to the city building inspector he would have ordered removal of the upper storey as, in his opinion, the structure, as it stood, was unsafe. On the ground floor there were three stores facing on Granville Street and six facing on Smythe Street, all occupied by tenants at the time of the accident. The upper storey was mainly one large room and was, and had been since 1932, untenanted. Plaintiff had given an option to lease the property for a period of 999 years which option was in force when the accident occurred. This option would have prevented the leasing of this upper storey. The details of the condition of the building, and especially of the south wall, are set out because they have, in my view, a serious bearing on the question of damages. On the main issue of liability they are irrelevant because an adjoining owner in building a wall on his own property has no right, in the absence of agreement, to borrow support from or exercise pressure upon his neighbour's wall. To do so would constitute a legal wrong for which, apart at any rate from the question of independent contractor, he would be liable if damage resulted: *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719, at 721. *Sic utere tuo ut alienum non lædas.* The defendant the Yorkshire Company in September, 1936, decided to erect a one-storey building on lot 3. Its walls were to be of cement. The company employed the third parties Sharp & Thompson as architects to make plans for and to supervise the construction of the building. Sharp & Thompson are reputable architects who have carried on their profession in Vancouver for many years. When the plans were completed the company made a contract with the third parties Kennett & Son for the construction of the building. Kennett & Son had the reputation of being competent builders. The specifications called for the north cement wall of the new building to be built against the south wall of plaintiff's building. I interpret this to mean not that the cement wall was to borrow any support from plaintiff's south wall but that the uprights of the outer

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side of the lumber forms, hereafter described, were to be in contact with the said south wall. Kennett & Son started construction in November or December, 1936. To construct a concrete wall the concrete must be in a liquid condition when first put in place. Liquid concrete like all other liquids exerts pressure in all directions since it seeks to find its own level. Obviously to build a wall, such as the one called for in the building plaintiff proposed to erect, the liquid concrete must be confined in some container the shape and thickness of the desired wall. Builders erecting concrete walls, such as the one in question here, first construct what are called "forms." These are made of lumber and Exhibit 3 is a model thereof. Where a concrete wall is to be erected in juxtaposition to an existing wall 2 x 4 uprights are placed against such existing wall and ship-lap is nailed to them. As a matter of practical building the ship-lap is carried up to the height of the first storey of the proposed building. Where, as here, such building, when completed, is to be of but one storey, the ship-lap is carried up the full height of the intended wall. The ship-lap so fastened to the uprights constitutes the outer wall of the lumber form. The specifications in the company's contract required the builder to leave this outer wall in place. Under proper construction of such an outer wall of the concrete form holes are bored at regular and frequent intervals in pairs a few inches apart through the uprights for their entire length. Wires are passed from the inner side of the ship-lap through one of these holes and back again through the other. The inner wall of the lumber form is constructed in the same manner by nailing ship-lap to uprights to the same height as the outer wall. This inner wall is placed in the proper position to secure the desired width of concrete wall and is fixed rigidly in place. Both walls are built concurrently to the proper height. As they rise the wires above mentioned are passed through holes around the uprights of the inner wall and the ends thereof firmly fastened together. Pieces of timber, called "spreads," the length of the desired width of the concrete wall are placed at intervals in the space the concrete wall is to occupy. The pairs of wires are then twisted by means of a lever one over the other with the result that the outer wall

of the form is drawn tightly against the pieces of wood called "spreaders" and is also firmly attached to the rigid inner wall and held there by the twisted wires. Lumber ends, the width of the wall, are placed in the forms to fix the respective ends of the concrete wall. The result is that under proper construction of a concrete wall liquid cement is poured into what is in effect an open lumber box, the bottom of which in the first instance is the earth. The object of thus firmly fixing the outer wall of the form to the rigidly anchored inner wall by means of twisted wires is to prevent this outer wall from yielding outwards under pressure of the liquid concrete in seeking its own level. In so doing it, of course, exercises pressure in all directions. It is obvious that if the outer wall of the form is not rigid enough to resist the lateral pressure such pressure will be communicated to the wall with which it is in contact. The builder in the case at Bar omitted altogether the wires from the lumber form which was used in the construction of the north wall of defendant's building, being the wall which the specifications required to be in contact with the south wall of plaintiff's building. He did use wires on the forms for the east and west walls of the new building but not on the south wall where the adjoining wall in the next building was constructed of cement which by arrangement with the owner was utilized as the outer wall of the lumber form. As stated practical building requires that the wooden forms to contain the concrete should be carried up to the full height of a one-storey building before the pouring of concrete begins. The first concrete poured therefore has a drop of from ten to twelve feet or more depending upon the height of the one-storey building. Concrete is poured from receptacles called "buggies" made to contain about six cubic feet. In practice the quantity poured at any one time is probably about four cubic feet in a job such as the one under consideration. The pouring is started at one end of the building and continued around the four walls. From about eighteen inches to two feet in height of concrete is poured at each course. Concrete will set so as to retain the vertical in from about an hour and a half to two hours' time. Its weight is about two and a half times that of water. Obviously the pressure of the concrete in all directions

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will be momentarily intensified by the impact of dropping it from the top of the form to where it is to rest. Such impact will also set up vibrations. The contractor started to pour concrete on December 30th and some four or five feet were poured on that day all around the building. Pouring was resumed on the morning of the 31st. One course of pouring had been completed and a second was in progress when a large portion of the south wall of plaintiff's building gave way and fell making a hole some 40 feet long by 28 feet high in the older portion of plaintiff's building and damaging some twelve feet more in length of the said south wall extending westerly to the Granville Street front. Witnesses on both sides agreed that the absence of wires in the lumber form in contact with the damaged wall was the cause of the accident. Because such wires were not used the pressure exerted by the liquid concrete in seeking its level heightened by the impact of the drop in pouring was transmitted to such wall causing it to crumble. Vibrations resulting from the drop and transmitted for the same reason were also a factor in the opinion of one witness. The building inspector for the City of Vancouver inspected the building shortly after the accident. He ordered extensive shoring up to be done as he considered the building in its damaged condition to be a menace to the public. The grounds in the south wall and their deterioration were concealed by the plaster applied as a finish to the inside of the building. The accident exposed the true condition. It also showed the lack of bond between the south and west walls at the south-west corner. It further showed that the mortar in the south wall had lost almost completely its binding power. Because of these facts and the other defects in the building the building inspector compelled the plaintiff to remove the second storey entirely. He allowed its reconstruction as a one-storey building permitting the plaintiff to utilize for that purpose what remained of the south wall and also all the other walls of the building. He testified that if he had known the true state of the building, whilst he would have ordered removal of the second storey, he would, had there been no accident, have allowed the south wall as it was before the accident to be used without change in a one-storey building. The plaintiff did in fact reconstruct

the building as a one-storey structure. This action is brought by her to recover damages against defendant company. The defendant company brought in as third party the architects, Sharp & Thompson, and the builders, Kennett & Son, claiming over against them any damages that might be awarded against the company in favour of the plaintiff. At the trial it was agreed that these claims against the third parties would come on for hearing later after the decision in the main case had been given. The company's defence is that it employed architects of repute to plan and supervise the construction of the building and an independent competent contractor to do the work and that therefore it is not liable. The law applicable to the case is in my opinion set out in *Honeywell and Stein, Ld.* v. *Larkin Brothers, Ld.*, [1934] 1 K.B. 191; 103 L.J.K.B. 74. At p. 196 this statement is made:

It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract.

On the same page the language of Lord Blackburn in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829; 50 L.J.Q.B. 689, at 750, as follows is cited with approval:

Ever since *Quarman* v. *Burnett* (1840), 6 M. & W. 499 it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.

Having thus stated the general law on p. 196 the decision on pp. 199-200 lays down the principle which I think is applicable to the case at Bar:

The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him.

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Applying this principle to the case at Bar in my opinion the plaintiff is entitled to succeed. Much evidence at the trial was directed to show that concrete is not in itself a dangerous substance. But the question involved here, as the language above cited shows, is not whether concrete is a dangerous substance but whether the work which the defendant contracted to have done was one which was to be carried on near another's property and which involved danger to that property unless proper care was taken in the doing of it. From what has been hereinbefore stated it is abundantly clear, and indeed all the witnesses on both sides agreed, if my memory serves me aright, that the work of building a concrete wall against an adjoining wall, as was done here, involves the danger of damage to such adjoining wall through lateral pressure exerted by the liquid concrete in seeking its own level, enhanced as such lateral pressure is in practical construction by dropping the concrete from a height unless precautions are taken by the construction of a properly wired or otherwise properly fastened lumber form to prevent such lateral pressure being communicated to such adjoining wall as well as any vibrations that may be set up by the drop. As stated in *Bower* v. *Peate* (1876), 1 Q.B.D. 321, at 326-7; 45 L.J.Q.B. 446, at 449:

> There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.

Clearly to my mind from the description hereinbefore given, based on the evidence, the construction of a concrete wall in the situation and in the manner in which this particular wall was required to be constructed is a work from which mischievous consequences to the adjoining wall would arise unless preventive measures by way of utilizing properly fastened lumber forms were adopted.

The distinction I think may be illustrated by contrasting the nature of the work involved in building a brick wall with that involved in building a concrete wall. No injurious consequences to an adjoining wall with which it is in contact can arise in the case of building a brick wall if the work is properly done. Bricks are inert substances. They exercise no lateral pressure if

properly laid. There is no drop in laying them. They are laid one upon another; hence no vibrations are set up. But mischievous consequences will arise in the case of the building of a concrete wall under similar circumstances, as is shown by the case at Bar, unless measures are adopted to prevent this lateral pressure and vibration (which, as shown hereinbefore, are bound to occur from the condition the concrete must be in when used and from the manner in which it must be handled in ordinary building practice) from being passed on to the adjoining wall. Indeed, as the evidence shows, the first step taken in the building of a concrete wall—the making of properly fastened lumber forms to hold the concrete—has no direct relation to the construction of the wall itself but is taken to control a quality inherent in the cement itself in the state in which it must be to be used for such purpose—its fluidity. The resulting pressure in all directions consequent upon the cement seeking its own level is enhanced by the drop which is a necessary incident to the practical building of such a wall. It is established beyond question on the evidence and is in fact demonstrated by what occurred that in the absence of such precautionary measures the building of a cement wall is fraught with danger to an adjoining wall with which it is in contact. It was suggested in argument that the cement layers could be laid on so thin that no such result would be brought about. The answer is that cement walls are not built in that way as a matter of practical building and it was ordinary building practice that was contemplated herein as shown by the contract and specifications.

There remains the question of damages. In considering this I think the case is to be adjudicated upon the same basis that it would have been had the building inspector not intervened in so far as expense was incurred because of his orders as distinguished from loss resulting from the accident itself. In order that they may be recovered both in contract and tort, damages must be such as arise not only naturally but also directly from the act complained of. Where in cases of contract and tort, they are not the proximate or the direct result of the act complained of, but of some independent intervening cause they are not recoverable: Halsbury's Laws of England, 2nd Ed., Vol. 10,

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sec. 130. The action of the building inspector was not occasioned by the hole in the wall but by the condition of the wall itself and of the building generally. Had he known the true condition of the premises he stated in evidence he would have given the orders as to alteration of the building which he did give even if the wall had been intact. Damages cannot be recovered from a defendant for remedying defects in the property of the plaintiff that only became known to an authority authorized to direct the remedy of them because they are exposed and so made known to such authority by defendant's negligent act: *The Princess* (1885), 5 Asp. M.C. 451; 52 L.T. 932. It follows that in the assessment of damages neither the cost of removing the top storey nor of the construction of a new roof can be taken into consideration. The measure of damages in a case such as the one at Bar is the difference between the money value to the plaintiff of the building before the accident and its money value immediately after the accident had occurred: *Moss* v. *Christchurch Rural Council,* [1925] 2 K.B. 750; 95 L.J.K.B. 81. Damages are not to be assessed on the principle that they are to be measured by the cost of restoring the thing damaged to its original state for such cost may greatly exceed the damage actually sustained: *Jones* v. *Gooday* (1841), 8 M. & W. 146; 151 E.R. 985. On the other hand, the cost of repairs may fall far short of recouping the plaintiff for damage actually sustained as, to cite the example used in *Moss* v. *Christchurch Rural Council, supra,* where irreparable damage had been done to some historic building. I find as a fact that the construction of the cement wall had nothing to do with the building being out of plumb nor with the condition of the north wall and the interior posts. I think the evidence of Swan, Bowes and Haggart establishes that pressure from the cement communicated no thrust to the north wall nor did it damage any part of the building other than the south wall. I find that the defects in the building other than the hole in the wall and the accompanying sagging of the roof and ceiling joints and apart from the scattering of debris over some of the stores all existed prior to the accident and were in no way made worse thereby. The value to plaintiff of the building before the accident was in my opinion its value in so

far as it could be utilized to remodel it into a one-storey building in accordance with orders the building inspector would have given had he known its true condition. The evidence of the building inspector and of Swan shows it to have been unsafe as it stood just before the accident. An unsafe building can have no real value until it is rendered safe by necessary alterations. Until this is done it is a serious contingent liability to its owner who might be liable for any damages resulting from its collapse. The difference in value to plaintiff of this building before the accident (such value being as stated its value in so far as it could be utilized for remodelling it into a one-storey building) and its value after the accident would be, I think, the cost of repairing the damage to the south wall sufficiently to enable the owner to utilize it in remodelling the building into a one-storey structure as fully as she could have utilized the old wall had there been no accident. This cost would represent to her the value of her property destroyed by the accident in so far as that property had any value to her. I accept Swan's estimate of this cost. His figure is $1,350. It is urged on defendant's behalf that this amount should be reduced by the $700 it would have cost plaintiff to remove and replace the grounds in the destroyed wall had it remained intact. But the building inspector testified he would have allowed the old wall to be utilized as it stood before the accident in the remodelled one-storey structure. There is other evidence that despite the presence of the grounds and their condition the south wall might have stood indefinitely. It would serve plaintiff as a south wall to a one-storey building just as well as would a new wall. Such new wall would not enhance the value of the one-storey structure since the building would still be an old building with all its other numerous defects, including such part of the old south wall as was not destroyed by the accident, still existent. It follows, I think, that no such reduction should be made.

With regard to the claims for special damages, the building inspector testified that he ordered the shoring to be done solely because of the hole in the wall. The cost of this was $606.70 which I allow.

The question of the loss of rent is more difficult to determine.

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In *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation*, [1908] A.C. 323, at 325; 77 L.J.K.B. 847, at 848, the Court uses this language:

> I think a Court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury.

Analogously I think a Court of justice ought not to scan too meticulously the matter of loss of rents in this case nor question too closely the length of time to be allowed plaintiff to make the necessary repairs. There was evidence that the time that would be required to repair the wall to serve the purpose of a one-storey building would be three and a half weeks. I would allow a full month. Plaintiff would have been compelled to give notice to all her tenants to vacate whilst she transformed her premises into a one-storey structure as she would have been forced to do had the building inspector known their true condition and as presumably she would have done for her own protection whether so ordered or not had she had the like knowledge. But the accident would have made it necessary that a month's more time would be consumed in doing this work than would be required had she had the old wall undamaged to make use of. The total monthly rental of the ground floor was $400 and I would allow that sum for loss of rent. She makes a claim for loss of arrears of rent but in my opinion that is not made out on the evidence and I would disallow it. On the evidence adduced any attempt to do so would be a mere guess on my part and the law is that plaintiff must prove her case. Liability insurance would have to be carried during the repair to the wall for the additional time required. As I have no evidence other than that $5 was paid for about two months of such insurance, I would allow $2.50. I would allow 10 per cent. of the cost of repairing the wall as a fee for obtaining estimates and supervising repairs thereto. This amounts to $135.

There will be judgment for plaintiff for $2,494.20 and costs.

The issues between the defendant company and third parties are to come on for hearing in due course.

Judgment for plaintiff.

IN RE CONSTITUTIONAL QUESTIONS DETERMINATION ACT AND *IN RE* NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT.

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July 8.

Constitutional law—Natural Products Marketing (British Columbia) Act—Validity—R.S.B.C. 1924, Cap. 46, Sec. 3—B.C. Stats. 1934, Cap. 38; 1936, Cap. 34; 1936 (Second Session), Cap. 30—R.S.B.C. 1936, Cap. 165.

The following question was referred to the Court of Appeal for hearing and consideration pursuant to section 3 of the Constitutional Questions Determination Act: "Is the Natural Products Marketing (British Columbia) Act as amended by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* of the Legislature of the Province of British Columbia?"

Held, that said Act and amendments thereto are not in any particular beyond the powers of the Legislature of the Province of British Columbia.

THE Government of British Columbia by order in council under the provisions of the Constitutional Questions Determination Act submitted a question to the Court of Appeal as to the validity of the Natural Products Marketing (British Columbia) Act and amendments thereto.

The reference was argued at Vancouver on the 24th, 25th, 28th and 29th of June, 1937, before MARTIN, C.J.B.C., McPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*Killam*, with him), for Province of British Columbia: The Dominion Act was declared invalid by the Supreme Court of Canada. This question deals with the Provincial Act of 1934 and the amendments in the two sessions of the Legislature in 1936. They are consolidated in the Revised Statutes of 1936 (Cap. 165). The references to the Dominion Act which is declared *ultra vires*, have no force and are harmless in so far as they refer to that Act. They claim there is unauthorized delegation of legislative authority to the Lieutenant-Governor in Council. As to the difference between "delegation" and "abdication," in "delegation" you retain control, whereas in

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"abdication" you renounce and strip yourself of all control. We say there is no abdication of legislative authority. The scope and purpose of the Act is disclosed in section 4 (1) which makes a detailed provision for the regulation and control of the marketing of natural products: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 127; *Re George Edwin Gray* (1918), 57 S.C.R. 150 at p. 157; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick,* [1892] A.C. 437; *Powell* v. *Apollo Candle Company* (1885), 10 App. Cas. 282 at p. 291; *In re The Initiative and Referendum Act,* [1919] A.C. 935 at pp. 940-41; *Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580. The Workmen's Compensation Act is more subject to attack than this Act. Where an Act is capable of two constructions, one *ultra vires* and the other *intra vires,* the construction should be given to it in relation to which the Legislature has power: see *Allen* v. *Hanson. In re The Scottish Canadian Asbestos Company* (1890), 18 S.C.R. 667; *The Merchants' Bank of Halifax* v. *Gillespie* (1885), 10 S.C.R. 312; *Regina* v. *Wason* (1890), 17 A.R. 221 at p. 235; *In re Alberta Railway Act* (1913), 48 S.C.R. 9 at p. 24; *Brophy* v. *Attorney-General of Manitoba,* [1895] A.C. 202 at p. 216. Again with reference to delegation see *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353 at p. 356. Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 594; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.,* [1923] A.C. 695. The B.N.A. Act is rigid and is not affected by peace or war: see *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502 at p. 514. As to the contention that regulation by licensing is not permissible as the power given to Boards to fix and collect licence fees amounts to the levy of an indirect tax, this is, in fact, a direct tax on the producers. In the case of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357 at pp. 363-64, the licence was declared invalid because the scheme itself was held invalid. See also *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398 at p. 411. The regulation of specified industries and not trade generally is not within the Federal jurisdiction: see *Citizens*

Insurance Company of Canada v. *Parsons* (1881), 7 App. Cas. 96; *Toronto Electric Commissioners* v. *Snider,* [1925] A.C. 396.

Maitland, K.C., for Lower Mainland Dairy Products and B.C. Vegetable Marketing Board: One must first find out what the Legislature had in mind and as far as the Act goes it was not the intention to go beyond its jurisdiction. That there should be a reference to the Court of Appeal on this Act see *Attorney-General for Ontario* v. *Attorney-General for Canada,* [1912] A.C. 571 at p. 580. On the question of delegation of authority see *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at p. 835; *The Queen* v. *Burah* (1878), 3 App. Cas. 889. On the question of indirect taxation the only source of revenue is the licence fees: see *Cotton* v. *Regem,* [1914] A.C. 176. The local Government can obtain a revenue by licences: see *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario,* [1897] A.C. 231. It is just a licence fee and not a tax on the amount sold: see *In the Matter of Validity of Manitoba Act,* [1924] S.C.R. 317 at p. 322; [1925] A.C. 561. In that case the tax was held to be bad because it was a tax on the commodity. On the question of "transportation" in section 4 (1) of the Act see *Chung Chuck and Mah Lai* v. *Gilmore* (1936), 51 B.C. 189; *Canadian Pacific Wine Co.* v. *Tuley,* [1921] 2 A.C. 417 at p. 419. In *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353 there is the distinction that they were dealing with marketing; see also *The King* v. *Eastern Terminal Elevator Co.,* [1925] S.C.R. 434 at p. 456.

Killam, on the same side, referred to Encyclopædia of the Laws of England, Vol. 3, p. 192 and Vol. 4, p. 486.

Hossie, K.C., (*J. E. T. McMullen,* with him), for Independent Milk Producers Co-operative Association: The Crown appeared before Mr. Justice MANSON in the *Hayward* action. Another action was started a year later and both were tried at the same time. The judgment of Mr. Justice MANSON applied to both cases. Section 2 defines the Dominion Act as the Act of 1934 which was declared *ultra vires* so that the parts of section 9 of the Provincial Act could not apply to any new Dominion Act that might be passed. We say section 4 of the consolidated Act

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does not show the intention of the Legislature. By section 5 power is given to the Lieutenant-Governor in Council and power is given to the Board to make regulations. On the question of delegated legislation see *In re The Initiative and Referendum Act,* [1919] A.C. 935 at p. 945; *The Queen* v. *Burah* (1878), 3 App. Cas. 889 at p. 905; *Powell* v. *Appolo Candle Company* (1885), 10 App. Cas. 282; *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at 835; *Attorney-General for Canada* v. *Cain,* [1906] A.C. 542 at p. 546. There is no principle in the Act as to what is to be done: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 at p. 132; *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353 at pp. 358-9; *Re George Edwin Gray* (1918), 57 S.C.R. 150 at pp. 159-168-181-182; *British Coal Corporation* v. *The King,* [1935] A.C. 500 at p. 520. We say the legislation is bad because it interferes with trade and commerce: see *In re Companies* (1913), 48 S.C.R. 331; *In re Grain Marketing Act, 1931,* [1931] 2 W.W.R. 146 at p. 155; *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* [1896] A.C. 348 at p. 368; *Rex* v. *Zaslavsky,* [1935] 2 W.W.R. 34 at pp. 39 and 43; *Rex* v. *Brodsky,* [1936] 1 W.W.R. 177 at p. 181. The whole transaction must begin and end within the Province: see *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357 at pp. 364-65; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398 at pp. 410, 412 and 414; *Reference re Natural Products Marketing Act, 1934,* [1937] 1 W.W.R. 328; *Canadian Pacific Wine Co.* v. *Tuley,* [1921] 2 A.C. 417; *Madden* v. *Nelson and Fort Sheppard Railway,* [1899] A.C. 626; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.,* [1930] A.C. 357. This legislation interferes with the Grain Act and other Dominion Acts. Licences are not permissible: see *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario,* [1897] A.C. 231 at pp. 236-7; *Severn* v. *The Queen* (1878), 2 S.C.R. 70 at pp. 97 and 125; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398 at pp. 411-12; *Brewers and Maltsters' Association of Ontario* v. *Attor-*

ney-General for Ontario (1897), A.C. 231 at pp. 236-37; *Attorney-General for Canada* v. *Attorney-General for Ontario et al.* (1937), 53 T.L.R. 325; [1937] 1 W.W.R. 299 at p. 311; *Reference re Employment and Social Insurance Act,* [1937] 1 W.W.R. 312 at p. 330. This Act permits indirect taxation which is illegal: see *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ld.,* [1933] A.C. 168 at pp. 175-76. Unlimited discretion is given the Board to fix the licence fees which is bad: see *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398. Because the Dominion Act is declared *ultra vires,* it does not follow that the Provincial Legislature can pass it. In no instance have they amended an *ultra vires Act.* They have always passed a new Act.

Farris, in reply, referred to *Hodge* v. *The Queen* (1883), 9 App. Cas. 117 and *Re George Edwin Gray* (1918), 57 S.C.R. 150.

Cur. adv. vult.

8th July, 1937.

MARTIN, C.J.B.C.: Pursuant to section 3 of the Constitutional Questions Determination Act, Cap. 46, R.S.B.C. 1924, the following question was on the 2nd of June last referred to this Court by His Honour the Lieutenant-Governor in Council, *viz.*:

> Is the Natural Products Marketing (British Columbia) Act as amended by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* of the Legislature of the Province of British Columbia?

The question came on for hearing on the 24th, 25th, 28th and 29th days of June and we reserved our opinion thereupon, and, in view of the public urgency of the matter, we on the 9th of July (though in vacation) "certified to the Lieutenant-Governor in Council [our] opinion" (section 4) that "the said referred Acts" are not in any particular beyond the powers of the Legislature of the Province of British Columbia; and my reasons for reaching that opinion follow.

It is to be noted that counsel for the Government of British

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Columbia informed us at the outset that our opinion on Part II. of the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), was not required because it had not been brought into operation, as provided by section 8 thereof, and that it was not the intention of the Government to do so, and we observe that this intention has been carried out in the new edition of the Revised Statutes of British Columbia, brought into force "on, from and after the 30th day of June, 1937," which in Cap. 165, Vol. 2, omits the said Part II.

Several objections were raised against the validity of the Acts in question, the first of which is that the Legislature of this Province has illegally delegated its functions to the Lieutenant-Governor in Council because (as I understand the argument) it has passed only the skeleton of an Act and left it to the sole discretion of the Lieutenant-Governor in Council to clothe it with flesh and blood, thereby in effect abdicating its functions. The answer to that submission depends upon the language of the statute and all that I can usefully say is that, after reading the whole statute, it does not support the argument, but on the contrary discloses by section 4 a "purpose and intent," which to my mind is not vague and uncertain but definite and concrete, to control and regulate within this Province the marketing (in all its aspects) of its natural products by establishing "schemes" under the control of a "Provincial board"—or "marketing boards" (sections 2, 3, and 5), which "schemes" are declared (section 4) to be

. . . . for the control and regulation within the Province of the transportation, packing, storage, and marketing of any natural products, and may constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage, and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage, and marketing in whole or in part.

(3.) Any scheme may relate to the whole of the Province or to any area within the Province, and may relate to one or more natural products or to any grade or class thereof.

And by the next section, 5, power is given to the Lieutenant-Governor in Council to "vest in any Provincial board any or all

of the following additional powers," which are specifically set out in eleven subsections that follow that bestowal, and nothing has been suggested to us to be lacking in said additional or preceding powers "considered necessary or advisable" to secure the practical working of any "scheme" established under said section 4. It is to me obvious that the powers of boards in section 5 called "additional" relate just as much, and only, to the "natural products within the Province" mentioned in section 4 as do the powers that section bestowed, and the term "regulated product" which occurs from the beginning to the end of the said eleven subsections of section 5 is in subject-matter identical with the term "regulate . . . the natural products" in section 4, and therefore the Lieutenant-Governor in Council is duly and jointly empowered by both sections to effectuate the establishment, regulation and working out of such "schemes" as he may think necessary. That the Legislature had the power to establish such "schemes" and "boards" has been, to my mind, beyond serious controversy since the decision of the Privy Council in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, wherein it was held that the Province of Ontario could delegate its authority over the sale of spirituous liquor to a board of Licence Commissioners who were empowered to regulate and determine by licence the sale thereof by and in taverns, shops, etc., and limit the number of licensees and regulate and prohibit sales, etc., their Lordships saying, p. 132:

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delecation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 of the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

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It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the Bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for Courts of Law, to decide. Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

That language is so appropriate to this question that I need only further point out that the Legislature here has not delegated its authority to a mere licensing board, but to the highest Provincial tribunal, the Lieutenant-Governor in Council (as was pointed out in *Esquimalt & Nanaimo Ry. Co.* v. *Wilson* (1921), 29 B.C. 333 at 353; [1922] 1 A.C. 202, at 214), a part indeed of its own constitutional structure, and "directly answerable to" itself, and it is to be remembered that, as Lord Watson said,

A Lieutenant-Governor, . . . , is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government:

Liquidators of the Maritime Bank of Canada v. *Receiver-General of New Brunswick,* [1892] A.C. 437, 443.

And he went on to point out that, as a result thereof, the revenues derived by the Provinces under the B.N.A. Act "continued to be vested in Her Majesty as the sovereign head of each Province"—p. 444. It is not therefore too much to say that powers entrusted by the Legislature to an officer of such high degree should be viewed and construed in a correspondingly wide light: a delegation to the Lieutenant-Governor in Council is indeed no less than a delegation to the "Executive Government" itself "a governing body who have no powers and no functions except as representatives of the Crown"—Lord Watson, *supra,* p. 443.

It was however submitted that the effect of *Hodge's* case is reduced by the decision of the Supreme Court of Canada in *Re*

George Edwin Gray (1918), 57 S.C.R. 150, but the result of that case is no more than to hold that when the nation is in peril then that emergency justifies the National Government in invading by an extraordinary exercise of its "peace, order and good government" powers (section 91, B.N.A. Act) the ordinary powers of the Provinces over "property and civil rights in the Province" (section 92 (13)) during the existence of the emergency: there is nothing in the case to indicate, once the power is acquired by the Nation or a Province in whatever way, that the general principles of delegation enunciated in *Hodge's* case are altered; on the contrary, it is cited in *Gray's* case by Anglin, J. (later Chief Justice) to support his view at p. 176, that:

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow."

On p. 181 he proceeds in justification of the delegation of the particular "extraordinary measures" under review, to say:

> Again, it is contended that should section 6 of the "War Measures Act" be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our Parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor in Council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extraordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them.

And further, p. 182:

> It has also been urged that such wide powers are open to abuse. This argument has often been presented and as often rejected by the Courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the Legislature, should be restricted. In this connection reference may be made with advantage to the observations of their Lordships in delivering the judgment of the House of Lords in *The King* v. *Halliday,* [1917] A.C. 260. As Lord Dunedin there said: "The danger of abuse is theoretically present; practically, as things exist, it is, in my opinion, absent."

He had already said, p. 171, on the same "War Measures Act" that

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there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence.

The point of constitutional incapacity seems indeed to be singularly destitute of substance.

See also the similar views expressed by Duff, J. (now Chief Justice) on pp. 168-9, and on p. 170 he said:

There is no attempt to substitute the Executive for Parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the Legislature. The powers granted could at any time be revoked and anything done under them nullified by Parliament, which Parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the Legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. Maitland's Constitutional History, pp. 1, 15 *et seq.*

With great respect, therefore, I find myself unable to take the view of *Gray's* case that is expressed by the Appellate Division of Alberta in *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353, which was invoked to support the attack upon the present statute. There is, moreover, no real similarity between *Hodge's* case and the Manitoba *Initiative and Referendum Act* case (1916), 27 Man. L.R. 1; [1919] A.C. 935, because as the Privy Council said in the latter case, p. 945 (after citing the former with approval) there had been an unconstitutional attempt by the Legislature to

create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.

The second objection to this statute was that it interfered with the National power of "The regulation of trade and commerce" (section 91 (2), B.N.A. Act); and in regard to this we are fortunate in having the very recent unanimous decision of the House of Lords on the Milk and Milk Products Act (Northern Ireland), 1934, in *Gallagher* v. *Lynn,* [1937] 3 All E.R. 598, wherein the exercise of powers conferred upon the Parliament of Northern Ireland to protect the health of its

inhabitants had put an end to the trade in milk between the farmers of Donegal (in the Irish Free State) and their "foreign" customers in Derry, and their Lordships, *per* Lord Atkin, said, pp. 601-2, upon the objection to the validity of the Act:

> My Lords, the short answer to this is that this Milk Act is not a law "in respect of" trade, but is a law for the peace, order, and good government of Northern Ireland "in respect of" precautions taken to secure the health of the inhabitants of Northern Ireland, by protecting them from the dangers of an unregulated supply of milk. These questions affecting limitation on the legislative powers of subordinate parliaments, or the distribution of powers between parliaments in a federal system, are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established, by *Russel* v. *R.* (1882), 7 App. Cas. 829; 51 L.J.P.C. 77; 46 L.T. 889, that you are to look at the "true nature and character of the legislation . . . the pith and substance of the legislation." If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorized field. The legislation must not, under the guise of dealing with one matter, in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, *e.g.*, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, *e.g.*, by a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed "in respect of" the forbidden subject. In the present case, any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, are that it is an Act to protect the health of the inhabitants of Northern Ireland, and, in those circumstances, though it may incidentally affect trade with county Donegal, it is not passed "in respect of" trade, and is therefore not subject to attack on that ground.

That language is so applicable to the present direct exercise, "in pith and substance," by means of this Act, of the said exclusive powers of "property and civil rights" conferred upon this Legislature that I shall not presume to enlarge upon it, but simply note the recent and prior decision of the Privy Council, delivered also by Lord Atkin in *Attorney-General for British Columbia* v. *Attorney-General for Canada,* [1937] A.C. 377, at 387, which obviously he had in mind. And I also add *Attorney-General for Canada* v. *Cain,* [1906] A.C. 542, at 546, recently followed, with *Hodge's* case, in *British Coal Corporation* v. *The King,* [1935] A.C. 500, 517-8; and finally the important and similar, in principle, case of *Standard Sausage Co. Ltd.* v. *Lee* (1933),

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47 B.C. 411, wherein we held that the National Government was justified in exercising in this Province its criminal powers to protect the national health though in so doing the powers of the Province over "property and civil rights" might be incidentally encroached upon—*cf.* pp. 423-5, 429-30.

The third objection to this statute is that it is invalid because it empowers a board, by section 5 (*d*), to fix and collect licence fees from all persons producing and marketing natural products which, it is submitted, is indirect taxation. It cannot be reasonably argued that the licensing or registering of such persons is not a necessary part of a marketing scheme; that course, indeed, is adopted in the corresponding statutes in Great Britain and in Northern Ireland, *e.g.*, the English Agricultural Marketing Act of 1931, sections 4-7, 18 dealing with and controlling and assessing "registered producers" of "regulated products" (the amendments to which and the schemes in force are set out in Butterworths' Twentieth Century Statutes, 1933, Vol. 30, pp. 9, and 31-3), and under the Agricultural Marketing Act, 1933, Cap. 31, Sec. 6 "producers" under a "development scheme" must take out from the "development board" "a producer's licence" before they can produce "secondary products" within the area of the scheme; and in the case of *Gallagher* v. *Lynn* hereinbefore considered, the requirements of the licensing provisions of the Milk and Milk Products Act (Northern Ireland), 1934, are in part recited, and, briefly stated, they prohibit the sale of milk unless the seller obtains a licence from the Minister of Agriculture "upon payment of the appropriate fee" and "upon the prescribed conditions." It may here be noted that in *Rowell* v. *Pratt,* [1937] 3 All E.R. 660 (H.L.) Lord Maugham said, p. 667, in a case arising out of the Potato Marketing Scheme (Approved) Order, 1933:

> It is true, . . . , that the Potato Marketing Board is not a department of state, but is merely a domestic executive body, which the Legislature has thought fit in the public interest to entrust with important statutory powers.

It was conceded (as to which presently) that these licence fees are taxes, but it was submitted that they are in no sense indirect but wholly direct because they are imposed as a personal condition upon would-be producers before they can participate in

the "scheme," and in my opinion that submission is correct, and I see nothing in the language of Mr. Justice (now Chief Justice) Duff in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, 364, to the contrary when the facts and circumstances to which he speaks are understood as they must be—*Quinn* v. *Leathem*, [1901] A.C. 495, 506 —and when also it is borne in mind that he is speaking of unlawful schemes which cannot be saved by a mere ancillary licence, but the present scheme is a lawful one for which it is necessary that the producers should be licensed or registered: the learned judge's real intention, indeed, appears from his remarks in *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, [1936] S.C.R. 398, at 412, where he in effect recognizes that the Provinces have

> the power to regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities.

Here the object is the direct one of personal qualification, to "require" the producers "to register with and obtain licences from the board" (section 5 (*b*)), to comply with the conditions of their licences, and to pay the appropriate fees therefor, and it may be noted that power to licence and register bakeries is given to municipalities by 59 (127) of the Municipal Act, Cap. 199, R.S.B.C. 1936.

It is erroneous to regard the power to impose purely revenue licences of the classes authorized by section 92 (9) as being the same power that flows necessarily from the effective exercise of powers initiated under head (13), because the subject-matters are entirely distinct in their nature, object and scope of operation, of which the present case is a good illustration, the object of the "scheme" in question being not to augment the revenue in general but to aid the efficient working of a special object in one department of "property and civil rights," *i.e.*, agriculture and the development of natural projects of certain, but far from all, classes, the great and varied "natural products" of our different mines, being, *e.g.*, excluded from its scope; and furthermore, it is to be noted that "the expenses of administering any scheme under this Act" cannot be paid from the Consolidated Revenue

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Fund, unless a special vote of the Legislature authorizes it—section 14. That the fees may, in the board's discretion, be payable at different times, and in different amounts by different classes of producers is not only, to my mind, unobjectionable, but commendable because that enables the board to adjust the fees to meet the exigencies of the moment brought about by the ever varying course of the seasons and unpredictable weather conditions to be expected, with corresponding varying consequences to and treatment of the "regulated product," and it would be obviously unjust to require an individual orchardist working twenty acres to pay the same fee as a large company working five thousand. This principle of requiring a personal licence to exploit natural products has from the very beginning of our legal history been recognized by our mining Acts, commencing with Governor Douglas's Proclamation of the 26th of March, 1853, respecting gold mining "within the colony of Queen Charlotte's Island" (1 M.M.C. 536) down to, *e.g.*, the present lode and placer Acts, of which, *e.g.*, the Mineral Act (Cap. 181, R.S.B.C. 1936,) fixes the fee for a free miner's certificate at $5 and for company's from $50 to $100; and a free miner may get a special certificate for a fee $15, but a company must pay $300 therefor—section 8; and prospectors for coal and petroleum must pay $100 for their licence (section 4, Cap. 175, R.S.B.C. 1936).

I have been assuming, so far, that these fees for registering and licensing are taxes, as was conceded at the argument, but on further consideration I think that in their essence they are not of that nature but are really service fees, paid for the special services of the board and its machinery and equipment, upon the same principle that we held that the Crown (Dominion) must pay the fees that this Province exacts for the use of the special services of its land registration system—*Attorney-General of Canada* v. *Registrar of Titles* (1934), 48 B.C. 544, 552.

Then objection was also taken to the control and regulation and prohibition of the transportation of natural products authorized by said sections 4 and 5, but when the sections are rightly comprehended in their true relation it becomes apparent that transportation is properly treated in connexion with and

as inseparable from the packing, storing, marketing and "the manner of distribution" (section 5 (*a*)), as regards quantity, quality, grade, and class of the regulated produce. It is obvious that products cannot be brought to packing-houses, and storage plants, and markets, without being "transported" by land, air, or waterways within the Province, and if the Province has the power, as it unquestionably has, to reduce or prohibit production of any kind of natural product in any area where it may deem it desirable to do so, in order, *e.g.*, to control the wide destruction caused by soil-drifting and dust storms, and restore original grazing and range conditions, or for any other reason that it may think beneficial, then it also has the power to control or prohibit the "distribution" by "transportation" of any natural product in such a way as it thinks will best promote the public interest economically, or protect the public health by requiring sanitary conditions, by, *e.g.*, not permitting milk to be "transported" and "marketed" (as some of us have seen in other and ancient lands) by driving goats to the doors of the customers then and there to be milked and their natural product "distributed" to the extent of the customers' requirements; or as all of us have seen in this land, and relatively recently, by transporting it in large cans and distributing it openly therefrom by pouring it into customers' open receptacles in the public streets. It is to be noted that the power to regulate and control the delivery of milk and cream, and prescribe the methods of delivery (*i.e.*, transportation) has been delegated to municipalities by section 59 (119) of the Municipal Act (1936), Cap. 199, R.S.B.C.; and also that the admittedly valid Government Liquor Act, Cap. 160, R.S.B.C. 1936, Sec. 123 (*x*) empowers the Liquor Control Board to regulate the time, manner, methods, and means by which, brewers and distillers shall deliver liquor and the "manner, methods, and means by which, liquor may be lawfully conveyed or carried within the Province."

Then it was further objected that the power "to exempt from any determination or order," etc., conferred by subsection (*b*) of section 5, is invalid, and the *Credit Foncier* case, *supra,* was again relied upon, p. 356, but with great respect I am unable to see why a power to exclude things or classes from the operation of

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a statute is invalid, when a power to include them is unquestionably valid. In *Hodge's* case, indeed, that very thing—exclusion or exemption from operation—formed a part of the impugned, but confirmed, statute, as appears at pp. 126-7, and 131-3, whereby the Licence Commissioners were delegated the power (section 4 (3)) to "exempt" certain cities and towns "from the necessity of having all the tavern accommodation required by law." It is however due to the learned judges in the *Credit Foncier* case to say that they seemed really to base their decision on this point on the fact that they were able to extract from the evidence before them an indirect and therefore unconstitutional motive on the part of the Lieutenant-Governor in Council "completely to nullify the Act" by excluding various classes of debts under five orders in council; as to which ground I say nothing because it is foreign to this case, but otherwise, with every respect, I am unable to agree with their reasoning on the point. One (out of many that might be given) illustration in a leading statute, constantly before the Courts of Canada, of a delegated and unquestioned power to the Governor in Council to include classes of things within the operation of a criminal statute is to be found in The Opium and Narcotic Drug Act, 1929, Cap. 49, Can. Stats. 1929, Sec. 24.

In conclusion, and generally with respect to the delegation of legislative powers, it should be remembered that at one time the whole of the colonial portion of the British Empire was, and much of it still is, governed by the Sovereign in Council of which the early history of the two former colonies of Vancouver Island (1849) and British Columbia (1858) afford striking examples, their absolute government for several years being delegated to their respective Governors, Blanshard and Douglas, and instructive references to their exercise of supreme authority (including the trial of capital cases)—(*cf.* Article "Gallows Point" in Captain Walbran's "British Columbia Coast Names," p. 197, Ottawa, Department of Marine, 1909) are to be found in *Attorney-General* v. *Ludgate* (1901), 8 B.C. 242. A later and interesting reference after the United (in 1866) Colonies were taking steps to enter the Dominion of Canada (in 1871) is to be found in Her Majesty's order in council of the 9th of August, 1870, in

the preamble of which the very word "delegation" is thus used:

> WHEREAS by the "British Columbia Government Act, 1870," Her Majesty was empowered by Order or Orders in Council to constitute a Legislature consisting of the Governor and a Legislative Council for the Colony of British Columbia, and to make such provisions and regulations in respect of such Legislature, or either branch thereof, as might seem to be expedient, and further to delegate certain powers therein mentioned to the Governor of the said Colony:
>
> It is hereby ordered by Her Majesty, by and with the advice of Her Privy Council, and in pursuance and exercise of the powers vested in Her Majesty by the said Act of Parliament, as follows, that is to say: . . . .

And a recent illustration of a reversion to delegation on the grand scale by the Dominion of Canada in making provision for the Government of the North-West Territories is cited by Mr. Justice Duff in *Gray's* case, *supra*, p. 171, as a "degree of devolution" that was "strictly a grant (within limits) of local self government."

I shall not, however, pursue at length this subject because, to use the language of the Privy Council in *The Queen* v. *Burah* (1878), 3 App. Cas. 889, 906, "The British Statute Book abounds with examples of it," and a consideration for several days of our early and late "statute book" discloses such a surprising number of delegations to various persons and bodies in all sorts of subject-matters that it would take several pages even to enumerate them, and it would also bring about a constitutional debâcle to invalidate them: I must therefore content myself by selecting four statutes only, *viz.*, the first being the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, B.C. Stats. 1917, Cap. 71, wherein the very unusual powers of a "judicial character" thereby bestowed upon the Lieutenant-Governor in Council were confirmed by the Privy Council in the *Esquimalt & Nanaimo Ry. Co.* case, *supra*, [1922] 1 A.C. 202, 212; the second is the Codling-moth Control Act, B.C. Stats. 1922, Cap. 10, whereby *carte blanche* powers were delegated over affected fruit lands areas to cope with that pest; the third is the Municipal Act, R.S.B.C. 1936, Cap. 199, Sec. 59, which, by section 59 alone, delegates power to municipal councils to "make, alter, and repeal by-laws" for no less than 266 distinct "purposes" of civic existence, from the regulation of elections to the prohibition of erection of buildings in certain areas and

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noxious trades, and, be it noted, the licensing (*e.g.*, 127-8; 135-45) and registration of many and various trades and callings and of the inspection and sale of food and seizure and destruction of tainted food (89 and 106 *et seq.*); and the fourth is the Act constituting this Court, 1936, R.S.B.C. Cap. 57, Sec. 37, whereby (and also by the Supreme and County Courts Act—Caps. 56 and 58) power is conferred upon the Lieutenant-Governor in Council to make rules of the widest scope and the first importance in our system of jurisprudence whereby our whole civil practice and procedure, appellate and trial, are regulated and constituted to such an extent that even the sittings we hold are thereto subjected.

As to the other objections raised, I do not (to adopt the final words of *Hodge's* case) "think it necessary or useful to advert to minor points of discussion.

It follows that the question referred to us should in my opinion be answered as hereinbefore set out.

McPhillips, J.A.: The argument that took place had reference to the Act as set forth in the Revised Statutes of B.C. 1936, being chapter 165 thereof as that Act is now the law and in no substantial particular differs from the Acts that preceded it. I may say at the outset that my opinion is that the Natural Products Marketing (British Columbia) Act, B.C. Stats. 1934, Cap. 38, as amended by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, Cap. 34, and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), Cap. 30, are not in any particular beyond the powers of the Legislature of the Province of British Columbia.

In passing it may be noted that The Natural Products Marketing Act, 1934 (Dominion), has been recently held by the Privy Council to be *ultra vires* so that now the standing legislation is Provincial only.

The arguments addressed to this Court of Appeal in support of the contention made that the Provincial legislation was *ultra vires* were somewhat numerous. The one, perhaps, that was most strongly pressed, was that there was a complete delegation

of legislative authority to the Lieutenant-Governor in Council. I must confess that I see no virtue in any such argument as the statute is only to be read to wholly displace any such contention; further, to so read the Act and give effect to it would displace a large body of legislation upon the Provincial statute books. I think it sufficient upon this point to refer to *Re George Edwin Gray* (1918), 57 S.C.R. 150, where the Chief Justice of Canada at p. 157, said:

Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such power must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

Here we have the Province legislating in respect to what may well be said to be exclusive powers under the British North America Act, that is to say, "property and civil rights." What is being dealt with here? Natural products within the Province and was construed by the Privy Council but a little time ago in the judgment of the Privy Council delivered by Lord Atkin as having relation to a matter wholly Provincial. In this connection I would refer to the case of *McGregor* v. *Esquimalt and Nanaimo Railway,* [1907] A.C. 462, at 468. The judgment dealt with the powers of the British Columbia Legislature when dealing with property and civil rights in the Province and the challenged legislation was upheld by the Privy Council. It would seem to me that the contention made that the legislation here challenged is *ultra vires* can be said to be wholly met by the two recent decisions before the Supreme Court of Canada and the Privy Council—*Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398, Duff, C.J., particularly at pp. 416-426, and *Attorney-General for Canada* v. *Attorney-General for Ontario et al.,* 53 T.L.R. 325; ([1937] 1 W.W.R. 299), and I would refer to what Lord Atkin said at p. 330:

But the validity of the legislation under the general words of section 91 was sought to be established not in relation to the treaty-making power alone but also as being concerned with matters of such general importance as to have "attained such dimensions as to affect the body politic," and to have "ceased to be merely local or personal and to have become matters of national concern." It is interesting to notice how often the words used by

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Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, 12 T.L.R. 388; [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the Provincial legislative powers given by section 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act, beginning at p. 65 of the record in that case, and dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice, naturally from his point of view, excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases—"abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce* case ([1922] 1 A.C. 191), "some extraordinary peril to the material life of Canada," "highly exceptional," "epidemic or pestilence" (*Snider's* case (41 T.L.R. 238; [1925] A.C. 396)) —to show how far the present case is from the conditions which may override the normal distinction of powers in sections 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point and preclude further disputes.

The Chief Justice of Canada in his learned judgment deals with sections 91 and 92 and we have here in particular to deal with section 92 "Exclusive powers of Provincial Legislatures," and the Dominion Marketing Act was held by the Chief Justice of Canada to be *ultra vires* and in that opinion he was sustained by the Privy Council. It is in my opinion patently clear upon the reading of the judgment of the Chief Justice of Canada and the judgment of the Privy Council delivered by Lord Atkin that the challenged legislation here in question is within section 92 (13) of the B.N.A. Act and we have Duff, C.J., saying at p. 416 [1936] S.C.R.:

It is settled by the decisions of the Judicial Committee that the phrase "property and civil rights" is used in the "largest sense," subject, of course, to the limitation arising expressly from the exception of the enumerated heads of section 91, and impliedly from the specification of subjects in section 92.

I think it well that the judgment of the Privy Council as delivered by Lord Atkin in *Attorney-General for British Columbia* v. *Attorney-General for Canada et al.* (Reference *re* The Natural Products Marketing Act, 1934), 53 T.L.R. 330; [1937] 1 W.W.R. 328, should be carefully read. It, of course, is plain that

the powers sought to be exercised by the Dominion Marketing Act were powers exclusively within the Province. It reasonably follows that the Provincial legislation on the subject must be valid unless in the enacting measure it in some way transcends the ambit of authority so exclusively conferred under property and civil rights—that I cannot see. I would particularly call attention to what Lord Atkin in 53 T.L.R. at p. 331; ([1937] 1 W.W.R. at p. 330) said:

> There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province and have no connection with interprovincial or export trade. It is therefore plain that the Act purports to effect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in section 91 must be beyond the competence of the Dominion Legislature. It was sought to bring the Act within the class (2) of section 91—namely, The Regulation of Trade and Commerce. Emphasis was laid upon those parts of the Act which deal with interprovincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province.

Here in the Provincial legislation we have clearly "the regulation of individual forms of trade or commerce confined to the Province.

The Court of Appeal had before it a case where the Marketing Act legislation was under review in 1936—*Chung Chuck and Mah Lai* v. *Gilmore,* 51 B.C. 189. It was on appeal from MURPHY, J. The Court divided. The Court was three in number. MURPHY, J. had granted an injunction. Upon the appeal the majority judgment set aside the injunction, MACDONALD, C.J.B.C., dissenting. The judgment of the Court was delivered by myself and I think it well to set forth the judgment here: [see judgment as reported in 51 B.C. at pp. 192-6].

I may say upon that argument practically the same grounds of argument were advanced as have been advanced here although technically the contention of *ultra vires* was not advanced. I do not propose to refer to what I might say of the multitude of cases to which we have been referred where questions of *ultra vires* have received consideration in the Courts during past years. Of course I look upon them with the greatest respect but it will well be said that they in the main have reference to the particular facts of each case. Here we have a Constitution Act passed by

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the Imperial Parliament in 1867—Canada and its various Provinces have advanced by leaps and bounds since that time—and time has developed wonderful changes in the business and industrial life of the people and legislation is of course necessary to cope with conditions in the industrial and agrarian life of the people. The scheme of the Constitution is democratic and the legislation may well be presumed to be the voice of the people. Here we have legislation upon a subject-matter wholly and exclusively within the power of the Legislature of the Province coming within "property and civil rights." My conception of the principle to be borne in mind is that all reasonable and proper legislative control of—as we have here natural products—must reside in the Provincial Legislature and it is idle to contend otherwise if not the statutory grant of exclusive authority becomes wholly abrogated. It cannot be the province of the Courts to say that this or that conferred authority shall not be exercised when what is legislated may fairly and reasonably be considered to be incidental to the exercise of the express constitutional power conferred. We have had submission after submission from counsel at the Bar, which would, if given effect to, be absolutely prohibitive of anything being done to exercise the constitutional powers conferred upon the Legislature of the Province—"levies are illegal"—I will not go on to detail them—and if given effect to it would be impossible to bring about reasonable control in marketing within the Province. The natural products are the growth and production of the Province and the Legislature in the public interest has legislated in respect thereto—being something to be done with the natural products of the Province—such as orderly and systematic growth and production and method of control in marketing. Wherein can it be said that there is the exercise of legislative authority within the Province beyond that conferred by statute? The legislation is not approved by all—that is profitless contention.

The Legislature of the Province is clothed with the constitutional and statutory authority in the premises, namely, "property and civil rights" and it is an exclusive authority. In my opinion and with the greatest respect to all contrary opinion, when constitutional powers are to be considered there must be some elas-

ticity in the construction. The constitutional authority is not for the day only of its passage and enactment, it must be read with the changing conditions of the times always to be applied to the requirements not only of the time of the passage and enactment but to the continuing development and industrial advancement and change that years bring about. I am reminded of what Lord Shaw said in *Attorney-General for Nigeria* v. *Holt & Co.* (1915), 84 L.J.P.C. 98 at p. 105:

The law must adapt itself to the conditions of modern society and trade.

Here we have had great development in the long years since 1867, and in the wisdom of the Legislature it is deemed in the public interest to provide for the regulation of the marketing and disposition within the Province of the natural products of the Province. Can it be reasonably said that this is not a conferred constitutional power and an exclusive one under the British North America Act enjoyed by the Province? In my opinion it cannot and if that be a correct view of the law I cannot see in what respect the Act called in question may be said to be *ultra vires*.

MACDONALD, J.A.: In discussing the finding that the Natural Products Marketing (British Columbia) Act is, to its full extent, *intra vires* of the Provincial Legislature, I will refer to the provisions of a consolidated Act placed before us by counsel during argument for convenience only as it includes in proper form and place the two amendments to the main Act of 1934 (B.C. Stats. 1934, Cap. 38; B.C. Stats. 1936, Cap. 34, and B.C. Stats. 1936 (Second Session), Cap. 30). It may now be found in R.S.B.C. 1936, as chapter 165.

The question may best be dealt with by considering the grounds upon which it was submitted that the Act is *ultra vires* of the Provincial Legislature.

(1) It was said—not I think with confidence—that because by section 2 the words "Dominion Act" wherever found are defined to mean "The Natural Products Marketing Act, 1934," of the Dominion of Canada recently held to be *ultra vires* by the Judicial Committee of the Privy Council together with a definition of "Dominion board" and further refer-

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ences elsewhere (*e.g.*, in sections 6, 8, and 11) to Dominion boards created, or to be created that the entire Act, if not *ultra vires* of the Provincial Legislature, is at least valueless. That is not so. We look at the whole Act as it stands. The Dominion Natural Products Marketing Act, 1934, has no longer any validity but it is not fatal to the Provincial Act to mention by name that legislative effort. It is still at least a paper writing capable of identification by reference. The draftsman may have had in mind that the Dominion Parliament at some future date may pass complementary marketing legislation within its powers as recently defined. If so, by a slight amendment—assuming a new Dominion Act will have another title—the definition of "Dominion Act" may be altered to refer to one of a later date. For the present the phrases are harmless and no objection should be raised to permitting them to remain in the Act in suspension for possible future use. As a statute is always speaking, on the passage of a Dominion Marketing Act these references will have a meaning and may remain in the meantime without affecting much less destroying the presently operative sections of the Act.

Section 7 for example providing that

> Every Provincial Board may, with the approval of the Lieutenant-Governor in Council, perform any function or duty and exercise any power imposed or conferred upon it by or pursuant to the Dominion Act, with reference to the marketing of a natural product.

is academic at present but may be operative in the future. If so, there is, I think, no doubt that the Provincial Legislature may clothe a board of its own creation with the capacity to perform functions and to carry out duties conferred upon it by a Dominion Act. If the Dominion Parliament confers on a Provincial Board certain duties section 7 creates a capacity to undertake it. (*Bonanza Creek Gold Mining Company, Limited* v. *The King*, [1916] 1 A.C. 566). Conversely by section 8 similar powers may be exercised by a Dominion board if created by later legislation. The same principle applies to section 9 (1). We are not concerned with the details of marketing schemes and it will not be presumed that under these sections either a Provincial or Dominion board acting independently, in co-operation, or as an agent, will exercise powers beyond the competency

of either Parliament to bestow. Any incident of that kind should be dealt with if and when it arises, as an Act without statutory sanction.

(2) Another objection raised to the whole Act was based on an alleged unauthorized delegation of legislative authority to the Lieutenant-Governor in Council. The powers conferred, it was submitted, were not merely ancillary to the provisions of the Act designed to make it effective but rather amount to an abdication of legislative authority. *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta,* [1937] 2 W.W.R. 353, was relied upon and the legislation there considered compared with the Act under review herein. I will only consider our own Act.

The first answer to this contention is that there is no abrogation of legislative authority. The main Act is not merely a skeleton Act without any substantive statement of policy or intent. Its scope and purpose apart from any reference to the Lieutenant-Governor in Council, is disclosed in section 4 (1), reading as follows:

4. (1.) The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the transportation, packing, storage, and marketing of natural products within the Province, including the prohibition of such transportation, packing, storage, and marketing in whole or in part.

This section makes, not a general but a detailed provision for every phase of the regulation and control of the marketing of natural products as defined in section 2, *viz.,* in so far as transportation (distribution), packing, storage, and marketing is concerned including prohibitions necessary to enforce control. It is then followed by subsection (2), authorizing the Lieutenant-Governor in Council to establish vary and revoke schemes and to regulate and control marketing not beyond the scope of section 4 (1) but within it. True it gives to the Lieutenant-Governor in Council power to constitute marketing boards but that power, in principle, is similar to powers given to the Board of Licence Commissioners considered by the Judicial Committee in *Hodge* v. *The Queen* and later referred to. In fact, after comparing the two Acts, one need not go further to justify this legislation in so far as the question of delegation is concerned.

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It was said, however, that by section 5 additional so-called legislative powers were conferred on the Lieutenant-Governor in Council, eleven in all (subsections (*a*) to (*b*) both inclusive), not covered by substantive provisions in the Act. If these were in fact additional powers it would not, I think, be material, so long as they relate—as they do—to marketing and control. In fact, however, no additional powers are conferred. It was not necessary to insert the word "additional" in the introductory clause in section 5. All the powers conferred, speaking generally, relate to the regulation of the packing, storing, marketing and distribution of natural products within the Province. Licensing and price fixing is part of that regulation and control. No authority is given to regulate or control in an adjoining Province.

The suggestion appeared to be that the details found in the subsections to section 5 and contemplated therein should each be the subject of an independent legislative enactment. That is not possible, desirable or necessary. A number of boards are contemplated for a large variety of products, each with schemes differing in detail and subject doubtless to constant changes as exigencies arise. The only practical way of legislating in respect to this question of property and civil rights within the Province and in relation to matter of a merely local nature such as this was to entrust details to Boards under the general supervision of the Lieutenant-Governor in Council with, however, the main Act (section 4) outlining policy and specifying the specific features of marketing and control dealt with by the Legislature.

We were referred by Mr. *Farris* to the decision of the Supreme Court of Canada in *Re George Edwin Gray* (1918), 57 S.C.R. 150, on the question of delegation. It was discussed by Harvey, C.J.A., in *Credit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta, supra,* in giving the judgment of the Appellate Division, and this decision was relied upon by Mr. *Hossie.* At p. 358 Harvey, C.J.A., said:

In that case [*Re Gray*] there had undoubtedly been given legislative authority to the Governor-General in Council. But as pointed out that was a case of emergency and urgency. It was a war measure and it has been more than once pointed out by the Judicial Committee that in such a case

the residuary power conferred by section 91 upon the Dominion Parliament may be resorted to.

His Lordship added referring to the Alberta Act:

This is neither a war measure nor is it Dominion legislation so the case cited would appear to have no application.

With the greatest respect I cannot agree with this view. It was not said in *Re George Edwin Gray,* as I read the reasons for judgment, that it was a case of emergency and urgency and because of that aspect the delegation ought to be treated as valid nor is there any intimation that if the Supreme Court of Canada had under consideration peace-time legislation of comparable import the decision would be different. Once it is found that the Federal or Provincial Parliament is legislating in respect to a subject-matter within its competence I do not think, on principle or on authority, powers of delegation are enlarged or restricted by the presence or absence of a state of war or any other emergency. On the contrary the governing principles are outlined in a well-known passage in *Hodge* v. *The Queen,* later discussed, and the principles there stated are not subject to alteration by national exigencies.

In *Fort Frances Pulp Co.* v. *Manitoba Free Press Co.* (1923), 93 L.J.P.C. 101 it was held by the Judicial Committee that in an emergency the Federal Parliament might legislate for the general welfare of Canada although the subject-matter of the legislation related to property and civil rights; in other words were it not for the emergency such legislation would be within the competency only of a Provincial Legislature. It was pointed out that when the emergency passed legislation of this character, if retained, would become *ultra vires, i.e.,* "when it is no longer called for" (p. 106). That principle does not apply to delegation of authority, *viz., intra vires* at one stage; *ultra vires* at another. The decision of the Board was based upon an interpretation of the British North America Act. I do not think any interpretation of that instrument will support the view however that wider powers of delegation arise with the approach or arrival of an emergency. Viscount Haldane, at p. 105, said:

The general control of property and civil rights for normal purposes remains with the Provincial Legislatures, but questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

Within the meaning of the words at the commencement of section 91 questions relating to peace, order and good government, under a proper interpretation of the Constitution Act, may arise as an overriding consideration where under ordinary circumstances a question of civil rights only is involved. Such a decision is in harmony with the provisions of the B.N.A. Act.

> It is proprietary and civil rights in new relations, which they do not present in normal times, which have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91, because in their fulness they extend beyond what section 92 can really cover:

p. 105. This view, or interpretation, is also supported by a reference to the fact that residuary powers are given to the central government "and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom" (p. 106). The Judicial Committee do not say in dealing with legislation of this character affecting property and civil rights passed by the Dominion Parliament during an emergency that the terms of the B.N.A. Act may be ignored. It is freely interpreted.

When we turn to the question of delegation of authority to subordinate bodies no support can be found in the constitution for the view that it is affected by emergencies. That authority as intimated is based on well-known principles discussed in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, where at p. 132 it is said:

> When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
>
> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.

I am referring at present to the principles governing delegation

of authority not to whether or not the delegation itself in the case at Bar is simply ancillary to legislation or an attempt at independent legislative efforts.

While it is clear that an emergency may change the aspect of property and civil rights giving it a national character without offence to the terms of the Act, it is, I think, impossible to say that the legal principles referred to, applicable to delegation of authority, change their complexion with the state of the nation. That would be a new, and I think, unwarranted conception.

If, however, the Supreme Court of Canada in *Re George Edwin Gray* held otherwise, leaving aside for the moment the decision in *Hodge* v. *The Queen,* we would be governed by it. One should not be misled by the fact that a War Measures Act (Can. Stats. 1915, Cap. 2) was considered, *i.e.,* emergency legislation. The question decided was the validity of section 6 conferring special powers on the Governor in Council and an order in council or regulations passed thereunder. If the Court intended to hold that this was a valid delegation only because of the nature of the legislation itself and the state of the country it would doubtless say so with the clearness displayed by Viscount Haldane in the *Fort Frances Pulp Co.* decision. The then Chief Justice of Canada made no reference to this aspect. He referred (pp. 156-7) to section 6 of the War Measures Act, 1914, and said:

> The practice of authorizing administrative bodies to make regulations to carry out the object of an Act, instead of setting out all the details in the Act itself, is well known and its legality is unquestioned. But it is said that the power to make such regulations could not constitutionally be granted to such an extent as to enable the express provisions of a statute to be amended or repealed; that under the constitution Parliament alone is to make laws, the Governor in Council to execute them, and the Court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the functions of any other branch.

Then the Chief Justice proceeds to say:

> In view of *Rex* v. *Halliday,* [1917] A.C. 260, I do not think this broad proposition can be maintained.

Rex v. *Halliday,* although concerned with the Defence of the Realm Act was not decided on the basis that an emergency altered the existing law. Lord Finlay, L.C., said at p. 264:

> It is beyond all dispute that Parliament has power to authorize the

making of such a regulation. The only question is whether *on a true construction of the Act it has done so.* [The italics are mine.]

Further at p. 157, in *Re George Edwin Gray,* the Chief Justice said:

Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

This language employed in a decision binding upon us is applicable to the case at Bar. In further support of the view that the opinion of the Chief Justice was not affected by any consideration except a question of interpretation and of the general powers of Parliament he said at p. 157:

I cannot, however, find anything in that Constitutional Act which, so far as material to the question now under consideration, would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament is not subject.

His decision is based on the view that "the language of section 6 is admittedly broad enough to cover power to make regulations for the raising of military forces" (p. 157). Nor does it follow because his Lordship stated at p. 159 that the enlightened men who framed that section, and the members of Parliament who adopted it, were providing for a very great emergency" that he found the delegation could only be supported on the ground that an emergency existed because he proceeded to say that as they were providing for an emergency "they must be understood to have employed words in their natural sense, and to have intended what they have said." Nor do I think the conclusion that this delegation was only considered valid because of conditions can be reached from the final words of the Chief Justice at p. 160, *viz.*:

Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.

The passage preceding this extract makes it clear that he was referring merely to the passage of the War Measures Act itself and to the duty of giving effect to it.

I turn to the judgment of Duff, J., now the Chief Justice of Canada. He simply expressed the view that (p. 168)

unless the language of the first branch of section 6 is affected by a qualifying context or by subsequent statutory modification the order in council of the 20th April (the subject matter of which in the above expressed view is indisputably within the scope of the "War Measures Act") is authorized by it.

At p. 169, referring to the function of the Court in construing legislative enactments his Lordship said:

> It ought not, moreover, to be forgotten in passing upon this argument for a narrow construction, that this Act of Parliament supervened upon a decision which was the most significant, indeed the most revolutionary decision in the history of the country, namely—that an Expeditionary Force of Canadian soldiers should take part in the war with Germany as actual combatants on the Continent of Europe; a decision which would entail, as everybody recognized, measures of great magnitude; requiring as a condition of swift and effective action, that extraordinary powers be possessed by the executive.

This excerpt was referred to by Mr. *Hossie* in support of the contention that in the view of the present Chief Justice a state of war gave validity to the delegation of power under consideration. That is not the subject-matter under discussion. He is, the context shows, contesting the view that a narrow construction should be given to section 6, not in relation to unwarranted delegation of powers but rather as to whether or not authority was given to the Governor in Council to repeal the Militia Act. The question of whether or not an emergency affected the extent of delegated authority was not discussed. That would be a concrete subject calling for pointed discussion. It is clear too from the following passage that the present Chief Justice brought, to the consideration of this aspect of the case, no such adventitious aid. At p. 170, he said:

> It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor in Council the whole legislative authority of parliament. The authority devolving upon the Governor in Council is, as already observed, strictly conditioned in two respects: First—It is exercisable during war only. Secondly—The measures passed under it must be such as the Governor in Council deems advisable by reason of war. There is no attempt to substitute the executive for parliament in the sense of distributing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act

as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.

Again—and I regard it as conclusive—there would be no point to the example his Lordship gave of "a striking instance of the 'delegation' so called of legislative authority with which the devolution effected by the War Measures Act may usefully be contrasted" (p. 170), *viz.*, in the example afforded in the government of the North-West Territories by a council exercising extensive legislative powers if his judgment was based on the view that an emergency only justified in law the delegation of authority under the War Measures Act reviewed by the Court. The validity of that Act, with its large delegation of powers, was, he said, "never doubted" and it "of course, involved a degree of devolution far beyond anything attempted by the War Measures Act. That of course was not emergency legislation. He proceeded to say, p. 171:

> In the case of the War Measures Act [and it is equally true of the Marketing Act] there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence. The point of constitutional incapacity seems indeed to be singularly destitute of substance.

The judgment of Anglin, J., later Chief Justice, remains to be considered. He summarized the only points raised for discussion at p. 175, as follows:

> Against the validity of the orders in council it is urged (a) that Parliament cannot delegate its major legislative functions to any other body; (b) that it has not delegated to the Governor in Council the right to legislate at all so as to repeal, alter or derogate from any statutory provision enacted by it; (c) that if such power has been conferred it can validly be exercised only when parliament is not in session.

If the point was taken that, in any event, the delegation was valid only because of war conditions he would, in all likelihood, have mentioned it. Significantly enough no one makes that statement nor is there any reference to it in the report of arguments of counsel. Anglin, J. rested his decision, not on special grounds of that character, but quite properly, on the authority of *Hodge* v. *The Queen* and similar decisions. He said at pp. 176-7:

A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample . . . . as the Imperial Parliament in the plenitude of its powers possessed and could bestow." . . . I am of the opinion that it was within the legislative authority of the Parliament of Canada to delegate to the Governor in Council the power to enact the impugned orders in council. To hold otherwise would be very materially to restrict the legislative powers of Parliament.

References to the existence of war and the defence and welfare of Canada found at p. 178, and to apprehended war and emergency at p. 180 do not disclose that in his Lordship's view the extent and scope of the delegation was only justified thereby. These expressions naturally appear because of the subject-matter of the Act. When too at pp. 181, and 182, he said "We are living in extraordinary times which necessitate the taking of extraordinary measures" he is referring to the passage of the War Measures Act itself, not to the principles upon which delegation of authority is based. This is shown by the passage immediately following:

At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, ...

He concludes:

It has also been urged that such wide powers are open to abuse. This argument has often been presented and as often rejected by the courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the Legislature, should be restricted.

I think, therefore, *Re George Edwin Gray* is a decision applicable to the case at Bar. I refer also to the language of Davies, J., in *Ouimet* v. *Bazin* (1912), 46 S.C.R. 502, at 514.

The judgment of the Judicial Committee in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, holding that the Legislature had authority under the Ontario Liquor Licence Act of 1877 to delegate to a Board of Licence Commissioners power to make police or municipal regulations, create offences and fix penalties supports the validity of the Act under review. Assuming that

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the Legislature had the right to exercise the powers conferred on the Licence Commissioners could it delegate such powers to the board? We assume for the present that it was within the competency of the Provincial Legislature to pass the Marketing Act and to legislate in respect to all the matters entrusted to the Lieutenant-Governor in Council. In the Court of Queen's Bench in Ontario the unanimous judgment of that Court, later reversed by the Court of Appeal was delivered by Hagarty, C.J. Sir Barnes Peacock in delivering the judgment of the Judicial Committee refers to this judgment at p. 124. That Court expressed the view now advanced in support of the contention that the Act under review herein is a skeleton Act without substantive provisions and therefore *ultra vires*. Hagarty, C.J., said (p. 124):

> "The Legislature had not enacted any of these, [referring to the resolutions of the board] but has merely authorized each board in its discretion to make them. It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first of creating a *quasi* offence, and then of punishing it by fine or imprisonment. We think it is a power that must be exercised by the legislature alone."

As stated the Court of Appeal holding that the delegation was justified reversed that decision.

The Act considered (Ontario Revised Statutes, 1877, Cap. 181) should be read particularly sections 3, 4 and 5 to compare it with similar sections in the Natural Products Marketing (British Columbia) Act and to observe the drastic powers to decide and to legislate conferred upon the Board of Licence Commissioners. What might be termed legislative power by a subordinate body was given to the board. To refer to a few only, power was given to define by resolutions (or as the Judicial Committee say by by-laws p. 135) the conditions and qualifications necessary to obtain tavern or shop licences; to limit the number of licences; to declare that a limited number of persons qualified to have tavern licences might be exempted from the necessity of providing all the tavern accommodation otherwise required by law; to regulate licensed taverns and shops; define the duties and powers of licence inspectors and to impose penalties for infraction of the board's resolutions. Power was given to the agent of the Legislature to create offences not provided

for in the substantive provisions of the Act and to impose penalties (section 5). Some of these powers were covered by substantive provisions in the main Act (*e.g.*, exemption from the necessity of providing the hotel accommodation required by law—see section 19) while others were not.

These powers, the Judicial Committee say at p. 131, were "similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments."

It was contended that the Imperial Parliament had not conferred on the local Legislature authority to delegate these powers and "that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone," and "the maxim *delegatus non potest delegare* was relied on" (pp. 131-2). As to that contention their Lordships said:

> The objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
>
> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.

Again at p. 132, "it was argued at the Bar that a legislature committing important regulations to agents or delegates effaces itself." As to that submission, repeated in the case at Bar, the Board said:

> That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate

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agencies, and how long it shall continue them, *are matters for each legislature,* and not for Courts of Law, to decide. [The italics are mine.]

And at pp. 133-4:

The provincial legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the Licence Commissioners.

The Judicial Committee treated the powers conferred as similar to those exercised by municipal institutions—municipal or police regulations interfering with liberty of action to the extent necessary to prevent disorder and abuses. In the case at Bar authority is delegated to a higher body, *viz.,* to the Lieutenant-Governor in Council for a purpose precisely similar having regard to the character of the legislation, *viz.,* to interfere with liberty of action and to control, to the extent necessary to carry out the purely local and Provincial purpose of the Act to regulate and control the marketing of natural products within the Province. It is "a limited discretionary authority" (p. 132).

It is of assistance to mention that the board referred to "the very full and very elaborate judgment of the [Ontario] Court of Appeal" containing "abundance of precedents for this legislation" (p. 132). In view of this statement in approval I refer to the report of that decision found in (1882), 7 A.R. 246. It supports the view that a Legislature may delegate "whatever may be necessary to carry into effect the enactments of the Legislature itself" (p. 254). The examples given by Spragge, C.J., at pp. 254 and 255, include legislation delegating to the judiciary the power to make rules and orders of Court, a power now conferred in this Province on the Lieutenant-Governor in Council. He points out at p. 255, "that the Imperial Parliament has, from time to time, delegated large powers of a like nature to the judiciary; and in the recent Judicature Acts, powers that are essentially legislative in their character." In fact, should the Courts now declare that Provincial Legislatures, functioning for so many years with the authority of the Judicial Committee as disclosed in *Hodge* v. *The Queen,* have not the authority to delegate taken in the legislation under review, many long-standing Acts of similar import will be open to attack. Such a view would cripple legislative efforts. This is particularly true in

legislation of the character under review, concerned with economic planning. Dealing with the marketing of a great variety of natural products by a large number of distinct boards, with different schemes suited to the product dealt with; with rules and regulations too differing in respect to each commodity and the necessity to alter and repeal arising from time to time it is impossible to avoid conferring large discretionary powers of a regulatory character on the delegates and equally impossible to outline such powers except in a general way, in the substantive portions of the Act.

The Act under review does not create a new deliberative body with the right to legislate. It would not be wise to attempt to define the area over which a power to delegate may be exercised.

> In all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point of controversy:

Hodge v. *The Queen, supra,* at p. 128.

It is enough to say, having regard to the particular powers delegated in the Act under review that they are, in view of the decisions discussed, within the competency of the Provincial Legislature to bestow.

I may add that, in principle, or on authority, or in the B.N.A. Act itself, I cannot find any support for Mr. *Hossie's* submission that the full powers of delegation existing in the Imperial Parliament before 1867 and considered in *Hodge* v. *The Queen,* are exercisable only by the Legislatures of Ontario and Quebec. I can find no authority in the sections of the B.N.A. Act to which we were referred—section 65 and others—for this novel view.

The views expressed heretofore are not affected by the judgment of the Judicial Committee in *In re The Initiative and Referendum Act,* [1919] A.C. 935. There a Manitoba Act was held to be *ultra vires* because it purported to alter the position of the Lieutenant-Governor by compelling him to submit a proposed Act for enactment to the electors, not to the Legislature. That point does not arise in this appeal. The board refer incidentally to the question of delegation at p. 945, pointing out that section 92 of the B.N.A. Act "entrusts the legislative power in a Province to its Legislature, and to that Legislature only." "No doubt," Viscount Haldane continues,

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a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, . . . *Hodge* v. *The Queen*, . . . ; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise.

This language, although not necessary to the decision, may well be accepted. Their Lordships were considering an Act where the "new legislative power" was not the Governor in Council, a part of the Legislature, but a body further removed from the source of power, *viz.*, the electors of the Province. There is no ground for the submission that under the Natural Products Marketing Act a new legislative body with powers equal to that of the Legislature has been created. There is no surrender of legislative functions. The Manitoba Act attempted to change the constitution. I may add that apparently it was not suggested that the powers of delegation of the Manitoba Legislature were more restricted than in Ontario.

(3) A further objection was based on section 94 of the B.N.A. Act, *viz.*, that it purports to regulate trade and commerce; also that it contravenes section 121 of the B.N.A. Act. I do not think the latter point calls for discussion. As to "trade and commerce" interference by the Provincial Legislature with the storing, packing, transporting, marketing and distribution of natural products, native to the Province and within it can be fully explained as a local function. It does not affect general trade. We were referred to the phrase "prohibition of such transportation" in section 4 (1) of the Act and to the word "transporting" in section 5 and elsewhere. This, however, is not general legislation purporting to control transportation as a railway board might control it. Transportation is affected as an incident only in the regulation and control of marketing. The Provincial Legislature could prevent the transportation, within the Province of articles injurious to health or likely to spread blight or disease. If it can regulate, within the Province, the distribution of natural products, it can, to the extent necessary to enforce its own regulations, interfere with transportation. Distribution involves transportation. Nor can immunity from

interference be obtained by a declaration of the owner that the goods are in transit to foreign parts. He may be stopped. Further an official properly authorized, doing so would not be doing an act in relation to interprovincial trade. The right of a Provincial government to regulate a fleet of trucks as to speed, weight, etc., could not be disputed on the ground that they were engaged only in transporting products from one Province to another. That would not be an interference with trade and transportation. Provincial legislation in respect to, or in relation to, property and civil rights and to matters of local concern is valid although it might affect interprovincial trade. It would not be legislation in relation to interprovincial trade.

It was submitted that the definition of "Natural product" in section 2 includes agricultural and other products produced anywhere in Canada. That is not so. Clearly it does not apply to Alberta wheat. This is a Provincial Act speaking with a local voice and natural products within the Province only are contemplated. The Act should be so read and construed if it is reasonably possible to do so. As often pointed out it should be assumed that the Legislature meant to act constitutionally. As long as the products remain in the Province they are subject to control by legislation in respect to property and civil rights. Once they pass beyond the boundary line control ceases. This Act, unlike the legislation considered in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, does not profess to operate extraprovincially. Regulation and control begins and ends within the Province.

The meaning of the words "regulation of trade and commerce" was discussed by the Judicial Committee in *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96, at pp. 112 and 113. While the board carefully "abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction" deciding only the point before it, they say at p. 113 that the phrase

the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with

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the power over property and civil rights assigned to the Legislature of Ontario by No. (13) of sect. 92.

The legislation under review deals with the business of particular trades within the Province. To the same effect is the judgment of the Chief Justice of Canada, approved by the Judicial Committee, in *Reference re The [Dominion] Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398. At p. 410, he said, after referring to a number of cases:

> It would appear to result from these decisions that that regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations of a particular kind of business, such as the insurance business in the Provinces, [or I would add the fruit and vegetable business] or the regulation of trade in particular commodities [*e.g.*, milk, fruit, etc.] in so far as it is local in the provincial sense.

As intimated the legislation we are concerned with on this reference differs materially from the Act considered in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction, supra.* It was held to be legislation in respect to trade and commerce because it purported to regulate the conduct of people (and of trade) beyond the Province. That is abundantly clear from a perusal of the Act and the judgment of the Chief Justice of Canada. Our legislation deals with matters of local and Provincial import only.

Strong support may be found in the judgment of the Chief Justice of Canada reported in [1936] S.C.R. 398, at p. 410 *et seq.* for the view, having regard to the terms of the Dominion Marketing legislation, considered in *Reference re The [Dominion] Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, and comparing it with the legislation under review, that the latter legislation is *intra vires* of the Provincial Legislature. I refer without quoting it to the last paragraph on p. 411, continuing on p. 412. The section 4 (1) (*a*) and (*f*) referred to will be found at p. 404. It bears a close resemblance to sections of our Provincial Marketing Act. Lord Atkin too, in delivering the judgment of the Judicial Committee on the same Act, 53 T.L.R. 330 at 331; ([1937] 1 W.W.R. 328, at 330) said:

There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province and have no connection with interprovincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in section 91 [and it was not] must be beyond the competence of the Dominion Legislature.

This language is susceptible of literal application to the Act under review. Lord Atkin said further at p. 331:

Emphasis was laid upon those parts of the Act which deal with interprovincial and export trade. But the regulation of trade and commerce does not permit the regulation of individual forms of trade and commerce confined to the Province.

Then follows an extract from the judgment of Duff, C.J., quoted with approval. Lord Atkin finds that "there is no answer to the contention that the Act in substance invades the Provincial field" (p. 332). When therefore we have a Provincial Act stripped of the extraprovincial features considered by the Supreme Court of Canada in the *Lawson* case, *supra,* dealing solely with regulation and control of natural products within the Province, in the light of the views referred to, there can be little, if indeed any doubt at all, as to the competency of the Provincial Legislature to pass this Act. With too "a totality of complete legislative authority" in the two legislative bodies Federal and Provincial it would be strange indeed if, with the fate of the Dominion Act before us dealing with the same subject-matter, this legislation should also fail, more particularly, as in my opinion at all events expressed with deference to other views, the Provincial Legislature was careful not to leave "its own sphere and [encroach] on that of the other" (p. 332).

In my view the only ground—although I do not think it is a sound one—upon which this legislation could possibly be regarded as invalid is stated by Mr. Tilley in his argument in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.,* [1933] A.C. 168, at 171. He submitted that "a province cannot legislate to regulate a trade which may pass outside the province." These regulated products in many instances do finally pass beyond the Province to find a market but there is no interference beyond the boundary line. No effect was given by the Judicial Committee to this submission although it should be added that it was not necessary to do so.

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(4) A final point raised at the Bar calling for discussion was that regulation by licensing is not permissible. This feature of the Act was attacked on the ground that the power given to boards to fix and to collect licence fees amounts to the levy of an indirect tax. I do not agree. I think too we have gone a long way in reaching a conclusion on this point if we are right in the view that this legislation is *intra vires,* affecting property and civil rights and not "the regulation of trade and commerce." "Licences in their primary function" may be "instrumentalities for the control of trade—even local or provincial trade" (Duff, C.J., in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357 at 364). This decision was relied upon by Mr. *Hossie.* We must in applying the views of the Chief Justice in this decision where reference is made to levies remember that he is speaking in reference to an Act, *ultra vires* of the Province. On the same page his Lordship said:

> The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade.

In other words levies were used as a means to that end.

The parts of the Act in reference to licensing are found in section 5 reading as follows:

> 5. Without limiting the generality of any of the other provisions of this Act, the Lieutenant-Governor in Council may vest in any Provincial board any or all of the following additional powers:—
>
> (*c.*) To require any or all persons engaged in the production, packing, transporting, storing, or marketing of the regulated product to register with and obtain licences from the board:
>
> (*d.*) To fix and collect yearly, half-yearly, quarterly, or monthly licence fees from any or all persons producing, packing, transporting, storing, or marketing the regulated product; and for this purpose to classify such persons into groups, and fix the licence fees payable by the members of the different groups in different amounts; and to recover any such licence fees by suit in any Court of competent jurisdiction:
>
> (*e.*) To cancel any licence for violation of any provision of the scheme or of any order of the board or of the regulations;
>
> (*j.*) To use in carrying out the purposes of the scheme and paying the expenses of the board any moneys received by the board.

It will be observed that the licence fee is required from "persons" and is not levied on commodities. In one aspect at least, it is an incident in regulation and control. Compulsory regulation and control cannot be carried out without a system of

licensing or some other similar plan. As an incident too revenue is obtained for the board.

Mr. *Farris* referred us to the views expressed by the Chief Justice of Canada in *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398, at 411. The difficulty was that his Lordship in the *Lawson* case, in the extract quoted in referring to licences as instrumentalities for the control of trade added the words "even local or provincial trade" implying as Mr. *Hossie* submitted that a system of licences as instrumentalities for the control of even local or provincial trade would be *ultra vires* of the Province. As stated the words must be read in reference to the character of the Act considered. He used this phrase too in considering the application of section 92 (9) of the B.N.A. Act. In any event in the case referred to in [1936] S.C.R. at pp. 411-12, the Chief Justice, after referring to *Hodge* v. *The Queen* and stating that a Province may regulate by a local licensing system the trade in liquor, said:

It does not seem to admit of serious dispute that, if, regards natural products, as defined by the Act, the provinces are destitute of the powers to regulate the dealing with natural products in respect of the matters designated in section 4 (1) (*a*), the powers of the provinces are much more limited than they have generally been supposed to be. If this defect of power exists in relation to natural products it exists in relation to anything that may be the subject of trade. Furthermore, if the Dominion has power to enact section 4 (1) (*f*), as a provision falling strictly within "the regulation of trade and commerce," then the provinces are destitute of the power to regulate, *by licensing* [the italics are mine] persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities.

Section 4 (1) (*f*), of the Dominion Act found at p. 404 of the report and referred to in this extract is a licensing section. His Lordship, I think, clearly indicates that the Provinces have the right to regulate "by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage . . . , in an exclusively local and provincial way."

I stated that a power to license appears to be inseparable from the compulsory regulation of the buying and selling of commodities in a local and provincial way and while the extract referred to is not a decision on the provisions of the Act under

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review, still having regard to its provisions it plainly indicates a view favourable to its validity in this respect. A Province can regulate matters clearly within its legislative powers by a system of licensing.

The judgment in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.*, [1933] A.C. 168, is of no assistance. The Court was there concerned, not with licences on individuals but with adjustment levies imposed on traders in the fluid-milk market imposed in the special manner set out in the statute and referred to at p. 173 of the report. It was levied on the products sold and entered into the price. In addition to the adjustment levies an "expense levy" was collected from farmers to meet outlays of the committee. The latter is relied upon as comparable to the licences imposed by the Act under review. That is not so. It was levied for a special purpose, not as here, for at least a double purpose, one being an element in regulation. In any event it does not follow that if the "expense levy" stood alone it would be deemed a direct tax. It fell with the adjustment levies. At p. 176 Lord Thankerton said:

It seems to follow that the expenses levies in the present case, ***which are ancillary to the adjustment levies***, must also be characterized as taxes. [The italics are mine.]

It would be, I think, difficult to justify the view that boards instituted under an *intra vires* Act to regulate local trading could not as a means of regulation and to defray expenses compel individuals concerned to procure a licence, and to adjust it in the manner provided in this Act. If a Province can regulate the marketing of its own natural products it can do all things necessary—including the use of a licensing system—to make it effective. Licensing is a common feature of many Provincial Acts. Because in *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at 837, in discussing heading (9) of section 92 it is said

that the power of granting licences is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes"

it does not follow that speaking generally a licence may not be an incident of or a necessary factor in the regulation and control of natural products in the same way that grading might be provided for as an aid in price regulation. Nor would it be material if as an additional use it provided for revenue to carry on the

work of the board. This reference by the Judicial Committee was based on heading (9) of section 91 of the B.N.A. Act.

Then it was said that this is indirect taxation. I think not. It may be said that, in some way, every licence imposed by Provincial authority on an auctioneer, fisherman or lawyer enters into the cost of some commodity or service and has a tendency to be passed on to others. That possibility does not determine the character of the levy as a direct tax. In *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario,* [1897] A.C. 231 at 237, Lord Herschell said:

It is of course possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

One must look at the primary purpose of the tax. If it is placed on a named commodity for a specified amount one knows that it is imposed, not for general purposes but in relation to an article of commerce; that it enters into its cost and must be added (or will likely be added) to the selling price. That cannot be said of every licence fee imposed on individuals. It is graduated according to the productive power of the licensee. It follows that, viewing it reasonably, it has not a tendency to enter into or to enhance the price of any product in the sense disclosed in the cases. That is not the purpose nor in fact the normal operation of the levy. It is doubtless so infinitesimal, having regard to the total volume of trade, that no thought is given first to estimating it, and second to adding it to the price. These licence fees in substance for "the nature of the tax is one of substance" (*Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561 at 566) are demanded from the person intended to pay it without expectation or intention to indemnify himself at the expense of another. It may be of some assistance to point out that Viscount Haldane in the case just referred to, in agreeing with the Supreme Court of Canada that the tax on contracts made for the sale of grain for future delivery was an indirect tax said in support of that view at p. 567: "The tax is not a licence tax."

It follows that I would answer the question submitted in the negative. It is wholly *intra vires* of the Provincial Legislature.

Question answered in the negative.

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April 21, 28.

THE TORONTO GENERAL TRUSTS CORPORATION *ET AL.* v. SHEPPARD.

Insurance, accident—Beneficiary—Designation of—Condition 19, Insurance Act—Designation by will—Change of beneficiary—Instructions to insurer not carried out—Letter from insurer to beneficiary—Inferences—Interpretation of statutes—B.C. Stats. 1928, Cap. 19, Sec. 7.

In May, 1936, D. S. deciding to take out an accident-insurance policy, instructed the insurer's agent to have the defendant named as the beneficiary and the agent so instructed the insurer, but the policy was made out for the benefit of the insured himself. On receiving it he handed it to the defendant without noticing the error but the defendant noticed it and called his attention to it, when he said he would attend to the matter. Later she received a letter from the insurer advising her that she was named as the beneficiary. D. S. was killed in an accident in June, 1936. In his will (executed in August, 1926) was the following clause: "I hereby declare and designate my wife and children to be preferred beneficiaries of all and any life and accident insurance policies now or hereafter taken out by me upon my life, or payable in respect of my death," etc. Condition 19 of the statutory conditions included in all accident policies reads: "Where moneys are payable under this policy upon the death of the insured by accident, the insured may from time to time designate a beneficiary, appoint, appropriate, or apportion such moneys, and alter or revoke any prior designation, appointment, appropriation or apportionment."

Held, that the Court must infer that the letter from the insurer notifying the defendant that she was named as the beneficiary was written as the result of the insured's pointing out that his instructions had not been carried out and that he did make a declaration constituting her the beneficiary.

Held, further, that a designation of a beneficiary in the event of the death of the insured can be made by will or by word of mouth. The will in question did make such a designation with reference to the particular policy in question but there was a specific declaration made after the will with respect to this policy, and said later designation of the defendant altered effectively in her favour the designation made by the will. The defendant is therefore entitled to the proceeds of the policy in question.

Where the provisions of two Acts have to be considered in deciding an issue, that construction is to be preferred which will allow effect to be given to all the provisions of both Acts as against the construction which necessarily involves a nullification of an important provision of one of them, particularly where as in the present case, the one Act is general in its scope whereas the other deals specifically with the particular matter under consideration.

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THE TORONTO GENERAL TRUSTS CORPORATION *v.* SHEPPARD

ACTION to determine which of two claimants is entitled to payment on an accident-insurance policy taken out by James Duff Stuart, deceased, on the 13th of May, 1936, in the Travelers Insurance Company. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 21st of April, 1937.

Hossie, K.C., and *Ghent Davis,* for plaintiffs.
Bull, K.C., for defendant.

Cur. adv. vult.

28th April, 1937.

MURPHY, J.: The late James Duff Stuart was killed in an accident which occurred in June, 1936. At the date of his death he had an accident policy current. It had been taken out on May 13th, 1936, and ran for 120 days. It provided for a money payment in case, *inter alia,* he met his death by accident. The deceased had for an unascertained time previous to his death carried similar accident policies in the same company—the Travelers Insurance Company. Each of the policies ran for 120 days but there was no right of renewal, hence the policy of May 13th, 1936, was a new contract. The agent of the insurance company, who dealt with the deceased in connection with these policies, was Perdue, Jr. He, however, was absent from Vancouver during the early part of May, 1936, and his father Perdue, Sr., who was also an agent of the Travelers Insurance Company, was looking after his son's business. Shortly before May 13th, the date when the then current policy would expire, Perdue, Sr. got in touch with the deceased and asked him if he desired to renew the policy. The deceased instructed Perdue, Sr. to renew it and to have defendant Mrs. Sheppard named as beneficiary. Perdue, Sr. so instructed the office of the insurance company and the policy was made out and given to him and by him handed or sent to the deceased. The policy as made out did not conform to the instructions of the deceased inasmuch as it did not make the defendant the beneficiary thereunder but was made out for the benefit of the deceased himself. Why this happened is not explained. Perdue, Sr. surmised in his evidence

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that it was because the insurance company would not issue policies for specific beneficiaries but this surmise is of course of no evidentiary value and it seems to be erroneous as appears from the letter dated May 22nd, hereinafter referred to. The deceased shortly after receiving the policy handed it to the defendant Mrs. Sheppard. He did this in my opinion because he believed she was named as beneficiary therein so that she might have the document in her possession in the event of the policy becoming a claim. He had given her several of the previous policies whilst they were current. She produces two being the policies in force immediately previous to the one in question herein. Both of these contain an endorsement making loss payable to her in case of a claim arising thereunder but one only of these endorsements is signed by deceased. Immediately the deceased handed her the policy in question herein defendant noticed that it did not contain any similar endorsement. She called his intention to this fact and he said he would look after it. She next received from the insurance company Exhibit 5, reading as follows:

May 22, 1936.

Mrs. May L. Sheppard
975 Chilco Street
Vancouver, B.C.

Dear Mrs. Sheppard:

This is to advise that you are nominated as the beneficiary in connection with James D. Stuart's accident ticket No. 1148 taken out May 13, 1936. Evidently this information was omitted from the accident ticket and Mr. Duff Stuart asked that we write you advising of the beneficiary designation.

Yours very truly,
[Sgd.] G. J. Dring.

How this letter came to be written is not proven but I think a Court is bound to infer that it came into existence as a result of the deceased having pointed out to the insurance company that his original instructions in reference to the policy had not been carried out and had requested that the matter be set right by making the defendant the beneficiary of the policy. As stated the deceased came to his death as the result of an accident during the currency of the policy and it thereupon became a claim. The defendant applied to the insurance company for payment. On August 9th, 1926, deceased had executed his will which was duly

probated after his death. In this will occurs the following clause:

TRUST DECLARATION

I hereby Declare and designate my wife and children to be preferred beneficiaries (within the meaning of the Insurance Act of British Columbia) of all and any life and accident insurance policies now or hereafter taken out by me upon my life, or payable in respect of my death (except such policies as are taken out in name of my executors of my said estate, and therein expressly stated to be for administration purposes), and I hereby nominate and appoint The Toronto General Trusts Corporation to be the trustee under the same Insurance Act to receive the proceeds of all such policies and to hold and invest the same upon the following trusts . . .

The Toronto General Trusts Corporation, as trustee, and the other plaintiffs and The Toronto General Trusts Corporation, as executors named in the will, likewise applied to the insurance company for payment of the proceeds of the accident policy because of the provisions in the will above set out. The present proceedings are taken to determine which claimant is entitled to payment. Condition 19 of the statutory conditions included in all accident policies by virtue of section 133 of the Insurance Act, 1925, Cap. 20, as enacted by the Insurance Act Amendment Act, 1928, Cap. 19, Sec. 7, reads as follows:

Where moneys are payable under this policy upon the death of the insured by accident, the insured may from time to time designate a beneficiary, appoint, appropriate, or apportion such moneys, and alter or revoke any prior designation, appointment, appropriation, or apportionment.

Two questions fall to be determined, one of fact and the other of law. It is contended on behalf of plaintiffs that defendant was never made a beneficiary under the policy because there is no proof that the deceased after it was issued, and after he knew that his instructions, as to making the defendant the beneficiary thereunder, had not been carried out, did not designate her as a beneficiary under the above provision. The argument, as I understand it, runs: Deceased knew that a policy had been issued, the benefit of which, in the case of his death, would accrue to his estate. If he desired to make the defendant a beneficiary he must do some act designating her as such and there is no proof of such act. The evidence, however, shows that his instructions were that the policy when issued was to contain a provision making her the beneficiary thereunder. Exhibit 6 shows that the omission to do so, whatever was the reason, was rectified by

the insurance company and that she was nominated as the beneficiary. If I am wrong in this view I think the Court must infer, because of Exhibit 5, that the deceased did make a declaration in favour of the defendant constituting her beneficiary under the policy. As will be seen hereafter, my view of the law is that such declaration can be made by word of mouth. Before passing to the point of law I should deal with a contention set up on behalf of defendant that the Court should hold on the evidence that deceased made an absolute assignment of the policy to the defendant. In other words, that he made a gift to her of the proceeds of the policy if it resulted in a claim. I do not think that I can do so. To bring about this result the deceased must have divested himself entirely of any control over the policy. In my view what he did was to make the defendant a beneficiary and because of the provision in the Insurance Act above cited he still had absolute control over it.

Passing to the question of law involved, the case for the plaintiffs involves I think the following propositions:

(1) A declaration under the Insurance Act can be made by will.

(2) The will adduced in evidence does make such a declaration in reference, *inter alia,* to this particular policy.

(3) A will by virtue of section 21 of the Wills Act, R.S.B.C. 1924, Cap. 274, speaks and takes effect as from the death of the testator.

(4) By virtue of condition 19 above set out the declaration in the will, since the will speaks from testator's death, is the final declaration designating the beneficiaries. These are the persons in whose favour the trust in the will above quoted is created.

I deal with these *seriatim.* I think proposition (1) is sound in law. It was urged by counsel for the defendant, not I think with much hope of success, that no declaration under condition 19 could be made by will. There is nothing in that condition setting out any requirement as to the manner in which an insured may designate a beneficiary. As stated I am of opinion that this could be done by word of mouth. An equitable assignment of a policy of life insurance for instance may be created by word of mouth: Porter's Law of Insurance, 8th Ed., 310, and

authorities there cited. That such a declaration can be made by a will is expressly decided in the case of *McKibbon* v. *Feegan* (1893), 21 A.R. 87, which is a decision on an analogous statute where moreover the statute did set forth specific requirements which had to be fulfilled to make a declaration valid. As pointed out above, condition 19 does not do so.

In my opinion proposition (2) is also correct. It might be argued that effect should not be given to general words where there has been a subsequent specific declaration made in reference to a particular policy but the words "of all and any life and accident insurance policies now or hereafter taken out by me upon my life or payable in respect of my death," etc. seems to me to be so specific, because of the introduction of the words "of all and any," that it must be held to include the specific policy in question.

As to proposition (3) defendant's counsel points out that section 21 is confined in its application to the real estate and personal estate comprised in the will. He argues that the question in the case at Bar is not what real and personal estate is comprised in the will but who is to take under the policy and cites the case of *Bullock* v. *Bennett* (1855), 7 De G. M. & G. 283; 24 L.J. Ch. 512; 44 E.R. 111, which decides that this provision of the Wills Act relates only to the property comprised in the will and not to donees taking under it. If any question arises as to who is a donee such question is to be determined by referring to the state of circumstances as they existed at the date of the will and not to the time of death. In my opinion this principle has no application to the present case. The question here is not one of who is a donee under a will. The question is which is the final declaration under condition 19 designating the beneficiary under the policy. Once that is determined the question of who takes is *ipso facto* settled. But in my opinion, if the plaintiffs had to rely upon the will alone, they would be out of Court because the policy in question at the time of death formed no part either of the real or personal estate of the deceased owing to the fact that he had before death designated a beneficiary thereof under condition 19. The case would be identical with that of a deceased having taken out a life-insurance policy

in favour of a beneficiary named therein. No one would contend that such a policy formed any part of deceased's estate at his death. In order to bring the proceeds of this policy into the estate of the deceased, plaintiffs must have recourse to condition 19 of the Insurance Act, set out above, for that is the only method whereby they can nullify the act of the deceased in naming the defendant the beneficiary under the policy. But if they have recourse to condition 19 they must I think come under the whole of its provisions. These, in my opinion, amount to a code on the subject of the rights of an insured in reference to beneficiaries. Their outstanding feature is that the owner of an accident policy may change the beneficiary thereunder at his unfettered discretion. This feature is emphasized by the history of the legislation. As condition 19 existed in the 1925 Insurance Act there were some fetters on this discretion but that condition was in the 1928 statutes struck out and a new one enacted which is the one hereinbefore set out. If it is to be held as plaintiffs contend that a deceased who has made a will containing a provision such as the one hereinbefore cited, is precluded thereafter from changing the beneficiaries so designated so long as the will stands then this outstanding feature of condition 19 is nullified. Further this result would only be brought about when the designation was made by will. If a trust, such as the one outlined above, was created in any other manner than by will such designation by virtue of condition 19 could be changed at any time by the insured. On the other hand, if it be held that the designation under the will is in the same category as all other designations in that it is subject to change by the beneficiary at his discretion then full effect can be given to condition 19 without in any way infringing section 21 of the Wills Act. Where the provisions of two Acts have to be considered in deciding an issue, in my opinion that construction is to be preferred which will allow effect to be given to all the provisions of both Acts as against the construction which necessarily involves a nullification of an important provision of one of them, particularly where, as in the present case, the one Act is general in its scope whereas the other deals specifically with the particular matter under consideration. Plaintiffs' counsel called my attention to

the fact that the Legislature itself in dealing with life-insurance policies had by section 99 of the Insurance Act expressly enacted that in reference to such policies a declaration made by will is to be deemed to have been made as at the date of the will and not at the death of the testator whereas no such provision occurs in the legislation dealing with accident insurance. This is an argument entitled to consideration but it is not conclusive. If the view hereinbefore expressed is correct then there would be no need of such legislation in reference to accident insurance. Further the provisions in the Insurance Act relative to designating beneficiaries under life-insurance policies differ widely from condition 19. I am not to be taken as holding that the legislation was necessary even in the case of life insurance. That matter is not before me and I have not considered it. It follows that in my opinion proposition (4) must be rejected. The result is that the defendant is entitled to the proceeds of the policy in question and I so hold. She is also entitled to costs against the plaintiffs.

Judgment for defendant.

SMITH v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED AND MARTIN.

S. C. In Chambers 1937 Nov. 5, 12.

Practice—Statement of claim—Amendment—Whether new cause of action set up—Application pending second trial—Lateness—R.S.B.C. 1936, Cap. 93, Sec. 5.

A statement of claim alleged that deceased came to his death because the defendant company by its servant or agent, the defendant Martin, so negligently and carelessly drove a street-car, the property of the defendant company, that it violently struck and collided with the deceased. After the trial on which the jury disagreed, the plaintiff applied for leave to amend the statement of claim by alleging that the injuries to the deceased were caused by the negligent operation of two of the defendant company's street-cars, or by negligence in the operation of one or other of them, or by the negligence of the drivers of the said street-cars, or one of them. Defendant company contended that the proposed amendments would add a new cause of action which was barred by section 5 of the Families' Compensation Act.

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Held, that the proposed amendment fell within the ambit of the endorsement on the writ and it could not be said that the plaintiff sought a new cause of action nor was it too late to allow the amendment to be made. That a trial had taken place was not a determining factor.

Held, further, that the Statute of Limitations is not a bar to an amendment which does no more than plead another fact or facts involving negligence arising out of the same set of circumstances and of the same character as that pleaded in the first instance.

APPLICATION by plaintiff for leave to amend the statement of claim. Heard by MANSON, J. in Chambers at Vancouver on the 5th of November, 1937.

Carmichael, for the application.
J. W. deB. Farris, K.C., contra.

Cur. adv. vult.

12th November, 1937.

MANSON, J.: Application for leave to amend statement of claim. The accident out of which the action arose occurred on September 24th, 1936, writ issued November 2nd, 1936. Action tried before my brother MURPHY with a jury on September 30th last. The jury disagreed. Endorsement on writ:

The plaintiff's claim is as executrix of the estate of the late John Thomas Smith, deceased, against the defendants for damages for the death of the said John Thomas Smith from injuries received caused by the negligence and improper conduct of the defendants, their servants or agents.

The statement of claim narrows down the endorsement to an allegation that the deceased came to his death by reason of the fact that the defendant company by its servant or agent, the defendant Martin, so negligently and carelessly drove or managed a street-car, the property of the defendant company, that it violently struck and collided with the deceased and thereby caused him injuries which resulted in his death.

The proposed amendments, substantially, seek to allege that the injuries to the deceased were caused by the negligent operation of two of the defendant company's street-cars instead of one, or by negligence in the operation of one or other of them, or by the negligence of the drivers of the said street-cars or one of them.

The defendant company contends that the proposed amendments involve the adding of the new cause of action and that

the new cause of action is statute-barred in point of time by the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, Sec. 5.

The object of statutory limitations is referred to by Lord St. Leonards in *Trustees of the Dundee Harbour* v. *Dougall* (1852), 1 Macq. H.L. 317, at 321, as follows:

All Statutes of Limitations have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held an important point of policy.

In *British Columbia Electric Railway Co.* v. *Pribble,* [1926] A.C. 466, at 475; 95 L.J.P.C. 51; 31 C.R.C. 418; 1 W.W.R. 786; 2 D.L.R. 865, Lord Sumner observed:

In practice a limitation is more necessary in accident cases than in cases of injury to property rights inflicted by reason of the construction or maintenance of the railway, since fraud is much more possible in the former class of action than in the latter, and after a considerable lapse of time the company has little or no chance of defending itself against a charge of causing a personal accident by the negligence of its servants.

Lightwood, in his "Time Limit on Actions," p. 3, says:

The Court, before holding a claim to be barred by lapse of time, must see clearly that the statute applies.

Lord Cranworth, L.C., in *Roddam* v. *Morley* (1857), 1 De G. & J. 1, at 23; 25 L.J. Ch. 329; 44 E.R. 622, lays down:

It [Statute of Limitations] is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment.

But as was well said by the editor of All England Law Reports in *Marshall* v. *London Passenger Transport Board,* [1936] 3 All E.R. 83:

The law does not allow the Statutes of Limitations to be circumvented by the device of bringing in a fresh claim by amendment of the pleadings in a pending action.

The question here, as in the *Marshall* case, *supra,* is whether the amendments sought to be made are such an alteration of the nature of the case as to make it in effect a new action. In the *Marshall* case the amendment sought alleged a breach of a statutory duty whereas the claim originally was one for damages for injury to the plaintiff by the negligent driving of the defendant or his servants. The Court of Appeal held that the amendment involved a new cause of action. As was said by Lord Wright, M.R., the amendment involved "a new departure, a new head of claim, or a new cause of action." He quoted Lord

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Esher, M.R. in *Weldon* v. *Neal* (1887), 19 Q.B.D. 394, at 395; 56 L.J.Q.B. 621:

If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.

While the amendments sought in the case at Bar involve no allegation of a breach of a statutory duty as in the *Marshall* case, *supra,* and while the facts in the two cases are not analogous, nevertheless the discussion of the pertinent law by the learned Master of the Rolls and his colleagues of the Court of Appeal is of distinct assistance. I quote the language of Lord Wright at p. 88:

The claim originally indorsed on the writ was for damages for personal injuries caused by the negligent driving of the defendants' servant—that is, a claim based on negligence in driving and negligence of a vicarious character; it proceeds on the liability of the defendants for their servant's default. The amendment which is proposed is based upon what I regard as something entirely different, not as a claim for negligent driving and not as a claim for breach of duty by the defendants' servant for which the defendants are liable; it is based on a claim for breach of statutory duty that may indeed be regarded as statutory negligence, . . . , but it is certainly an entirely different claim from a claim for negligent driving, and it is a claim which is not based on vicarious liability. It is a claim for breach of a statutory duty, which is a liability personal to the corporation and not capable of being delegated; but in addition to that it involves, as I read the proposed amendment, a quite different set of ideas, quite a different allegation of fact. . . . In my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries. No doubt in cases of negligence injury is the gist of the action, but it is only one element. The cause of action involved duty, breach and damage, and the proposed amendment would have set up an entirely different duty and an entirely different breach of that duty. The one remaining feature of damage, it may be, would have been the same.

I quote from the reasons of Romer, L.J. at p. 89:

The first cause of action was owing to the breach of one duty on the part of defendants. The alleged amendment proposes to charge the defendants with a breach of an entirely different kind of duty.

It cannot be said that the defendants did not have by the endorsement on the writ warning of a claim sufficiently broad

in character to encompass that which is now alleged in the proposed amendments. The statute limits only the time for the commencement of the action. The pertinent words of the section of the statute are "and every such action shall be commenced within twelve calendar months after the death of such deceased person." It cannot be said, looking to the endorsement on the writ, that the plaintiff now seeks "a new departure, a new head of claim, or a new cause of action." The proposed amendments fall within the ambit of the endorsement. The plaintiff did commence an action, within the time limited by the statute, sufficiently wide in character to warrant approval of the amendments.

But further question arises. Has the plaintiff by particularity in her statement of claim changed the situation and, so to speak, narrowed the breadth of the warning given by the endorsement on the writ? She went to trial upon that statement of claim and the defendant company had, once the pleadings were closed, no reason to believe that it would have to meet allegations with respect to the negligent operation of a second tramcar. It was pointed out in argument that the motorman of the second car might have left the defendant company's service, and that his present whereabouts might be unknown to the defendants. But the ready answer is that the motorman of the second car was by reason of his close proximity to the accident (the deceased was crossing Granville Street, Vancouver, B.C., apparently from east to west and having passed in front of a north-bound car found that he had not time to cross in front of a south-bound car and stepping back was hit by the north-bound car) an eye witness of it and therefore a material witness in any event. The moment the writ was issued the defendants had notice that the presence of the motorman of the south-bound car might be required at the trial. It indeed might well be that he would be a most material witness for the defence of the defendant Martin—as to whether he was a witness at the first trial I am unaware. The proposed amendments may be to the advantage of the defendant Martin. They do not, I think, involve an allegation of a different character from those already set up in the statement of claim. On the contrary the negligence

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now sought to be alleged is identical in character with that alleged in the statement of claim. I do not overlook that *Lancaster* v. *Moss* (1899), 15 T.L.R. 476, shows "a very strict interpretation of the rule and a very strict limitation of what is meant by a cause of action or a new cause of action," as was noted by Lord Wright in the *Marshall* case, *supra,* at p. 88. But I know of no authority which lays down so strict an interpretation of the rule as to preclude an amendment which does no more than to plead another fact or facts involving negligence arising out of the same set of circumstances and of the same character as that set up in the first instance. The proposed amendments do not set up "an entirely different duty," "quite new sets of facts" or "quite new causes of damage and injury" within the meaning of those phrases as used by Lord Wright in the passage quoted above. The purpose of the rule is not to prevent the plaintiff amending, but to prevent the plaintiff amending to the prejudice of the defendant by setting up a claim new in character and of which the defendant had no warning within the statutory time. The warning required is warning of the "nature" of the claim, not of the "facts in support." "Facts in support" are a proper subject-matter for amendment. The conclusion, in my view, is inescapable that the question raised at the opening of this paragraph must be answered in the negative.

One other point—should the amendment be allowed at this late date? Lopes, L.J. in *Weldon* v. *Neal, supra,* at p. 396, made this observation:

> I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, *viz.,* that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side.

In *Des Brisay and Bulwer* v. *Canadian Government Merchant Marine Ltd.* (1936), 51 B.C. 396, the Court of Appeal of this Province approved an order giving leave to amend a statement of claim almost three years after the pleadings in the action had been closed. Many illustrations might be had of leave to amend

being granted at a very late date. Nor do I think that the incident of a trial having taken place is a determining factor.

There will be leave to amend as asked. Costs to the defendants in any event.

Application granted.

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MURRAY v. DISTRICT OF WEST VANCOUVER.

S. C. 1937 July 21, 28.

Damages—Construction of drain on highway—Augmented flow of water resulting—Constitutional law—Supremacy of Parliament—Construction of statute.

The cardinal principle of both the British and Canadian Constitutions is the supremacy of the Parliament or of a Legislature acting within the ambit of its powers. Where, therefore, the language of a Legislature admits of but one interpretation, effect must be given to it whatever be its consequences.

ACTION by plaintiff for damages resulting from the augmented flow of water on her lots, owing to a ditch constructed by the defendant municipality on Palmerston Avenue, West Vancouver. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 21st of July, 1937.

McAlpine, K.C., for plaintiff.
Stockton, and *Robson,* for defendant.

Cur. adv. vult.

28th July, 1937.

MURPHY, J.: Plaintiff is the owner of three lots—14, 15 and 16, fronting on Lawson Avenue, situate within the boundaries of defendant municipality. A small stream, known as Marr Creek, flows through a portion of lot 14 and lot 15. The land north of plaintiff's property, through which this stream flows, rises steeply to Hollyburn Ridge. Marr Creek therefore makes a precipitous descent from its source and may be properly called

a mountain stream. Four blocks north of Lawson Avenue and running parallel with it is Palmerston Avenue, likewise situate within the corporate limits of the defendant municipality. In the summer and fall of 1933 the defendant municipality constructed on Palmerston Avenue a ditch, some 1,800 feet in length, for the purpose of draining said Palmerston Avenue. The ditch led to a flume which in turn carried water collected by the ditch into said Marr Creek. Plaintiff claims that her property has been damaged by erosion caused by the augmented supply of water received from said ditch and asks damages and an injunction restraining defendant municipality from continuing to pour the water collected in said ditch into Marr Creek. The writ herein was issued on January 31st, 1935. Defendant municipality *in limine* pleads that plaintiff's action is not maintainable relying on section 299A of the Municipal Act, R.S.B.C. 1924, Cap. 179, as enacted by B.C. Stats. 1936 (Second Session), Cap. 37, Sec. 18, assented to November 20th, 1936. Said section reads:

299A. No action arising out of, or by reason of, or in respect of the construction, maintenance, operation, or user of any drain or ditch authorized by section 297, whether such drain or ditch now is or is hereafter constructed, shall be brought or, if already brought, be maintained in any Court against any district municipality.

Section 297 therein referred to was likewise re-enacted at the same time and reads:

297. Each district municipality shall have the right and shall be deemed to have had the right since its incorporation to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient natural waterway.

I find it proven that the defendant municipality is a district municipality within the meaning of the Municipal Act; that Palmerston Avenue is a legal public highway; that the ditch in question is constructed on said Palmerston Avenue; that the excess water complained of by the plaintiff comes from said ditch. In addition I accept *in toto* the evidence of Conway, a witness for the defence. I find that there is no feasible way to collect water from Palmerston Avenue other than by the ditch in question and that the most convenient natural waterway in which to discharge the water from said ditch is said Marr Creek. It

follows, in my opinion, that section 299A aforesaid is a bar to this action and the same must be dismissed.

It was argued on plaintiff's behalf that to have this effect said section must be held to have a retroactive effect, which of course is true, and many cases were cited to show that the Court leans strongly against such construction. In each case, however, is to be found the qualification that if the language of the Legislature is clear and unequivocal, showing that the Legislature intended the legislation to be retroactive, then effect must be given to such intention. I can place no other construction on the phrase "if already brought" than to hold that section 299A applies to the case at Bar.

It was also strongly urged on plaintiff's behalf that said hereinbefore cited sections, coupled with section 298 of the Municipal Act, work grave injustice on the plaintiff—in fact deprive her of any remedy whatsoever no matter how well founded her case may be. Again many cases were cited to show that the Court in construing statutes will endeavour, if possible, to avoid unjust consequences. Yet in each of such cases also it will be found that the power of Parliament to pass even what might be considered unjust legislation is unimpeachable provided the language used is open to no other construction than one which would have such effect. The language of the section cited can only be construed in my opinion as barring this action. No question of this legislation being *ultra vires* arises since it is clearly within the ambit of the powers of the Legislature. The cardinal principle of both the British and Canadian constitutions is the supremacy of Parliament or of a Legislature acting within the ambit of its powers. Where therefore the language of a Legislature admits of but one interpretation effect must be given to it whatever be its consequences. I hold that is the situation here and so must dismiss the action. I was asked to assess damages in any event. I could not do so without making a close study of a transcript of the evidence bearing on this phase of the case. To obtain such transcript would mean expense which would be thrown away if my view of the law is correct.

Action dismissed.

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March 12, 13.

REX v. MOLLAND.

Criminal law—Practice—Sentence—Leave to appeal—Adequate reasons—Criminal Code, Secs. 1013 (2) and 1022.

Adequate reasons must be advanced before leave to appeal from sentence will be granted.

Rex v. *Le Court* (1936), 11 M.P.R. 133, applied.

APPLICATION for leave to appeal from sentence upon a conviction by MANSON, J. on a charge of inciting to riot. Heard by MARTIN, C.J.B.C. in Chambers at Vancouver on the 12th of March, 1937.

Lucas, for the application.
J. A. Russell, K.C., for the Crown.

Cur. adv. vult.

13th March, 1937.

MARTIN, C.J.B.C.: After a careful consideration of this application I can only reach the conclusion that "adequate reasons" have not been advanced in favour of it and therefore it should not be granted—*Rex* v. *Le Court* (1936), 6 F.L.J. 213; 11 M.P.R. 133. The case presents itself as one more appropriately to be addressed to the mercy of the Crown (Criminal Code, Sec. 1022) when matters may be taken into consideration which are not open to this Court.

Application refused.

J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY.

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July 13, 20.

Motor-vehicles—Arterial highway—Collision at top of hill—Car turning to left into gas-station—Negligence going too slowly—Not amounting to contributory negligence—Too high speed on hill-top after slow sign—Damages.

The point of impact in a collision between two automobiles was the entrance to a gas-station at the top of a hill on the north side of the Pacific Highway about nine miles south-east of New Westminster. G., driving south-east, slowed down as he approached the gas-station, and as he turned to the left across the line of traffic of north-west bound cars, to enter the gas-station, he was going at six or seven miles per hour. The defendant B., coming up the hill from the south-east in his car at about 45 miles an hour, ran into the right front corner of G.'s car when the nose of the car was over the northerly edge of the pavement. The accident took place at 4.35 p.m. on the 8th of December, 1936. It was a dull day and dusk at the time. G.'s lights were on, but in turning into the gas-station he did not give the hand signal and neither driver sounded his horn. There were "slow" signs a short distance away on both sides of the gas-station.

Held, that G. was guilty of negligence in crossing adverse traffic on the highway at too slow a speed and of minor negligence in not using his horn, and that B. coming up a hill with a turn at the brow of the hill, with which he was familiar, was travelling at an excessive rate of speed without keeping such an alert look-out as the circumstances demanded. He should have seen the warning sign below the hill and in these respects he was guilty of negligence. G.'s negligence, though reprehensible, did not contribute to the accident in the legal sense, it was the negligence of B. that really was responsible for the accident.

CONSOLIDATED ACTIONS for damages for alleged negligence of both drivers in an automobile collision. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 13th of July, 1937.

Clyne, for J. W. Bailey, plaintiff in first action.

Bull, K.C., and *Merritt*, for Grogan, defendant in first action and plaintiff in second action.

McAlpine, K.C., and *J. L. Farris*, for G. R. Bailey, third party in first action and defendant in second action.

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MANSON, J.: The consolidated actions arise out of the collision of a motor-car driven by George R. Bailey and one driven by Grogan. The following facts are conclusively established: George R. Bailey—his brother John with him in the front seat in a 1935 Terraplane sedan—*en route* from Everett, Washington, to Vancouver, B.C., on the afternoon of December 8th, 1936, on the international coast highway known as the Pacific Highway; Grogan *en route* homeward from Vancouver in a 1929 Ford coupe; place of accident—vicinity Wander In Service Station on north side of highway about nine miles south-east of New Westminster and at top of hill rising from Fry's Corners south-east of the service-station towards the north-west; point of impact—four feet south-east of the north-westerly end of the culvert at the entrance to the service-station; hour of accident—approximately 4.35 p.m.; weather—midafternoon some rain, none at time of accident; visibility—very dull day and dusk at time of accident; pavement—concrete, slightly damp, eighteen feet wide, medial line painted, gravel shoulders; grade—from a point several hundred feet north-west of the service-station to a point 50 feet north-west of the medial point of the Meridian Road which intersects the Pacific Highway, a downward grade of 1.2 per cent.; from the last-mentioned point across Meridian Road in all for an approximate distance of 215 feet a downward grade of 7.9 per cent.; thence by the end of Serpentine Road for a distance of 300 feet or more a downward grade of 2.8 per cent. gradually increasing into a downward grade of 8 per cent. for several hundred feet farther. The hill south-east of the Meridian Road intersection is 1,100 or 1,200 feet long. A ditch parallels the highway on the north side, north-west of the service-station and enters a gravel-covered culvert just north-west of the north-west entrance of the service-station; signs—at the foot of the hill on the right-hand side is a standard public works department slow sign with the word "slow" in large letters and a marking thereon indicating a double curve—this for the guidance of north-west bound traffic; at a point about 250 feet north-west of the westerly entrance of the Wander In Service Station is a similar slow sign against

south-east bound traffic; signals—neither driver sounded his horn. Grogan did not give a hand signal intimating his intention to make a left turn into the service-station. I accept Exhibit 1, as filed, as accurate. I accept Exhibit 3 as a true photograph of the scene of the accident at the time thereof. I accept Exhibits 5 and 6 as true photographs of the cars involved in the accident as they appeared after the accident, subject to the fact that they had been moved prior to the photographs having been taken.

In making further findings of fact one is confronted with the usual contradictions in evidence, the indication that considerable of the testimony is reconstruction and not recollection, and some unusual contradictions in evidence. The accident was one which clearly ought not to have occurred but the fixing of the responsibility therefor gives considerable difficulty. There were several witnesses whose evidence was, or ought to have been, disinterested. One, Brown, was standing in front of a telephone-pole which stands to the north of the pavement between the pavement and the gas-pump at the service-station (*vide* Exhibit 3). Brown was obviously not a particularly close observer. I am satisfied that he was twenty-five to thirty-five minutes out in his estimate of the time of the accident. He saw the Bailey car as it came over the brow of the hill and says the lights were on on the Bailey car. He says that he saw the Grogan car as he turned his eyes from the left to the right following the Bailey car, and that the point of impact was at the point "B" as marked on Exhibit 3. I think he is approximately correct as to the point of impact. From what he saw he anticipated that the Bailey car was going to hit the Grogan car on the right-hand side, which it did. He does not know whether the lights were on on the Grogan car or not, nor could he estimate the speed of the Grogan car. He admitted that shortly after the accident he estimated the speed of the Bailey car at 45 miles per hour; at the trial his estimate was 40 miles per hour. He could not say that the left front wheel of the Grogan car was not on the gravel at the time of the impact. He says that the Bailey car was about halfway from where it passed him to the point of impact when it obscured the Grogan car. He says that it was still raining a little. It

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clearly was not. One, William Bray, an attendant at the gas-station, says that the lights were on on the Grogan car after the accident and that he personally switched them off, and that there were no lights on the Bailey car after the accident. Mrs. Bray, the wife of the last named witness, was in the service-station when the crash occurred. She heard it and went out. She says that J. W. Bailey was then standing up, that George was assisting him to walk into the service-station. She says that J. W. Bailey was conscious, further that George made the statement that he had the only witness, namely Brown who was outside, and that his brother was asleep in the car. She says that George Bailey asked Grogan if he was insured, to which Grogan replied in the affirmative; that Grogan then asked George Bailey if he was insured, to which the latter replied evasively by saying that he would let his solicitor look after the matter. She says that both John W. Bailey and Grogan were groggy and she says definitely that George Bailey did not say to Grogan "He [J. W.] is asleep, thanks to you." John R. Combs, the owner of the Bailey car, having been called on the 'phone arrived at the service-station before the parties had departed. He states that Grogan came out of the service-station while he was talking to constable Mortimer, that he asked Grogan the cause of the accident, that Grogan said he did not know because he did not see Bailey at all. G. R. Bailey both before and after the accident was in Combs's employ. There were two occasions prior to the trial upon which Combs could have given his rather important evidence as to statements allegedly made by Grogan. He did not give evidence on either of those occasions. He says that he mentioned his conversation with Grogan to George Bailey shortly after the accident, in the hospital, and again just a few days before the trial of this action. The evidence of Combs is flatly contradicted by constable Mortimer, who says that he was with Combs from the moment of his arrival at the scene of the accident until he left, and during the whole of the time that Grogan was with the two of them. I accept without hesitation the evidence of constable Mortimer and of Grogan as to the alleged conversation between Combs and Grogan, and I find as a fact that Grogan made no statements whatsoever to

Combs explanatory of the accident. Constable Mortimer arrived at the scene of the accident about ten minutes after its occurrence. The constable is an experienced officer, he has had to do with many accidents, and he impressed me as being fair and accurate in his observations. He fixes the point of impact at three feet north of the northerly edge of the pavement and four feet east of the mouth of the culvert near the westerly entrance to the service-station. He does so by reason of the fact that he found a gauge or scoop in the gravel 18 feet in length paralleling the northerly edge of the pavement and leading to the left front wheel of the Grogan car. He found grass and red dirt along the scoop line and gravel and grass embedded between the tire and the rim on the wheel of the Grogan car. I accept the constable's evidence as to the point of impact. He states further that the lights were not on on the Bailey car other than the stop light; that the left head-light was on on the Grogan car at dim. It was urged that Bray in his evidence had stated that he had turned the lights off on the Grogan car before the arrival of the constable and that the constable must therefore be in error. My notes do not indicate that Bray especially stated when he had turned the lights off. In any event I am entirely satisfied upon the evidence that the lights were on on the Grogan car. Grogan says that he did not give the hand signal for his turn into the service-station by reason of the fact that it was so dark that it could not have been seen even if he had. That it was dusk is agreed by all the witnesses but I cannot arrive at a conclusion upon the evidence as to whether dark had so far advanced as to prevent a hand signal being seen by an on-coming car. In passing I only observe that drivers are well advised to give a hand signal at all hours of day and night—in other words, it is the part of wisdom to err on the safe side. When the cars came to rest they both had their front wheels in the ditch to the north-west of the service-station and were two or three feet apart and at right angles to the pavement. Grogan says that he was travelling as he came along from Westminster about 25 miles per hour, that several hundred feet from the gas-station he slowed down to about 12 miles per hour, that as he crossed the northerly half of the pavement in his turn into

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the service-station his speed was further reduced to six or seven miles per hour. The Pacific Highway is an arterial highway and quite a busy one. Highways are created arterial to speed up traffic, and on straightaway stretches speeds of from 40 to 60 miles per hour are not unusual, and with modern cars well tired a speed of even 60 miles per hour is not necessarily dangerous. Vehicles crossing adverse traffic on arterials should do so with the very greatest caution. The fact that a highway is arterial is a circumstance which every user of the highway should take into account. To cross adverse traffic at six or seven miles an hour amounts to negligence unless it be that the driver has a clear view for a considerable distance. It was dusk, and unless the adverse car was lighted Grogan could not have had a clear view even when 75 feet west of the point of impact of more than 350 feet. In actuality upon the occasion in question Grogan probably had not a clear view of the Bailey car from a point 75 feet west of the point of impact of more than 325 feet. He says that when he first saw it he just detected its dim outline, and that when he commenced to make his turn the Bailey car was still approximately 200 feet distant. Constable Mortimer's recollection is that Grogan told him that he did not see the Bailey car until after he had started to make the turn. George Bailey says that he was within two or three car lengths of Grogan —in other words 40 to 50 feet from him, when Grogan commenced his turn across the medial line, and in this he is borne out by his brother. Upon consideration of the whole of the evidence I have definitely more confidence in Grogan's account of what occurred than I have in the account given by the Bailey brothers. Grogan's evidence was more specific in almost every respect than that of the Baileys, and where the post accident facts served as a check on the accuracy of the testimony given, these facts confirmed the evidence given by Grogan to a much greater extent than they did the evidence given by the Baileys. The Grogan car was hit on the right front corner when its nose was over the northerly edge of the pavement and at the time when probably either one or both of its wheels were actually off the pavement. He would traverse approximately 22 feet in making the turn. If his average speed in making the crossing

was eight miles per hour it would take him 1.41 seconds, or if his average speed was nine miles per hour his crossing would take him 1.16 seconds. In 1.25 seconds—upon the assumption that Grogan was travelling at an average rate of speed across the pavement of eight or nine miles per hour—Bailey at 45 miles per hour would travel 82½ feet. If Bailey was distant, when Grogan started to make his turn, approximately 200 feet, as I conclude he was, he should have been able to bring his car to a full stop in not more than 125 feet, and of course it would not have been necessary for him to bring his car to a full stop, it would have only been necessary to slow it down to such a speed as would enable Grogan to complete his crossing. Both Grogan and Bailey in the circumstances, had they been wise, would have used their horns—Grogan to draw Bailey's attention to the fact that he was about to manœuvre from his position, and Bailey to draw Grogan's attention to the fact that he was bearing down upon him. Upon the whole of the evidence I arrive at two conclusions that are material: First, Grogan in the circumstances was guilty of negligence in crossing adverse traffic on the highway at too slow a speed, and of minor negligence in not using his horn. Secondly, Bailey in the circumstances, coming up a hill with a turn at the brow of the hill with which he was familiar, was travelling at an excessive rate of speed and without keeping such an alert look-out as the circumstances demanded, and in these respects he was guilty of negligence. It is the part of wisdom to never come over the brow of a hill on a highway at a high rate of speed. There may be an intersection at the brow of the hill as there was in this case, or there may be a service-station into which the public have a right to turn, as there was in this case. Furthermore if Bailey had his lights on as he says he did he should have seen the warning slow sign, and even if his lights were not on he knew he was coming up a steep hill. Grogan had not the advantage of a modern high-speed car with quick pick-up and powerful brakes, nevertheless he had a right to be on the highway and he had a right to make the turn, providing always he exercised caution.

While both drivers were negligent the question arises as to whether the negligence of Grogan amounted to contributory

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negligence. I am rather of the opinion that the language used by MARTIN, J.A. (as he then was) in *Perdue* v. *Epstein* (1933), 48 B.C. 115, at 118, is apposite. There, speaking of the negligence of the plaintiff, he says:

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

Reprehensible as the driving of Grogan was, in my view it was the negligence of George R. Bailey that really was responsible for the accident. Should another Court take a different view I shall assess the damages of J. W. Bailey and G. R. Bailey hereunder.

Damages: J. W. Bailey sustained quite serious injuries, George Bailey minor injuries, and Grogan serious injuries but not of so serious a character as those sustained by J. W. Bailey. In the case of J. W. Bailey damages are assessed as follows: Special damages:

Dr. R. G. Langston	$ 75.00
Dr. W. J. G. Miller—X-ray	15.00
Royal Columbian Hospital	42.76
Drs. Whitelaw and McIntosh	25.00
Dr. McQueen	185.00
Dr. F. A. Turnbull	50.00
Dr. Thompsett	150.00
Dr. Paton	75.00
	$617.76

General damages, $3,000.

In the case of Grogan damages are assessed as follows: Special damages:

St. Mary's Hospital	$ 37.75
Dr. Geo. T. Wilson	40.00
Hired man to look after farm during incapacity	23.00
Car damage	175.00
	$275.75

General damages $750.

In the case of George R. Bailey damages are assessed as follows: Special damages:

Dr. Howard Willis .... $ 4.00

General damages $25.

Judgment accordingly.

Judgment accordingly.

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Criminal law—Abortion—Evidence—Dying declaration—Admissibility.

On a charge of murder based upon the alleged acts of the accused in attempting to bring about an abortion, causing death, the evidence of deceased's husband that she told him she had of her own motion made attempts to bring about her own abortion, was withdrawn from the jury.

Held, MACDONALD, C.J.B.C. dissenting, that this evidence was admissible and as it would go directly to refute the evidence of the deceased in her dying declaration that the accused alone had done it, there should be a new trial.

The dying declaration of deceased was made on the 29th of May, 1936, and she died on the 13th of July following.

Held, McPHILLIPS, J.A. dissenting, that the dying declaration was properly admitted in evidence by the judge below on the facts before him.

Per MARTIN, J.A.: I hold, as I did in *Rex* v. *Louie* (1903), 10 B.C. 1, that the declarant herein had "a settled hopeless expectation of impending death" and therefore her declaration was properly admitted. There was a lapse of six and one-half weeks between the making of the declaration and declarant's death, but that interval does not render it inadmissible if at the time when it was made she had the said "hopeless expectation."

APPEAL by accused from her conviction of manslaughter by MANSON, J. and a jury on the 23rd of October, 1936. The charge was that of murder and arose out of an abortion. The deceased was a married woman and the servant of one Mrs. Martin, who lived on Chancellor Boulevard in Vancouver, and on the 27th of May, 1936, Mrs. Martin sent for her doctor as her servant was ill. The doctor came and after an examination he sent the servant to the general hospital. On the 29th of May she made a dying declaration implicating the accused. She died on the 13th of July.

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The appeal was argued at Victoria on the 12th to the 15th of January, 1937, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Crux, for appellant: A dying declaration must be made under a "settled hopeless expectation of death" but the evidence of the woman's state of mind does not go that far. I submit the declaration is inadmissible: see *Reg.* v. *Gloster* (1888), 16 Cox, C.C. 471 at pp. 473-4; *Rex* v. *Perry*, [1909] 2 K.B. 697; 2 Cr. App. R. 267; *Chapdelaine* v. *Regem*, [1935] S.C.R. 53 at p. 58. A glimmer of hope is sufficient to destroy the declaration: see *Rex* v. *Spilsbury* (1835), 7 Car. & P. 187 at p. 189; *Belyea* v. *Regem*, [1932] S.C.R. 279 at p. 296; *Rex* v. *Louie* (1903), 10 B.C. 1; *Regina* v. *Woods* (1897), 5 B.C. 585. The learned judge erred in telling the jury they had nothing to do with the admissibility of the dying declaration; in fact they have in final analysis: see *Rex* v. *Christensen (No. 2)* (1923), 19 Alta. L.R. 337; 21 Cyc. 985. He erred in telling the jury that if they found the accused played a part in bringing about an abortion they must convict her either of murder or manslaughter. There is evidence of deceased having taken drugs and tampering with herself.

J. A. Russell, K.C., for the Crown: The deceased was married about four months before the alleged offence. She lived for about six weeks after the dying declaration was made. The dying declaration was nevertheless properly allowed in evidence. The test is whether all hope of life has been abandoned so that the person making the statement thinks that death must follow: see *Rex* v. *Perry*, [1909] 2 K.B. 697 at p. 703; *Reg.* v. *Bernadotti* (1869), 11 Cox, C.C. 316 at p. 317; *Rex* v. *Austin* (1912), 8 Cr. App. R. 27 at p. 28; *Chapdelaine* v. *Regem* (1934), 63 Can. C.C. 5 at p. 10; [1935] S.C.R. 53; *Regina* v. *Woods* (1897), 5 B.C. 585.

Crux, replied.

Cur. adv. vult.

2nd March, 1937.

MACDONALD, C.J.B.C.: This was a case of abortion and the defendant Jean McIntosh is appealing from her conviction. A

contest arose over the evidence of the deceased given on her examination before death. The examination was taken more than six weeks before her death and it was contended that it was not a proper declaration to admit at the trial. It is true that a dying declaration should be made in contemplation of immediate death or as one judge put it death within a few days. The time elapsing before death seems to be contrary to the general practice in cases of this kind. It was also suggested that she was overawed by the crowd of people who attended to hear her testimony. There were two or three doctors, the nurse and two or three other people. The appellant was not represented, as, indeed, I believe it is not necessary that she should be, but if her solicitor had been present perhaps a different dying declaration would have been evolved. According to the evidence of the doctors her recovery was hopeless, but after the notes of the declaration were taken by the person who took them, and while he was absent from the room putting them in form, she said to the nurse "I am not going to die am I?" and the nurse gave her some consoling words, saying that she would be taken very good care of. Nevertheless when the completed document was brought into the room and read to her she signed it without any objection. The practice of taking and admitting in evidence a dying declaration is not a new one and when it is considered that as evidence it is most important one has to consider whether in the particular case the proceedings have been conducted in a fair and equitable way. In this case there is no question of the fairness of those who questioned her and the gentleman who took the evidence down but it is rather a long step between the fear of immediate death and more than six weeks which seems to me to throw a good deal of doubt upon the validity of this dying declaration. On the whole case, however, having regard to the fact that she seems never to have changed her mind and stood by her dying declaration when it was read over to her and having regard to the fact that the words "fear of immediate death" may be expanded to include some further time, I think the dying declaration was duly admissible and that the appeal must be dismissed.

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MARTIN, J.A.: Several grounds are advanced in support of this appeal from a conviction of manslaughter at the Vancouver Fall Assizes, *coram* MANSON, J., on an indictment for the murder of Phyllis Vellocette arising out of attempted abortion, and the first ground is that important evidence in favour of the accused was wrongfully rejected. It appears that in the dying declaration of Mrs. Vellocette, which was admitted in evidence, she, after saying that the accused had operated on her by putting an instrument and cotton wool into her uterus, made the statement that she "pulled it out next day" and that bleeding followed, and

I told Dr. MacLachlan when he came to see me that I had done it myself. The woman [accused] had told me to say this if I went into the hospital and anything happened.

The defence to this charge was rightly put to the jury by the learned judge thus:

The defence goes further and says this girl brought this thing on herself. She attempted to bring on an abortion by her own hand, and death was the result. I think that comprehends the defence.

The question therefore of prime importance is, was this statement true that she had attempted to abort herself? Her admission to her own doctor that she had done so would be very strong proof of it, but she sought to escape from that position by saying that she told an untruth at the instigation of the accused. In order to show that the deceased had tampered with herself the accused's counsel asked her husband on cross-examination this question:

Did your wife tell you, when you first got back to Vancouver, or around that time, that she had used a penholder on herself in order to cause an abortion or something like that? She told me she used something.

And in answer to the Court:

She told me she used something and she kind of indicated to her bag, and I was going to take the bag to see what it was, and she wouldn't let me have it.

Yes. Now when did this occur? I can't recall when. It was either the 14th or the 12th of May.

The Crown counsel conceded that these were relevant questions and answers (the time of the offence being laid "between the 6th day of May and the 14th day of July, 1936) and the evidence was received and the Crown counsel re-examined upon it, but thereafter the learned judge examined the witness at much length and, when he left the box, said to the jury:

> . . . I am going to instruct you now, as I will when I charge you, that you will disregard anything that this man said he was told by his wife, except when Mrs. McIntosh was there. . . .

The trial then proceeded and in his charge next day the learned judge twice more instructed the jury to the same effect giving as his reason that

> . . . If the deceased had said that in the presence of the accused that would be evidence, but what she is supposed to have told her husband is not evidence, for this reason, that there are no means of testing it.

And:

> We have not the girl here. The girl cannot reply. That is unfortunate, but is is not a matter that you can take into account. It is just one of the incidents of the administration of justice. We do not know what the girl [deceased] would say if she were here. We have not her evidence.

This, with respect, overlooks the fact that the Court did have the "evidence of the girl" before it in the shape of her dying declaration, and the legal result of its admission was well stated by that able judge, Baron Alderson, just a century ago, in *Ashton's Case* (1837), 2 Lewin, C.C. 147, thus:

> When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination.

For this reason it has always been open to the accused to challenge and refute the statements made against him in such a declaration, of which *Rex* v. *Bonner* (1834), 6 Car. & P. 386 is a striking example and in principle very similar to this case because there a witness was called to and did prove that the deceased had caused his own death by overturning his own cart, instead of the accused so doing, as charged in the deceased's declaration.

It is to be remembered that "the admission of such declarations is a strong exception to the rule of law that statements made behind the back of the prisoner cannot be given in evidence" because "the principle of the rule against hearsay is that it involves giving credit to the statement of a person who is not subjected to the ordinary tests required by law for testing the truth of testimony"—Russell on Crimes, 8th Ed., Vol. II.,

pp. 1917, 1923, and therefore every principle of justice requires that every reasonable opportunity should be afforded the accused to answer accusations so difficult to meet as those made by a "witness" from the grave.

In a leading case on contradicting witnesses, *Attorney-General* v. *Hitchcock* (1847), 1 Ex. 91; 74 R.R. 552, the same Baron Alderson aptly said, p. 102:

> Now the question is this, can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it, you may prove that fact, as you are at liberty to prove any fact material to the issue; and in that case, though it may not be thought necessary to put the question previously to the witness, yet it would be but just to do so.

And Baron Rolfe (later Lord Chancellor Cranworth) said, p. 105:

> . . . some line must be drawn, and I take it the established rule is, that you may contradict any portion of the testimony that is given in support or contradiction of the issue between the parties. That is clear.

In *Reg.* v. *Riley* (1887), 16 Cox, C.C. 191, on a Crown case reserved, the Court, of five judges, unanimously quashed a conviction for rape because evidence tendered on behalf of the accused to contradict the denial of the prosecutrix that she had had previous intercourse with him, was rejected; and another apt illustration of contradicting the denial of a witness respecting his former statements is *Reg.* v. *Whelan* (1881), 14 Cox, C.C. 595; and see also the case of *Reg.* v. *Macarthy* (1842), cited in Russell on Crimes, *supra,* p. 1932, note (*g*) by that eminent authority Mr. C. S. Greaves, Q.C. (*cf.* Russell on Crimes, *supra,* Vol. I., Preface, p. v.).

So it is clear that if this "witness," as she was "in practical state" (*Ashton's* case, *supra*) had been in the box she could have been "asked any question, [material to the issue] which, if answered, would qualify or contradict some previous part of that witness's testimony," (*Hitchcock's* case, *supra*) and if she denied it the fact could have been proved against her denial; the present practice in regard to the contradiction of oral statements by living witnesses is governed by section 11 of the Canada Evidence Act, but its requirements as to "designating the particular occasion," etc., cannot, of course, be applied to the dead.

It follows, therefore, that the said evidence of her husband

respecting her statements to him of her "attempts" upon herself was wrongfully rejected, and since it is beyond serious question that it would have been of substantial benefit to the accused, not only in the limited way the case was presented to the jury, but otherwise, the appeal must be allowed and a new trial directed.

By way of precaution it should be added that if her said dying declaration had been excluded from evidence, then her said statements to her husband would also have been properly excluded as being mere hearsay—*Rex* v. *Thomson*, [1912] 3 K.B. 19.

But the general rule is as stated in Roscoe's Criminal Evidence, 15 Ed., 36:

> Dying declarations are, of course, open to direct contradiction in the same manner as any other evidence; . . .

Since there is to be a new trial it is necessary to consider the objection that the learned judge should not have admitted the said dying declaration. On that point much evidence was given and lengthy arguments submitted, with corresponding lists of cases, but I see no good reason for interfering with the conclusion reached by the learned judge though I do not adopt all the reasons therefor. It is well not to depart from the standing decisions of the Courts of Criminal Appeal of this Province, *e.g.*, in *Regina* v. *Woods* (1897), 5 B.C. 585 (in which the present Chief Justice of Canada was counsel for the appellant) respecting the requirements for admission of such declarations, wherein it was held, after a review of leading authorities, that "there must be a settled hopeless expectation of death" (*per* DAVIE, C.J. 589) or, a "conviction of impending death, without any hope of recovery," (*per* DRAKE, J., 596) which is only another way of expressing the same thing, and that "the question turns upon the state of mind rather than the interval between the declaration and the death," 597. Then in *Rex* v. *Louie* (1903), 10 B.C. 1, the Full Court, including myself, adopted, almost *in ipsis verbis*, the said language of DAVIE, C.J., and held, p. 5, that:

> An Indian woman's expression "I think I am going to die," is a sufficient indication of a settled hopeless expectation of impending death.

This definition (which is exactly that adopted by Russell on Crimes, 8th Ed., 1924) should be adhered to because it has been acted on in this Province for nearly 35 years and has not been

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even questioned, much less overruled, by the only tribunal that now has power to do so, *i.e.*, the Supreme Court of Canada. The author of the definition (omitting "impending") was that great judge Willes, J., in *Regina* v. *Peel* (1860), 2 F. & F. 21-2, and it was adopted by another very learned judge, Charles, J., in *Reg.* v. *Gloster* (1888), 16 Cox, C.C. 471, 476, and by the Court of Criminal Appeal in England as the right view and as being embodied in "very clear and crisp language" in *Rex* v. *Perry*, [1909] 2 K.B. 697, 702; 78 L.J.K.B. 1034; and *Rex* v. *Austin* (1912), 8 Cr. App. R. 27, 29. In *Louie's* case, *supra*, we added the apt word "impending" as a result, probably, of Charles, J.'s observations, p. 477, so as to remove all doubt of our exact meaning, and the word has been recently adopted in the Supreme Court of Canada by Cannon and Crocket, JJ. in *Rex* v. *Schwartzenhauer*, [1935] S.C.R. 367, 372.

And it may be noted that in that sound text-book Powell on Evidence, 10th Ed., 1921, it is said, p. 72:

> The phrase now regarded as the best guide is that used by Willes, J., in *Regina* v. *Peel*, [*supra*] "a settled hopeless expectation of death."

In *Chapdelaine* v. *Regem*, [1935] S.C.R. 53, at 58, the Chief Justice said (Crocket, J. concurring) that the judge first

> must determine the question whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately.

The words "almost immediately" I regard as being essentially equivalent to "impending," which is defined in the Oxford Dictionary as "to be about to happen, to be imminent or near at hand," and it is the view of her own condition that is "entertained" by the "declarant," and not by others, that "determines the question" of admissibility of her declaration—*Regina* v. *Peel*, and *Rex* v. *Austin*, *supra*, and *Reg.* v. *Hubbard* (1881), 14 Cox, C.C. 565; and so we have this further confirmation of the "phrase" of Willes, J., and also of our former Full Court in *Louie's* case, *supra*. I therefore apply our "phrase" to this case and after a very careful consideration of all the evidence hold, as I did in *Louie's* case, that the declarant herein had "a settled hopeless expectation of impending death" and therefore her declaration was properly admitted.

It is only necessary to add that it was pressed upon us that

since the declarant did not die for six and a half weeks after her declaration, that fact alone was good cause for its rejection. But it is clear that the question of what length of time would justify rejection depends upon what is reasonable in the particular circumstances of each case, and in the present one the progress of the virulent form of blood infection that she was dying from turned out to be much slower than was expected by her physician, her unusual powers of resistance enabling her to cling to life far beyond the usual time, but there is no evidence that she ever expressed any hope of recovery after she signed the declaration, whatever the effect of that might be, if any—*cf. Rex* v. *Austin, supra*, 29; or any wish to alter it.

The general rule is well stated in Powell on Evidence, *supra*, p. 72, *viz.*:

> There appears to be no definite limitation of the time, before death, within which the declaration must be made. . . .

Many decisions support this passage: *e.g., Reaney's Case* (1857), Dears. & B. 151, wherein the Court of Criminal Appeal, on a case reserved by Willes, J., unanimously held that eleven days were not too long, saying *per* Pollock, C.B., 155-6:

> No doubt, in order to render a statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval between the declaration and the death. In this case the deceased was in such a state when he made the declaration, that it was impossible for him to recover, and, in point of fact, the statement having been made on 23rd October, he died on the 3rd of November. . . . What the surgeon said was evidently said to assist nature by encouraging the patient; but the patient himself entertained no hope, and before the constable left the room he said he could not recover.

And Watson, B., said, 157:

> The statements of the deceased show that the declaration was made under the impression of impending death.

And Wightman, J. said, pp. 156-7:

> He had no hope, though the doctor had held out hopes, and before the constable left the room he said that he could not recover. That was his own opinion of his case, and the impression on his mind was that death was impending.

In *Mosley's Case* (1825), 1 M.C.C. 97, 105, on a case reserved, all the judges held that a declaration made eleven days

before death was properly received; in *Craven's Case* (1826), 1 Lewin, C.C. 77, Hullock, B. received a declaration "although several weeks before . . . death"; and in *Reg.* v. *Bernadotti* (1869), 11 Cox, C.C. 316, Brett, J., after consulting Lush, J., admitted a declaration made nearly three weeks before death, saying, p. 318:

> The fact of his living so long would have been important if there had been any doubt as to his actual danger, but the mere fact of his lingering on would not do away with the strong conclusive evidence as to his state at the time.

The result of the English decisions up to 1933 is thus correctly stated in Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 452:

> The lapse of a considerable interval between the making of the declaration and the death of the deceased does not render it inadmissible, if at the time when it was made he had the conviction of immediately impending death.

And it is said in Roscoe's Criminal Evidence, 15th Ed., 35:

> There does not appear to be any case in which the evidence has been rejected on this ground.

There is no case in Canada, that I have found, to the contrary and therefore, in my opinion, the time in question in this case was not, under its circumstances too long to prevent the admission of the declaration.

MCPHILLIPS, J.A.: The majority opinion in this case is that there should be a new trial. I have come to almost a firm conclusion that the dying declaration is invalid, that is, that it is illegal evidence, and without the dying declaration there is no sufficient evidence to uphold the conviction and if so the appeal should succeed and the conviction be quashed. In connection with that view I would refer to *Chapdelaine* v. *Regem*, [1935] S.C.R. 53 at p. 58 where the Chief Justice of Canada said:

> First of all, he [the trial judge] must determine the question whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately. Then, he must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so it cannot properly be admitted as a dying declaration. Therefore a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

Now in this case the deceased woman lived for six and a half weeks after the making of the dying declaration and there is

evidence in which she said she was going to live between the time when the dying declaration was taken down and later written out. It is true though that when the written statement was drafted out and presented to her she nevertheless signed it, and it contained this statement—a prepared statement—not of course her words:

> 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 declaration.

The evidence is that her mind was bright and alert for six and one half weeks after she signed the dying declaration. The authorities, as I read them, would not, in my opinion, warrant the acceptance of the alleged dying declaration after such a long lapse of time. However, as the majority of the Court have come to the conclusion that there should be a new trial I do not propose to dissent from that view and I am in agreement that there should be a new trial. With a new trial had the question of whether the alleged dying declaration can be accepted as legal evidence will have to be passed upon again.

I would also refer to the case of *Schwartzenhauer* v. *Regem*, [1935] 3 D.L.R. 711. There it was held by the Supreme Court of Canada, quoting from the head-note:

> Dying declarations are competent only in homicidal cases and where the death of the deceased is the subject of the charges and then only in so far as the statements therein could have been given by the deceased had she lived. A charge of counselling or procuring an abortion from which death resulted is not one of homicide.

There the judgment of Lamont and Davis, JJ. was delivered by Mr. Justice Davis. In the judgment, at p. 711, Mr. Justice Davis had this to say:

> In the words of Byles, J. in *Reg.* v. *Jenkins* (1869), 11 Cox, C.C. 250 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.

MACDONALD, J.A.: I think there must be a new trial on the ground that material evidence was not submitted to the jury. A charge of murder was based upon the alleged acts of the accused Mrs. McIntosh in bringing about or attempting to bring about an abortion causing the death of Phyllis Vellocette, a young

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married woman. The evidence withdrawn from the jury was given by Stanley Vellocette, the husband of the deceased. He was asked this question in cross-examination:

> Did your wife tell you, when you first got back to Vancouver, or around that time, that she had used a penholder on herself in order to cause an abortion or something like that?

He replied:

> She told me she used something and she kind of indicated to her bag, and I was going to take the bag to see what it was, and she wouldn't let me have it.

No one else was present. Mr. *Russell* for the Crown did not object to this evidence. He thought it was admissible and said so. It indicated self manipulation on the part of the deceased and if that caused her death the accused would not be guilty of murder.

This conversation took place on the 12th or 14th of May, 1936, and the accused was charged with committing the crime between the 6th and 14th of that month. It will be observed that although the witness Vellocette fixed the date of the conversation with his late wife he did not say when, according to her statement, she tampered with herself. It may have occurred before the 6th of May.

The point arises—was that evidence adduced on cross-examination admissible and did its rejection affect the issue? I think it was admissible. The conviction was based upon statements made in a dying declaration by the deceased Phyllis Vellocette. The statements contained therein were inconsistent with the alleged admissions made to her husband. The jury it is evident accepted the facts outlined in the dying declaration. They were not obliged to do so; it was evidence properly before them for acceptance or rejection. They might not have accepted it if they had been permitted to consider the evidence of the husband.

The evidence of any witness may be discounted by proving inconsistent statements on another occasion. It is an admission that may be used against him. While admissions differ from confessions the alleged statement of the deceased to her husband was in the nature of a voluntary confession. It would assist the jury in assigning proper weight to the statements afterwards made in the dying declaration. It may be true that in any event

the jury would reject the husband's evidence. That, however, is conjectural. They should have the opportunity of considering it.

The dying declaration is only admissible as an exception to the usual rule on compliance with certain conditions. The evidence rejected tends to qualify, if not to destroy, the statements made therein. One can conceive of an extreme case (and it aids in determining principles that should govern) of one, without fear of death, falsely accusing another in a dying declaration. If she confided to a friend that she did so, such an admission ought to be received in evidence to assist the jury in deciding what, if any, weight should be given to the dying declaration. It is at least analogous to the rule in respect to declarations against interest. Phipson in his work on Evidence, 7th Ed., 267, states that "previous inconsistent statements" have "been received in America to impeach a dying declaration"; and again at p. 309:

In America, however, the rule is established, evidence of the declarant's bad character, inconsistent statements, or previous conviction [are] receivable.

In *In re Adams. Benton* v. *Powell,* [1922] P. 240, certain words uttered before his death by one interested under a will were held to be admissible. Horridge, J., said at p. 242:

The only ground on which it can be received is the well-known rule regarding declarations by deceased persons against their pecuniary or proprietary interest.

I think, therefore, where the guilt of the accused depends upon statements made in a dying declaration any admissions before death tending to qualify or contradict the statements made therein are admissible. *Rex* v. *Wilkinson* (1934), 62 Can. C.C. 63, and *Rex* v. *Harris* (1927), 20 Cr. App. R. 144 although not directly on the point may be referred to. In the latter case I do not, with deference, agree that the evidence referred to was, as stated, "negligible." Its weight only was affected.

The further question arises, *viz.,* did (or might) the withdrawal of this evidence from the jury vitally affect the issue? It is well to refer to other evidence on the same point, which was admitted, in deciding this question. A witness, Mrs. Padberg, testified that she met the deceased at the residence of the

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accused some time during the first or second week in May. She testified as follows:

> After she [the deceased] said she was not feeling very well she started to cry, and she said that it seemed as though everybody was having trouble now, or words to that effect, and she said that she had got herself into quite a jam or mess.

Later she (the deceased) said that "She had taken a lot of dope and some pills," and again "She had taken a pen and scraped the paint off it and used it, inserted it into herself." These alleged admissions were made by the deceased to Mrs. Padberg in the presence of the accused. They were similar to the alleged admissions made to her husband. The jury, however, apparently rejected Mrs Padberg's evidence. They doubtless found it difficult to believe that the deceased spoke in this manner to a woman she never met before. In view, therefore, of the fate of that evidence at the hands of the jury it was submitted with, I must agree, considerable justification, that the evidence of the husband would (if admitted) have also been rejected and that therefore no substantial wrong occurred.

The husband, however, is in a different position. Whatever my own view may be, I would hesitate, viewing all the facts, to take the place of the jury and decide that his evidence would, in any event, be rejected by any jury acting fairly and conscientiously. It is true that he might have approved of the operation and therefore felt inclined to protect the accused. On the other hand his intimate relations with the deceased might have led the latter to confide in him and if so one would think he would hesitate to assign a lie to a woman since deceased. While, therefore, the jury might reject (as they did) the evidence of one witness (Mrs. Padberg) testifying along similar lines, they might, on the other hand have accepted it, if, in its essentials, it was supported by the husband's evidence. I cannot therefore say that the rejection of the latter's evidence was not material.

It was submitted, however, that if the accused, notwithstanding the alleged action of the deceased in tampering with herself, had any part in the commission of the crime by aiding, counselling, or by operative work she would be guilty. Section 69 of the Criminal Code was referred to. No doubt on that aspect certain questions might arise for discussion with the jury if

they should find that both had a part in bringing about a condition having fatal results. Dependent, therefore, on the facts found by the jury, section 69 might be invoked. It cannot, however, be said that the present verdict should stand on the ground that the facts bring the accused within the purview of section 69, because it was not brought to the attention of the jury. They were not asked to pass upon facts that might bring the accused within it. Further if the jury accepted the evidence of Mrs. Padberg and of the husband of the deceased it might lead to an acquittal.

There remains the question of the dying declaration. It was submitted as death did not ensue until six and a half weeks after it was taken on that ground alone it was not admissible and the accused should be discharged. I do not agree as a question of law that the dying declaration should be rejected on that ground although it forms part of the evidence the trial judge should take into consideration in deciding upon its rejection or admissibility. We were referred to *Chapdelaine* v. *Regem,* [1935] S.C.R. 53 at 58, where the Chief Justice of Canada, discussing the principles governing the admissibility of dying declarations said: [already set out in the judgment of MCPHILLIPS, J.A.].
Attention was drawn to the use of the words "almost immediately" in support of the contention that where death followed, not "almost immediately" but six and a half weeks after the declaration it should not be received. That is not so. The Chief Justice was referring to the expectation in the mind of the deceased. If he thought he would die "almost immediately," the fact that due to certain causes he lingered for some time would not be material. The question of length of time between the statement and death as a test of its admissibility was not the subject under discussion in the extract referred to. Dying declarations have been received although several weeks elapsed before death. However, I offer no opinion as to whether or not this declaration should be received in evidence on the new trial. It is wholly a question for the trial judge to decide.

I would allow the appeal, set aside the conviction and direct a new trial.

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McQUARRIE, J.A.: I agree with my learned brother M. A. MACDONALD that this appeal should be allowed and a new trial ordered.

Appeal allowed and a new trial ordered.

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June 7, 8, 9, 10, 11; *Sept.* 24.

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Criminal law—Manslaughter—Abortion—Dying declaration—Admissibility—Accomplice—Corroboration—Evidence—Charge.

On the trial of a charge of murder based on an alleged abortion or attempts to bring about an abortion, evidence of the deceased given on an examination within one-half an hour before her death was admitted as a dying declaration. The examination commenced as follows: "Doctor: You are in full realization of the fact that you are not going to get better? Yes. Do you know what that means? Yes." A police officer then questioned her as to the facts of the case.

Held, on appeal, that the dying declaration was properly admitted.

Held, further (MARTIN, C.J.B.C. dissenting and would grant a new trial), that the learned judge in his charge placed the whole case clearly and in a complete manner before the jury and the appeal should be dismissed.

APPEAL by accused from the decision of FISHER, J. of the 7th of April, 1937, finding the accused guilty of manslaughter on a charge of murder arising out of an attempt to procure an abortion. One Helen McDowell died at about 10 o'clock in the evening of Saturday, the 27th of June, 1936. Her dying declaration, taken at 9.45 the same evening by J. E. Fraser, a justice of the peace, was as follows:

Doctor: You are in full realization of the fact that you are not going to get better? Yes.

Doctor: Do you know what that means? Yes.

Doctor: Alright, now the detective will speak to you.

Detective Copland: We as police officers wish to ask you questions. Yes.

Your name is Helen McDowell? Yes.

You live at 735 Hamilton Street? Yes.

Did you know you were in child-birth? Yes.

How long? Five weeks.

You went to see someone? Yes.

Who did you see? Miss Abbott, Seymour Street just on Georgia.

Do you remember the date you went to see Miss Abbott? It was on Friday, two weeks ago last Friday.

What did she do to you? She put a piece of cotton batting in my person.

What did it do to you? It had a pulling effect.

Did you go up again? I told her I had started to flow. She said everything was O.K. now.

Did you pay her money? Thirty-five dollars on Friday at 11 o'clock in the morning.

Was it the same day she performed the operation on you? Yes.

Did you previously make arrangements? The day before, Thursday.

Did you know Miss Abbott? I met her once at Mrs. Sinclair's.

When you interviewed her on Thursday, what was the conversation? Just that it would come right away.

You made her acquainted with the fact that you were in child-birth? Yes.

Did Bill your boy friend accompany you to Georgia Hotel? Yes.

Would you explain what happened at Georgia Hotel? A big clot of blood came out. I didn't see anything else, I fell asleep. I was awful cold. He "Bill" covered me up.

Did you see her again? Yes. I was in pain all week. I couldn't walk very little.

Is there anything else that you can recall you wish us to know? I don't think so, everything is true and just as it happened.

The appeal was argued at Vancouver on the 7th to the 11th of June, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and MCQUARRIE, JJ.A.

J. W. deB. Farris, K.C. (*Williams, K.C.*, with him), for appellant: The only evidence to connect accused with this crime is the dying declaration of the girl upon whom it is alleged the operation to bring on an abortion was made. The accused and her husband had an electric treatment and massage establishment on Seymour Street between Georgia and Robson Streets. The dying declaration was improperly admitted. She died twenty minutes after the dying declaration was taken and she had not the remotest idea that she was about to die: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 450, sec. 771; Crankshaw's Criminal Code, 6th Ed., 786; *Rex* v. *Perry* (1909), 78 L.J.K.B. 1034 at p. 1037. The statement must be made when every hope of life is abandoned: see *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1 at p. 10, and on appeal, [1935] S.C.R. 367 at p. 368; *Reg.* v. *Forester* (1866), 10 Cox, C.C. 368. Even with the admission of the dying declaration it does not support a verdict: see *Rex* v. *Mead* (1824), 2 B. & C.

605. Irrelevant matter was allowed in evidence: see *Brunet* v. *Regem,* [1928] 3 D.L.R. 822 at p. 826; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193 at p. 207; *Evans* v. *Evans* (1790), 1 Hag. Cons. 35; 161 E.R. 466; *Rex* v. *Smart* (1927), 49 Can. C.C. 75. An accessory must be corroborated in some material particular, and there is no evidence outside the declaration: see *Mahadeo* v. *Regem,* [1936] 2 All E.R. 813 at p. 817. There is no evidence outside the declaration and the evidence of the accused should be accepted: see *Seneviratne* v. *Regem,* [1936] 3 All E.R. 38 at pp. 46-8; *Rex* v. *Collinge* (1928), 40 B.C. 418 at p. 423. There should in any case be a new trial.

J. A. Russell, K.C., for the Crown: There is a sequence of events that establishes a crime. On Thursday, June 11th, there was an arrangement for the operation. On June 12th the operation took place and $35 was paid. On the 13th of June accused told deceased everything was all right. The dying declaration may be in the way of answers to questions: see *Rex* v. *Fagent* (1835), 7 Car. & P. 238. That it was properly admitted see *Rex* v. *Perry* (1909), 78 L.J.K.B. 1034 at p. 1038. She accepted the doctor's statement and died one-half hour after it was made to her: see *Rex* v. *McIntosh,* [*ante,* p. 249]; [1937] 2 W.W.R. 1; *Regina* v. *Woods* (1897), 5 B.C. 585; *Rex* v. *Louie* (1903), 10 B.C. 1 at pp. 7 and 9; *Rex* v. *Bonner* (1834), 6 Car. & P. 386; *Rex* v. *Austin* (1912), 8 Cr. App. R. 27 at p. 28; *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1 at p. 9.

Cur. adv. vult.

24th September, 1937.

MARTIN, C.J.B.C.: This case has caused us very anxious and prolonged consideration; but we have finally arrived at the conclusion that, according to the view of the majority of the Court, the appeal should be dismissed. I have the misfortune to dissent partially from my learned brothers in that I think we should direct a new trial.

We are in accord in the view that the dying declaration was properly admitted. I do not wish it to be understood that, speaking for myself only in this relation, I am entirely satisfied

with that conclusion, because much is to be said against it; but the learned judge having reached the opinion he did thereon, I do not feel strong enough in the entertainment of a contrary view to feel justified in overruling it. Then it flows therefrom, that, if there is a proper direction, we are all agreed that there should not be a new trial, because there is one statement in the said declaration which would lend some support to the view, which is the main submission of the Crown, that the uterus in this case was actually packed with cotton batting, in that a "pulling effect" resulted from what was done to the deceased as she described.

The difficulty arises, in my view, subject of course to the greatest respect for that of my learned brothers, that there was misdirection in this case, and non-direction amounting to misdirection, and improper reception of evidence.

Taking up the question of the reception of evidence first; the articles mentioned in the list of exhibits in the appeal book were tendered by the counsel for the Crown as being circumstantial evidence. It appears that the police by virtue of a search warrant had searched the dwelling-house and the office of the accused and found a number of articles (p. 290) which counsel for the Crown submitted should go in evidence; this was strongly opposed by the counsel for the accused but the Court nevertheless admitted them. At pp. 116 and 117 Mr. *Williams's* objection is repeated; and the Court then finally said to Mr. *Russell*:

Do you submit the evidence is admissible, Mr. *Russell?* Yes, my Lord, on the ground it will be of assistance to the Court as circumstantial evidence in connection with this case.

THE COURT: I allow the evidence.

I regret to say that in my opinion there was no ground whatever for the admission of any of those articles except possibly, but very doubtfully (*cf.* p. 28) the knitting-needle and bicycle spoke there referred to. I say it with respect, it was unfortunate that the safe rule in criminal cases was not followed, *i.e.,* that everything should be rigorously excluded unless it can be clearly said to have relevance to the case. It must be admitted that these articles had no relation whatever to the case (with the possible said exception), and in my opinion they tended unquestionably to confuse and prejudice the jury, and the more so seeing they

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were brought in as a result of two search warrants executed by the police. The mischief thereby created was accentuated by the fact that the learned judge pointed out, quite correctly, that the Crown's case depended upon "the aid of . . . circumstantial evidence" and yet it went to the jury without any direction in regard to these articles, when at least it should have been pointed out to them, particularly in view of the repeated strong objection that had been taken, that at the worst they were all entirely consistent with innocent use.

Then there was in my opinion misdirection and non-direction amounting to misdirection of a very serious kind upon the point upon which the whole case turned, *i.e.,* that it had become clear beyond peradventure, indeed it may be said that it was, tacitly at least, conceded, that unless the Crown could by its own medical witnesses prove that the cotton batting was actually packed within the uterus, anything short of that was simply innocuous in relevant effect and the charge could not be supported. It therefore becomes apparent that it was essential that the direction of the jury upon that point should be clear and beyond any danger of misapprehension. But unfortunately, as I regard it, particularly at pp. 275 and 276 of the appeal book, the matter was presented in such a way that the jury must inevitably have been misled. The effect of the evidence was put to them as if it turned upon a mere "suggestion" as to where the cotton batting was inserted; and reference was made to a "distinction to be drawn" between the introduction of the cotton batting into the vagina and cotton batting into the womb, and some evidence of Dr. Hunter was read to them on that point, but unfortunately the learned judge only read that portion of it which was sufficient to mislead the jury, and he omitted the crucial part which set out what the "distinction" was, and wherein the doctor showed, beyond peradventure, as I see it ("distinction" is not an appropriate word) that the essential part of the "operation" so-called was that if the cotton batting was not "placed into the womb" and "very high" up then it would have no relevant effect. The learned judge stopped without reading that, which in my opinion he should have read, and then went on to advise the jury to "recall very carefully the dis-

tinction." But if the distinction should be carefully recalled, and undoubtedly that was essential, then it should have been made quite clear to them, because, the way it was left—the effect of reading a part of the doctor's evidence and leaving out the crucial part—was to my mind very misleading. This is what the learned judge did not read:

> What is the distinction? Well, the vagina is from roughly between four to six inches in length before you come to the womb, and the womb, the neck of it, where it starts, is attached to the upper end of the vagina, and if the absorbent cotton was placed into the womb, it would have to be placed very high, and the opening in the neck of the womb would have to be opened so that you could put it in.

Now it is beyond question that that confirms what was said by the other medical witness called on behalf of the Crown, *e.g.*, Dr. Pitt: he is being cross-examined by counsel for the accused, and he is asked this question:

> In regard to this so-called cotton batting, if cotton batting had been placed in the vulva of a female, which is the outside lips that cover the vagina, it would cause no harm? I wouldn't think so.
>
> If it had been inserted with the fingers over the mouth or into the mouth of the vagina it would cause no harm? No, I wouldn't think so.
>
> In order to cause any harm it would have to be a very extraordinary proceeding, that is, I submit, it would have to be packed in with some sort of instrument? You mean into the womb itself?
>
> Into the womb itself? Yes, I should think you are right.

So it is to be seen that so far as any miscalled "suggestion" or "distinction" is concerned the jury were not instructed as to what exactly they must pass upon, and the only conclusion that I can reach, with regret, is that they were in that vital respect not only inadequately directed but misdirected and left in a state of mind which was inevitably seriously prejudicial to the accused.

Then as to corroboration: the learned judge instructed the jury that the deceased was an accomplice of the accused. I accept that for the moment, and the trial proceeded upon that basis and no objection was raised. And then he properly instructed them that it would be dangerous to convict without corroboration and addressed them very briefly on p. 254. But the error there is that the whole question of corroboration, as to whether there was any corroboration at all, was left to the jury, and instead of telling them that there was corroborating evidence

and pointing out to them what is was and leaving the inferences from and weight of it to them, he left that very important subject-matter at large to them to extract it unguided from the whole body of evidence—*Hubin* v. *Regem,* [1927] S.C.R. 442; *Rex* v. *Ellerton* (1927), 49 Can. C.C. 94; and *Rex* v. *Beauchesne* (1933), 60 Can. C.C. 25, 31. The unfortunate result of that is that nobody can place a finger upon what the judge or jury regarded as corroborative evidence. The jury may, *e.g.,* very probably have regarded as corroboration all those pieces of circumstantial evidence that were objected to and wrongly admitted to fortify the Crown's case, and the more so because the judge instructed them that they could resort to circumstantial evidence as well as direct evidence to seek corroboration: therefore, to my mind, it is clear that there was misdirection on that head also: the case is almost singular in this respect, but in principle closely resembles *Rex* v. *Martin* (1934), 24 Cr. App. R. 177, 185-8. It is to be remembered that this is a capital case and therefore the *onus* upon the prosecution is exceptionally heavy (*Martin's* case, *supra,* 180) in seeking to support the conviction by a resort to section 1014 (2), which present circumstances do not, in my opinion justify. Compare *Gudmondson* v. *Regem* (1933), 60 Can. C.C. 332.

Now having said so much, I only wish to add this in regard to corroboration (because, in my opinion, should this case go further, an important question is now again raised and should be decided; and in this respect I regard the accused as having been too favourably treated): *viz.,* that in my opinion the deceased was not an accomplice, and therefore the direction should have been in that respect one which was more favourable to the Crown. But it would be unfair, in my opinion, to the appellant, having regard to the course of the trial and of this appeal, to say anything more about that here because in the way the case went to the jury in that respect, I do not think that I should now invoke that more favourable ground for the Crown against the accused. The point, in brief, is this, that, in my opinion, in a case of murder charged and manslaughter found of this description, *i.e.,* where the victim of the abortion dies, she is not an accomplice, and I have already expressed my views

in *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, founded upon *Rex* v. *Tinckler* (1781), 1 East, P.C. 354; 1 Den. C.C. v-vii, and others cited at pp. 6, 9-10, that under such circumstances the trial proceeds, as the Court of King's Bench composed of all the judges by a majority held "like the common case of any other murder," *i.e.*, on the assumption that she was not an accomplice.

It only remains to be said that I am sure we have all been impressed by the fact there have been two trials of the appellant on this charge. As to that, it should also be said that while it is perfectly true that there were two trials yet in the first one the result was that the present appellant was liberated, that is to say, it terminated in her favour. The next trial terminated against her. We directed, in the first case, a new trial on the appeal by the Crown that she was wrongly set at liberty. So the present position is a very unusual one, and could not occur except in recent times since the change in the statute allowing the Crown to appeal. We thus have the very unusual situation that one trial has resulted in favour of the accused and one trial has resulted in favour of the Crown. It therefore should be understood that when I take the view that there should be a new trial I have not lost sight of such a situation, unprecedented in this Court at least. And I only add this, that if there have been two unfair trials—because no new trial can be ordered unless the preceding trial has been unfair—one of them has been unfair to the Crown and one of them has been unfair to the accused. So it is perfectly obvious that while it should be regretted that there are appeals from two trials, yet nobody can under our jurisprudence be lawfully convicted on an unfair trial, and hence the fact that there have been one or two or three or four, or any number of unfair trials, cannot constitute a fair one. Therefore since in my opinion, there has not yet been a fair trial herein I would direct a new one.

McPHILLIPS, J.A. (oral): With great respect to the judgment just now delivered by my learned brother the Chief Justice, I have come to a contrary conclusion. The evidence is voluminous, and there is no doubt it has to be scanned closely, and

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analyzed closely. But I think after all that the premise on which we commence to view this case would be, what was the element or view of the matter as to how this deceased lady came to her death? That appears in the evidence to be well defined. The question was put to the doctor, and put by accused's own counsel:

From the evidence you have heard and from the discharge you saw when she called at your office, do you draw any conclusion? Yes, she was well on the way to miscarriage when she came to me.

Now that was apparent, well on the way to miscarriage. That put the position, when considered with the dying declaration, perfectly clear in this, that the accused knew that this woman was with child. Therefore, at the commencement of things she was guilty of a criminal act, in any way interfering with her person. But she did, she tampered with the deceased woman. And it had a drawing effect, a pulling effect. What was it, now? It was something. It could be what has been well indicated by the medical evidence. It could have been—because the deceased woman mentioned it—cotton batting; it could have been the insertion of cotton batting into her person. Now, on the other hand, the appellant contends that she only put two pieces of cotton batting, or some kind of material such as that, on either side of her legs, not into her person at all. Well, of course, that would be a very different thing. But even then I think that what she did would be something also carrying out what I have said, that she ought not to have done, tampered with the person of the deceased woman in any particular when she discovered what her state and condition was.

I am of the opinion that the dying declaration was properly admitted. And I think it very completely meets the whole case. She was in full knowledge that her speedy death would take place; and it did take place. The declaration is in these terms:

You are in full realization of the fact that you are not going to get better? Yes.

Do you know what that means? Yes.

Your name is Helen McDowell? Yes.

You live at 735 Hamilton Street? Yes.

Did you know you were in child-birth? Yes.

Now a good deal was said, both in the Court below and before

us, on the statement of child-birth, that that did not look quite the right definition. Well, I think, coupled with the fact that the appellant was apprized she was in a state of miscarriage, naturally that would have carried along with it something to do with child-birth; it would be the fact that there was something in the womb.

Did you know you were in child-birth? Yes.

How long? Five weeks.

You went to see someone? Yes.

Who did you see? Miss Abbott, Seymour Street just on Georgia.

Do you remember the date you went to see Miss Abbott? It was on Friday, two weeks ago last Friday.

What did she do to you? She put a piece of cotton batting in my person.

What did it do to you? It had a pulling effect.

Did you go up again? I told her I had started to flow. She said everything was O.K. now.

Now that is a very cogent piece of evidence; she starts to flow. It is well known that normally a woman suffering from an on-coming miscarriage would not be subject to the normal flow which women have, at all. Therefore, what was it brought on the flow? The flow was consequent, as I think, reasonably, and the jury reasonably also advised themselves that something had been done to that woman's person which brought about the something which would be a criminal act in this case. It might be said in passing that Miss Abbott was another name for the appellant. That is all shown in the evidence. Here follows the remaining portion of the dying declaration:

Do you remember the date you went to see Miss Abbott? It was on Friday, two weeks ago last Friday.

Did you go up again? I told her I had started to flow. She said everything was O.K. now.

That would mean that consequent upon the operation everything was O.K. now.

Did you pay her money? Thirty-five dollars on Friday at eleven o'clock in the morning.

Was it the same day she performed the operation on you? Yes.

Did you previously make arrangements? The day before, Thursday.

Did you know Miss Abbott? I met her once at Mrs. Sinclair's.

When you interviewed her on Thursday, what was the conversation? Just that it would come right away.

You made her acquainted with the fact that you were in child-birth? Yes.

Did Bill your boy friend accompany you to Georgia Hotel? Yes.

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Would you explain what happened at Georgia Hotel? A big clot of blood came out. I didn't see anything else. I fell asleep. I was awful cold. He "Bill" covered me up.

Did you see her again? I was in pain all week. I couldn't walk very little.

Is there anything else that you can recall you wish us to know? I don't think so, everything is true and just as it happened.

Well, of course the dying declaration being admitted is a very important piece of evidence, and the jury I think were well entitled to take it as read, that it meant that the appellant was guilty, actively guilty of interfering with the course of nature, and further eventuating in her death, consequent upon this tampering, and interference with these organs of the body of the deceased. An incident sometimes goes to show whether a person has a guilty belief of having done something contrary to the law. I would not say it is an absolute indication in every instance, but where a person flees from justice, it is a considerable factor, and no doubt it was so considered by the jury. This woman was arrested at the border, as she puts it. Well, why did she seek to cross the border? Fleeing from justice is the ordinary reason.

I do not propose to deal specifically with any of the other points of evidence, but, after all, the jury is the forum to find a verdict one way or the other. I consider that the evidence such as I have adverted to is in itself sufficient—the dying declaration and the admissions under cross-examination in the evidence on the part of the appellant, make a complete case, and one that the criminal law is aimed at. And if it be so the verdict of the jury is unassailable. The jury unquestionably formed the opinion in finding a verdict of guilty that some class of operation was performed upon the deceased woman which was the cause of her death. Therefore I think that the jury arrived at a proper conclusion, and one that should not be disturbed.

I would dismiss the appeal.

McQUARRIE, J.A.: I am of opinion that the dying declaration of Helen McDowell deceased was properly admitted by the learned trial judge, particularly in view of the medical evidence and the fact that the said Helen McDowell died about 20 minutes after making the declaration. During the course of the hearing of this appeal I remarked that I considered that, in a city as

large as Vancouver where a municipal legal department was available, such legal department should have been called in for the purpose of ensuring that such an important declaration, impossible of duplication, was made in unquestionable and unattackable form. I still adhere to that opinion although I think the police officers who acted in the matter did their best on very short notice.

I do not see that the learned trial judge's charge was objectionable in any respect but on the contrary I think that he placed the whole case clearly and carefully in a most helpful and complete manner before the jury in accordance with principles so often enunciated by this and other Courts.

The jury having found the appellant guilty of manslaughter and there being evidence to support such a verdict, I am of the opinion that the same should not be disturbed. I would therefore dismiss the appeal.

Appeal dismissed, Martin, C.J.B.C. dissenting and would grant a new trial.

REYNOLDS v. CITY OF VANCOUVER.

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1937
Mar. 10, 17.

Negligence—Highways—Non-repair—Hole in dirt road near car rail—Injury to passenger alighting from car—B.C. Stats. 1928, Cap. 58, Sec. 38.

The plaintiff in getting off the rear end and north side of a west-bound street-car on 41st Avenue in Vancouver, alleged that she caught the heel of her right foot in a hole between the asphalt and the track, and falling was injured. On each side of the road is an asphalt pavement which comes to a short distance from the north and south rails, and on the south side of the asphalt on the north side of the track there is laid a "wooden ribbon" three inches wide and eight inches deep. There was evidence that at the point where the plaintiff alighted the "wooden ribbon" had worn away, but there was conflict as to its extent, and the spot where the plaintiff alighted was not definitely shown.

Held, that it was impossible to say that the street was not in a reasonable state of repair, and under the circumstances the city could not reasonably have anticipated any damage to a passenger alighting from a street-car.

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ACTION for damages for injuries sustained when alighting from a street-car and falling, owing to the failure of the City of Vancouver to keep the highway in proper repair. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 10th of March, 1937.

R. T. Du Moulin, and *McCulloch,* for plaintiff.
Lord, for defendant.

Cur. adv. vult.

17th March, 1937.

ROBERTSON, J.: On January 4th, 1936, at about 8.45 p.m., on a dark night, the plaintiff, stepping off a west-bound street-car on 41st Avenue, at a point about 150 feet west of McKenzie Avenue, fell and was injured and now sues the city for damages, claiming it failed to keep the highway in a reasonable repair as required by section 320 of its Acts of Incorporation. The notice (Exhibit 1) says the plaintiff's foot slipped off the edge of the pavement into a depression or hole in the ground which was approximately parallel to the edge. There is a single street-car track on 41st Avenue for some distance east and west of McKenzie Avenue. At the point, where the accident is said to have occurred, there is a switch, so that cars bound in opposite directions may pass each other. On each side of the switch is an asphalt pavement which comes to a short distance of the north and south rails. There is laid along the south side of the asphalt on the north side of the tracks a "wooden ribbon" three inches in width by eight inches in depth and a "wooden ribbon" is likewise along the north boundary of the south pavement. Between these ribbons there is no pavement. It is what is commonly known as a "dirt" road. The plaintiff says when she got off the car its rear end was opposite the south-west window of a house on the north side of 41st Avenue. She put her right foot on the pavement, then put her left foot on the ground and then the heel of her right foot went into a hole and she fell in a heap and lost consciousness. Her husband went to the scene of the accident on January 6th and says that at a point opposite the south-west window, referred to by his wife, about

150 feet east of McKenzie property line, he found a strip of the ribbon on the south side of the north pavement, eight feet in length, had broken or been worn away and along this was a hole ranging from a depth of one and one-half inches to three inches. Clark went there on January 13th and found the same hole, the depth of which he says ranged from one inch to four and one-half inches deep. He took photographs. Unfortunately neither the plaintiff nor her witnesses examined the *locus* at the time or shortly after the accident. The city officials admit that the ribbon was practically worn down to the level of the earth, so, I have no difficulty in finding that the ribbon was worn away for eight feet. It is difficult to say that this was the exact place where the plaintiff got off but I shall assume that it is. The city called two officials. One was Tooker, instrument man in the resident engineer's office, and the other was Grieg, the assistant engineer, who visited this spot respectively on February 17th and 19th, 1936. They did not find the hole referred to by the plaintiff witnesses. They found the greatest difference between the level of the asphalt and the shoulder to be one inch. The engineer says that no repair work had been done here since the accident. McDonald was the conductor on the street-car from which the plaintiff got off. He visited the scene of the accident on January 5th, being the next day, and he did not find the hole referred to by the plaintiff's witnesses. He found the dirt to be not more than one inch lower than the asphalt. He is an independent witness. Both the husband and Clark may be telling the truth. The accident took place in January. The evidence shows that the ribbon was worn down by traffic. It is therefore clear that the traffic went on this part of the road. It is quite possible then that after McDonald visited the scene of the accident, and before the plaintiff's husband did, that a truck or some other vehicle went off the road and made the hole which the plaintiff's husband found there on January 6th. There is no evidence as to what the weather was in January but as it was the winter season the chances are the ground was wet and a heavily-laden truck might easily have made a hole, in the dirt, of the kind described by the plaintiff's witnesses. By January 13th, from Clark's evidence, it would appear the hole had increased in

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Robertson, J.

depth; yet when the defendant's officials went there in February there was no sign of a hole. This could be accounted for by the fact that the traffic had so disturbed the dirt as to fill up the hole. I find that the dirt road was one inch lower than the asphalt at the time of the accident. The facts in this case are entirely different to all the cases cited by counsel. Those cases related to paved highways and permanent sidewalks. It is common knowledge that in wet weather there will be deep wheel tracks on any dirt road on which there is any traffic. The wheel tracks would change from day to day. I think it would be placing an impossible burden upon the municipality to say that a dirt road was not in a reasonable state of repair which had a hole in it of the description mentioned. It may be suggested that the city should have taken special care at the point in question. The photograph (Exhibit 5) which was put in by the plaintiff shows a motorman or conductor standing with one foot on the pavement well away from the edge and the other foot on the step. This would indicate that a person stepping off the street car would land on the pavement and not on the dirt road. Under these circumstances I do not see how the city could have reasonably anticipated any damage to a passenger alighting from a street-car. It is impossible to say that the highway was not in a reasonable state of repair.

The action is dismissed.

Action dismissed.

S. C.
1937
Aug. 13, 20.

IN RE SCOTT ESTATE.

Will—Construction—Absolute gift—Subsequent restrictions—Effect of.

By his will a testator gave to his wife "all my real estate of every kind and all my personal estate and effects whatsoever to her sole use and benefit, subject to the following restrictions: one-half of the whole of my said estate both real and personal which shall remain at the time of the death or remarriage of my said wife shall go to my said wife or such person or persons as she shall appoint, and the remainder of my said estate shall be divided in the following manner, that is to say . . . ."

Held, that there is an absolute gift here in the first instance and the subsequent words do not cut it down.

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IN RE SCOTT ESTATE

ORIGINATING SUMMONS for the construction of the will of the late Richard Bosque Lundie Scott. Heard by MANSON, J. at Vancouver on the 13th of August, 1937.

H. Freeman, for Isabella Scott.
Mahon, for executor.

Cur. adv. vult.

20th August, 1937.

MANSON, J.: Originating summons for the construction of the will of the late Richard Bosque Lundie Scott. The words that give difficulty are:

I devise and bequeath to my wife Isabella Scott, all my real estate of every kind and all my personal estate and effects whatsoever to her sole use and benefit, subject to the following restrictions: one-half of the whole of my said estate both real and personal which shall remain at the time of the death or remarriage of my said wife shall go to my said wife or such person or persons as she shall appoint, and the remainder of my said estate shall be divided in the following manner, that is to say . . . .

Words in terms conferring an absolute gift can only be modified in their effect by clear words cutting down the absolute character of the gift. There is an absolute gift here in the first instance and the subsequent words do not cut it down. There can be no doubt that the testator intended that his widow should have the absolute right to the use of his whole estate. In these changing times it might well have been that she would require it for her reasonable maintenance and the testator probably had that possibility in mind. The "restrictions" amount to no more than an expression of a desire on the part of the deceased and are void in law as against the absolute gift to the widow. This is in accord with numerous decisions, among them: *In re Jones; Richards* v. *Jones,* [1898] 1 Ch. 438, at 441; 67 L.J. Ch. 211; *The Nova Scotia Trust Co.* v. *Smith et al.* (1933), 6 M.P.R. 205; and *Re Walker* (1925), 56 O.L.R. 517, at 520 *et seq.*

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1937
Oct. 1, 8.

REX v. COLPE.

Summary conviction—Under Metalliferous Mines Regulation Act—Certiorari — Magistrate — Jurisdiction — Evidence as to — Whether two offences—Amendment of conviction—R.S.B.C. 1924, Cap. 245, Sec. 101—B.C. Stats. 1935, Cap. 46, Secs. 7 (1), 45 and 46.

The accused was convicted under the Summary Convictions Act for refusing to comply with an order given under section 7 (1) of the Metalliferous Mines Regulation Act. The conviction imposed a penalty of $300 under section 45 of the Act and a further penalty under section 46 of $5 per day from September 11th, 1936, to January 7th, 1937 (the date of the conviction), save and except Sundays and statutory holidays, and also required the accused to pay $4.25 costs to the magistrate. On an application by way of *certiorari* to quash the conviction:—

Held, that the conviction was for one offence only; that the magistrate had jurisdiction territorially and otherwise to try a case of the kind described in the information and conviction; that apart from section 101 of the Summary Convictions Act the Court had no right to consider whether there was sufficient or proper evidence on which to convict; that the further penalty was one which the magistrate did not have the power under such an information and conviction to impose and that part of the conviction awarding costs in the sum of $4.25 to the magistrate is bad on its face.

Held, further, that as the Court was satisfied that an offence of the nature described in the conviction over which the magistrate had jurisdiction had been committed, the conviction should be upheld under the curative provisions of section 101 of the Summary Convictions Act, but it should be amended by striking out the words imposing the further penalty and costs.

APPLICATION by way of *certiorari* to quash a conviction by stipendiary magistrate John Williams at Prince Rupert. Heard by FISHER, J. at Vancouver on the 1st of October, 1937.

J. A. Russell, K.C., for the application.
G. P. Hogg, contra.

Cur. adv. vult.

8th October, 1937.

FISHER, J.: This is an application by way of *certiorari* proceedings to quash a conviction made by John Williams, stipendiary magistrate in and for the County of Prince Rupert, on January 7th, 1937, whereby the applicant Charles Henry Colpe was convicted

for that he, the said Charles Henry Colpe, manager Colpe Mining Company, Ltd., Spruce Creek, Atlin, B.C., on January 5th, 1937, at Spruce Creek, Atlin, B.C., in the County of Prince Rupert, unlawfully did refuse or fail to comply with the requirements of an order given and made under section 7, subsection (1) Metalliferous Mines Regulation Act, dated July 31st, 1936, copy of order posted up at said mine on August 1st, 1936; said order sent by registered mail to the manager, Colpe Mining Co. Ltd., Spruce Creek, Atlin, B.C., August 2nd, 1936, contrary to the form of statute in such case made and provided,

and whereby it was adjudged that the said Charles Henry Colpe for his said offence should forfeit and pay the sum of $300 under section 45 of said Act and a further penalty of $5 per day under section 46 of said Act, dating from September 11th, 1936, to January 7th, 1937, save and except Sundays and statutory holidays to be paid and applied according to law; and also to pay to the said John Williams the sum of $4.25 for his costs in this behalf; and that if the said several sums were not paid forthwith the said Charles Henry Colpe should be imprisoned in the common gaol in the county of Westminster for the term of two months unless the said sums and the costs and charges of the commitment and of the conveying of the said Charles Henry Colpe to the said common gaol were sooner paid.

The information was as follows:

The information and complaint of Charles Graham of Prince Rupert, in the said County of Prince Rupert, Inspector of Mines, taken this sixth day of January, in the year one thousand nine hundred and thirty-seven before the undersigned, one of His Majesty's Stipendiary Magistrates in and for the said County of Prince Rupert at Atlin, in the said County of Prince Rupert who saith that Charles Henry Colpe, manager Colpe Mining Company, Ltd., Spruce Creek, Atlin, B.C., on January 5th, 1937, at Spruce Creek, Atlin, B.C., in the County of Prince Rupert unlawfully did refuse or fail to comply with the requirements of an order given and made under section 7 subsection (1) Metalliferous Mines Regulation Act, dated July 31st, 1936, copy of order posted up at said mine on August 1st, 1936; said order sent by registered mail to The Manager, Colpe Mining Co. Ltd., Spruce Creek, Atlin, B.C., August 2nd, 1936.

The application to quash the conviction is based upon eighteen grounds set out in the notice of motion and it will be convenient hereinafter to refer to some of the grounds simply by number. With regard to the grounds numbered 1, 2 and 3 I have to say that I do not think the jurisdiction of the magistrate to try the case was affected by the information alleged to have been received by the applicant from the constable effecting the service to the

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effect that he would only be required to take a preliminary hearing as it is apparent from the affidavit of the applicant filed that when he attended before the magistrate he was informed by the magistrate that he was going to try the charge summarily. In view of the affidavit made by the magistrate, which is part of the material before me, I am satisfied and find that the accused was given every opportunity to put in his full defence and proceeded to do so without the assistance of counsel.

As to the contention that the information, as above set out, charges two offences, I have to say that, in my opinion, the information does not charge two offences but only one offence stated to have been committed on January 5th, 1937. Counsel on behalf of the applicant, however, contends that the conviction itself finds the accused not only guilty of such offence but also of a continuing offence before the said January 5th, 1937, and therefore the magistrate must be held to have entered upon the trial of two separate and distinct offences against a party at one time. If this contention is correct then the magistrate did something which is against a well-established principle and which it was held in the *Montemurro* case, *infra,* he had no jurisdiction to do. In my view, however, this contention is not correct. I think the magistrate entered upon the trial of only one offence against the accused, *viz.*, that charged as having been committed on January 5th, 1937. I also think that the magistrate convicted the accused of only this one offence and imposed a penalty under section 45 of said Metalliferous Mines Regulation Act, which he had power to do. Though the magistrate then proceeded to impose a further penalty under section 46 of said Act I do not think that it can properly be said that this amounted to convicting the accused of two offences. I will deal later with the question of whether or not the conviction should be held invalid by reason of such further penalty having been imposed or, if the punishment is in excess of that which might lawfully have been imposed, the conviction should be upheld under the curative provisions of section 101 of the Summary Convictions Act, R.S.B.C. 1924, Cap. 245.

It was agreed between counsel that the application should be dealt with as though the writ of *certiorari* had issued and the

return thereto had been made. It is contended, however, by counsel on behalf of the Crown that, unless said section 101 of our Summary Convictions Act is being utilized to amend the conviction, this Court is not at liberty to consider the evidence upon which the conviction was based. Counsel for the applicant relies especially upon *Rex* v. *Montemurro,* [1924] 2 W.W.R. 250, and *Rex* v. *Hardy* (1932), 46 B.C. 152; 59 Can. C.C. 394, and I agree with the submission that want of jurisdiction territorially or otherwise may be shown by affidavit evidence. I also agree that such evidence may be received to show that an accused person was deprived of the right to have it established in the course of evidence at the trial by a magistrate of limited territorial jurisdiction as a condition precedent to the exercise of his jurisdiction that the charge was one triable by him. See *Rex* v. *Gustafson,* 42 B.C. 58; 52 Can. C.C. 151; [1929] 3 W.W.R. 209, and *Rex* v. *Hardy* above. It must be noted, however, that such evidence is received not to show that the magistrate came to a wrong conclusion but to show his lack of jurisdiction. See *Rex* v. *Montemurro, supra,* at p. 251. Assuming then that I would be at liberty to consider evidence extrinsic to the record, *e.g.,* the depositions, if brought before me as an exhibit to a verifying affidavit, apart from the purpose of such section 101 and for the purpose of deciding whether or not such evidence establishes that the magistrate had jurisdiction, I have to say in the first place with respect to grounds numbered 4 and 12 that my decision would be that there was evidence establishing that the said Charles Graham was an inspector of mines, that he had instituted the prosecution and that the offence, if any, took place within the jurisdiction and of the said magistrate. Counsel for the applicant however apparently submits that the conviction should be quashed if in the view of this Court the evidence fails to establish any one or more of a great many other facts. This is apparent from certain of the grounds set out in the notice of motion for quashing the conviction and the verifying affidavit of the applicant in which some of the statements are as follows:

5. That there was no evidence that any matter, thing or practice in, or in connection with the Colpe Mining Company Limited's practice was dangerous or defective.

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6. That there was no evidence that a chief inspector or any inspector gave notice in writing to Charles Henry Colpe stating the particulars in which he considered the matter, thing or practice to be dangerous or defective.

7. That there was no evidence that an inspector under the Act ordered such dangerous or defective condition to be remedied.

8. That the ladder-way referred to in evidence for the prosecution was not proven to be and was not a ladder-way within section 38 of the Act, General Rules 80 and 81.

9. That no notice or order as required by Act was posted at said mine on August 1st, 1936.

10. That the trial magistrate erred when he went entirely outside of the charge made in the summons and erred when he went outside of any evidence given for the prosecution to make the conviction which is now sought to be set aside.

11. That the transcript of proceedings before the magistrate were incomplete in that they did not disclose a copy of the information, all the proceedings before the magistrate, a memo of memorandum of adjudication, and failed to show any justification for the conviction made.

13. That there was no evidence in the record of any offence as charged on which to make this conviction.

14. That there was no evidence that under section 45 or 46 of the Act Charles Henry Colpe was the owner, agent or manager guilty of any offence against the Act and Charles Henry Colpe was therefore not liable on summary conviction or otherwise to the fine imposed.

17. That exhibits A, B and C in trial proceedings were wrongfully admitted in that they had no bearing on the charge on which Charles Henry Colpe was summoned.

In my view none of these statements, even if true, raises a matter which may be regarded as affecting jurisdiction. The information as above set out was sworn before and the summary trial was proceeded with by the said magistrate who, in my opinion, had jurisdiction territorially and otherwise to try a case of the kind described in the information and conviction. I have carefully considered the wording of section 7, subsections (1), (2) and (3) and section 38, rr. (80) and (81), of the Metalliferous Mines Regulation Act as it stood at the time the conviction was made and the cases above mentioned relied upon by counsel for the applicant. I think, however, that these cases are distinguishable from the present one and that if, apart from the provisions of said section 101 of the Summary Convictions Act, I were to enter upon a consideration of whether the applicant is right in any or all of the statements aforesaid I would be considering whether there was sufficient or proper evidence upon

which the magistrate might convict the accused. Following the views expressed in *Rex* v. *Nat Bell Liquors, Ld.,* [1922] 2 A.C. 128; 2 W.W.R. 30; 91 L.J.P.C. 146, commonly known as the *Nat Bell* case, and especially in certain portions of such judgment, more particularly set out by MACDONALD, J. in *Rex* v. *Chin Yow Hing,* 41 B.C. 214 at 215-16; 51 Can. C.C. 407, [1929] 2 W.W.R. 73, I hold that, apart from said section 101, I have no right to consider whether there was sufficient or proper evidence upon which the magistrate might convict the accused. As was said in the *Nat Bell* judgment above ([1922] 2 A.C. at 141) so I would say here that:

> The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so . . . No conditions precedent to the exercise of his jurisdiction were unfulfilled.

I come now to consider whether or not the punishment imposed was in excess of that which might have been lawfully imposed and, if so, whether the curative provisions of said section 101 should be applied. Sections 45 and 46 of said Metalliferous Mines Regulation Act read as follows:

> 45. (1.) Every owner, agent, or manager who is guilty of an offence against this Act shall be liable, on summary conviction, to a fine of not less than one hundred dollars or more than one thousand dollars.
>
> (2.) Every person, other than an owner, agent, or manager, engaged or employed in or about a mine, quarry, or metallurgical works who is guilty of an offence against this Act shall be liable, on summary conviction, to a fine of not less than ten dollars or more than one hundred dollars.
>
> 46. Where an Inspector has given written notice to an owner, agent, or manager, or any person engaged or employed in or about a mine, quarry, or metallurgical works, that an offence has been committed against this Act, such owner, agent, manager, or other person shall incur a further penalty not exceeding one hundred dollars for every day upon which the offence continues after the giving of the notice.

I have already set out the information showing the offence charged as having been committed on January 5th, 1937. In my view the magistrate having entered upon the trial of the accused upon such an information and having convicted him of the offence therein charged as having been committed on January 5th, 1937, did not have power then to impose a further penalty as though the accused had been tried and convicted upon the charge of a continuing offence beginning prior to such date even assuming that proof had been given of notice having been given to the manager of the company on September 10th, 1936, that

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an offence had been committed against said Act. An accused person is entitled to know the exact nature of the offence charged against him including particulars of time and place of the alleged offence and a continuing offence beginning long prior to January 5th, 1937, was not the offence charged. With respect to such further penalty therefore the punishment imposed is in excess of that which might lawfully have been imposed. There is another part of the conviction which is bad on its face, quite apart from anything that might be ascertained from depositions, *viz.*, that part which awards costs in the sum of $4.25 payable to the convicting magistrate himself and referred to in ground numbered 18. See *Rex* v. *Cox,* 41 B.C. 9; especially at pp. 12-15; 51 Can. C.C. 203; [1929] 1 W.W.R. 542; and *Rex* v. *Henderson,* 41 B.C. 242; 52 Can. C.C. 82; [1929] 2 W.W.R. 209, at 215-16. I pause here to say that I have also considered grounds numbered 15 and 16 but connot see any substantial basis for them.

The question therefore arises whether the curative provisions of said section 101 should be applied. It is clear that, notwithstanding my finding that the punishment imposed was in excess of that which might lawfully have been imposed, the conviction should nevertheless be upheld if I am satisfied upon a perusal of the depositions that an offence of the nature described in the conviction has been committed over which the said magistrate had jurisdiction. In the *Nat Bell* case, *supra,* at p. 164, Lord Sumner, after referring to the depositions not being made part of the record, added that:

They are used as independent materials, upon which the judge must uphold a conviction, which on its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section.

In the present case I have to say that, upon perusal of the depositions, I am satisfied that an offence of the nature described in the conviction has been committed over which the said magistrate had jurisdiction. I, therefore, uphold the conviction but it will be amended by striking out the words "and a further penalty of $5 per day under section 46 of said Act, dating from September 11th, 1936, to January 7th, 1937, save and except Sundays

and statutory holidays" and the words "and also to pay to the said John Williams the sum of $4.25 for his costs in this behalf." Order accordingly. No costs.

Order accordingly.

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1937
Sept. 20, 27.

CANADIAN LINEN COMPANY, LIMITED v. GRAHAM.

Contract — Master and servant — Agreement between — Reasonableness — Restraint of trade.

The plaintiff manufactured linen supplies and was engaged in furnishing linen supplies in Vancouver and within a radius of 55 miles therefrom. Drivers, salesmen and collectors in its employ were required to enter into a contract with the company that during their employment and for one year after its termination they would not for themselves or any other person engage in said business or call for and deliver laundered or unlaundered goods to persons who had been customers of the plaintiff during their employment, or solicit or take away any of plaintiff's customers within any territory or country in which their headquarters had been, or within any of the territories or delivery routes which had been assigned to them. There were at least eight or nine companies in the same line of business in the area in which the plaintiff carried on its business. In an action for damages and for an injunction to restrain the defendant from committing a breach of his agreement:—

Held, that the contract was not illegal nor was it unreasonable or in restraint of trade.

ACTION for damages for breach of agreement and for an injunction to restrain the defendant from continuing to operate in breach of said agreement. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 20th of September, 1937.

Beeston, and *Noble*, for plaintiff.
Brazier, for defendant.

Cur. adv. vult.

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1937

CANADIAN LINEN COMPANY, LIMITED
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27th September, 1937.

MURPHY, J.: Plaintiff, an incorporated company, has since 1925 carried on business as manufacturer of linen supplies and a linen supply business and the business of laundrying and dry cleaning and calling for unlaundered goods from and delivering laundered goods to its customers and furnishing them new and laundered coats, overalls, aprons, towels and other such supplies. When a new customer is acquired who needs any of the dress articles mentioned plaintiff makes these to order. It does not sell any of the articles it furnishes but rents them to its customers. Since a large proportion of the articles which it furnishes required to be laundered or dry cleaned frequently it employs drivers who call once a week or more frequently as required on its customers. These drivers gather up soiled articles and deliver clean ones. Deliveries are made by trucks. Plaintiff has several thousand customers. A new customer means a capital expenditure of about $9 in each case. Frequently a considerable length of time is required for this capital expenditure to be recouped through profits since many of the accounts are small. Its field of operations are the City of Vancouver, North Vancouver, Burnaby and New Westminster and its environs and the Fraser River Valley on both sides up to Mission and Abbotsford respectively and inclusively. To obtain new customers it employs salesmen to whom it pays commissions. If a driver procures new customers he is paid a commission in addition to his wages. Plaintiff also employs collectors who call on customers for payment of accounts other than those which are settled by cheques through the mail. Plaintiff's business has this peculiar feature that those who actually run it, such as the managing director and other high officials, do not come into direct contact with its customers. The three classes of employees mentioned, *viz.*, drivers, salesmen and collectors are the only persons connected with plaintiff who do have such direct contact. Defendant entered plaintiff's employ in 1931 but did not become a driver until early in 1932. Plaintiff requires all its drivers, salesmen and collectors, but no other of its employees, to enter into a contract with it as to their conduct should they leave the company's employ. Defendant signed such contract on June

11th, 1932 (Exhibit 1). This contract contains, *inter alia,* the following provisions:

10. The salesman agrees that during his employment with the company in whatever branch or branches to which he shall be assigned or after any termination of his services under clause 8 hereof, he will not divulge to any person or persons not connected with the company any of its business methods, forms, names or addresses of customers; and the salesman further covenants and agrees that he will not at any time while in the employ of the company or within a period of one year after the termination of his services, with or without cause, either:

(1) For himself, or any other person, or company, engage in the business of linen supplies, towels, supplies, laundry or dry cleaning, or for himself or any other person or company call for and deliver laundered and unlaundered goods, from or to any person or persons who shall have been customers of said company and supplied to or obtained by salesman during any time he may have been employed under this contract, or directly solicit, divert, take away or attempt to solicit, divert or to take away any of the customer's business or patronage of such customers during said period of one year within any territory or county in which his headquarters have been, nor within any of the territories or delivery routes which shall have been assigned or entrusted to him by the company;

(2) For himself or any other person, firm or corporation, directly or indirectly, solicit or take orders for or sell or deliver any such goods in said county, territories or delivery routes; or,

(3) In any way, directly or indirectly, solicit, divert, take away or interfere with or attempt to solicit, divert, take away or interfere with any of the custom, trade, business or patronage of the company in such county, territories or delivery routes, or in any way directly or indirectly, interfere or attempt to interfere with any of the salesmen or solicitors who shall have been appointed by the company.

It is mutually understood and agreed by the parties hereto that the provisions of this tenth paragraph shall be of the very essence of this contract and that the company employs the salesman upon the express condition that he agrees to each of the provisions thereof.

Defendant remained continuously in the employ of plaintiff company until early in July of this year when he left of his own accord. He did not, according to his own statement, have any other employment immediately in view at the time. During the years of his employment with plaintiff he acted at various times as driver, salesman and collector. Whilst his field of employment was mainly the downtown business section of Vancouver he in fact, during the period of his employment, came into contact, at some time or other, in his various capacities, as employee of plaintiff, with about 90 per cent. of its customers and acted as such employee in the Fraser Valley and in prac-

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tically every part of the area in which plaintiff does business. One Mole had been a fellow-employee as driver and possibly in other capacities with defendant in the service of plaintiff. Mole had, to defendant's knowledge, signed a similar agreement to Exhibit 1. In May of this year Mole left plaintiff's employ and set up on his own behalf in business identical with that of the plaintiff under the name of Independent Towel & Linen Supply. By the beginning of July the Independent Towel & Linen Supply had acquired some 50 or 60 of plaintiff's customers including three large accounts. A week after defendant threw up his position with plaintiff he entered the employ of the Independent Towel & Linen Supply owned, as stated, by Mole. He had been receiving $22 or $23 a week from plaintiff. Mole paid him $25. He had on occasion, when acting as relief driver during his employment with the plaintiff, covered plaintiff's Fraser River route as a delivery man. When a driver is assigned to a route by plaintiff he is given a list of customers to be served on such route. Shortly after defendant entered Mole's employ they together made deliveries for the Independent Towel & Linen Supply in the area of the Fraser Valley in which plaintiff operated. Within a short time after defendant entered Mole's employ plaintiff lost some fifteen further customers to the Independent Towel & Linen Supply. From the standpoint of effective business administration there was no need for two men to be engaged on one truck in making deliveries as Mole and defendant were doing when defendant first entered Mole's employ. Greenbank, a witness for plaintiff, stated that he met defendant and Mole on several occasions at various points on plaintiff's Fraser River Valley route. On one of them Mole, at Abbotsford, informed him that they, meaning defendant and himself, were going to get more business for their company, meaning the Independent Towel & Linen Supply, at the expense of plaintiff's business. Mole said that they had some big orders lined up (meaning from customers of plaintiff) and were going to make plaintiff company sit up and notice. To these statements by Mole defendant nodded assent. Plaintiff brought action against Mole and early in August obtained an *interim* injunction against him enjoining him from breaches of his

agreement similar to Exhibit 1. Defendant continued to act as delivery driver for the Independent Towel & Linen Supply in the area in which plaintiff company operates until plaintiff instituted this action and obtained an *interim* injunction in turn against him. It was argued on defendant's behalf that he had not solicited any of the plaintiff's customers or committed any other breach of his agreement. I find that he did. To my mind the fact that he accompanied Mole on the delivery-truck through Fraser River Valley points on several occasions, thereby entailing unnecessary expense on the Independent Towel & Linen Supply, coupled with the statements made by Mole to Greenbank, to which he assented, prove that he was soliciting plaintiff's customers or otherwise interfering with them in breach of his agreement for the benefit of the Independent Towel & Linen Supply. The evidence also, to my mind, establishes that he imparted knowledge of at least one form used by plaintiff in its business to the Independent Towel & Linen Supply. In the alternative it is strongly urged that the agreement (Exhibit 1) is unlawful as being unreasonable and in restraint of trade. The first point taken in support of this view is that the agreement is either indefinite in defining the area to be covered thereby or in the alternative that such area is too extensive. As to the first point my opinion, gathered from the language of the document considered in the light of the circumstances under which it was executed, is that the area it purports to cover is definitely set out as being the area in which plaintiff is operating. The other point will be discussed hereafter. The law applicable to the case at Bar is laid down in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company,* [1894] A.C. 535; 63 L.J. Ch. 908. In that case it was pointed out that it is still true that all interference with individual liberty of action in trading and all restraint of trade of themselves, if there is nothing more, are contrary to public policy and therefore void (p. 565):

But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford

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adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

On the facts of this case no possible injury to the public can result from the agreement (Exhibit 1). The evidence shows that there are at least eight or nine companies in the same line of business operating in the area in which plaintiff carries on its business. There can, therefore, be no question of monopoly or unsatisfied need. Is the restriction reasonable in reference to the interests of plaintiff? In my opinion it is. Plaintiff's business consists of several thousand accounts, the majority of them small. Its chief officials have no direct contact with its customers. The contact is made only by its drivers, salesmen and collectors. These men, if engaged in the service of plaintiff for any considerable length of time, as was defendant, would become well acquainted with the customers they meet and might thereby be enabled to divert such customers to another concern in the same line of business if it was to their advantage to do so. Since plaintiff pays commissions for new customers, in addition to wages to employees who obtain them, it seems reasonable to assume that other concerns would recompense employees for bringing in new customers. Obviously if the company lost a sufficient volume of business by the deflection of customers to other competing concerns, through the action of former employees, it would have to cease operations. Since the contacts made by its drivers, salesmen and collectors leading to close acquaintanceship with customers may possibly be made in any part of the area in which plaintiff carries on business, it is, I think, only a reasonable protection from plaintiff's standpoint to require the execution by such an employee, as was the defendant, of an agreement similar to Exhibit 1 covering every part of the area in which it actually carries on business. This area is after all not so very great in extent. Is the restriction reasonable from the standpoint of the defendant? The authorities show that the Court views more strictly this question of reasonableness when the agreement under consideration is based on the relation of master and servant than it does when it is based on the relation of vendor and purchaser of the goodwill of a business. The *Nordenfelt* case, *supra,* was one concerning vendor and pur-

chaser, but that the governing principles are the same in a master and servant case, subject to the observation as to stricter scrutiny, already stated, is shown by many cases of which *Millers, Lim.* v. *Steedman* (1915), 84 L.J.K.B. 2057; 113 L.T. 538, and *Hall* v. *More* (1928), 39 B.C. 346, are examples. On the facts of the case at Bar I am of opinion that the agreement imposes no unreasonable restriction on the defendant, when the time limit is kept in mind. He can still earn his livelihood even in the area covered by the agreement as a truck-driver. The restriction against him is merely on this phase of the question that he shall not for the period of one year act as a delivery-man either on his own behalf or for other concerns in the same line of business as the plaintiff. Trucking of that character is obviously but a small portion of the trucking business that goes on within the area in question. Likewise to my mind it is no unreasonable restriction upon him to stipulate that for a like period he shall refrain from canvassing, selling or taking orders in the linen supply business within the prescribed area. That business also is likewise only a small part of the business of soliciting orders in said area. He is free to engage in this far wider field of soliciting. The same reasoning applies to the restriction preventing him for a like period from engaging on his own behalf in the linen supply business. The period of one year does not seem to me unreasonable considering the opportunities defendant had to become intimately acquainted with plaintiff's customers. I find that the agreement Exhibit 1 is legal. The plaintiff is entitled to an injunction restraining defendant from committing breaches of same. It is also entitled to nominal damages which I fix at $1 for the breaches already committed by defendant and to its costs of action.

Injunction granted.

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HAMPTON v. PARK *ET AL.*

Costs—Action for damages for negligence—Cars driven by two of the defendants—One found wholly responsible—Action dismissed with costs as to the other—Entitled to costs against the plaintiff—Order LXV., r. 32.

Order LXV., r. 32 provides that "where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff."

The defendant P., in the employ of the defendant G., when driving a truck, ran into the defendant I.'s car, causing it to hit the plaintiff, a pedestrian, who was injured. It was found that P.'s negligence was the sole cause of the accident. Judgment was given against the defendants P. and G., and the action was dismissed with costs as against the defendant I. Upon I.'s application that the action be dismissed as against him with costs payable by the plaintiff, and plaintiff's objection that I. recover his costs direct from the defendants P. and G., or in the alternative that the plaintiff recover from the defendants P. and G. the costs he has to pay to I.:—

Held, that said rule 32 does not deprive a successful defendant of the right to recover his costs against the plaintiff and he is entitled to such order under rule of Court.

Held, further, that plaintiff's alternative application for an order that he recover from the unsuccessful defendants the costs payable by him to the successful defendant be refused as there is no jurisdiction to make it.

Green v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75, followed.

APPLICATION by successful defendant that an action for damages resulting from an automobile accident be dismissed as against him with costs payable by plaintiff. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 22nd and 23rd of September, 1937.

L. H. Jackson, for plaintiff.

Tysoe, for defendant Park.

Bull, K.C., and *Ray*, for defendant Inouye.

G. F. H. Long, for defendants Broadway Messenger Service and Giberson.

Cur. adv. vult.

24th September, 1937.

MURPHY, J.: The plaintiff Hampton was injured by an automobile driven by the defendant Inouye. He brought action against Inouye, Park and Giberson. Park was in the employ of the defendant Giberson at the time of the accident. Park was driving a truck which ran into Inouye's car causing it to strike the plaintiff who was walking across an intersection. The three defendants filed defences denying negligence. In addition Giberson raised the defence that Park was not acting as his employee when the accident occurred. After notice of trial had been given Park amended his defence by admitting liability and paid an amount into Court in satisfaction of damages. Just before the trial date Giberson likewise amended his defence by admitting that Park was his employee and was acting within the scope of his employment when the accident occurred. The case was tried before me with a jury. Plaintiff proceeded against all three defendants. The jury found Park's negligence to be the sole cause of the accident and assessed damages in excess of the amount paid in. Accordingly the case was dismissed as against Inouye and judgment for the amount of damages found by the jury was given against Park and Giberson. The matter of costs was reserved for further argument. Counsel for Inouye asks for his costs against plaintiff. He is entitled to such order under our rule of Court, that costs must follow the event unless good cause to the contrary be shown. Plaintiff's counsel contends that I must order that Inouye recover his costs against Park and Giberson because of the provisions of rule 32 of Order LXV. of the Supreme Court Rules. I see nothing in this rule which deprives a successful defendant of the right to recover his costs against the plaintiff and no authority to that effect was cited to me. An apparently identical rule was dealt with in *Perry* v. *Perry*, [1917] 3 W.W.R. 315. It was there held that such rule conferred no new jurisdiction. Rule 32, in my view, can be invoked by a successful defendant if he so desires in a case where the Court in the exercise of judicial discretion on the particular facts of the case is of the opinion that such costs ought to be paid by the losing defendant. In the case at Bar counsel for Inouye does not wish such an order made. Counsel for Inouye

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insists that the action be dismissed as against his client with costs payable by the plaintiff. Because I am of the opinion that said rule 32 does not deprive him of this right I so order. Counsel for plaintiff in the alternative requests that I direct that he recover from defendants Park and Giberson the costs he has to pay to Inouye. In *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75, a negligence case, CLEMENT, J. held there was no jurisdiction to make such order. In that case apparently counsel for plaintiff requested that the defendant the B.C. Electric Railway Company should be ordered to pay to her the costs she was ordered to pay to the Dominion Creosoting Company, which she had made a co-defendant, and against which company the action had been dismissed. In the alternative counsel for the plaintiff requested that an order be made under said rule 32 directing the B.C. Electric Railway Company to pay direct to its co-defendant the Dominion Creosoting Company its costs. In his judgment CLEMENT, J. dealt specifically with the latter application only and held there was no jurisdiction to make such an order. Inferentially he dismissed the alternative application on the same ground. It would seem to me that this decision has been virtually overruled in so far as it deals with said rule 32 by the Appeal Court in *Jarvis* v. *Southard Motors Ltd.* (1932), 45 B.C. 144. The matter was again before that tribunal in *Smith* v. *Kennedy and Thomas* (1936), 51 B.C. 52. In this case an order had been made by the trial judge under rule 32 that a successful defendant recover his costs direct from an unsuccessful defendant. There was an equal division of the Court, not on the question of jurisdiction but on the question of the exercise of discretion. Neither of the dissenting judges questioned the jurisdiction to make the order. These decisions do not touch directly upon the question of whether or not there is jurisdiction in a proper case to order that a plaintiff recover the costs which he is directed to pay against a successful defendant from a defendant who has been held liable. In *Holt* v. *Holmes & Wilson Ltd.* (1930), 42 B.C. 545 and in *Goodell* v. *Marriott* (1929), 44 B.C. 239 MACDONALD, J., following the decision of CLEMENT, J. in *Green* v. *B.C. Electric Ry. Co.* held there was no jurisdiction to make such an order. In *Rhys* v.

Wright and Lambert (1931), 43 B.C. 558 MORRISON, C.J.S.C. questioned the correctness of the decision in *Green* v. *B.C. Electric Ry. Co.* (*supra*). He was not however called upon to decide whether or not he would follow the *Green* case on the question of a plaintiff's right to recover from an unsuccessful defendant the costs payable by him to a successful defendant, where the particular facts would justify such action, for he made an order under rule 32. Since the successful defendant in the case at Bar objects to my making such an order I think I am precluded from doing so for the reasons hereinbefore set out even if the facts would justify such action on my part. The correctness of the *Green* decision on the alternative proposition is, I think, questionable, but inasmuch as it is strictly in point, has stood unimpeached on this aspect for many years and has been followed in at least two instances I do not think it is open to me to disregard it as a precedent. I therefore hold that I have no jurisdiction to make the alternative order asked for, even if the particular facts would give me discretion to do so, as to which I express no opinion. The resulting situation is anomalous since in a case where the facts would justify an order that an unsuccessful defendant pay a successful defendant's costs direct to him the plaintiff must, at the option of the successful defendant, pay such costs and yet has no remedy over to recover same from the unsuccessful defendant. In effect it amounts to this that it lies with the successful defendant to say whether or not in a case admitting of the exercise of judicial discretion plaintiff shall be out the amount of such successful defendant's costs. It seems highly desirable that the matter be carried to the Court of Appeal.

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MATTOCK v. MATTOCK (No. 2).

Divorce—Practice—Examination for discovery of intervener—Application for—Tending to show adultery—R.S.B.C. 1936, Cap. 76, Sec. 27.

On a petition for dissolution of marriage, the petitioner applied for an order directing the district registrar to issue an appointment for examination for discovery of the intervener and for a direction that upon the said examination the intervener be not exempt from answering questions that relate to the adultery alleged between her and the husband.

Held, that the authorities are against the making of such an order. Discovery will not be required of a party to a divorce proceeding when it is sought for no other purpose than to prove such party guilty of adultery.

MOTION for an order for examination for discovery of the intervener in a petition for dissolution of marriage and for a direction that upon the said examination the intervener be not exempt from answering questions that relate to the adultery alleged as between her and the husband. Heard by MANSON, J. in Chambers at Vancouver on the 11th, 14th and 15th of June, 1937.

Woodworth, for the motion: Section 27 of the Divorce Act provides:

> The Court may make an order allowing the petitioner to be examined and cross-examined on oath before the trial, but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery.

There is no section in the Act thus protecting the respondent, the intervener or the co-respondent. Section 97 of the Divorce Rules makes the Supreme Court Rules apply to procedure in the Divorce Court except where by statute or rules it is otherwise provided. By the invariable current of decisions in British Columbia and Western Canada the Courts have refused an order to examine any party whatsoever in a divorce suit where the question tends to prove him or her guilty of adultery, following the decision in *Redfern* v. *Redfern,* [1891] P. 139. My submission is that it should not be followed because it does not apply to conditions here where there is no established church. The

doctrine of *stare decisis* cannot make into law a practice wholly illegal without any sound basis. The censure or excommunication of the church given as a reason for excusing such questions in this Province is almost ridiculous. *Redfern* v. *Redfern, supra,* has in effect been overruled by *Elliott* v. *Albert,* [1934] 1 K.B. 650.

Aubrey, contra.

Cur. adv. vult.

15th September, 1937.

MANSON, J.: The petitioner, who seeks by her petition, a divorce *a vinculo,* from her husband on the ground of adultery, brings this motion for an order directing the district registrar to issue an appointment for examination for discovery of the intervener and for a direction that upon the said examination the intervener be not exempt from answering questions that relate to the adultery alleged as between her and the husband.

The authorities are against the making of such an order. In 1906, IRVING, J. in *Levy* v. *Levy,* 12 B.C. 60, dealt with the matter in a case where, as here, a divorce *a vinculo,* on the ground of adultery was sought. In disposing of the application he used this language:

> Having regard to the language used by Lindley and Bowen, LL.J., in giving judgment in *Redfern* v. *Redfern,* [1891] P. 139, I am of opinion that discovery both by affidavit of documents and interrogatories may be ordered. But discovery will not be required of a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery.

In *Rogers* v. *Rogers* (1918), 25 B.C. 439 MORRISON, J. (now C.J.S.C.) decided to the same effect and in doing so quoted:

> "It is one of the inveterate principles of English law that a party cannot be compelled to discover that which if answered would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure. . . . Based upon the traditions of a law belonging to an earlier age and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated": Bowen, L.J. in *Redfern* v. *Redfern, supra.*

In 1929, MURPHY, J. in *Brammall* v. *Brammall,* 41 B.C. 224, followed *Redfern* v. *Redfern* (*supra*) and *Levy* v. *Levy,* as did the Appellate Division of Alberta in *Harrison* v. *King (No. 2),* [1925] 2 W.W.R. 407.

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MARTIN, J.A. (now C.J.B.C.), in his classical judgment in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486, supplements the account of the proceedings in *M., falsely called S——* v. *S——* (1877), 1 B.C. (Pt. 1) 25, and at p. 490, reports the late Sir MATTHEW BEGBIE, C.J., as having said in the last-mentioned case:

The Rules and Regulations of an English Court are not part of the law of England and are therefore not in force here.

The Court (BEGBIE, C.J., GRAY and CREASE, JJ.) adjourned the further hearing of the case "until proper rules and regulations have been promulgated" and on March 21st, 1877, the first Divorce Rules of this Province were promulgated. We were not bound in this Province, as it seems to me, by the *Redfern* case and adultery was not a crime in November, 1858, when the Matrimonial Causes Act of 1857 (Imperial), was brought into effect in British Columbia, nor has it been since nor were there at any time ecclesiastical offences in British Columbia. That adultery is an ugly thing to be charged with is conceded but an admission of adultery can only be said to be an incrimination of oneself when a broad meaning is given to the word "incriminate." It was urged that the authority of the *Redfern* case had been negatived by *Elliott* v. *Albert*, [1934] 1 K.B. 650. The latter was an alienation of affections case and not a divorce *a vinculo* case as was *Redfern* v. *Redfern*. Adultery was a collateral matter and not the issue *per se*. Both Scrutton, L.J. and Maugham, L.J., were careful to distinguish the case they were considering from the *Redfern* case. Maugham, L.J., says at p. 667:

To my mind it is a mistake to suppose that *Redfern* v. *Redfern*, [1891] P. 129 established that in no case can a party be interrogated if the answer to the interrogatory might tend to incriminate him in the sense of tending to show he committed adultery and thus would expose him to the risk of ecclesiastical censure, although at the same time I do not intend to throw the smallest doubt on the propriety of the rule in a proceeding founded on divorce.

While then, not being bound in this Province by the English practice in divorce, and being of the opinion that it was not necessary that the *Redfern* decision should have been followed here, nevertheless the fact remains that it has been followed and for a period of over 30 years. The principle of *stare decisis* applies and I ought not to disturb the practice, which has been established in

this Court. As was said by my brother McDONALD, recently in *Whitehead* v. *City of North Vancouver*, [1937] 2 W.W.R. 95-6:

> The decision . . . has stood for 25 years and appears never to have been impugned and in addition it has survived the revision of the Rules in 1925.

The *Levy* decision has survived several revisions of the Rules by both the Bench and the Lieutenant-Governor in Council. The principle of *stare decisis* is elaborately dealt with in the *Sheppard* case (*supra*). If the practice is to be changed it should be done by competent authority by amendment of the Rules or by the Court of Appeal, upon which there recently has been conferred appellate jurisdiction in divorce.

The motion will be dismissed.

Motion dismissed.

MATTOCK v. MATTOCK (No. 3).

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Practice—Contempt of Court—Divorce—Order for security for wife's costs —Non-compliance with order—Order for commitment—Costs for maintenance—Order LXIX., rr. 1 and 2—Divorce Rules 78 and 91.

An order was made on the 21st of July, 1937, to commit the respondent to gaol for contempt of Court by non-payment of costs taxed under Divorce Rule 91. On September 4th, 1937, the respondent was apprehended, lodged in the Provincial gaol at Oakalla Prison Farm and $7 was paid for his maintenance for one week. On September 10th, 1937, a further $7 was paid under protest for maintenance. On September 18th following, upon demand being made for the costs of maintenance, the petitioner's solicitor refused to pay. Respondent's solicitor then applied under Supreme Court Order LXIX., r. 2, for his discharge.

Held, that the issue to decide is whether or not Order LXIX., rr. 1 and 2 are applicable. This involves the question of whether or not the order of the 21st of July, 1937, may be said to be a writ of *capias ad respondendum*, *capias ad satisfaciendum* or *ne exeat regno*, as referred to in Order LXIX., r. 1. The order made is an order "that the respondent has been guilty of a contempt of this Court and that he do stand committed to prison for his said contempt for the period there set out." It is not an order that could be properly described as one of the writs referred to in Order LXIX., r. 1, and the application is dismissed.

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APPLICATION for the discharge of the defendant from custody under Supreme Court Order LXIX., r. 2. On July 21st, 1937, an order was made to commit Mattock to gaol for contempt of Court by non-payment of costs taxed under Divorce Rule 91. On July 29th, 1937, this order was delivered to the sheriff along with $22.75. Of this $12.75 was the sheriff's fee, $7 was paid under protest for the maintenance of Mattock for one week at Oakalla, and $5 was also paid under protest as the fee of the doctor for medical examination of Mattock in order to certify that he was free from contagious diseases. On August 19th, 1937, the sheriff of Vancouver, stating that he could not apprehend Mattock, handed back the order to the petitioner's solicitor and repaid the $22.75. The order was then placed in the hands of the City of Vancouver police who apprehended Mattock on September 4th, 1937, and lodged him in the Provincial gaol at Oakalla Prison Farm and paid the $7 for his one week's keep, $5 for the physician's fee for examination, both under protest. On September 10th, 1937, the petitioner's solicitor waited on the warden at Oakalla, but found him absent on holidays, and paid a further $7 under protest receiving a receipt stating same was paid under protest. It was conceded that it had been the invariable practice for years under orders for commitment in the Supreme Court and in the County Court on order after judgment summons to pay these fees. It was contended that this was wholly without authority. The petitioner's solicitor refused to pay the costs for maintenance that was demanded on the 18th of September, 1937. Heard by FISHER, J. in Chambers at Vancouver on the 21st and 22nd of September, 1937.

Aubrey, for the application.
Woodworth, contra.

FISHER, J.: This is an application for an order that the respondent "be released from the Provincial gaol at Oakalla Prison Farm and be discharged from the custody thereof, wherein he is now incarcerated" pursuant to the order of my brother MANSON made on the 21st of July, 1937. The application, counsel on behalf of the applicant submits, is made pur-

suant to Divorce Rule 78, and reliance is put upon Order LXIX., rr. 1 and 2 of our Supreme Court Rules, and it seems to me fair to say that, though counsel for the respective parties may have argued otherwise at first, they would appear to me now to be on common ground, that the real issue for me to decide is whether or not Order LXIX., rr. 1 and 2, are applicable.

To my mind, this involves the question of whether or not the order referred to made the 21st day of July, 1937, may be said to be a writ of *capias ad respondendum, capias ad satisfaciendum* or *ne exeat regno,* as referred to in Order LXIX., r. 1. Counsel seem to agree also that these writs may be called also writs of attachment. On the face of it, the order would not appear to be a writ. Counsel for the applicant relies on *Humber* v. *Humber* (1936), 50 B.C. 427. It might be pointed out that this was an application by the wife for a writ of attachment. There would seem to be a distinction between attachment and committal and between a motion for committal and a motion for an attachment.

In this connection reference might be made to the Annual Practice, 1937, especially at p. 830, where it says towards the end of the page:

> On a notice of motion for committal the Court may give leave for an attachment (*Piper* v. *Piper*, [1876] W.N. 202); and in *Callow* v. *Young*, [(1887)] 56 L.T. 147, leave was given to amend a notice of motion for attachment by asking for committal; but see *Buist* v. *Bridge*, [(1880)] 29 W.R. 117, cited under r. 1, p. 826.

On said page 826, under the title of "Form of Order," it is said:

> Where an order has been made on notice of motion for leave to issue a writ of attachment, the Court will not afterwards on an *ex parte* application alter the order to one of committal.

And then it goes on: "but see *Callow* v. *Young*," already referred to, "where leave was given to amend the notice of motion by asking for committal." And then on p. 826, also is found this:

> But in *D.* v. *A. & Co.*, [1900] 1 Ch. 484, where the notice of motion asked for attachment for breach of an undertaking instead of committal, the application was refused.

So that there would appear to be a distinction between an application for committal and an application for attachment, and in this particular case it may be noted that the Divorce Rule 78 referred to also uses the two different words "attachment" or "committal."

It may be noted also that in the *Callow* v. *Young* case, *supra*, at p. 147, Chitty, J. says:

Attachment goes to the sheriff and committal to the officer of the Court, and in cases of attachment bail is sometimes admitted. I adopted the method of committal the other day myself as being the most convenient and expeditious method. It was a case where the party sought to be attached or committed would probably have escaped the country if the most expeditious way of dealing with him had not been employed. I have made these observations to show that for some purposes there is still a distinction between attachment and committal, though in substance it is generally immaterial whether the motion be for attachment or committal.

That was said in a case where leave was given to amend the notice of motion by asking for committal, but I have already referred to the *Buist* case, where the Court held that after an order had been made on a notice of motion for leave to issue a writ of attachment it would not afterwards on an *ex parte* application alter the order to one of committal.

In view of these cases, and also the forms that have been referred to, and it might be noted that on p. 430 of Seton's Judgments and Orders, 7th Ed., Vol. I., there is an order which reads somewhat similar to the order I have before me, where the words are "that the defendant do stand committed to prison for the said contempt for the following period." In this particular case before me the summons issued upon which the order was made is clearly for an order to commit, and the order made is an order that the respondent has been guilty of a contempt of this Court and that he do stand committed to prison for his said contempt for the period there set out, the order being on the lines indicated and more particularly referred to in the argument.

I hold that it is not an order that could be properly described as one of the writs referred to in Order LXIX., r. 1, and I dismiss the application.

Aubrey: As to the question of costs, my Lord. Your Lordship has discretion. The matter was very doubtful, and one I think the prisoner could reasonably bring before you.

Woodworth: I would say in regard to that, first I may say that I refer to your brother MANSON's finding. This case has gone on, and I presume there is about $700 costs.

THE COURT: You are asking for costs?

Woodworth: Yes.

THE COURT: The application is dismissed with costs.

Application dismissed.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA *EX REL.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN.

S. C.
1937
Nov. 29, 30.

Injunction—Foreign dentist—Advertising in British Columbia—Effective as against local assistance.

The defendant, a dentist practising his profession in the City of Spokane, in the State of Washington, advertised in the Trail and Nelson newspapers and by means of radio broadcasts over the Trail and Kelowna stations of the Canadian Broadcasting Corporation in respect to his practice of dentistry in Spokane. Advertising of this nature would not be permitted by a British Columbia practitioner. In an action at the instance of the College of Dental Surgeons of British Columbia to restrain the defendant from so advertising in British Columbia in respect of his practice of dentistry in Spokane:—

Held, that the purpose of this motion is not to restrain anything being done in Spokane but something being done in British Columbia which the Legislature has declared to be wrong. The case is aimed really at the persons within the Province who assist the defendant in doing something which is illegal. An injunction is granted.

MOTION for judgment in an action brought in the name of the Attorney-General on the relation of the College of Dental Surgeons of British Columbia to restrain the defendant from advertising in British Columbia in respect to the practice of dentistry. The defendant is a dentist practising in Spokane, Washington State. He is not a member of the College of Dental Surgeons in British Columbia and is not entitled to practise in this Province. He advertised prices of dentistry and the great advantages to be secured by patients in having their dental work done by him in Spokane. His advertisements appeared in the Nelson and Trail newspapers and he also advertised by means of radio broadcasts over the Trail and Kelowna stations of the Canadian Broadcasting Corporation. Advertising of the nature undertaken by the defendant would, if undertaken by a member of the College of Dental Surgeons, amount to improper and unprofessional conduct. Counsel agreed to treat the motion as a motion for final judgment and a permanent injunction. Heard by MCDONALD, J. at Vancouver on the 29th of November, 1937.

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1937

ATTORNEY-GENERAL FOR BRITISH COLUMBIA EX REL. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA
v.
COWEN

Maitland, K.C. (*Remnant,* with him), for the motion, referred to *Tozier* v. *Hawkins* (1885), 15 Q.B.D. 650 and 680; *Badische Anilin und Soda Fabrik* v. *Henry Johnson & Co. and Basle Chemical Works, Bindschedler,* [1896] 1 Ch. 25; [1897] 2 Ch. 322; [1898] A.C. 200; *Hall* v. *Ball* (1923), 54 O.L.R. 147; *Elmslie* v. *Boursier* (1869), L.R. 9 Eq. 217; *Dunlop Rubber Company* v. *Dunlop,* [1921] 1 A.C. 367; *Bassel's Lunch Ltd.* v. *Kick et al.* [1936] O.R. 445.

Aubrey, contra, referred to *Marshall* v. *Marshall* (1888), 38 Ch. D. 330; Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 16; *In re Burland's Trade-Mark. Burland* v. *Broxburn Oil Company* (1889), 41 Ch. D. 542 at p. 545; *Harris* v. *Beauchamp Brothers,* [1894] 1 Q.B. 801 at p. 809; *Iveson* v. *Harris* (1802), 7 Ves. 251 at p. 256; *Marconi Wireless Telegraph Co.* v. *Canadian Car & Foundry Co.* (1918), 43 D.L.R. 382.

Cur. adv. vult.

30th November, 1937.

McDONALD, J.: Motion for an injunction heard, by agreement, as a motion for judgment.

The defendant is known as an "advertising" dentist carrying on his profession in Spokane, Wash., with no office in British Columbia and with no intention of coming here. What is complained of is that by carrying unprofessional advertisements in various British Columbia newspapers he has attracted patients from this Province to his office in Spokane. It is admitted that no dentist in British Columbia would be permitted so to advertise but it is contended that there is no jurisdiction to restrain the defendant from carrying on as he is doing. Cases such as *Bassel's Lunch Ltd.* v. *Kick et al.* [1936] O.R. 445; *Marshall* v. *Marshall* (1888), 38 Ch. D. 330; *Tozier* v. *Hawkins* (1885), 15 Q.B.D. 650 and 680; *Badische Anilin und Soda Fabrik* v. *Henry Johnson & Co. and Basle Chemical Works, Bindschedler,* [1896] 1 Ch. 25 are of assistance but none of them is exactly on all fours with the present case.

The purpose of this motion is not to restrain anything being done in Spokane but something being done in British Columbia; something which the Legislature has declared to be wrong if

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ATTORNEY-GENERAL FOR BRITISH COLUMBIA EX REL. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN

done under the circumstances here present. It may be taken as a general rule that an injunction will not be granted unless it can be enforced and for that reason it will not be granted against a person living without the jurisdiction. The plaintiff's case here, however, is aimed really at the persons who in this Province assist the defendant to do something which is illegal. I think upon the authorities an injunction may go and that as against those persons in British Columbia the decree will not be ineffectual.

Judgment will go as asked. Costs, including the costs of the examination in Spokane, will follow the event.

Injunction granted.

S. C.
1937
Oct. 27; *Dec.* 3.

IN RE FRAUDULENT PREFERENCES ACT AND *IN RE* COMMERCIAL SECURITIES CORPORATION LIMITED (JUDGMENT CREDITOR), GEORGE KOVACH (JUDGMENT DEBTOR) AND GEORGE TYSON.

Real property—Land Registry Act—Priority as between unregistered deed and judgment—Unregistered deed executed before registration of judgment—R.S.B.C. 1936, Cap. 105, Sec. 4; Cap. 106, Sec. 3 (1); Cap. 140, Sec. 34.

The Commercial Securities Corporation Limited, having recovered judgment against George Kovach in the Province of Saskatchewan for $422.12, brought action in the County Court in Vancouver against Kovach upon the judgment on the 27th of January, 1937, and the plaint and summons were served on Kovach on the 1st of February, 1937. On the next day Kovach transferred a property on Napier Street in Vancouver to his wife, who registered her deed and a certificate of indefeasible title was issued in her favour on the 4th of February, 1937. On April 17th, 1937, the wife transferred the property to George Tyson, who paid her $300. Tyson did not register his deed. On the 19th of April judgment was entered in favour of the judgment creditor against the judgment debtor for $460.37, and it was registered in the Land Registry office on the 30th of April, 1937. Tyson swore he knew nothing of the judgment of the judgment creditor against Kovach until June 14th, 1937, and that his transaction with Mrs. Kovach was entirely *bona fide.*

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1937

IN RE FRAUDULENT PREFERENCES ACT AND IN RE COMMERCIAL SECURITIES LTD., KOVACH AND TYSON

On motion for judgment in an action to set aside the transfer of said property to Mrs. Kovach and that the judgment debtor be restored as the registered owner thereof:—

Held, that the transfer by the judgment debtor to his wife falls within section 3 (1) of the Fraudulent Preferences Act and is as against the judgment creditor not "utterly void" but voidable. The judgment creditor is entitled to an order setting aside the conveyance from husband to wife and directing that the certificate in favour of Mrs. Kovach be surrendered for cancellation.

Held, further, that as the deed to Tyson was not registered, the effect of the provisions of the Land Registry Act is to deprive him of the advantage which would be his as an innocent purchaser for value without notice.

MOTION by the judgment creditor that the transfer of 2480 Napier Street in the City of Vancouver from the judgment debtor to his wife be set aside, and that the judgment debtor be restored to the register as the owner thereof and that the certificate of title in the name of the wife and held by the defendant George Tyson be delivered up for cancellation. Heard by MANSON, J. at Vancouver on the 27th of October, 1937.

J. D. Forin, for judgment creditor.
Mayall, for George Tyson.

Cur. adv. vult.

3rd December, 1937.

MANSON, J.: The judgment creditor sued George Kovach in the County Court of Vancouver on the 26th of January, 1937, upon a Saskatchewan judgment for the sum of $422.12. The plaint and summons were served on Kovach on the 1st of February, 1937. On the following day the said Kovach transferred the Napier Street premises to his wife. On the 19th of April judgment was entered in favour of the judgment creditor against the judgment debtor in the sum of $460.37, including costs and the said judgment was registered in the Land Registry office at Vancouver, B.C., on the 30th of April, 1937. Mrs. Kovach applied to register her deed of 2nd February immediately, and a certificate of indefeasible title was issued in her favour on the 4th of February, 1937. The value of the property seems to have been about $425. On the 17th of April, 1937, Mary Kovach transferred the Napier Street premises to George Tyson who advanced, as Tyson says, to Mrs. Kovach $300 upon

the understanding that he would retransfer the property to her upon payment to him of the sum of $350 within six months from the 17th of April, 1937. Tyson swears that he knew nothing of the judgment of the judgment creditor against Kovach until the 14th of June, 1937, and that his transaction with Mrs. Kovach was entirely *bona fide*. Tyson did not register his deed although he might have done so at that time free of the judgment of the judgment creditor or other encumbrance. At the time the judgment creditor registered his judgment, *viz.*, on the 30th of April, 1937, the property stood in the name of Mary Kovach free of encumbrance or charge.

The registrar, under date of 8th October, 1937, after inquiry pursuant to order of 14th June, 1937, and order of 21st June, 1937, reported that the transfer of 2480 Napier Street by the judgment debtor to his wife Mary Kovach was made fraudulently with intent to defeat the claim of the judgment creditor and that the transfer of the said premises by Mary Kovach to George Tyson on the 17th of April, 1937, was in the nature of a mortgage. He found further that "the $300 advanced by Tyson was handed over to the use of the judgment debtor Kovach." I see no reason, upon the material, for disturbing the report of the registrar and it is therefore confirmed. While the advance by Tyson upon the security of the property seems high, and while the fact that Tyson handed the $300 over to the use of the judgment debtor raises a suspicion, nevertheless those facts in themselves are not sufficient to warrant a finding that the transaction was, to the knowledge of Tyson, fraudulent.

The transfer by the judgment debtor to his wife falls within section 3 (1) of the Fraudulent Preferences Act, R.S.B.C. 1936, Cap. 106, as a transfer of property real by a person unable to pay his debts in full made with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them and is, as against the judgment creditor, therefore, "utterly void." Despite the language of the statute, it would seem clear, upon the authorities, that the phrase "utterly void" means no more than, voidable at the suit of the creditor and, that an innocent transferee for value without notice of the fraud as between the debtor and his donee (leaving out of consideration for the

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IN RE FRAUDULENT PREFERENCES ACT AND IN RE COMMERCIAL SECURITIES LTD., KOVACH AND TYSON

Manson, J.

moment the Land Registry Act, R.S.B.C. 1936, Cap. 140), takes good title. I cannot agree, however, with the submission of Mr. *Mayall* in his careful argument that section 4 of the Fraudulent Preferences Act operates to the advantage of Tyson. That section is not so far-reaching as section 4 of the Fraudulent Conveyances Act, R.S.B.C. 1936, Cap. 105. It has clearly reference to transactions by the debtor and not to transactions by the donee of the debtor. The situation is complicated, however, by the failure of Tyson to register his conveyance. A certificate of title had issued in favour of Mrs. Kovach on the 4th of February and that certificate was conclusive under section 37 of the Land Registry Act against the whole world with certain exceptions. One of the exceptions is set forth in clause (*j*) of section 37 (1). In effect that clause says that the certificate shall not be conclusive where fraud can be shown on the part of the registered owner or on the part of the person from or through whom the registered owner derived title. The certificate of title of Mrs. Kovach is not conclusive as against the judgment creditor and can be successfully attacked.

In considering that section, reference may be had to *White* v. *Neaylon* (1886), 11 App. Cas. 171, a case which does not appear to have been cited in *Gregg* v. *Palmer* (1932), 45 B.C. 267. There the South Australian Registration Act was under consideration. The material words of the statute under consideration ran thus (p. 176):

"That all contracts in writing concerning any lands may, after the commencement of this Act, be registered, and every such contract shall be adjudged fraudulent and void at law and in equity against any subsequent purchaser unless registered, and that although such subsequent purchaser had notice of such prior contract before or at the time of the making of such subsequent conveyance."

Lord Hobhouse, speaking for the Judicial Committee, observed (p. 176):

It is quite clear under this enactment that a prior document of a registrable nature, unregistered, cannot convey a good title against a subsequent document of a registrable nature and registered.

And speaking of the fact that the statute made no reference to an unwritten equity of which a subsequent purchaser had notice and of the argument that the Legislature must have intended

to exclude such equities, Lord Hobhouse observed further (pp. 176-7):

It is no doubt difficult, if we were to speculate on the matter, to suppose that such was the deliberate intention of the Legislature. It may not have been so, but their Lordships have nothing whatever but the words of the Act, and for aught they can tell there may have been something which induced the Legislature to leave the law in that state. . . . Their Lordships can do nothing but construe the statute literally as it stands.

Returning now to the consideration of section 34 of our own Land Registry Act, the effect of that section, applying it to the facts here, is that, except as against Mrs. Kovach, the unregistered conveyance to Tyson does not operate to pass any estate or interest either at law or in equity in the land until the instrument is registered, but the conveyance does confer on Tyson, being a person benefited thereby, the right to apply to have the instrument registered. The situation would appear to be that while Mrs. Kovach is estopped from denying that she conveyed to Tyson, Tyson, nevertheless, has under this section no estate or interest at law or in equity in the land conveyed. That conclusion is not consistent with the view expressed by MACDONALD, J.A. in *Gregg* v. *Palmer, supra,* at p. 282, where in interpreting the effect of the phrase "except as against the person making the same," added to section 34 in 1921, that learned judge observes:

It means that as against the maker, *i.e.*, the judgment debtor, some estate right or interest at law or in equity in the land passes to the holder of an unregistered instrument. The latter acquired the beneficial right to the fee with a statutory right to apply to register it. That the debtor under his hand and seal parted with some interest is I think indisputable.

An examination of the reasons of the other learned members of the Court does not disclose that any of them expressed so far reaching a view, nor, with respect, do I think that the view expressed was essential to the conclusion arrived at by the majority of the Court. If A gives a deed to B who does not register it and subsequently gives a deed to C who promptly registers it, C takes to the exclusion of B, assuming of course that C is an innocent purchaser for value without notice of the fraud on the part of A. As it seems to me, with very great respect for the contrary view expressed, the illustration given makes it very clear that the unregistered grantee takes no estate at law or in equity, but only that which the statute gives him in the latter part of the section, *viz.,* a right to apply to register—

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a right which will be valueless if, prior to his application to register, a subsequent innocent grantee for value has registered. Having regard to the general tenor of the Act, namely, that unregistered instruments, whether by way of charge or in fee, shall not operate to pass any estate at law or in equity, I am unable to conclude that the phrase in question amounts to more than a statutory estoppel as against the grantor. The grantee has a statutory right, subject to certain exceptions, to acquire by registration an estate or interest in the lands—as it seems to me, no more. If that be true, the judgment creditor may continue his proceedings to set aside the conveyance from Kovach to his wife, and for an order directing that the certificate of title in favour of Mrs. Kovach be delivered up for cancellation. I think he is entitled to an order setting aside the conveyance from husband to wife and directing that the certificate in favour of Mrs. Kovach be surrendered for cancellation.

The effect of such an order is to restore the title to the name of Kovach and the certificate of judgment registered will thereupon run as against the land in the name of Kovach, and it will be open to the judgment creditor to proceed to the realization of his judgment under the Execution Act. A judgment, from the time of the registering of the same forms

a lien and charge on all the lands of the judgment debtor . . . , in the same manner as if charged in writing by the judgment debtor under his hand and seal:

vide Execution Act, R.S.B.C. 1936, Cap. 91, Sec. 35.

But the proceedings which the judgment creditor has taken will not be for the benefit of himself alone, but for the benefit of all the creditors of Kovach. Tyson would not appear to be a creditor of Kovach, but upon that point I make no finding. The effect of my decision is to deprive Tyson of the advantage which would be his as an innocent purchaser for value without notice, but, as it seems to me, if I follow the reasoning in *White* v. *Neaylon* (and the principle of the South Australian Act is similar to that of our Act), that is the effect of the provisions of the Land Registry Act. *Gregg* v. *Palmer*, *supra*, was cited by Mr. *Mayall*. That was a decision of the majority of the Court of Appeal of this Province and, therefore, an authority, though given, in so far at least as MARTIN, J.A. (now C.J.B.C.)

was concerned, with some hesitation (*vide* observations of that learned judge at p. 277), but the facts in that case were not identical with the facts in the case at Bar. In the *Palmer* case there was a contest as between the holder of a registered judgment and the holder of an unregistered mortgage, the mortgage antedating the judgment. The judgment debtor was also the mortgagor. It was held that the mortgagee in a proper case and by virtue of the provisions of the Execution Act, R.S.B.C. 1936, Cap. 91, and the Land Registry Act, *supra,* might secure registration of his mortgage so as to give the mortgage priority over the judgment. There was no question of fraud in the *Palmer* case, and the lands were registered in the name of the judgment debtor who was, as pointed out above, the mortgagor. There too the mortgagee had applied to register his mortgage—not so here. There the issue was as to the right of the mortgagee to register in priority to the registered judgment, as is so clearly set forth in the reasons of MACDONALD, J.A. at p. 279 *et seq.* Here the mortgagee has made no application to register. As it seems to me, the *Palmer* case is distinguishable. In the case at Bar the judgment creditor is able to successfully attack the title of the mortgagor and restore title to the name of the husband against whom his judgment runs.

In *Gray* v. *Quinn* (1922), 22 O.W.N. 325, Middleton, J. held, in circumstances similar to those in the case at Bar, that he could not declare the conveyance from husband to wife invalid as against the *bona fide* purchaser for value without notice, but the learned judge was not confronted as I am with the provisions of a statute similar to our Land Registry Act. For the same reason *Harrods, Ld.* v. *Stanton,* [1923] 1 K.B. 516 is inapplicable. So too are *Doe d. Bothwell* v. *Marytr* (1805), 4 Bos. & P. 332 and similar cases cited by Mr. *Mayall.* It is of note that no case was cited in support of Tyson's submission from a jurisdiction having what is commonly known as the "Torrens" registration system.

It was strongly urged that at best Tyson had but an equitable mortgage. As to that I do not decide, but if Tyson's mortgage amounted to no more than an equitable mortgage, then section 46 of the Land Registry Act comes into operation. It reads:

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IN RE FRAUDULENT PREFERENCES ACT AND IN RE COMMERCIAL SECURITIES LTD., KOVACH AND TYSON

Manson, J.

46. No equitable mortgage or lien created by a deposit of title deeds or a certificate of title, whether accompanied or not by a memorandum of deposit, shall entitle the person interested to register under this Act.

The conveyance by the judgment debtor to his wife will be set aside. The title will be restored by the district registrar of titles to the name of the judgment debtor and that regardless of the whereabouts of the certificate of title. (*Vide In re Land Registry Act. Morrison & Pollard* v. *Taylor* (1926), 37 B.C. 325, and *Howard* v. *Miller* (1914), 84 L.J.P.C. 49; [1915] A.C. 318 at p. 329). Tyson will deliver up to the district registrar of titles for cancellation certificate of title in the name of Mary Kovach.

Costs of the judgment creditor and Tyson as against the judgment debtor and Mary Kovach.

Since the filing of the above reasons, counsel for Tyson has brought to my attention that application to register was made by Tyson on the 14th of June, 1937, but that at that time the *lis pendens* of the judgment creditor prevented his registration. There is, of course, nothing in the material showing Tyson's application to register. Counsel for Tyson draws attention to some evidence suggesting that the Kovachs value the property at more than $425. I would attach no value to their valuation, and in any event nothing in my reasons turns upon the valuation of the property.

Motion granted.

BOWES v. HAWKE.

S. C.
1937
Dec. 7, 10.

Negligence—Damages—Motor-vehicle—Injury to plaintiff's infant daughter—Contributory negligence—Special damages of father—Apportionment—R.S.B.C. 1936, Cap. 52, Sec. 2.

Where a father and infant daughter are suing for damages for negligence causing injury to the daughter and the damages to the daughter are divided under the Contributory Negligence Act, the special damages awarded the father must be reduced in the same proportion.

ACTION for damages by a father for injuries sustained by his infant daughter owing to the negligent driving of a motor-truck by the defendant. Tried by McDONALD, J. at Vancouver on the 7th of December, 1937.

Burnett, for plaintiff.
R. T. Du Moulin, for defendant.

Cur. adv. vult.

10th December, 1937.

McDONALD, J.: The plaintiff, Arthur W. Bowes, sues as next friend of his daughter Audrey, nine years old on the 5th of December instant, as well as in his personal capacity. The infant's claim is for damages sustained by her when struck by the defendant's truck, and the father's claim is for medical expenses incurred by him as a result of the accident. I have concluded, on the evidence, that the defendant, while driving his truck in a westerly direction on a country road, misled the infant plaintiff and her brother and sister, as they stood in a safe position beside the defendant's milk-stand, into the belief that he was going to stop at the milk-stand. I accept the children's evidence in this regard. They did not impress me as having been "coached," nor as having concocted their evidence. The defendant having proceeded on the south side of the road until he had nearly reached the milk-stand, the children were justified in believing that he was about to stop and that they might safely cross from their place of safety. The two older children were more cautious than Audrey who, I think, with a

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McDonald, J.

little more care, would have hesitated a moment in order to make certain of the driver's intentions. In my opinion the defendant and the infant plaintiff were equally at fault. I assess the infant plaintiff's damages at $350 of which she will recover one-half. As to the father's special damages amounting to $184.90, it would seem that he is entitled on these findings to recover only one-half. In so deciding, I follow the decisions of the Ontario Courts of which the latest appears to be *Dority* v. *Ottawa R.C.S.S. Trustees,* [1930] 3 D.L.R. 633. This is in line with the opinion of the New Brunswick Court in *Long* v. *McLaughlin,* [1926] 3 D.L.R. 918. While it is true that the latter decision was rather questioned in the Supreme Court of Canada there was no finding that it was wrong. I confess that had I not been guided by authority, I should have held that the plaintiff Arthur W. Bowes, having been forced by the defendant's tort, into a legal liability to pay for his child's medical treatment, would have been entitled to recover those expenses, regardless of the fact that the negligence of the infant plaintiff or of any other person contributed to the accident.

There will be judgment in accordance with the above findings: costs to be taxed under Column 1 of Appendix N.

Judgment accordingly.

REX v. JUNG QUON CHONG.

C. A.

1937

Oct. 4; Nov. 12.

Criminal law—Conviction for offence against The Opium and Narcotic Drug Act, 1929—Sentence—Adequacy—Fine in addition—Ten days' imprisonment in default of payment—Adequacy—Can. Stats. 1929, Cap. 49, Sec. 4, Subsec. (1) (d) and (i) and Subsec. (2).

Subsection (1) (*d*) and (i) of section 4 of The Opium and Narcotic Drug Act, 1929, provides "Every person who has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; shall be guilty of an offence, and shall be liable upon indictment, to imprisonment for any term not exceeding seven years and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars, and, in addition, at the discretion of the judge, to be whipped."

The accused was arrested on the 29th of July, 1937, and detained in gaol awaiting trial until the 26th of August, 1937, when he was tried and convicted of having opium in his possession and the magistrate sentenced him to a term of imprisonment for six months at hard labour from and including the day of arrest, July 29th, 1937, and imposed a fine of $200, and directed that in default of payment of the fine he serve a further term of ten days' hard labour. On appeal by the Crown that the magistrate had no power to make the direction he did, that the sentence of six months' imprisonment was inadequate and that the sentence of ten days' imprisonment on default of payment of the fine was inadequate:—

Held, that the term of imprisonment passed on respondent is twenty-six days less than the minimum sentence prescribed by the statute and the sentence should be amended accordingly.

Held, further, that the magistrate has a wide discretion and there are no grounds for holding that he has improperly exercised that discretion either as to the sentence imposed for the crime or the sentence to imprisonment on failure to pay the fine.

APPEAL by the Crown from the sentence passed by deputy police magistrate Matheson of Vancouver upon Jung Quon Chong on the 26th of August, 1937, on his conviction upon the charge that he the said Jung Quon Chong, at the City of Vancouver on the 28th of July, 1937, did unlawfully have in his possession a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929, when it was adjudged that for said offence he be imprisoned for six months with hard labour from and including date of arrest, July 29th, 1937, and that he should pay the sum of $200, and in case of default of payment that he

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be imprisoned and there kept at hard labour for the term of ten days.

The appeal was argued at Victoria on the 4th of October, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Donaghy, K.C., for the Crown.
Hurley, for accused.

Cur. adv. vult.

On the 12th of November, 1937, the judgment of the Court was delivered by

SLOAN, J.A.: The Crown appeals from a sentence imposed on the respondent for a violation of subsection (1) (*d*) of section 4 of The Opium and Narcotic Drug Act, 1929. The prosecution was upon indictment and the accused consented to be tried summarily before the magistrate. Under paragraph (i) of section 4 (1) the respondent was liable to imprisonment for any term not exceeding seven years and not less than six months and to a fine not exceeding $1,000 and not less than $200. In addition there is jurisdiction to add the further punishment of whipping. In this case the magistrate sentenced the respondent to a term of imprisonment for six months at hard labour and imposed a fine of $200 and directed (under section 14) that in default of payment of the fine the respondent serve a further term of ten days' hard labour.

The conviction is dated the 26th day of August, 1937; sentence was passed on that day and normally the term of imprisonment would commence on that date but the magistrate directed that the term of imprisonment should commence "from and including date of arrest July 29, 1937." The respondent was detained in the city gaol awaiting trial for 26 days and it is this period which the magistrate has credited him upon his sentence.

The Crown advanced three grounds of appeal.

First: The magistrate had no power to make the direction he did. Second: The sentence of six months' imprisonment was inadequate. Third: The sentence of ten days' imprisonment on default of payment of the fine was inadequate.

I propose to deal with each heading in order. The first ground of appeal raises a narrow point upon which there does

not appear to be any direct authority. Counsel could not refer us to any and I have been unable to discover any cases which are in point. Expressions that appear relevant may be extracted from the definitely conflicting decisions on section 1029 of the Code and section 3 of the Prisons and Reformatories Act (R.S.C. 1927, Cap. 163) collected in Daly's Criminal Procedure, 3rd Ed., 200, but in my opinion The Opium and Narcotic Drug Act, 1929, is to be construed as a complete Code in relation to those matters within the scope of its enactment.

In my view we can extract the intention of Parliament in relation to sentences imposed for a violation of this statute by considering subsection (2) of section 4. That subsection reads as follows:

(2) Notwithstanding the provisions of the Criminal Code, or of any other statute or law, the Court shall have no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment; and any person who commits an offence under paragraph (*e*) of this section shall be proceeded against by indictment, and not summarily.

From a reading of that subsection it is clear to me that the magistrate could not impose a lesser fine than $200 on conviction on indictment. It is equally clear to me that he cannot sentence to imprisonment on conviction on indictment for a lesser period than six months.

In this case the term of imprisonment passed on the respondent on conviction is 26 days less than the minimum sentence prescribed by the statute and in my opinion the sentence should be amended accordingly.

Before leaving the first point in the appeal, I wish to make reference to *Rex* v. *Choquette* (1929), 46 Que. K.B. 372. Greenshields, J.A., after quoting subsection (2) of section 4 of The Opium and Narcotic Drug Act, 1929, says at p. 374:

This paragraph makes two exceptions. It excludes the application of the criminal law, which, presumably, would otherwise apply, and in case of subsection (*e*) it excludes the prosecution by way of summary conviction.

In that case a physician was convicted on indictment for a violation of section 6 of The Opium and Narcotic Drug Act, R.S.C. 1927, Cap. 144, and it was held that the magistrate had the right to sentence the accused to pay a fine in lieu of the punishment of imprisonment prescribed by said section 6 for

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the reason that subsection (2) of section 4 applied only to the penalties prescribed for a violation of section 4 and therefore section 1035 of the Code could be applied to the penalties prescribed for a violation of section 6.

When The Opium and Narcotic Drug Act was amended and consolidated in 1929 (Can. Stats. 1929, Cap. 49) subsection (2) was added to section 6 which added subsection abrogates the decision in *Choquette's* case, but the observation I have quoted from that case confirms my view of the proper interpretation to be put upon subsection (2) of section 4. See also *Rex* v. *Soanes* (1927), 33 O.W.N. 207.

With reference to the second ground of appeal, *i.e.*, the contention that the sentence is inadequate, in my view I do not think it should be disturbed. Within the limits of the section the magistrate has a wide discretion and I do not see any grounds here for holding that he has improperly exercised that discretion.

With reference to the third ground of appeal, *i.e.*, the contention that the sentence to imprisonment for ten days on failure to pay the $200 fine is inadequate I must say that if I had been the magistrate I would have inflicted a more severe penalty on default. I cannot find, however, that the magistrate improperly exercised his discretion.

In the result I would allow the appeal and direct that the sentence be amended to provide that the term of imprisonment commence from the day of passing of such sentence.

Appeal allowed in part.

RE BANTA SINGH AND THE IMMIGRATION ACT.

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Nov. 12, 26.

Habeas corpus—Certiorari in aid—Entry of a Sikh into Canada from India —Subsequent issue of "passport" and "certificate of registration" to him by proper officials—Effect of—Inquiry by Board of Inquiry—Released by Board—Arrested again for further inquiry—Legality—R.S.C. 1927, Cap. 93, Secs. 33, Subsec. 7, and 42.

The applicant, a Sikh, was admitted into Canada from India in October, 1913. In March, 1931, he obtained from the proper authorities a passport "good for India." In September, 1931, he was permitted to go to Seattle, Washington, for a few days upon obtaining a "certificate of registration" signed by an official in the Immigration office. In March, April, and August, 1937, he was summoned and appeared at the Immigration offices in Victoria and on each occasion was examined by an immigration officer with reference to facts in connection with his entry into Canada. On August 30th, 1937, he was arrested pursuant to a warrant, brought before a Board of Inquiry and subjected to a long examination on that and the following day. The Board adjourned until September 3rd. When the Board reconvened the chairman said the inquiry was closed and the applicant was released, but after his release the chairman said it was the intention to take further proceedings against him, and applicant undertook to appear at a later date to be agreed upon, under protest. On September 16th, 1937, he was again arrested but obtained his liberty on giving bail. On October 12th, 1937, he was again arrested and taken before the Board of Inquiry. Applicant's counsel protested that he had been released and was entitled to be free, and on the Board proceeding with the inquiry the applicant, on the advice of counsel, refused to answer questions. The application for a writ of *habeas corpus* with *certiorari* in aid was then made on the grounds (1) of estoppel by *res judicata*, (2) the holding of a second Board of Inquiry was against the "essentials of justice," (3) the passport constituted a formal admission of the right of Banta Singh to be in Canada, (4) the certificate of registration given to Banta Singh to go to Seattle was also a formal admission of his right to be in Canada.

Held, that the issuance of a passport has nothing to do with the Immigration Act or the question as to whether or not the holder had duly entered Canada and the "certificate of registration" was not intended to be a recognition of the *status* of the applicant. As to estoppel, the first Board of Inquiry had a hearing only on the charge of "eluding examination by an officer at the port of entry." Section 33, subsection 7 of the Immigration Act prohibits certain different acts and creates several quite distinct offences with respect to "entry" in addition to "eluding examination." A second Board of Inquiry may proceed to have a hearing on an offence not before the first Board, and as to the "essentials of justice" there is nothing in the Act to prohibit the second Board having a hearing. The application is dismissed.

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1937

Re Banta Singh and the Immigration Act

Motion for a writ of *habeas corpus* with *certiorari* in aid. The facts are set out in the reasons for judgment. Heard by Robertson, J. in Chambers at Victoria on the 12th of November, 1937.

Jackson, K.C., for the motion.

Macfarlane, K.C., for the Crown, *contra*.

Cur. adv. vult.

26th November, 1937.

Robertson, J.: Application for a writ of *habeas corpus* under the following circumstances.

The applicant, who is a Sikh, alleges that he was duly admitted into Canada as an immigrant from India in October, 1913, and has resided continuously in Canada ever since and has acquired Canadian domicil. On the 5th of March, 1931, he obtained, upon application to the proper authorities, a passport "good for India." In September, 1931, he was permitted to go to Seattle, Washington, for a few days upon obtaining a "certificate of registration" signed by an official in the Immigration office. In March, 1937, April, 1937, and August, 1937, he was summoned to appear and did appear at the Immigration offices at Victoria. On each occasion he was examined by an immigration officer with reference to the facts in connection with his entry into Canada. On the 30th of August, 1937, he was arrested, pursuant to a warrant, and brought before a Board of Inquiry consisting of Messrs. Anderson, Marshall and Dorman. He was represented by counsel. He was subjected to a long examination by members of the Board on the 30th and 31st of August, 1937, and the Board then adjourned until the 3rd of September. When the Board reconvened, its chairman said the Board of Inquiry was closed and "you Banta Singh are released and allowed to leave the Immigration Building." He had been under arrest all this time. Just after Banta Singh was released the chairman stated it was the intention to take further proceedings against him. Banta Singh undertook to appear at a later date to be agreed upon, although, at the same time, protesting the Immigration authorities no longer had any right

to interfere with him or deprive him of his liberty. On the 16th of September, 1937, in compliance with his undertaking he went to the Immigration Building and was again arrested. His demand to be set free was refused. He obtained his liberty by giving bail. On the 12th of October, 1937, he again attended at the Immigration office, pursuant to a notice, when he was again arrested and taken before a Board of Inquiry consisting of Messrs. Anderson, Marshall and Needs. His counsel protested that Banta Singh had been released and was "entitled to be free." The chairman stated that Banta Singh had been arrested by him, as he suspected he was a person "illegally in Canada," and for his appearance before a Board of Inquiry as to his right to remain in Canada.

The Board then proceeded with the inquiry. Banta Singh's counsel stated he refused to recognize the Board as having any power or authority to sit. Banta Singh, under his counsel's advice, refused to answer questions. The Board then adjourned pending further instructions from the Inspector in charge. The present application was then brought. The applicant bases his case on four grounds: (1) Estoppel by *res judicata*. (2) The holding of a second Board of Inquiry was against the "essentials of justice." (3) The passport constituted a formal admission of the right of Banta Singh to be in Canada. (4) The certificate of registration given to Banta Singh to go to Seattle was also a formal admission of his right to be in Canada.

As to the passport, there does not appear to be any legislation in Canada dealing with this matter. The "information" on the inside of the back cover of the passport shows that at the time of its issue, in Canada, passports were granted to natural born British subjects and to persons naturalized in the Dominion of Canada, the United Kingdom or in any British Dominion or Colony or in India. It apparently made no difference where the British subject resided. A British subject temporarily in Canada might apply to the Dominion for a passport. The issuance of a passport had nothing to do with the Immigration Act or the question as to whether or not the holder had duly entered Canada. Further, the passport, which purports to bear a facsimile of the signature of His Excellency, Viscount Willing-

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Robertson, J.

don, then Governor-General of Canada, merely requests in the name of His Britannic Majesty, all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. In *Rex* v. *Brailsford,* [1905] 2 K.B. 730, at 745, Lord Alverstone, C.J. said:

It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.

Again, Mr. Justice Thompson in delivering the judgment of the Supreme Court of the United States, in *Urtetiqui* v. *D'Arcy* (1835), 9 Pet. 692, at 699, said:

Upon the general and abstract question, whether the passport, *per se*, was legal and competent evidence of the fact of citizenship, we are of opinion, that it was not. There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact, of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is, as to the fact of citizenship. It is a mere *ex parte* certificate; and if founded upon any evidence produced to the secretary of state, establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact.

See also *United States* v. *Redfern* (1910), 180 Fed. 506. As to the fourth ground the certificate itself contains a statement by the applicant that he was admitted into Canada on the 15th of October, 1913, that is that he was duly admitted. Further, it was not intended to be a recognition of the *status* of Banta Singh. It was merely permission to go to Seattle, Washington, and to return to Canada. In any case, the action of a Govern-

ment official does not in any way work an estoppel against the Crown: see *The King* v. *Capital Brewing Co. Ltd.*, [1932] Ex. C.R. 171, at 182.

As to estoppel, it was submitted the department had, through its prior investigations by its officials, determined the charge it proposed to lay and elected to have a hearing only on the charge of "eluding examination by an officer at a port of entry" before the Board of Inquiry held in September; and as it was open to lay before the said Board of Inquiry any other grounds upon which it was alleged Banta Singh was not properly in Canada, and no others were mentioned and the hearing was closed, and Banta Singh released, the question of his right to be in Canada could not again be debated. Estoppel would lie, only in respect of what was actually before the first Board, that is, whether or not Banta Singh had "eluded examination by an immigration officer." Section 33, subsection 7, prohibits certain different acts—see *In re Narain Singh* (1913), 18 B.C. 506 at 510, and "creates several quite distinct offences with respect to entry"—see *In re Immigration Act and Munetaka Samejima* (1913), 44 B.C. 317 at 319. In addition to the offence of "eluding examination" there are the offences of entering Canada by force, or misrepresentation, or stealth, etc. It is not certain upon which ground the second Board will proceed. It may not concern itself with the offence of "eluding" in which case no question of estoppel could arise. As to the "essentials of justice" there is nothing in the Act to prohibit the second Board having a hearing. Apart from the question of estoppel which may arise should the second Board proceed on the "eluding" charge I see no reason why the second Board should not proceed to have a hearing on an offence not before the first Board. In any event the application is in my opinion premature.

In the view which I have taken, it is not necessary, now, to deal with the submission that the first Board never had jurisdiction as the warrant was dated before the complaint and would therefore appear to have been issued before the complaint was made under section 42. The application is dismissed.

Motion dismissed.

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Sept. 30;
Oct. 1;
Nov. 12.

REX v. WONG LOON.

Criminal law—In possession of morphine—"Mens rea"—Construction of section 17 of The Opium and Narcotic Drug Act, 1929—Onus—Can. Stats. 1929, Cap. 49, Secs. 4 (1) (d) and 17.

Section 17 of The Opium and Narcotic Drug Act, 1929, provides that "Without limiting the generality of paragraph (*d*) of section four of this Act, any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof."

Four years prior to his arrest the accused brought two jars of Chinese brown pills from China through the Customs to his store in Vancouver, where they were openly sold as a cough medicine. Each jar contained 50 packages and each package contained 78 pills. Two years prior to his arrest he was told that it was illegal to sell them, so he took the two jars from his store to his room, where he put them under his bed. Prior to his arrest the police found two packages of the pills in a drawer in his store, and the two jars under his bed in his room. An analysis disclosed that 24 packages weighed one ounce and contained in all .83 grains of morphine. An ounce of the pills could be taken at once by a person and it would do him no harm. The accused swore he had no knowledge whatever that the pills contained morphine. Accused was convicted of having morphine in his possession.

Held, on appeal, reversing the decision of police magistrate Wood, that "*mens rea*" is not an essential ingredient in the proof of an offence under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929, standing alone, but while section 17 of said Act is not a substantive section creating an offence, its intention and effect is to shift the burden of proof to the accused and opens the door to the defence of ignorance. In this case the possession by the accused of the pills was that possession contemplated by said section 17. The learned magistrate, in closing the door to the accused making a successful defence of ignorance, even if he was satisfied that the accused did not in fact know the pills in question contained morphine, misdirected himself as to the law and there should be a new trial.

APPEAL by accused from his conviction by police magistrate Wood on the 26th of July, 1937, on a charge of having morphine in his possession. The accused had a store at 115 East Pender Street in Vancouver, and he lived in a room at 105 East Pender Street. On the 3rd of June, 1937, three officers of the

Royal Canadian Mounted Police entered accused's store and found two packages of pills. The police then went to his room at 105 East Pender Street and found two jars each containing 50 packages of pills of the same kind as were found in the store. There was some dust on the jars. Each of the packages held 78 pills. An analysis showed that a full package weighed 19½ grains, and there were .83 grains of morphine in each ounce of pills. There was evidence that an ounce of pills (about 24 packages) could be taken by a person at once and it would do no harm. The pills were made in China from selected Chinese herbs and are used as a cough remedy and were used openly in Chinatown in Vancouver prior to 1933. The accused bought the two jars in Hongkong and took them to Vancouver through the Customs. About two years prior to his arrest accused was told it was illegal to sell them so he took the two jars from his store and put them under his bed in his room, where they remained until the police found them.

The appeal was argued at Victoria on the 30th of September and 1st of October, 1937, before MARTIN, C.J.B.C., McPHILLIPS and SLOAN, JJ.A.

Maitland, K.C. (*G. P. Hogg,* with him), for appellant: This is a charge of having in his possession morphine. These pills were brought from China by the accused through the Customs and were sold as a cough medicine openly until he was told it was illegal to sell them. He then took two jars containing the parcels in which the pills were kept about two years before his arrest to his room and sold no more. He did not know they contained morphine. This man was never a drug-runner. If we have a remedy and we do not know that it contains morphine we cannot be convicted on a charge under the Act. Twenty-four packages of thes pills taken at once would do no harm, as the amount of morphine in them is so small. The magistrate followed a Quebec case, *Morelli* v. *Regem* (1932), 52 Que. K.B. 440, in which it was decided that knowledge was not necessary. We submit this case was wrongly decided: see *Rex* v. *Gosling* (1921), 37 Can. C.C. 66 at p. 70; *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205 at pp. 207-8. He must have the morphine

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with his knowledge and consent: see *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491. In that case the words "without his knowledge" are used in allowing the appeal after the trial judge had convicted: see also *Rex* v. *Gun Ying* (1930), 65 O.L.R. 369.

J. A. McGeer (*Jackson, K.C.,* with him), for the Crown: The Quebec case is the same as the British Columbia cases. All an accused need say is that he did not know if his contention is correct: see *Rex* v. *Burke,* [1925] 3 D.L.R. 625. We say if he is in possession that is sufficient: see *Rex* v. *McKenzie* (1921), 29 B.C. 513; *Rex* v. *Petheran* (1936), 65 Can. C.C. 151; *Rex* v. *Lee Po* (1932), 45 B.C. 503; 58 Can. C.C. 315; *Reg.* v. *Sleep* (1861), 8 Cox, C.C. 472. It is not reasonable to suppose he did not know why they were illegal. He should not be believed.

Maitland, in reply: From section 17 of the Opium Act it must be held that *mens rea* applies.

Cur. adv. vult.

On the 12th of November, 1937, the judgment of the Court was delivered by

SLOAN, J.A.: The appellant appeals from his conviction by police magistrate Wood on a charge that he did unlawfully have in his possession morphine contrary to The Opium and Narcotic Drug Act, 1929. The relevant facts are simple enough. The appellant is the owner of a store in Vancouver's Chinatown. In this store and in his room at the place where he resided were found some pills in containers labelled cough medicine. These pills at one time were allowed entry into Canada and were used extensively by Chinese for treating coughs. On analysis they were found to contain morphine.

The appellant gave evidence before the magistrate to the effect that he did not know the pills contained morphine. The magistrate before convicting said (in part):

I do not see how I can do other than follow this *Morelli* decision. I am doing that purely on the basis that is set up, that this man had actual possession of these things. Maybe he did not know what was in them. Morphine was in them. That being the case he was in possession of morphine. He cannot be heard to say, in view of that decision, that he did not know what was in the pills. You have the benefit of that for any purpose you want, Mr. *Hogg* [counsel for accused]. I do not see how I

can do other than follow that decision, although as you say, it is perhaps legislation contrary to what has been decided as the law, as the common law, as you pointed out, the decision of the English Court, *Reg.* v. *Sleep* (1861), 8 Cox, C.C. 472. Therefore, I find him guilty.

That comment might be construed, in my opinion, as a finding that the accused did not know of the contents of the pills for if there is any reasonable doubt about the matter the accused is entitled to the benefit of that doubt. *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205; *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 201.

The neat point then for decision is, as I see it: Is this lack of knowledge on the part of the accused a good defence in this case? The magistrate considered that *Morelli* v. *Regem* (1932), 58 Can. C.C. 120; 52 Que. K.B. 440, barred such a defence.

Before considering that decision I wish to deal with the relevant sections of The Opium and Narcotic Drug Act, 1929, and other authorities. The apposite wording of section 4 of the Act in question is as follows:

Every person who . . . has in his possession any drug . . . shall be guilty of an offence.

It is common ground, in this case, that *"mens rea"* is not an essential ingredient in the proof of an offence under this section standing alone. The burden on the Crown is discharged when possession is brought home to the accused. See *Rex* v. *Lee Po* (1932), 45 B.C. 503, at p. 508.

The next section to be considered is section 17, the relevant wording of which reads as follows:

Without limiting the generality of paragraph (*d*) of section four . . . , any person who ocupies, controls or is in possession of any . . . , room, . . . , in or upon which any drug is found, shall, . . . , be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, . . .

The opening phrase "without limiting the generality of paragraph (*d*) of section four " I take to refer to the wide interpretation to be put upon the word "possession" in that paragraph which is to be left unfettered in scope and meaning by anything in section 17.

If there were any doubts that *"mens rea"* is not an essential ingredient in a prosecution under section 4, paragraph (*d*), section 17 dispels them for, as I view section 17, while it is not

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a substantive section creating an offence, its intention and effect is to shift the burden of proof to the accused. It does, however, much more than that because section 17, in my opinion, opens the door to the defence of ignorance whereas that defence is not open under section 4, paragraph (*d*).

In *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491, a decision of this Court, the accused was held to have established his defence under section 17 (then section 16). There the drug in question was found secreted in the toes of a shipment of slippers: our learned brother Macdonald, at p. 497, said:

I think the accused established by evidence that the drug was concealed in the shipment without his authority, knowledge or consent.

In *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205, also a decision of this Court, the accused who had been convicted of having opium in her possession in a room in her house, was acquitted by this Court because it was of the opinion that the evidence she offered created a reasonable doubt as to whether the drug was in the room with her "authority, knowledge or consent."

These last two mentioned decisions are identical in principle with the case now before us and in my view the learned magistrate was bound to apply them in his determination herein.

It is to be noted that other Courts in Canada have arrived at the same conclusion as this Court in relation to this aspect of the matter in question.

In *Lamontagne* v. *Regem* (1929), 54 Can. C.C. 338, Mr. Justice Greenshields, delivering the judgment of the Quebec Court of King's Bench, said at p. 340:

The Crown, in a prosecution under this statute, must prove its case. If the Crown succeeds in proving that contraband drugs were found in the actual physical possession of the person, in his pocket, for instance, or in a building or room in a building occupied by the accused, under his control, or in his possession, then the Crown has sufficiently proved the commission of the offence by the accused person, and a verdict of guilty, in the absence of any proof made by the accused, must stand.

Whether or not the accused's possession is a lawful or an unlawful possession, is a question of fact, and in deciding that question of fact all the circumstances surrounding the receipt by the accused of the drug, and his subsequent possession or retention of the drug, must and should be taken into consideration by the jury called upon to pass upon the guilt or innocence of the accused.

The sections in question here came before the Court of King's Bench in Quebec again in *Tom Youck* v. *Regem* (1931), 56 Can. C.C. 286. Howard, J., at p. 288, in dealing with section 4 (*d*) and section 17, says:

Under s. 4 (*d*), the mere fact that the forbidden drug was found in his possession is a proof of the guilt of the accused entirely independent of any *mens rea* on his part—a statutory offence against which no evidence can be received—whereas s. 17 deals with situations that are quite different, in any of which it is open to the accused to establish his innocence by proving that the drug was in his possession, within the meaning of that article, without his authority, knowledge or consent.

Letourneau, J., at pp. 291-2:

Whatever can be said of the distinction that could be made between the two enactments, we ought to recognize that the case, upon consideration, is rather one of indirect possession as really the accused was occupying, controlling and possessing the vehicle in which was found the compromising package.

We would then rather be in the case contemplated by s. 17 and, consequently, the right of the accused to rebut the presumption, would leave no doubt. *Lamontagne* v. *The King* (1929), 54 Can. C.C. 338, 48 Que. K.B. 474.

Bond, J., at p. 294, speaking of section 17, said:

As a result of this last-mentioned section, it would appear that a person is deemed to have been in possession of a prohibited drug, where such drug, while not actually in his possession in the ordinary sense of the word, is found in any building, room, vessel, vehicle, enclosure or place occupied, controlled, or in the possession of such person. But where such constructive possession is invoked, the person charged may exculpate himself by proving that the drug was there without his authority, knowledge or consent.

It is to be noted that the *Lamontagne* case and the *Tom Youck* case were not cited to the learned magistrate, nor for that matter were they referred to by counsel before us.

The learned magistrate considered the effect of *Morelli* v. *Regem, supra,* was to close the door to the accused making a successful defence of ignorance even if (as I understand his comment quoted above) he was satisfied that the accused did not in fact know the pills in question contained morphine.

I do not read the *Morelli* case that way. The *Morelli* case, from my reading of it, was a development of the concept in *Tom Youck's* case. In the *Morelli* case Rivard, J. is of opinion (p. 121) there is a difference between the "possession" in section 4 (1) (*d*) and section 17. He is of opinion that section 17 contemplates an "incomplete possession" and the defence of "default of knowledge" is open when the accused is charged with possession of that kind.

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He thinks that the possession contemplated by section 4 (1) (*d*) is "direct possession" and the defence of want of knowledge is not open to an accused charged with possession of that kind.

Bond, J. (at p. 127), holds there is a "marked contradistinction between the two forms of possession," *i.e.,* "actual or physical possession, on the one hand, and constructive or indirect possession through control, on the other hand." He believes in the former case *"mens rea"* does not constitute an element of the crime while the latter requires guilty knowledge. The remaining members of the Court gave no reasons for their conclusions.

In this case the possession by the accused of the pills was that possession contemplated by section 17. There was no physical possession; thus by reason of the authorities referred to both of this Court and the Court of King's Bench in Quebec the defence of want of knowledge was clearly open to the accused. See also *Rex* v. *Gun Ying* (1930), 53 Can. C.C. 378 and *Rex* v. *Wong Yip Lan and Lee Lung* (1936), 50 B.C. 350.

I wish it understood that I express no opinion whether or not there is any distinction between the "possession" contemplated by section 4 and that of section 17. That is not before us for consideration in this appeal.

As the learned magistrate (with respect) misdirected himself, as to the law, and bearing in mind the somewhat unsatisfactory state of the case, in relation to the knowledge of the accused of the contents of the pills, I would allow the appeal and direct a new trial.

Appeal allowed; new trial directed.

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June 18, 21, 22; *Sept*. 14.

Negligence—Damages—Automobile—Boy injured crossing highway—Excessive speed—Evidence of—Expert opinion—Skid marks—R.S.B.C. 1936, Cap. 195, Sec. 53.

The plaintiff infant was driven home from school, and the car, going northerly on the Pacific Highway, stopped on the east side of the road opposite his home that was over on the west side. When about to get out of the car the boy was warned by the driver of the approach of the defendant's car from the north, and stopped him getting out of the left-hand door, but the boy said "he could make it" and getting out of the right-hand door he ran around the back of the car and continued to cross the road, when he was struck by the defendant's car and severely injured. There was conflict of evidence as to the speed at which the defendant was going and the distance he was away when the boy emerged from behind the stationary car. The action was dismissed.

Held, on appeal, reversing the decision of McDONALD, J. (McQUARRIE, J.A. dissenting), that on the evidence there was no escape from finding that the skid marks on the road extending 108 feet were caused by the defendant's car and the circumstances herein justified the evidence of three independent expert witnesses who testified that the defendant was travelling in excess of 50 miles per hour. Had the defendant been travelling at a reasonable rate of speed he could have avoided the consequences of the negligence of the boy which negligence consisted in crossing the road without looking. Excessive speed under the circumstances was a "self created incapacity."

British Columbia Electric Railway v. *Loach* (1915), 85 L.J.P.C. 23; [1916] 1 A.C. 719, applied and defendant held solely responsible for the accident.

Section 35 of Motor-vehicle Act, while not absolute in terms, is helpful when considering what constitutes reasonable speed, and reasonable speed under the circumstances is that speed at which the defendant could have controlled his car so as to have avoided the risk he ought to have anticipated.

APPEAL by plaintiffs from the decision of McDONALD, J. of the 11th of February, 1937, dismissing the plaintiffs' action for damages for injury sustained by the infant plaintiff owing to the negligent driving of an automobile by the defendant. On the afternoon of the 19th of May, 1936, the infant plaintiff Theodore Reopel (ten years of age) was driven home from school by one Evans. As Evans came northerly along the Pacific Highway he stopped on the east side of the highway opposite the house

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where the boy lived, the house being over on the westerly side of the highway. When he stopped Evans saw the defendant's car approaching from the north and warned the boy not to get out and held the left-hand rear door closed to prevent his getting out. The boy disregarded the warning, and saying he could make it, jumped out of the right-hand door, ran around the back of the car and started on the run to cross the road. The defendant alleges he did not see the boy until he was six or seven feet from him, and although going at a moderate rate of speed he was so close that he could not avoid running into him. The boy was badly injured.

The appeal was argued at Vancouver on the 18th, 21st and 22nd of June, 1937, before MCPHILLIPS, MCQUARRIE and SLOAN, JJ.A.

Donnenworth, for appellants: There is evidence of grossly excessive speed on the part of the defendant, and there was disregard of this by the trial judge: see *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304 at p. 316. As the credibility of the witnesses is not impugned by the trial judge this Court can review the whole case: see *Sayward* v. *Dunsmuir and Harrison* (1905), 11 B.C. 375 at p. 392; *Hendry* v. *Laird* (1920), 28 B.C. 445; *Jarvis* v. *London Street R.W. Co.* (1919), 45 O.L.R. 167 at p. 174; *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13; *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23; [1916] 1 A.C. 719; *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256.

Bull, K.C., for respondent: They complain of excessive speed on the part of the defendant and that he did not sound his horn. As to sounding the horn the boy was warned and knew the defendant was coming, so the sounding of a horn would have no effect. On the question of speed the finding was in our favour and this is the only remaining question of fact. That this Court should uphold the finding of the trial judge in regard to this see *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304 at pp. 311 and 314-5; *Nemetz* v. *Telford* (1930), 43 B.C. 281; *Chisholm* v. *Aird* (1930), *ib.* 354; *S.S.*

Hontestroom v. *S.S. Sagaporack,* [1927] A.C. 37 at p. 48; *Swartz* v. *Wills,* [1935] S.C.R. 628 at p. 632; *Hornby* v. *Paterson* (1929), 41 B.C. 548; *Swadling* v. *Cooper,* [1931] A.C. 1 at pp. 8 and 10; *Jeremy and Jeremy* v. *Fontaine,* [1931] 3 W.W.R. 203 at p. 218; *Perdue* v. *Epstein* (1933), 48 B.C. 115; *Armstrong* v. *Houston,* [1936] 2 D.L.R. 65 at pp. 69 and 77; *Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690 at p. 695.

Donnenworth, in reply, referred to *Ruff* v. *Sutherland* (1930), 43 B.C. 218; Eversley on Domestic Relations, 4th Ed., 434.

Cur. adv. vult.

14th September, 1937.

MCPHILLIPS, J.A.: With great respect to the learned trial judge I cannot agree with his disposition of this case. In my opinion the evidence is overwhelming that the case was one of gross negligence upon the part of the defendant. The witnesses, who could give the most precise evidence as to the salient and necessary facts upon which judgment should go for the plaintiffs in the action, were clear in their version of the facts and were in every way independent witnesses and I cannot approve the learned trial judge's passing over the evidence and no sufficient reason was given for his rejection of that evidence. I do not propose to canvass the evidence in detail. My learned brother SLOAN has done this in a very complete way—his analysis of the facts and references to the controlling cases in my opinion conclusively establish liability upon the defendant. This case brings to notice in a graphic manner the very terrible happenings of so frequent occurrence in these days consequent upon the now so general motor-car traffic on the highways. Here we have an arterial highway leading to one of the large cities of Canada (Vancouver) upon which extensive traffic takes place with many homes along the highway. The little boy some nine years of age, the infant plaintiff, seeing the motor-car of the defendant a distance of over 700 feet away, descends from the motor-car in which he was a passenger, and, whilst in the act of proceeding across the road, is struck in the back by this motor-car of the defendant and is carried a considerable distance upon

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the bonnet of the motor-car and a little later is hurled upon the highway when the defendant swerves his motor-car from off the highway. The infant plaintiff suffered severe bodily injuries and his recovery can only be said to be miraculous in its nature. The motor-car of the defendant was being driven at a speed in excess of 50 miles an hour. The defendant had a clear view and was on a well-paved road—no obstruction of view whatever—nevertheless he fails to pull up and runs the little boy down. As I have already stated, the case is one of gross negligence. I see no extenuating feature of any nature or kind. This happening indicates that it is in the public interest and for the preservation of life on the highways that strict regulations and control of speed and equipment of motor-cars should occupy the attention of the Legislature and fitting legislation should be enacted. I would allow the appeal, a new trial to be had limited to the assessment of damages only.

MCQUARRIE, J.A.: I am of opinion that there is evidence to support the findings of the learned trial judge and I would not interfere with his judgment.

I might add that I do not believe it possible for an alleged expert witness to estimate with any degree of accuracy the speed at which an automobile was travelling immediately prior to the happening of an accident merely by skid marks on the roadway seen by such witness some time after the accident occurred.

I would therefore dismiss the appeal.

SLOAN, J.A.: This is an appeal from a judgment of Mr. Justice MCDONALD dismissing an action for damages in a running-down case brought by an infant by his mother as his next friend against the defendant.

Because of *Hildebrand* v. *Franck*, [1922] 3 W.W.R 755, I would mention that the mother is divorced from her husband and has the custody of the infant plaintiff.

The accident, the subject-matter of the action, occurred in the afternoon of the 19th of May, 1936, on the Pacific Highway approximately one-half mile north of Cloverdale. The boy Theodore Reopel was about 10 years old at the time and lived

with his grandparents in a house situate on the west side of the highway and on the afternoon in question had been driven home from school at Cloverdale by one Roy Evans.

While with Evans Theodore was in the back seat of the car, together with two other children, and Evans stopped on the east side of the highway opposite a driveway leading to the residence of the grandparents in order that Theodore might proceed across the highway to his home. While Theodore was crossing the highway leading to the driveway he was struck by the defendant's car which was travelling south toward Cloverdale and was seriously injured. The allegation is that the defendant was travelling at an excessive rate of speed and not keeping a proper lookout while the defendant submitted successfully below that he was travelling at a reasonable rate of speed and that the boy came suddenly out from behind Evans's car without looking; that the defendant could do nothing to avoid the accident and consequently the injuries suffered by the boy could not be attributed to any negligence on his part.

The learned trial judge found that the defendant was not travelling at an excessive rate of speed and adds that "the real cause of this unfortunate accident was the boy's own negligence in placing the defendant in a position from which he was quite unable to extricate himself in order to avoid the collision."

Before considering the actions of the boy Theodore, I address myself to the allegation of negligence made against the defendant following the time-honoured formula as stated by the House of Lords in *H. & C. Grayson* v. *Ellerman Line,* [1920] A.C. 466; 89 L.J.K.B. 924, in the form of three questions: (1) Was the defendant negligent? (2) Was the plaintiff negligent? (3) If both parties were negligent could the defendant in the result by the exercise of ordinary care and diligence have avoided the mischief which happened?

The submission made to us by counsel for the plaintiffs was that the defendant's negligence consisted in driving at an excessive rate of speed. In support of this submission he relied upon skid marks on the road made by the defendant's car. He sought to prove these skid marks by calling a policeman of twelve years' experience who made measurements shortly after the accident.

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The officer testified that the skid marks started twelve feet north of the north edge of the driveway into the grandparents' property and extended in a southerly direction straight for 40 feet as "heavy black burned rubber marks." From that point to where the defendant's car landed in a ditch on the west side of the road the skid marks continued but indicated that the car was swerving and swinging and "the two sets of wheels were not tracking." From the start of the skid marks to where they ended at the car in the ditch was 108 feet. Thirty-five feet south from where the car left the pavement and three feet in from the edge of the pavement were two patches of blood indicating that Theodore was thrown or rolled 35 feet along the highway from where the car came to rest.

The officer stated that from the physical evidence at the scene of the accident the defendant in his opinion was travelling in excess of 50 miles an hour. This estimate of speed is supported by Howard, an automotive engineer of 30 years' experience, who testified in his opinion the car must have been travelling "somewhere over 50 miles an hour." Philbrook, an automotive engineer of fourteen years' experience, gave as his opinion that the defendant would be travelling at "a speed of slightly over 50 miles on hour."

The defendant was driving a new Ford V-8, that had only been driven a few hundred miles. The day was fine and clear; the surface of the highway was coarse concrete and there is no grade at the place in question.

The learned judge below in dealing with this aspect of the case states in his reasons for judgment:

I have considered the whole of the evidence with care and have reached the conclusion that no case of excessive speed has been made out. The deductions drawn by the police officer and the experts are, I think, based on a wrong assumption. I was particularly impressed by, and I accept, the evidence of Mrs. Ross and of the independent witness Stewart, and must therefore hold that the police officer is mistaken.

With great respect to the learned trial judge I would point out that the evidence of the police officer was not based upon any assumption. He testified as to his actual observation and measurements of the skid marks made by the defendant's car upon the highway.

In cross-examination he said:

There is the continuity of marks . . . as clear and as evident as though it had gone through snow.

The witness Evans speaking of the skid marks swore they ran from "just a bit ahead of our car to where it [the defendant's car] went into the ditch." He said when the defendant's car was abreast of his car he could hear the brakes go on and smelled burning rubber.

The grandfather of the infant plaintiff testified that he could hear the screeching of brakes from his residence and that when he got out to the highway he saw burned rubber marks extending from a point four yards north of the driveway "all the way down to where the car went into the ditch off the cement."

The defendant on cross-examination said that the police officer pointed out skid marks to him which began north of the driveway and then in his presence traced them down to where his car was in the ditch. The defendant, however, said at the trial the marks could not have been caused by him as he never applied his brakes until after he had struck the boy.

On the question of speed the learned trial judge has accepted the evidence of Mrs. Ross, wife of the defendant, and Stewart. Counsel for the defendant offered as a theory that the skid marks were caused by a truck driven by Stewart south on the highway which was about 150 feet behind the Ross car at the time of the accident. For this he receives some support from the evidence of Mrs. Ross. She testified that while the Ross car was in the ditch Stewart's truck came along "the brakes screeched and I thought it was going to crash into us."

This explanation of the skid marks seems to have been accepted by the learned trial judge but when we turn to the evidence of Stewart, the other witness who particularly impressed the learned trial judge, it is clear that Stewart brought his car to an ordinary stop. When asked if he skidded his car he answered "Not that I can remember." There was no reason for Stewart to bring his car to a sudden stop. The accident occurred 150 feet in front of him and his car was so controlled by a governor that his speed could not exceed 32 miles an hour. It seems to me, with respect, impossible to explain away the skid marks by charging them to Stewart's car.

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Stewart, as I have mentioned, was 150 feet away from the point of impact. His version of the occurrence was that the boy came from behind Evans's car and the defendant "drove his car straight into the ditch to avoid the accident." In his evidence in chief he "imagined" the defendant applied his brakes and when cross-examined said "He could not have applied his brakes at all, he swerved into the ditch." Mrs. Ross on the other hand, who was riding in the back seat of the defendant's car was thrown violently, she said, off her seat to the floor pushing the front seat forward to such an extent that her boy who was in the front seat "went into the dash board." Mrs. Ross is of the opinion that the sudden application of brakes caused her to be thrown from her seat.

Mrs. Ross testified that the defendant was driving between 20 and 25 miles an hour just before the accident. Stewart on the other hand swore that he was travelling between 28 and 30 miles an hour when the defendant passed him about 1,500 feet north of the accident and that the defendant was still gaining on him when the boy was struck. He estimated the defendant passed him travelling at 35 or 40 miles an hour.

It is difficult to understand on what ground the learned trial judge could accept both the evidence of Mrs. Ross and Stewart where there is such a direct conflict between them in matters fundamental to the understanding of this occurrence and concerning those matters upon which the learned trial judge found that the police officer was mistaken. The testimony of Stewart that the defendant did not apply his brakes but ran "straight into the ditch" is contradicted by the defendant who says he applied his brakes. There is no possible explanation offered on this theory of how the injured boy was carried and thrown a distance of about 143 feet.

Stewart also imported into the case another feature to be considered as it was offered by counsel as a reason why the skid marks were not caused by the defendant's car. Stewart said Evans's car was not parked opposite the driveway but about 35 feet south of that point. Therefore, counsel submitted, the defendant would have had no occasion to apply his brakes near the driveway and in consequence the skid marks were not made

by the defendant. Evans said he stopped his car opposite the driveway, the defendant agrees with Evans and Fawcett a passenger in the Stewart car says it was "almost opposite." It seems improbable that Evans would stop at any other spot to let young Reopel alight. There is an open ditch along the road and why Evans should want to leave his charge to clamber over ditches instead of crossing the bridge provided escapes me. Assuming, however, that Evans's car was stopped 35 feet south of the driveway we would then have a circumstance to my mind operating a great deal more to the disadvantage of the defendant than if the car was where the principal actors said it was. If the skid marks were caused by the defendant's car then assuming Evans's car 35 feet south of the driveway it is clear that the defendant must have had just that much more distance in which to stop before striking the plaintiff. And to my mind the placing of Evans's car 35 feet south does not erase one inch of skid mark.

To sum up this end of the inquiry I am, with great respect, of the opinion that the learned trial judge is clearly wrong when he finds that the defendant was travelling at a reasonable rate of speed. The positive and direct evidence of the police officer as to the skid marks should not to my mind be displaced by accepting the testimony of two other witnesses when we find that these witnesses are in direct conflict with each other on matters relative to those facts to which the officer testified.

I can see no escape from concluding that beyond question, to my mind, the skid marks were caused by the violent application of the brakes of the defendant's car. I am also of the view the evidence of Howard and Philbrook to the effect that the defendant was travelling in excess of 50 miles an hour seems reasonable. This new car would be equipped with good tires and had four-wheel brakes. On a dry concrete pavement it skidded 108 feet most of which distance with its four wheels locked, and then came to rest in a ditch with such a sudden stop that the plaintiff was thrown a further 35 feet. I am satisfied that the defendant was travelling at an excessive rate of speed and was guilty of negligence.

What of the boy? This second branch of the inquiry presents little difficulty. He got out of the east side of Evans's car and

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regardless of the warning by Evans proceeded to the back of the car and from that point to cross the highway without looking. It may be that he was lulled into a false sense of security by the fact that the defendant's car was some 750 feet away when he started to get out of Evans's car but this would not relieve the plaintiff from the obligation of keeping a proper look-out for the approaching car before he ventured into the highway.

Having concluded that both parties were negligent "Could the defendant in the result by the exercise of ordinary care and diligence have avoided the mischief which happened?"

On this aspect of the case counsel for the defendant submitted that even if the defendant had been travelling at an excessive rate of speed, which he denied, such excessive speed was not the effective cause of the accident. He submitted that assuming excessive speed it was not an anterior disabling factor because there was not a sufficient space of distance or time in which the defendant could have extricated himself from a situation brought about by the negligence of the plaintiff and that had the defendant been travelling at a reasonable rate of speed he could not have avoided striking the plaintiff. The facts here, in my opinion, do not support the contention advanced by defendant's counsel. As I can see no escape from finding that the skid marks were caused by the defendant's car it is clear the defendant skidded over twenty feet before striking the boy. If he was travelling at least 50 miles an hour a considerable distance would be covered before the application of the brakes during that period termed by plaintiffs' counsel "the reaction ratio," *i.e.*, the time it would take for the physical application of the brakes after the danger became apparent. We have no evidence before us upon which to base an estimate but assuming that a one-half second elapsed from the time the defendant saw the boy until the brakes were applied and gripped the surface of the highway, a time which I do not think could be called anything but fair to the defendant, he must therefore have seen the boy some 60 feet away before striking him.

The learned trial judge holds that the plaintiff placed the defendant "in a position from which he was quite unable to extricate himself in order to avoid the collision." While that is

correct as far as it goes, with respect, the real reason why the defendant could not extricate himself was the excessive speed that he was travelling.

In my opinion had the defendant been travelling at a reasonable rate of speed he would have had ample time and opportunity to extricate himself and "to avert the impending catastrophe." His failure to do so, as I have said, was due to his excessive speed—a "self-created incapacity which rendered such efforts inefficacious." The defendant is therefore solely responsible for this accident. *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23; [1916] 1 A.C. 719.

Two other matters remain to be mentioned.

There is nothing before us upon which to base any conclusion that the plaintiff had the last chance of avoiding the negligence of the defendant. The defendant gave no warning of his approach and the plaintiff by not looking was unaware of the danger until the impact. Had the defendant on the other hand, as I have indicated, been travelling at a reasonable rate of speed, he could have avoided the plaintiff.

When considering what constitutes reasonable speed regard must be had of the surrounding circumstances. The defendant says, as near as he can remember he saw Evans's car when he was passing the Moffat place, a distance of over 700 feet from the driveway.

It would seem to me the defendant on seeing Evans's car in that position ought to have anticipated as a reasonable and prudent man that passengers would alight from that vehicle from either side. As it is the obligation of a driver "to take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way" (*Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690 at 698), the speed at which the defendant approached Evans's car should not have exceeded that speed at which the defendant could have controlled his car so as to have avoided the risk he should have anticipated. Anything in excess of that speed is, in my opinion, unreasonable.

I would not attempt any definition of reasonable speed in terms of miles per hour as so many factors are to be considered

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according to the circumstances surrounding the occasion, *e.g.*, condition of tires, brakes, highway, traffic, visibility and such like.

It is to be noted, however, that the statutory obligation, in this Province, is to drive in "a careful and prudent manner having regard to all the circumstances." The Act states that driving a motor-vehicle upon any highway within a city, town or village at a greater speed than twenty miles an hour or upon any highway not within a city, town or village at a greater speed than 30 miles an hour shall *prima facie* be deemed to be driving in other than a careful and prudent manner" (Motor-vehicle Act, R.S.B.C. 1936, Cap. 195, Sec. 53). We thus have this expression of the Legislature of the Province, as a sign-post of warning to motorists who feel inclined to speed along our highways. While the section I have quoted is not absolute in terms nevertheless it is helpful when considering what constitutes reasonable speed.

In reaching the conclusion that this appeal should be allowed I am not unmindful of the "inevitable qualifications" surrounding an appellate Court in appeals of this character. Nevertheless I have, with great respect, come to the firm conclusion that the appellant has satisfied the *onus* upon him to convince us that the judgment below was clearly wrong. *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304.

In the result and according to the practice laid down in *Perdue* v. *Epstein* (1933), 48 B.C. 115, I would direct a new trial limited to the assessment of damages.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellants: *F. M. Donnenworth.*
Solicitor for respondent: *W. W. Walsh.*

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May 31; *June* 1, 2; *Sept.* 14.

County Court—Fraudulent sale—Action to set aside—Jurisdiction—Discovery—Examination for—Trial—Putting in other parties' examination—Effect of—R.S.B.C. 1936, Cap. 58, Sec. 40 (1)—Rule 370r.

The County Court has jurisdiction under section 40 (1) of the County Courts Act to entertain an action to set aside as fraudulent a bill of sale from a mother to her daughter where the damage sustained on the estate or fund in respect of which the relief is sought does not exceed in amount or value $2,500.

In an action to set aside as fraudulent a bill of sale from the defendant Mrs. Burnett to her daughter, the defendant Mrs. Bullock, the plaintiff put in part only of the examination for discovery of the defendant Bullock, and also part only of the examination for discovery of her mother and co-defendant "in explanation of Mrs. Bullock's evidence."

Held, taking into consideration the object sought to be accomplished by so doing, that "taken as a whole" as it ought to be, the combined testimony of the said two witnesses supports the plaintiff's case and justifies the conclusion reached by the learned judge below.

APPEAL by defendants from the decision of LENNOX, Co. J. of the 22nd of March, 1937, in an action for a declaration that a bill of sale of certain goods and chattels made by the defendant Burnett to the defendant Bullock is fraudulent within the meaning of the Fraudulent Conveyances Act. In an action commenced on the 19th of June, 1936, the plaintiff recovered judgment against the defendant Burnett on the 22nd of September, 1936, in the County Court at Vancouver before HARPER, Co. J. for $250 and costs for services rendered by the said plaintiff to the defendants on the 4th of June, 1936. On a warrant of execution being issued the execution was returned *nulla bona* on the 1st of October, 1936. On the 14th of July, 1936, the defendant Burnett transferred by bill of sale the goods and chattels in her rooming-house in Vancouver to her daughter, the defendant Bullock, for $1,500.

The appeal was argued at Vancouver on the 31st of May and the 1st and 2nd of June, 1937, before MARTIN, C.J.B.C., McPHILLIPS and McQUARRIE, JJ.A.

P. D. Murphy, for appellants: On the jurisdiction of the County Court see *Parsons Produce Company* v. *Given* (1896),

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5 B.C. 58; *Brethour* v. *Davis and Palmer* (1919), 27 B.C. 250; May on Fraudulent and Voluntary Disposition of Property, 3rd Ed., 307. With reference to fraudulent preference, the Statute of Elizabeth did no more than make clear the common law on the subject: see May, *supra* p. 5. When he puts in the discovery evidence he is bound by that evidence: see *Anderson* v. *Smythe* (1935), 50 B.C. 112 at p. 155. We have the direct and uncontradicted evidence of the *bona fides* of the transaction and the sale was made to one who was innocent of any knowledge of the pending action: see *Kiervin* v. *Irving Oil Co.* (1935), 4 F.L.J. 244; *Hayhurst* v. *Innisfail Motors Ltd.,* [1935] 1 W.W.R. 385; *Capital Trust Corporation* v. *Fowler* (1921), 50 O.L.R. 48; *Brown* v. *Weil* (1927), 61 O.L.R. 55 at pp 59-60. When defendant's discovery was put in it was proved that the transaction was for valuable consideration and that it was done without knowledge of the first trial. The goodwill of the business and the furniture in the apartment-house was sold and the bill of sale registered according to law. We submit that *Koop* v. *Smith* (1915), 51 S.C.R. 554 does not apply to this case. The burden of proof is on the plaintiff: see Halsbury's Laws of England, 2nd Ed., Vol. 15, p. 252, sec. 464; *Golden* v. *Gillam* (1881), 51 L.J. Ch. 154 and 503; *Shephard* v. *Shephard* (1925), 56 O.L.R. 555 at pp. 557-8; *Wagner* v. *Hartows,* [1922] 3 W.W.R. 1050 at p. 1051; *Penny* v. *Fulljames,* [1920] 1 W.W.R. 555 at pp. 556-8.

Crux, for respondent: The rule laid down in *Koop* v. *Smith* (1915), 51 S.C.R. 554 applies to this case. Mrs. Burnett stated frankly that she sold to her daughter to defeat the debt to Sherlock. She refused a sale of the chattels for $1,800 five weeks previous to the sale to her daughter for $1,500. On the question of a transaction between near relatives see *Kushner* v. *Yasinka,* [1927] 3 W.W.R. 328 at p. 330; *Bludoff* v. *Osachoff,* [1928] 2 W.W.R. 150 at p. 157; *Capital Trust Corporation* v. *Fowler* (1921), 64 D.L.R. 289 at p. 294. As to the effect of putting in the discovery evidence see *Kiervin* v. *Irving Oil Co.* (1935), 4 F.L.J. 244; *Hayhurst* v. *Innisfail Motors Ltd.,* [1935] 1

W.W.R. 385 at pp. 388-9; *Hearn* v. *Hodgson*, [1923] 2 D.L.R. 258; Kerr on Fraud and Mistake, 6th Ed., 283.

Murphy, in reply: The case of *Capital Trust Corporation* v. *Fowler* (1921), 50 O.L.R. 48 is in our favour. See also *Brown* v. *Weil* (1927), 61 O.L.R. 55 at pp. 59 and 60. He must show that the grantee is privy to the fraudulent sale: see *Golden* v. *Gillam* (1882), 51 L.J. Ch. 503. On the question of jurisdiction see *Stephenson* v. *Garnett*, [1898] 1 Q.B. 677. With relation to the Statute of Elizabeth see *Cadogan* v. *Kennett* (1776), 2 Cowp. 432; 98 E.R. 1171; *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523; Kerr on Fraud and Mistake, 6th Ed., 218-9.

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On the 14th of September, 1937, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: This is an appeal from the judgment of LENNOX, Co. J., setting aside as fraudulent a bill of sale from the defendant Burnett to her daughter the defendant Bullock, and upon the facts we see no good reason for disturbing it.

A question arose, however, upon the jurisdiction of a County Court to entertain such an action having regard to the decision of Mr. Justice DRAKE in *Parsons* v. *Given* (1896), 5 B.C. 58, but since then the jurisdiction has been enlarged and now relevantly stands as section 40 (*l*) of Cap. 58 of the County Courts Act, R.S.B.C. 1936, to include

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

This subsection is taken from and is the same as subsection (8) of section 67 of the English County Courts Act, 1888, under which it was held by the Court of Appeal in *Stephenson* v. *Garnett*, [1898] 1 Q.B. 677, that the County Courts had "competent jurisdiction" (p. 680) to decide the question as to whether or no a deed of release, based upon the settlement of a judgment had been obtained by fraud: Chitty, L.J., at p. 681. said:

The judge had jurisdiction in equity under [said subsection] to deal with this deed of release on the ground of fraud.

We see no distinction in principle between that case and this,

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and therefore are of opinion that the learned judge below had jurisdiction. We note the decision of LAMPMAN, Co. J., in *Brethour* v. *Davis and Palmer* (1919), 27 B.C. 250, but, whatever may be said of it, its foundation is that the action was based not upon the County Courts Act but upon a special statute, the Fraudulent Preferences Act, and therefore the reasoning is inapplicable hereto.

A further question arose as to the consequence resulting from one party putting the examination on discovery of an opposite party in evidence, and it was submitted that by so doing the party is bound by the evidence he thus elected to put in to support his case, and therefore cannot question its accuracy if it fails to do so.

Many decisions were cited on the point including *Capital Trust Corporation* v. *Fowler* (1921), 50 O.L.R. 48; *Brown* v. *Weil* (1927), 61 O.L.R. 55; *Hayhurst* v. *Innisfail Motors Ltd.*, [1935] 1 W.W.R. 385; *Kiervin* v. *Irving Oil Co.* (1935), 4 F.L.J. 244; and *Anderson* v. *Smythe* (1935), 50 B.C. 112, 116; which we have considered and to which should be added our own decision in *Canary* v. *Vested Estates Limited* (1931), 43 B.C. 365, wherein the scope and object of rule 370r (under which this discovery evidence was put in) are considered, that rule being:

(1.) Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Under that rule, as was pointed out in *Canary's* case, *supra*, pp. 368-9:

It was, therefore, the duty of the judge, either *ex mero motu* or at the request of counsel, when the plaintiffs had put in certain parts of the examination of *Brougham*, to "look at the whole of the examination" to see if he could form the "opinion that any other part of it is so connected with the part to be used that the last-mentioned part ought not to be used without such other part," and in so doing the object sought to be accomplished by putting in the original part must be taken into consideration as one of the elements in the forming of that opinion. It is to be observed that the part to be put in by the judge is not "explanatory" merely, but is "connected" with the original part in such a way that it would be contrary to justice to disregard it.

In considering the question as to the extent to which a party is bound by "using in evidence any part of the examination of the opposite party," it must be remembered that his counsel is not in control of the situation so as to limit the use of the evidence to the part that he selects as favourable to his client, but it is for the judge to decide if any other "connected" part is also "to be put in evidence" even though unfavourable to said counsel's submissions.

The leading case is the one first mentioned, being a decision of the Ontario Court of Appeal upon an identical rule, from which ours was taken, and in it Hodgins, J.A., said, in delivering the judgment of the Court, at pp. 52-3:

The law seems quite settled that, if an admission is used by one party, it must be used in its entirety, that is, everything must be read that is necessary to the understanding and appreciation of the meaning and extent of the admission. It is also equally established that, if a party uses an admission, he makes it evidence in the cause both as to himself and as to the opposite party in the litigation as well; but, if he desires to contradict or qualify any statement in it, he may do so. He can therefore give other evidence so to contradict or qualify it, but, if he does not see fit to do so, the whole of the admission remains as evidence in the cause for the benefit of both parties. If this were not so, there would be no sense in requiring all of it to be read nor any necessity for allowing contradiction of part of it. These rules apply to all admissions, such as answers in Chancery, interrogatories, and depositions, as well as to writings and conversations. . . . The respondents, as plaintiffs, put in an admission which contained certain statements not necessary for their case, but valuable to the other side. They could not have used the admission without so doing; but, not being conclusively bound by all its terms, they are entitled to contradict those parts which qualified its usefulness to them:

And on p. 54:

The examination for discovery of a party, when put in as evidence under our Rules, is merely an admission made under oath before an examiner. Those Rules permit part of the examination to be put in. But such portion as may be selected differs in no way from any other admission, except that its proof is simplified and defined, and it must therefore be taken as a whole.

These expressions are, we think, appropriate to the present case, in which the plaintiff put in part only of the said examination of the defendant Bullock, and also part only of the examination of her mother and co-defendant "in explanation of Mrs. Bullock's evidence," as counsel stated, and, following *Canary's* case, *supra,* we "take into consideration" the "object sought to be accomplished" by so doing and are of opinion that "taken as a

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whole," as it ought to be, the combined testimony of said two witnesses supports the plaintiff's case and justifies the conclusion reached by the learned judge below.

It is neither possible, nor desirable to attempt, to lay down any general rule as to the extent to which a party may be bound by using in evidence the examination of an opposite party, because that result depends upon the circumstances of each case: an illustration of a party being bound by the whole evidence when she elected "to put in as part of her case all of the evidence taken on discovery" is to be found in *Kiervin* v. *Irving Oil Co.* (1935), 4 F.L.J. 244, wherein "by a strict construction" of a similar rule in New Brunswick, it was held by Barry, C.J.K.B., that

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

Our brother McPHILLIPS in *Anderson* v. *Smythe* (1935), 50 B.C. 112 at p. 116, was of opinion that the circumstances therein were such as to warrant the application of the said citation from *Kiervin's* case, but we all think that it is not applicable to this one.

It follows that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Murphy, Freeman & Murphy.*
Solicitor for respondent: *A. G. D. Crux.*

McINTOSH v. SCOTT.

S. C.
1937
Nov. 19, 26.

Slander—Meeting of Pharmaceutical Association—Presidential address—Qualified privilege—R.S.B.C. 1936, Cap. 215.

The defendant was the president of the Pharmaceutical Association of British Columbia, created under the Pharmacy Act. The plaintiff conducted at a profit a school of pharmacy in Vancouver which was attended by pharmacy students. The school was in no way connected with the association. At the annual meeting of the association the low average of successful candidates in the subjects of *materia medica* and botany was commented upon, and the president in his address to the meeting said "I fear *materia medica* and botany are not being properly taught in Vancouver in either of the schools." In an action for slander:—

Held, that the statutory direction that a meeting of members of the association be held annually was made so that members could be informed of the business of the association and of any matter in which they as such members are interested. The annual meeting was a privileged occasion upon which defendant was entitled to use the language above quoted without incurring legal liability for so doing.

Held, further, that the defence of qualified privilege is not destroyed by the fact that the editor of a trade journal, whose presence was required by the by-laws, was present at the meeting and defendant knew that his remarks would be published in that journal.

ACTION for slander. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 19th of November, 1937.

Bray, and *Elder*, for plaintiff.
Nicholson, and *J. R. Young*, for defendant.

Cur. adv. vult.

26th November, 1937.

MURPHY, J.: The practice of pharmacy in British Columbia is governed by the Pharmacy Act, R.S.B.C. 1936, Cap. 215. The Act as therein set out is identical with the Act in force at the time the occurrences in question herein took place. It creates a corporation called the Pharmaceutical Association of the Province of British Columbia (hereinafter referred to as the association). The association's affairs are carried on by an elected council. The Act provides that the council may make

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by-laws and regulations respecting, *inter alia*, the establishment and support of a school of pharmacy, the holding and conducting of examinations of candidates for registration as pharmaceutical chemists and as certified apprentices, the prescribing of subjects on which the candidates are to be examined and the qualifications of a candidate, the appointment, remuneration and defining of the duties of examiners. It further provides that the Lieutenant-Governor in Council shall on the recommendation of the council of the association appoint each year a board of examiners to examine persons who apply to be examined and registered under it. No person can practice as a pharmaceutical chemist in the Province unless registered as the Act provides. Both plaintiff and defendant are duly registered members of the association. The council has not established a school of pharmacy. Persons wishing to become pharmaceutical chemists are apprenticed for four years to a duly-registered member of the association. At the end of that period the apprentice must pass the examinations prescribed. Plaintiff has for years conducted for profit a school of pharmacy in Vancouver which apprentices could attend if they so desired. This is a purely private venture on his part and neither his school nor the one other pharmacy school conducted likewise in the City of Vancouver receives any official recognition from the association though the evidence would indicate that its members knew of their existence. These two are the only pharmacy schools in the Province. For many years previous to 1934 the examination papers in *materia medica* and botany were set by a Mr. Stearman and the papers of candidates who took the examinations in these subjects were marked by him. Some members of the association, including the plaintiff, considered that there was too high a percentage of failures in these subjects. They took the matter up with the council with the view to having a change of examiner made. The defendant was president of the association in 1934. Late in that year, as a result of these representations Stearman was released from that office and a Mr. Nelson, who during his apprentice days had attended the school of plaintiff, was appointed in his stead as examiner in *materia medica* and botany. The Act provides that an annual meeting of the association shall

be held. This meeting took place in Vancouver on or about June 25th, 1935. Previous to the association meeting a council meeting was held. Defendant as president asked the registrar of the association to prepare for him a comparative statement of the results of the examinations in *materia medica* and botany covering the last few years of Stearman's incumbency and the period during which Nelson had occupied that office. Only one examination had been held by Nelson up to June, 1935. The registrar did so and defendant was surprised to learn therefrom that the percentage of failures under Nelson was greater than under Stearman. The annual meeting then took place with defendant in the chair. The association had decided to make a presentation gift to Stearman as a retiring examiner, he having occupied that position for about 30 years. Stearman was not present but defendant, as president, made the presentation *in absentia*. What occurred in this connection was stated in the evidence of Stewart, the registrar of the association. I quote from his testimony:

You say Mr. Scott presided at the annual meeting held on the morning of the 25th June, 1935? Yes.

Do you recall an address and certain remarks made by Mr. Scott on that occasion relative to the examinations in *materia medica* and botany and other pharmacy subjects? Yes, I do.

Would you tell us what Mr. Scott said on that occasion? Mr. Scott, in making the presentation to the retiring examiners——

Just a moment, please. Was the meeting still in progress? Yes, it was.

Part of the proceedings of the annual meeting? Yes, I remember that as a fact, and the minutes show it to be so.

You say he was making a presentation. On whose behalf? On behalf of the association to Mr. Fisher and Mr. Stearman.

Tell us what was said on that occasion by Mr. Scott? In respect to Mr. Stearman, Mr. Scott's remarks were to the effect there had been some criticism of the examination papers set by Mr. Stearman and that he had come to the conclusion such criticism was not justified.

That he, Scott, had come to the conclusion? Yes.

Yes? He stated he had examined the marks obtained by the new examiner as compared with the marks got by the old examiner over a period of years, and that it was reasonable to assume a new examiner would be lenient in his markings, yet the marks as he had them before him showed a greater number of failures under the new examiner than had prevailed under the old examiner.

Yes? Then he went on to say, "It seems to me that the fault lies with the candidates rather than with the examiner, and that these subjects botany

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and *materia medica* are not being taught in either of the pharmacy schools in Vancouver."

Are not being taught? "Properly or correctly taught."

"Are not being taught properly or correctly in either of the schools"? Yes.

Yes. What else did he say, if anything? I can't just recall.

Is that all you can recall of the remarks which related to the examinations in *materia medica* and botany and also to the teaching of these subjects in these two schools? Nothing further you can recall? I don't recall anything.

In his examination for discovery defendant admitted that what he said in reference to the two schools of pharmacy was: "I fear *materia medica* and botany are not being properly taught in Vancouver in either of the schools."

Plaintiff brings this action for slander, alleging that the words admitted by the defendant to have been used by him were spoken of him (the plaintiff) in relation to his profession of teacher in his school of pharmacy and are such as would naturally tend to injure or prejudice his reputation therein.

Defendant sets up, *inter alia,* the defence of qualified privilege. I hold that this defence has been made out and that the action must be dismissed.

A privileged occasion is defined in Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 470:

An occasion is privileged where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The privilege extends only to a communication upon the subject with respect to which privilege exists, and does not extend to anything that is not relevant and pertinent to the discharge of the duty, or the exercise of the right, or the safeguarding of the interest, which creates the privilege.

In my opinion the annual meeting required by the Pharmacy Act was a privileged occasion upon which defendant was entitled to use the language above quoted without incurring legal liability for so doing. Only members of the association were present with the exception of the editor of the "Western Druggist," a trade journal published under the auspices of the association. I will discuss the matter of his presence hereafter. Clearly, I think the statutory direction that a meeting of members of the association be held annually was made so that members could be informed of the business of the association and of any matter in

which they, as such members, were interested. The conduct of examiners, the holding of examinations and the results of such examinations are, I think, matters of this character. During the year that had elapsed since the last annual meeting a change of examiners had been made. It was, I think, the duty, if not legal at any rate moral, of the president to inform the members as to the results of such change. At the least he had a right to do so considering the position he occupied and considering the nature of the meeting he was addressing. I hold further that the remarks he made in reference to the schools were relevant and pertinent to the discharge of this duty or at any rate the exercise of this right. The association had made a change with a view to lowering the percentage of examination failures. The change had brought not improvement but an increased number of failures. It would seem that it was, if not the duty, at least the right of the president of the association to inform the members of this and to express his honest opinion as to a possible cause, as a matter relevant and pertinent to the exercise of such right, and that the members had a corresponding interest entitling them to hear such honest opinion. If this view is incorrect then I think the requirements of the law, as to statements made on an occasion of qualified privilege, are satisfied on another ground. Many of the members present must have had apprentices who in due course would be taking the examinations for the evidence shows that twice a year a considerable number of such apprentices passed the examinations and further it was possible that any member who did not then have an apprentice might any day take one. It would be the moral duty of such members (and quite probably the articles of apprenticeship would impose upon them the legal duty) to see that their apprentices received proper training so as to enable them to pass their examinations. Plaintiff's school was open to all such apprentices, wherever they resided, should they choose to attend and pay the fees. It was, I think, therefore, relevant and pertinent in the discharge of his duty or at least it was in the exercise of his right, for the defendant on the occasion in question to express his opinion of the tuition given in the two schools of pharmacy providing he was expressing his honest belief and was not actuated by malice

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in the technical sense in which that word is implied in relation to actions of slander. It was, I think, a matter of common interest and a matter of importance to all members that they should have any knowledge available as to the character of tuition given in plaintiff's school so that they could advise their apprentices whether or not it would be wise for them to attend same and I also think it was at least the right of defendant under the circumstances to express the opinion he did as a contribution to such knowledge provided he did so honestly. If the occasion was one of qualified privilege and if the views above expressed are correct the *onus* is on the plaintiff to show malice. There was no evidence adduced which under the authorities, as I read them, satisfies this *onus*.

It is urged on behalf of plaintiff, as showing malice, that defendant made the statement without any investigation of the character of the tuition given in plaintiff's school and without knowledge of what number, if any, of examinees who had attended plaintiff's school had failed. The law on this point is set out in Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 499-500:

The malice which avoids privilege is a wrong feeling or motive existing in the mind of the defendant at the time of the publication and actuating it. It is actual malice, or malice in fact, and is usually termed express malice to distinguish it from implied malice, or that malice in law which is presumed to exist from the publication of defamatory matter without justification or excuse.

It is not enough for the plaintiff to show that the defendant in making a statement on such an occasion was rash, improvident, credulous, or stupid, or that he did not do or say what a man of the world would do or say on such an occasion. If the defendant made the statement believing it to be true, he will not lose the protection arising from the occasion because he had no reasonable grounds for his belief.

Defendant at the time he made the statement did not know plaintiff though he had had correspondence with him. There is no evidence of actual malice on his part. I hold he made the statement complained of believing it to be true and without malice.

It is further urged on plaintiff's behalf that the presence of the editor of the "Western Druggist" at the annual meeting would take the occasion out of the category of one of qualified privilege. The case of *Pittard* v. *Oliver*, [1891] 1 Q.B. 474;

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60 L.J.Q.B. 219, is, I think, decisive against this contention. The by-laws of the association required the presence of the editor at the annual meeting. The defendant did not invite him there and could not have compelled him to leave. Defendant knew that his remarks would be published in the "Western Druggist" but he did not suggest such publication. In consequence the defence of qualified privilege is not destroyed: *Hopewell* v. *Kennedy* (1904), 9 O.L.R. 43.

The action is dismissed with costs.

Action dismissed.

TREWIN v. WAWANESA MUTUAL INSURANCE COMPANY.

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1937
Dec. 20, 21.

Practice—Discovery—Company—"Past officer"—Agent without authority to bind company—Not within rule 370c.

An agent who has no authority to bind an insurance company but merely takes applications for insurance and submits them for acceptance or rejection is not an "officer" and cannot be examined as a "past officer" within rule 370c.

APPLICATION by plaintiff under rule 370c for leave to examine for discovery G. H. Monk as a past officer of the defendant company.

Plaintiff had been insured against motor-vehicle liability with defendant, the policy having been placed by Monk, an insurance agent. When the policy was about to expire Monk asked the plaintiff if he desired to renew the policy, and plaintiff replied in the affirmative and requested Monk to renew it. Monk advised plaintiff he would be covered. Monk had no authority to contract on behalf of the defendant but simply to submit applications for insurance to the defendant for its acceptance or rejection. Monk did not submit plaintiff's application for renewal to the defendant. Plaintiff brought this action for, *inter alia,*

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specific performance of the contract of insurance alleged to have been made by Monk on behalf of the defendant when the plaintiff applied to Monk for the renewal. Heard by McDONALD, J. at Vancouver on the 20th and 21st of December, 1937.

W. H. Campbell, for the application, referred to *Yamashita* v. *Hudson Bay Insurance Co.* (1918), 26 B.C. 387.

Tysoe, contra: The *Yamashita* case is distinguishable. The record in that case shows the defendant company was relying upon a cancellation of the policy on its behalf by the agent sought to be examined as an officer. Under such circumstances it might be said there had been sufficient delegation of authority to the agent to make him an officer of the corporation within the rule. Moreover, since that case was decided, the Insurance Act makes a clear distinction between agents and officers: see *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223 at 226; *Powell* v. *Edmonton, Yukon & Pacific Ry. Co.* (1909), 2 Alta. L.R. 339 at 340; *Nichols & Shepard Co.* v. *Skedanuk* (1912), 6 D.L.R. 115; *Kapoor Lumber Co., Ltd.* v. *Canadian Northern Pacific Ry. Co.* (1932), 45 B.C. 213 at 218 and 219; *Vardeman* v. *Penn Mutual Life Ins. Co.* (1906), 54 S.E. 66.

McDONALD, J.: An insurance agent who is without power or authority to bind an insurance company, but who takes applications for insurance and submits them to the company for its acceptance or rejection, is not an "officer" of the company and so cannot be examined as a "past officer" under rule 370c.

Application dismissed.

Application dismissed.

BARON v. WHALEN *ET AL.*

S. C.
1937
Dec. 17, 23.

Negligence — Damages — Motor-vehicle—Collision with pedestrian—Excessive speed—Ignoring stop sign at intersection—Alleged insanity of defendant—Liability.

In the afternoon of March 30th, 1937, the defendant drove an automobile west on Twelfth Avenue in Vancouver at a rate of 40 miles an hour. He ignored the stop sign at Cambie Street intersection, struck the rear of a car driven by one Newmeyer which was travelling south on Cambie Street, mounted the curb, broke off two sign-posts and struck the plaintiff, a boy of 13 years of age, who was walking west on the sidewalk on Twelfth Avenue west of Cambie. The boy was hurled into the air, fell on the concrete sidewalk and was severely injured. In an action for damages the defence set up was that the defendant at the time of the accident was insane.

Held, that the *onus* on the defendant to prove a state of insanity that would excuse him from liability has not been satisfied. On the contrary, the evidence proves that he was sane to the extent required to make him liable for his negligence.

Discussion on the law as to whether insanity can be a defence in a negligence action.

Slattery v. *Haley,* [1923] 3 D.L.R. 156, and *Donaghy* v. *Brennan* (1901), 19 N.Z.L.R. 289, applied.

ACTION for damages, the plaintiff having been run into and severely injured owing to the negligent driving of an automobile by the defendant. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 17th of December, 1937.

McCrossan, K.C., for plaintiff.
Bull, K.C., and *Ray,* for defendants.

Cur. adv. vult.

23rd December, 1937.

MURPHY, J.: Twelfth Avenue in the City of Vancouver runs approximately east and west. It is intersected by Cambie Street which runs approximately north and south. The new City Hall stands on the north-east corner of the intersection. When it was built Twelfth Avenue east of Cambie was widened for some distance but not west of Cambie. The consequence is that if a

motor going west is driven close to the curb on Twelfth Avenue east of Cambie and continues across the intersection without deviation it will strike the curb on the west side of Cambie. To call attention to the situation a 4 x 4 sign-post several feet in height and painted yellow and black was erected on the boulevard on Twelfth Avenue west of Cambie. Collapsible stop signs are placed in the centre of Twelfth Avenue, both on the east and west at its intersection with Cambie. Similar stop signs are placed in the centre of Cambie Street at the same intersection, both north and south of Twelfth Avenue.

On March 30th, 1937, in the afternoon, John A. Whalen, the defendant, drove an auto west on Twelfth Avenue at a rate of 40 miles an hour or possibly more. He ignored the stop sign at the Cambie Street intersection, struck the rear of a car driven by one Newmeyer, which was travelling south on Cambie, mounted the curb, broke off the sign-post and an upright iron pipe which supported a "no parking" sign, struck the plaintiff, a lad of 13 years of age, who was walking west on the sidewalk on Twelfth Avenue west of Cambie and hurled him into the air. The car finally stopped against a concrete wall. Plaintiff fell upon the concrete sidewalk and was seriously injured. No question is raised as to Newmeyer being in any way responsible for what occurred; in fact the defendant John A. Whalen's negligence is practically admitted since no cross-examination took place on this phase of his conduct. The defence set up is that he, at the time of the occurrence, was insane. It is admitted that the auto driven by him was purchased on March 23rd, 1937; that he had driven an auto probably several times during the space of ten days prior to the accident and probably within the space of 30 days and a few times within the space of 60 days and that he had driven the auto which caused the accident on the date on which it occurred either in the morning, at the noon hour or during the early afternoon. It is further admitted that he attended to his business and financial and household affairs during a substantial period of time prior to the accident and up to the day upon which it happened and that he was accustomed prior and approximately up to the date of the accident to attend customary church services from time to time and

to occasionally attend picture shows. It is also admitted that subsequent to the accident he for some considerable time was free to move about as he desired and went out alone from time to time and returned to his then place of residence from where he started. Very shortly after the accident the defendant attended at the police station to make out a report concerning same. There is no evidence that he was requested to do so. Apparently he went because he knew it was his duty under the law. At the police station he did not seem to be able to see what he was writing nor to make out the report properly. However, he told the constable in charge about the collision with the car driven by Newmeyer. He said he had struck Newmeyer's car which had been proceeding south on Cambie Street and that Newmeyer had not stopped at the stop sign, meaning the stop sign for south-bound traffic on Cambie. It is not clear on the evidence whether he personally made out the report or whether someone else did so on his behalf. On April 2nd, 1937, Dr. Davidson saw him at his home and came to the conclusion that he was mentally deranged. During his talk with Dr. Davidson on that occasion the defendant told him of the accident. He said he had been driving at 50 miles an hour, had struck Newmeyer's car and had then hit the plaintiff. He exhibited no regret for having done so. Although Dr. Davidson considered defendant mentally deranged he was allowed for a time to go and come alone as already set out. On May 15th, 1937, he was sent to Hollywood Sanitarium in New Westminster. There he remained for some three months. He grew progressively worse and was finally certified as an insane person and sent to Essondale Mental Hospital where he now is. Medical men diagnosed that he was suffering from arterio-sclerosis. The evidence shows this to be a slowly progressive disease. Not infrequently in its later stages it results in reducing the blood stream to the brain so greatly that the afflicted person becomes insane as was the case with the defendant. On the defence of insanity two questions arise for decision. First one of fact—Was the defendant insane in the legal sense at the time of the accident and, second, if he was, does that fact release him from liability to the plaintiff for the injury caused by the accident? I deal first with the

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question of fact. The answer thereto depends upon what is meant by insanity that will relieve from liability in a negligence action, assuming for the moment that insanity can be a defence at all. I am content, so far as the facts of this case are concerned, to accept as correct the statement of Middleton, J. in *Slattery* v. *Haley*, [1923] 3 D.L.R. 156 at 160:

That to create liability for an act which is not wilful and intentional but merely negligent it must be shown to have been the conscious act of the defendant's volition. He must have done that which he ought not to have done, or omitted that which he ought to have done, as a conscious being.

The *onus* is on the defendant to make out the defence of insanity. The occurrence itself cannot be relied upon as proof for although it showed negligence to the point of recklessness almost daily experience in the Courts shows that such negligence occurs not infrequently even when no question of insanity or liquor is involved. Dr. Davidson's opinion is that he was insane when the accident occurred. Expert opinion is of course to be given due weight in deciding any question of fact but it is not conclusive. It is for the Court to decide the question of fact after considering all the evidence. In this connection there is an important matter to be taken into consideration. Any one who has had much experience in presiding over Assize trials in which the defence of insanity was raised is aware that the medical concept of insanity differs widely from the legal concept. As it is expressed in *Donaghy* v. *Brennan* (1901), 19 N.Z.L.R. 289,

to a medical man, a man subject to delusions or with a depraved or weakened will should not be expected to act as a normal man and his liability both criminal and civil should be less than that of the same man with a normal will.

The judgment proceeds:

But our law even in criminal cases has not adopted this medical point of view.

In my opinion the law of Canada is, in this respect, identical with the law of New Zealand as is evidenced by section 19 of the Criminal Code. Dr. Davidson was not asked directly to define what he meant by insanity in reference to the defendant. His answers in cross-examination, however, I think show that he was of opinion that defendant knew what he was doing when the accident occurred in the sense that the accident was the

conscious act of the defendant's volition. If this view of his evidence is correct then its effect is to assist the plaintiff's case instead of satisfying the *onus* on the defendant. But there is direct as contrasted with opinion evidence that must be considered. The defendant was going, as the evidence shows, about his business in the ordinary manner up to and including the date of the accident. No doctor was called in until April 2nd, so far as the evidence shows, and even thereafter defendant does not seem to have been under any restraint but to have come and gone as he wished up to May 15th when he was sent to Hollywood Sanitarium. Much more important are the conduct and statements of the defendant immediately after the accident and on April 2nd to Dr. Davidson. Since it is impossible for one person to look into the mind of another the only means of judging of the mental processes of that other is by what he does and by what he says. I attach importance to the fact that the defendant went to the police station to report the accident as required by law and particularly to what he then said to the police officer. In stating that Newmeyer had not stopped at the stop sign, he was I think obviously endeavouring to excuse himself and to throw the blame upon Newmeyer. If this view is correct then he was not only conscious of what he had done but he knew that what he had done was wrong. The time that elapsed between the making of this statement and the accident was so short that I think it is a fair inference that his mental condition was the same at the time of the accident as it was when he made the statement. If so he would not only be civilly but criminally responsible, in my opinion, as will appear more definitely when I discuss the law. Next: what he said to Dr. Davidson on April 2nd I think shows that the accident was a conscious act of his volition. That he exhibited callousness in reference to plaintiff's injuries is, I think, no indication that what he had done was not such a conscious act. I gathered from Dr. Davidson's evidence that defendant seemed rather proud of the occurrence. If so that would tend to confirm my view. I hold, therefore, that the *onus* on the defendant to prove a state of insanity that would excuse him from liability has not been satisfied even according to the

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standard set up in the *Slattery* case. On the contrary, the evidence proves to my satisfaction that he was sane to the extent required by that case to make him liable for his negligence. This disposes of the insanity aspect of the case, but, in view of the argument, I feel I should briefly discuss the law as to whether insanity can be a defence in a negligence case. Plaintiff's counsel argues that no matter how pronounced the insanity is it is no defence to civil liability in an action for negligence. This is the view of the American Courts.

> While a guilty intent is an essential element of criminal responsibility, intent is not generally an essential element of liability for tortuous acts or negligence, and hence the general rule is that an insane person may be liable for his torts the same as a sane person, except perhaps those in which malice, and therefore intention, is a necessary ingredient, as in the case of libel or slander:

32 C.J. 749-50. The New Zealand Court of Appeal took the same view of the law in the *Donaghy* case, *supra.* The correctness of the law so laid down is questioned by the trial judge in the *Slattery* case. His decision was affirmed on appeal but no reasons were given by the appellate tribunal. The *Slattery* case was cited by defendant's counsel, not because it was in point on the facts of the case at Bar but because of this criticism and because of *dicta* which the judgment of the trial judge contains on the question of insanity being a defence in an action for negligence. In that case the defendant, whilst driving an automobile, became suddenly ill and fell back in the car as though suffering from a fit or a stroke. He had no companion or passenger and the car, left without any guidance, ran upon the sidewalk and killed a boy. The defendant never had had any similar attack and supposed himself to be in good health. It will be seen that these facts differ entirely from those in the case at Bar. In the *Slattery* case the defendant was devoid of all mentality whatever. He was quite unconscious and had nothing to do with steering the car in such a fashion as to cause it to strike the boy. The facts here are the exact opposite. The *Slattery* case was not a case where the defence of insanity was set up but, as stated, the trial judge by way of *dicta* did canvass the law with regard to the defence of insanity in negligence cases. As appears from what was said in dealing with the ques-

tion of fact, my view is that the case at Bar falls within the definition of liability in insanity cases enunciated by him. I would point out, however, that the judgment, in so far as the *dicta* with regard to insanity are concerned, if they are to be read as meaning that insanity would be a defence to negligence cases in every set of facts (which I do not suggest is the case) seems to be founded on an erroneous premise. The learned judge states the Supreme Court of Canada in *McCarthy* v. *Regem* (1921), 62 S.C.R. 40 determined that the effect of section 247 of the Canadian Criminal Code is to place civil and criminal liability on precisely the same grounds. This view of the *McCarthy* case was expressly repudiated by Duff, J. (as he then was), delivering the judgment of the whole Court, in *Rex* v. *Baker* (1929), 51 Can. C.C. 352. The importance of this is that in reality there is a marked difference between civil and criminal liability in negligence cases. In a civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In the criminal Court, on the contrary, the amount and the degree of negligence are the determining question. There must be *mens rea*.

> In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment:

Rex v. *Bateman* (1925), 95 L.J.K.B. 791 at 793-4.

> The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established:

Andrews v. *Director of Public Prosecutions* (1937), 106 L.J.K.B. 370.

That the same view is taken in Canada is shown by *Rex* v. *Greisman* (1926), 46 Can. C.C. 172; *Rex* v. *Costello* (1932), 58 Can. C.C. 3, and *Shortt* v. *Rush and British American Oil Co.,*

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[1937] 4 D.L.R. 62. All these cases with the exception of the last are criminal cases involving manslaughter. It is true that by enacting subsection 3 of section 951 of the Criminal Code Parliament has introduced in manslaughter cases arising out of the operation of a motor-vehicle the idea of degree of criminal culpability. See *Rex* v. *Preusantanz* (1936), 65 Can. C.C. 129, and *Rex* v. *Kennedy* (1936), *ib.* 158. That enactment however in no way alters the fundamental distinction embedded in the common law between civil and criminal liability for negligence as set forth in the *Bateman* and *Andrews* cases, *supra.* That distinction applies in my opinion to criminal negligence cases as fully as it does to manslaughter cases for it is founded not on the specific nature of manslaughter as such but on the concept of crime in general as embodied in the common law.

Although I am firmly of opinion that the standard of criminal liability is not applicable to civil liability yet, if I am in error and it is, I would still hold that the defendant has not satisfied the *onus* upon him to prove that he was insane according to that standard. The Canadian Criminal Code excuses a person from criminal responsibility on the ground of insanity if such person because of disease of the mind is incapable of appreciating the nature or quality of the act or omission of which he has been guilty and of knowing that such an act or omission was wrong. If now regard is had to what Whalen said to the police officer at the police station shortly after the accident it might well be that he was criminally as well as civilly responsible. His words, in my opinion, indicate that he knew the nature of the act when he committed it and also knew that such act was wrong in the sense that it was prohibited by law and the case would have had to be submitted to a jury had he been prosecuted for criminal negligence. Reverting to the question of civil liability it may well be that if lunacy of the defendant of so extreme a type, as to preclude any general intention to do the act complained of were proven there would be no voluntary act at all and therefore no liability although such authority as there is seems to make the proposition doubtful. I need not, however, pursue the matter further since taking the most favourable view of the law for the defendant that can be found in any decision,

viz., that in the *Slattery* case, I hold the defence fails for reasons hereinbefore set out.

The next question is the *quantum* of damages, always difficult and particularly so in the case at Bar. The plaintiff had a small bone of one of his legs broken and suffered other minor injuries. So far as these are concerned he has fully recovered but it is claimed that he suffered serious brain injury as a result of the accident, causing epileptic fits in the past and the probability of recurrence of same in the future. The evidence shows that his personality is greatly changed since the accident. Before it he was fond of reading. Now he cares very little for books. Previous to the accident he liked games, such as football, baseball, etc. Now he merely plays catch with his nine-year-old brother. Dr. McLean, an eye specialist, first called in on April 28th, 1937, found plaintiff suffering from double vision, convergence and loss of accommodation in his eyes. The first two conditions might be accounted for, he testified, by injury to the eye but the third, loss of accommodation, could not be. In Dr. McLean's opinion it indicated some sort of brain injury but not being a specialist with regard to the brain he does not assume to state its nature. Dr. Emmons, who is such a specialist and who later on attended the plaintiff, was emphatic in his testimony that plaintiff had suffered from epileptic fits and would probably suffer from such fits in the future. Dr. Turnbull, likewise a brain specialist, also examined the plaintiff. His opinion is that plaintiff has not suffered from epilepsy and that he will be fully recovered in a year to eighteen months from the date of the accident if he is placed in a proper environment which he considers he is not now in. Dr. Turvey, another brain specialist, who saw the plaintiff, declined to express an opinion so long as plaintiff remains in his present environment. He felt that plaintiff should be removed from such environment for some months when it might be possible to form an opinion relative to his future health prospects. Both Dr. Turnbull and Dr. Turvey testified that plaintiff had made statements to each of them in connection with the examination of his eyes which were untrue because they were physical impossibilities. Plaintiff has not attended school since the accident and no medical witness

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suggests he will be fit to do so under the most favourable circumstances before March next at the earliest. The boy's mother, Mrs. Baron, testified that in the first week of October plaintiff had three seizures, two at home and one at a neighbour's house. As no evidence was led with regard to this latter seizure and, as her testimony with regard to it must have been based on hearsay, I exclude it from consideration. With regard to the other two seizures I accept the mother's testimony as true. The first one in particular was quite severe. Both Dr. Turnbull and Dr. Turvey declined to regard these seizures as definitely epileptic. The furthest they would go was to state that possibly they might be. They said that a layman's description of a seizure could never be relied upon as establishing the occurrence of epilepsy. Dr. Turnbull did say that if these October seizures were epileptic in nature then his diagnosis as to the future would be much more unfavourable. He further said that for the purpose of treatment, if plaintiff was under his care, he would consider these seizures as epileptic because that is a possibility but that he could not say any more than that. The occurrence of these October seizures was not expressly mentioned to Dr. Emmons by either counsel though he had heard of them and had had plaintiff's case in hand since their occurrence. He was asked to enumerate the reasons why in his opinion plaintiff had suffered from epilepsy. He enumerated five such reasons. He did refer to "subsequent *responses*" and on behalf of plaintiff it is urged that he was referring to these seizures. This is controverted by defence counsel. It is perhaps to be regretted that neither counsel directed his attention specifically to them.

Weighing all the evidence to the best of my ability I am of opinion that it is more probable than not that the plaintiff has suffered from epilepsy and that it is more probable than not that he will suffer from that disease in the future. If this conclusion is correct it means that the accident has impaired the health of plaintiff so seriously that it is difficult to estimate what would be proper compensation therefor in terms of money. A lad of 13 years of age who will probably be liable to epilepsy has undobutedly been gravely injured in his health and in his life prospects. I award him $5,000 general damages. Special

damages to the amount of $1,158.74 are claimed by his mother, the plaintiff Mrs. Baron, and proved except with regard to *quantum* in respect of two items which are questioned on behalf of the defendant. The first is Dr. Clement's bill for $352.50. This is said to be excessive. Dr. Clement testified in his opinion it was a reasonable charge. No testimony, medical or otherwise, was called to show that it was not. I do not think, therefore, that I should question it. The next item of special damage disputed is a claim for $500 loss of earnings by plaintiff Mrs. Baron. Previous to the accident she did catering at parties and says that she earned from $70 to $80 a month. She alleges that since the accident she has had to devote herself entirely to the care of her injured son. It is argued that after the first two or three months at any rate she could have continued in her occupation and hired assistance to care for him. It is suggested that such assistance would not cost more than $25 a month. Board for such assistance would make the cost at least $40 a month I think. The claim of $500 is made up to September 14th, 1937, the date of the writ. Mrs. Baron testified that she is still devoting her time exclusively to caring for her son. The seizures in the first week of October and the evidence as to headaches, insomnia, etc., which still persist would indicate that he requires such care and unless he is taken from home none of the medical witnesses would venture an opinion as to how long he will be so incapacitated as not to be able to attend school. She would be entitled to have her loss considered not only up to the present but for the future. On the whole I think $500 is not excessive and I give her judgment for $1,158.74. Plaintiffs are entitled to their costs.

Judgment for plaintiffs.

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ANDERSON v. CALEDONIA INSURANCE COMPANY.

Insurance, accident — Wife owner of car — Name of husband inserted in insurance policy by mistake—Effect of—Driver of car without licence—Breach of statutory condition—Insurer's knowledge—Continuation of defence in action against insured—Waiver of condition—Estoppel.

The plaintiff held a policy of insurance to indemnify her against liability for injury to others by her car. The policy was running out in July, 1935, and her husband applied to the agents of the defendant company for a like policy to cover said car. The agents sent him an application and he signed it without noticing that his name appeared as applicant and owner of the car instead of the name of his wife, and the policy was duly issued in his name. On the 5th of November, 1935, while the car was driven by one Hanbury, a boy of seventeen years of age, it struck and injured one Hughes. The next day the plaintiff's husband notified the defendant's agents in writing of the accident, that Hanbury, a boy of seventeen years, was driving the car, and that he had no licence. On February 19th, 1936, Hughes brought action against the plaintiff and Hanbury for injuries sustained. The defendant company was immediately notified of the action and of the defence that in fact a boy named Kennedy was entrusted with the car and not Hanbury, but Hanbury was allowed to drive the car by Kennedy after they had left the plaintiff's house. The defendant company then undertook the defence of the action and carried through to judgment, but the trial judge declined to accept plaintiff's evidence and found she had entrusted the car to Hanbury and gave judgment in favour of Hughes against both Hanbury and herself. The plaintiff then brought this action that the defendant company indemnify her against the Hughes judgment under the policy. Two defences were raised, first, that the policy was not issued in her name and there was no contract between herself and the defendant company; secondly, there was breach of a statutory condition in that Hanbury, who drove the car, had no driver's licence.

Held, that from the evidence of the local manager of the defendant company it is clear that the company elected, after the accident, to treat the plaintiff as the insured and the company conducted the defence in the Hughes action which could only be done on the basis of a contract of insurance existing between it and the plaintiff. This case has to be adjudicated upon the same basis as it would be had plaintiff been the named insured in the policy and if estoppel has to be made out to support this view, the evidence establishes it.

Held, further, that the defendant with full knowledge of the breach of said statutory condition (that Hanbury had no driver's licence) elected to proceed with the defence, and having done so, waived any right to dispute liability under the policy upon this ground.

ACTION against the defendant company on an accident-insurance policy to indemnify the plaintiff against a judgment obtained against her for damages owing to an accident, as provided for by said policy. Tried by MURPHY, J. at Vancouver on the 6th of January, 1938.

Clyne, for plaintiff.
McAlpine, K.C., and *J. L. Farris,* for defendant.

Cur. adv. vult.

14th January, 1938.

MURPHY, J.: In July, 1935, and previous thereto, plaintiff was the owner of a Pontiac sedan automobile. Her husband had business relations with Edwards & Ames. Edwards & Ames were agents for defendant company to solicit automobile insurance and issue policies therefor. Plaintiff had insurance on her car which was running out in July, 1935. Her husband, because of his business relations with Edwards & Ames, desired to put business in their way and accordingly made application to them for a policy intended to cover his wife's car. They drew up an application for insurance in the name of Stanley J. Anderson, the husband, and sent it to him. He says he signed the application without noticing that his name appeared, as applicant and owner of the car, instead of the name of his wife. The policy was duly issued in the name of Stanley J. Anderson. On November 15th, 1935, whilst the car was being driven by one George K. Hanbury, a lad of seventeen, it struck and injured a man named Hughes. The next day the husband notified Edwards & Ames by letter of the accident. This letter was forwarded by Edwards & Ames to Burgess, the manager for British Columbia, of the defendant company, and was received by him on November 18th or 19th.

On February 19th, 1935, Hughes brought action for the injuries sustained in the said accident, making as defendants the driver, George Kilgour Hanbury by his guardian *ad litem* George R. Hanbury, one James Kennedy, also a lad of about seventeen, and Margaret S. Anderson, the plaintiff herein.

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Whilst James Kennedy was named in the writ as a defendant he was subsequently dropped from the action which continued against George K. Hanbury and the plaintiff herein, Margaret S. Anderson. The defendant was notified that the action had been instituted. Burgess referred the matter to the defendant's solicitor. From the solicitor he learned of the error that had been made in issuing the policy in the name of the husband, Stanley J. Anderson, instead of in the name of the wife. Burgess recognized, as he put it in his examination for discovery, made part of the evidence at the trial, that this was simply a mistake. "If we had been offered the insurance in the name of Mrs. Anderson we would have accepted it—quite a common error," he said. Thereupon he was asked: "So therefore you were prepared to treat Mrs. Anderson as the assured?" To which he replied: "As if she were the insured, yes."

Plaintiff and her witnesses instructed the solicitor for the defendant company that the facts in relation to Hanbury having the car at the time of the accident were as follows:

Plaintiff's daughter Jean was going to a party on the evening of November 15th, 1935, and Hanbury was to be her escort. Hanbury and the daughter were desirous of getting the loan of the plaintiff's car to go to this party. They were, however, aware that plaintiff would probably refer the question of whether or not they were to have it to her husband. They were also aware that it was unlikely that the husband would permit the loan of the car to Hanbury. They had a friend, Kennedy (the person originally named in the Hughes action but against whom it was dropped), whom they thought would be more likely to obtain permission to use the car. The three of them were present in the Anderson home when application was made to plaintiff for the use of the car. She referred the matter to her husband who was also present. He refused to sanction the loan of the car to Hanbury but was willing that it should be loaned to Kennedy, who it was stated was likewise going to the party. Accordingly the plaintiff consented to Kennedy driving the car, taking her daughter and Hanbury as passengers. Shortly after leaving the house, Kennedy stopped at a drug store to get cigarettes and when he came back he found Hanbury at the wheel and allowed

him to drive the car. Kennedy was not in the car at the time of the accident to Hughes, having got out at a friend's house. With these instructions, as to what the evidence for the defence would be, defendant company undertook plaintiff's defence and carried same through to judgment. At the trial, FISHER, J. held that the plaintiff Hughes was entitled to judgment against Margaret S. Anderson, the plaintiff herein. He declined to accept the evidence adduced by the defence and found as a fact that plaintiff herein had entrusted her car not to Kennedy but to Hanbury and held that in law she was liable for Hanbury's negligence. He accordingly gave judgment against the plaintiff herein for $957.75 and costs to be taxed. These costs were subsequently taxed at $288.10, making the total amount of the judgment $1,245.85. In this litigation I am bound to accept this judgment as correct both as to fact and law. I have no jurisdiction to review it. Defendant's remedy was to appeal if it was dissatisfied with the adjudication. As soon as judgment was handed down defendant notified plaintiff that it would have nothing further to do with the Hughes case and repudiated liability under the insurance policy issued by it.

The plaintiff brings this action claiming that defendant indemnify her against the Hughes judgment as provided for by said policy. Two defences are set up. First: that she is not the person to whom the policy was issued and that consequently no contract exists between her and the defendant company. From the evidence of Burgess, quoted above, it is clear that the company elected, after the accident occurred, to treat the plaintiff as the insured. In addition to this, defendant company, as stated, conducted the defence for plaintiff herein in the Hughes litigation. Its only right to conduct such defence would be if and only because a contract of insurance existed between it and the plaintiff. Because of these actions on defendant's part I hold this case has to be adjudicated upon the same basis as it would be had plaintiff been the named insured in the policy. If estoppel has to be made out to support this view, I hold the evidence establishes it. Plaintiff, because of defendant's attitude, gave up her right to have her own legal adviser, her right to control the defence in the Hughes action and her right to settle that

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litigation if she deemed that course advisable. It is worth noting that she was, for family reasons, so anxious that the Hughes action be settled before trial that she informed Burgess, defendant's manager, that she would contribute $50 out of her own pocket to bring this about. Further, during the trial, an offer was made to defendant's counsel on behalf of Hughes to settle the matter, so far as any liability attaching to plaintiff herein was concerned for $100. This offer was declined and the fact that it had been made was not communicated to the plaintiff herein. Next: defendant says that there was a breach of a statutory condition embodied in the policy, because, according to the finding of FISHER, J. plaintiff had entrusted her car to Hanbury, a person not qualified and authorized by law to drive an automobile. Hanbury was, as stated, seventeen years of age and to the knowledge of plaintiff had no driver's licence. To this plaintiff replies that defendant with full knowledge of said breach of said statutory condition elected to proceed with the defence and, having done so, waived any right to dispute liability under the policy for such breach of condition, citing in support *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595 and *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110. I think these cases support this proposition. The decision of this case, therefore, depends upon a question of fact, namely, whether or not the defendant company, with full knowledge of the breach complained of, assumed and carried on plaintiff's defence in the Hughes action. That it did have such knowledge is I think placed beyond question by Exhibit 7, being the notification of the insurance company of the accident which Burgess, defendant's manager admits receiving on or about November 18th, 1935. That letter contains this statement:

> Young Hanbury is seventeen years of age and had no licence but I understand Mr. Hanbury, sr. is taking up the matter with the police department to see what can be done about it.

Defendant, in addition, knew that Hanbury was the driver of the car at the time the accident occurred and that plaintiff was not then even in it. It obtained this information from said letter of November 18th, 1935, and had it confirmed by the statement of plaintiff and her witnesses as to what their

evidence would be at the Hughes trial. As soon as it received the statement of claim in the Hughes action it knew that there were but two defendants against whom Hughes was proceeding, *viz.,* plaintiff and Hanbury. Since it already knew plaintiff was not driving the car when the accident occurred it obviously knew from the fact that the action was proceeding only against plaintiff and Hanbury that Hughes was endeavouring to fix plaintiff with responsibility for Hanbury's asserted negligence. With knowledge of these facts in its possession defendant was in a position to say to plaintiff:

> We insured you against liability for injury to others by your car. It has injured Hughes and he has sued you and is endeavouring to hold you liable for damages. But when it injured Hughes Hanbury was the driver. Hanbury to your knowledge had no driver's licence. Hence we are not interested in the Hughes litigation for we are under no liability to you, no matter what the outcome. Either you will or will not be held liable for Hanbury's negligence if he is proven to have been negligent. In the one case no liability will attach to you and consequently none to us. In the other judgment will go against you but the liability upon which such judgment will be founded, *viz.*, Hanbury's negligence, is not a risk within the policy issued to you. That policy specifically provides that the automobile shall not with the knowledge, consent or connivance of the insured be used or driven by any person not qualified and authorized by law to drive an automobile. The Motor-vehicle Act makes it unlawful for anyone to drive an automobile without a driver's licence. You can be held liable for Hanbury's negligence only if it is decided that he was driving your car with your knowledge, consent or connivance, for no person can be held liable for the acts of a trespasser. That brings you within the provision of the policy above set out and it is therefore a liability which the policy does not cover.

Instead of taking that position defendant by its acts said to plaintiff:

> Although we have knowledge of facts which show that the liability sought to be fastened upon you in the Hughes action is not covered by our policy issued to you, nevertheless, we will defend that action.

That being so the cases cited are, I think, authority that the second ground of defence also fails.

It was strongly argued by defence counsel that the defendant did not know that the plaintiff had entrusted her car to Hanbury until the decision of FISHER, J. in the Hughes litigation was rendered when he so found. But as soon at any rate as the statement of claim in the Hughes case was delivered defendant knew the following facts:

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First, that such a finding was possible; 2nd, that only if such a finding was made could plaintiff be held liable, and 3rd, that if such a finding was made it involved a breach of a condition of the policy which breach released defendant from any liability to indemnify plaintiff against any judgment given against her in that action. When with this knowledge in its possession defendant elected to continue the defence of the Hughes action it, in my opinion, brought itself within the principle of the cases hereinbefore cited. It knew that the risk of a judgment against plaintiff in the Hughes case was not a risk within the policy. Despite this knowledge it chose to defend that action. To my mind it should have been obvious to the defendant that the basic question involved in the Hughes litigation, so far as any liability attaching to the plaintiff herein was concerned, was, whether or not she had entrusted her car to Hanbury. Defendant knew it was Hanbury and not she who was driving the car when the accident occurred. Hanbury was the only other defendant. Plaintiff herein could only be held liable if it was found she was responsible for Hanbury's negligence. Defendant must be taken to have known this for everyone is presumed to know the law. To effect this result, whatever else had to be found, it was a *sine qua non* that there should be a finding that she had entrusted the car to him. She could not possibly have been liable for Hanbury's negligence if his possession of the car was a mere trespass so far as plaintiff was concerned. Again defendant must be taken to have known this for the same reason. Defendant's interest in the Hughes litigation existed only if and because Mrs. Anderson's possible liability for Hanbury's negligence was within the risk covered by the policy. It can justify its action in defending the Hughes case for plaintiff only on the basis that her possible liability therein was such a risk. But it would not have been within the risk if the policy had been invalidated by the breach of a condition therein unless defendant, with full knowledge of such breach elected to make it so. For reasons hereinbefore stated I hold defendant did so elect. If this view is correct the cases cited are decisive against the validity of the second ground of defence.

There will be judgment in favour of plaintiff with costs.

Judgment for plaintiff.

JAMES EDWARD BECK, ADMINISTRATOR (WITH THE WILL ANNEXED) OF THE ESTATE OF WALTER TURNER HOOVER, DECEASED v. FLORENCE BIRDIE ARMSTRONG.

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Mines and mining — Deceased co-owner — Proportion of expenditure for development work—Notice under section 28 of the Mineral Act—Effect of—Interest of deceased not open to forfeiture for twelve months—R.S.B.C. 1936, Cap. 181, Secs. 28 and 126.

The plaintiff is administrator (with the will annexed) of the estate of Walter Turner Hoover, deceased, who was a co-owner with the defendant in the Antler group of mineral claims situate in the Cariboo Mining Division of British Columbia. After Hoover's death the defendant published an advertisement under section 28 of the Mineral Act, R.S.B.C. 1936, Cap. 181, addressed to the deceased as a delinquent co-owner, calling upon him to pay the sum of $600 as the deceased's proportion of expenditure required under the provisions of the Mineral Act for assessment work on the said mineral claims for the years 1935 and 1936, and stating that in default of payment of the amount with costs of the advertisement the interest of the deceased would be forfeited and become vested in the defendant. After the notice had been advertised for a period of 90 days a copy thereof was filed in the office of the mining recorder of the said Division with an affidavit of the publisher of the newspaper in which the notice was printed stating the respective dates of insertion of the notice in his newspaper, and the defendant thereafter claimed to be the sole owner of the said mineral claims. The plaintiff brought an action for a declaration that he is entitled to an undivided one-half interest in the said mineral claims and that the notice, being addressed to a deceased person, was a nullity, and that pursuant to section 126 of the Mineral Act the interest of the deceased could not be forfeited within the period of twelve months after his death.

Held, that a notice addressed to a deceased person is not a notice in conformity with the requirements of section 28 and is a nullity.

ACTION for a declaration that the plaintiff as administrator (with the will annexed) of the estate of Walter Turner Hoover, deceased, is entitled to an undivided one-half interest in the Antler, Antler No. 1, Antler No. 2, Antler No. 3, Antler No. 4 and Grouse mineral claims situate in the Cariboo Mining Division of British Columbia and for an injunction restraining the defendant from alienating or disposing of the plaintiff's said undivided one-half interest. The further necessary facts are

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set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 30th of November and the 1st of December, 1937, and the 24th of January, 1938.

A. M. Whiteside, K.C., for plaintiff.

A. deB. McPhillips, for defendant.

MANSON, J.: The plaintiff is the administrator with the will annexed of the estate of the late Walter Turner Hoover who died at the City of San Francisco, U.S.A., on the 28th day of June, 1936. Letters were granted on the 7th of July, 1937, to Mr. *Beck* under power of attorney from one Ogden, appointed administrator by the Superior Court of the State of California, U.S.A., and were limited to the estate within the Province of British Columbia (Exhibit 1). The defendant is the wife of E. E. Armstrong and resides at Barkerville in this Province. Mr. Hoover, during his lifetime, was the holder of Free Miner's Certificates at all times material to this action. It was agreed that his last Free Miner's Certificate was for the period 31st of May, 1936, to the 31st of May, 1937. A special Free Miner's Certificate on behalf of the estate was taken out by the plaintiff on the 12th of July, 1937. Title to an undivided one-half interest in a group of mineral claims situate on or near Antler Mountain in the Cariboo Mining Division is involved in the action—the Antler group consisting of the Grouse, Antler, Antler No. 1, Antler No. 2, Antler No. 3 and Antler No. 4. The Turkey group situate in the same locality and to the north-east of the Antler group consisting of the Cochran No. 1, the Pat, the Turkey, the Gravy, the Cranberry and the Gold Hill is indirectly involved. Both groups were conveyed to the defendant by the locators in February, 1933, and the bill of sale was recorded on the 24th of February, 1933. The defendant conveyed a one-half interest in both groups to Hoover by bill of sale dated the 22nd of November, 1933, and recorded 29th of November, 1933 (*vide* Exhibit 4). The claims in the Turkey group, except the Cranberry, lapsed on the 6th of January, 1936. The Cranberry claim expired on the 8th of February, 1936. Hoover caused all the claims in the Turkey group, except the Cranberry, to be

restaked by one Cochran on the 7th of January, 1936, and the stakings to be recorded on the 9th of January, 1936. The Cranberry was restaked on the 9th of February, 1936, and the staking recorded on the 12th of February, 1936. The restakings were known as the Courage group. The Courage group on expiry was restaked by one J. D. Cochran as the New Year group—all the claims on the 10th of January, 1937, except one which was restaked on the 13th of February, 1937. The restakings were duly recorded. The plaintiff caused the same ground to be restaked in July, 1937, as the New Deal group, and had the stakings recorded. No surveys were made of the Turkey, Courage, New Year and New Deal groups. The restakings may or may not have covered the exact ground covered by the six original claims in the Turkey group.

None of the claims above mentioned was Crown granted. All the claims in the Antler group were recorded on the 7th of January, 1933. The last day for filing the assessment work on the claims in both the Antler and the Turkey groups was early in January of each year. There was an exchange of correspondence between Hoover and the defendant as to the assessment work on the twelve claims between the 14th of August, 1935, and December 17th, 1935 (*vide* Exhibit 14, and Exhibits 7 to 12 inclusive). The defendant, at the trial, denied responsibility for a letter from her husband to Hoover from Williamsburg, Ont., under date of 4th November, 1935 (Exhibit 8), but I find as a fact that the husband, E. E. Armstrong, was the agent of the defendant when he wrote the letter in question. In conjunction with the evidence at the trial and the exhibits last mentioned are to be read questions and answers 14 to 44 inclusive, of the defendant upon her examination for discovery.

Without consulting Hoover the Armstrongs paid to the gold commissioner in lieu of the assessment work for the year 1935 on the Antler group the sum of $600, which sum covered not only Mrs. Armstrong's liability but Hoover's liability if the claims were to be kept alive. After this had been done by the Armstrongs they intimated in their letters above referred to that it was up to Hoover to protect the Turkey group either by doing the assessment work or by paying into the gold commissioner

$600 in lieu of assessment work. There can be no doubt that the defendant assented to the restaking of the Turkey group by Hoover as a set-off against the $300 paid on his account on the Antler group. Attention is particularly directed to Exhibit 11 and the sketch attached thereto, upon which this memorandum appears written across the six claims constituting the Turkey group: "Assessment to be paid or claims restaked by you." Attention is also directed to questions 42 and 44 of the defendant's examination for discovery set out hereunder:

42. Well, that isn't the point. He was either to pay $600 for the assessment work on this group or to have it restaked, was he not? Yes.

44. And that was by arrangement with you? That was by your consent? Yes.

The Courage group was staked in the names of the following as locators: J. D. Cochran, L. B. Cochran, Florence B. Armstrong (the defendant), Elmer E. Armstrong (the defendant's husband), L. B. Cochran and N. W. Thompson. It was clearly the understanding that the staking of this group was to be as to one-half interest for the benefit of the defendant, and as to the other half interest for the benefit of Hoover. The defendant takes the position that the staking was invalid as having been done in violation of section 55 of the Mineral Act, R.S.B.C. 1936, Cap. 181. She seeks to go even further and to disclaim responsibility for the restaking of the Turkey group as the Courage group, but I have already found that she assented to the restaking. She was notified of Hoover's intent to restake in a letter from him dated 17th December, 1935 (Exhibit 12). She made no objection to the restaking.

In February, March and April of 1937 Mrs. Armstrong, purporting to do so under section 28 of the Mineral Act, caused an advertisement to be inserted in a newspaper published and circulating in the Cariboo Mining Division. The notice in the newspaper was addressed to Walter Turner Hoover. It is dated the 22nd of February, 1937, and runs as follows:

TAKE NOTICE that unless you do pay within ninety days from the date hereof, the sum of Six hundred Dollars ($600.00) being your proportion of the expenditure required for the years 1935 and 1936, by section 48 of the "Mineral Act," R.S.B.C. 1924, chapter 167, upon the following mineral claims, that is to say: Grouse mineral claim, Antler mineral claim, Antler No. 1 mineral claim, Antler No. 2 mineral claim, Antler No. 3 mineral claim

and Antler No. 4 mineral claim situate on Antler Mountain, in the Cariboo Mining Division, Cariboo District of the Province of British Columbia, and bearing record numbers 3743, 3738, 3739, 3740, 3741 and 3742 respectively, together with all costs of this notice, to the undersigned, your co-owner in the said mineral claims, your interest in the said mineral claims will be forfeited and become vested in the undersigned who has made the required expenditures.

The notice was filed with the mining recorder of the Cariboo Mining Division, and there was thereto attached, in conformity with section 28 of the statute, an affidavit of the manager of the newspaper in which the notice was printed, stating the date of the first, last and each insertion of the notice. The filing was made on the 3rd of June, 1937.

The defendant heard rumours of Hoover's death shortly after it occurred—she had been told of it by Mr. Tregillus of Barkerville. I am entirely satisfied that the defendant had no doubt as to the fact of Hoover's death at the time she caused the notice under section 28 to be inserted in the newspaper. I have arrived at this conclusion upon the defendant's evidence at the trial and upon questions 45 to 75 inclusive of her examination for discovery.

Counsel for the plaintiff submits:

1. That section 28 of the Mineral Act is a forfeiture section and therefore to be strictly construed.

2. That the notice was insufficient in that it was addressed to Walter Turner Hoover who had died on the 28th day of June, 1936.

3. That Hoover was not delinquent as to his share of the assessment work on the Antler group for the year 1935, in that pursuant to agreement with his co-owner he had caused to be restaked the Turkey group in which they each owned an undivided one-half interest.

4. That, invoking section 126 of the Mineral Act, the interest of the deceased Hoover in the Antler group was not open to forfeiture within the period of twelve months after his death.

I think there can be no doubt as to the correctness of the first submission. There is more than one section in the Mineral Act which makes it clear that it was the intention of the Legislature that the mining interests of deceased free miners should not be

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dealt with harshly. Section 126 is an illustration of the mind of the Legislature in that respect. The day was not long ago in British Columbia when the majority of our prospectors were unmarried men who had come from the older Provinces or from foreign parts. It would indeed be harsh and iniquitous if the law were that upon the death of a free miner whose relatives were in distant parts a co-owner could take advantage of section 28 to forfeit his interest in perhaps a very valuable mining property by reason of the fact he was incapacitated from attending to his assessment work by his last illness or death. In the head-note of the report of *Granger* v. *Fotheringham* (1894), 3 B.C. 590; 1 M.M.C. 71, I find these words:

> The Court should deal with mining disputes upon the principles of a Court of Equity.

Counsel for the defendant contends that upon the death of a free miner his heirs become the delinquent co-owners and that the notice in question was a sufficient notice. In my view a notice addressed to a deceased person is not a notice in conformity with the requirements of section 28. In my view such a notice is a nullity and it becomes unnecessary for me to consider the further submissions.

Judgment for the plaintiff.

Judgment for plaintiff.

FUJIWARA *ET AL.* v. OSAWA.

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June 2, 3, 4, 7; *Sept.* 14.

Negligence—Motor-vehicles—One car passing another when going in the same direction—Passing car cutting in too sharply—Collision—Confusion of driver of slower car—Resulting damages—Liability of original wrong-doer for subsequent casualties.

At about 9 o'clock in the morning of Sunday, the 10th of November, 1935, the plaintiff, with his wife, two sons and a young girl in the car, was driving easterly on St. John's Road in Port Moody 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 him, cut in so sharply in front that his car was alleged to have struck the left front fender of the plaintiff's car. There was asphalt pavement in the centre of the road eighteen feet wide with twelve foot gravel strips on each side. The plaintiff swerved to the left on to the gravel strip, and in attempting to stop he stepped on the accelerator instead of the foot-brake. The car accelerated in speed and continued to the left over a small tree on to the sidewalk. It continued along the sidewalk, sideswiped an electric-light pole with its left fender and was thrown over against a terrace and some steps on the south side of the sidewalk, and continued on easterly until it struck another electric-light pole about 180 feet from where the collision took place. The plaintiff's wife and the three children were severely injured. The trial judge in finding the defendant solely responsible for the accident, stated: "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."

Held, on appeal, affirming the decision of MANSON, J. (McQUARRIE, J.A. dissenting), that even if it could be said, and there is something to support it, that perhaps it was not as definite a finding as is usual, nevertheless in giving his judgment the learned judge ought to have found that primary fact in favour of the plaintiffs and that the expression he used "I think it did" (take place) should be regarded as a finding of fact and the judgment can be primarily sustained upon that fact of impact as well as upon the other facts upon which he relied.

Per McPHILLIPS, J.A.: This case falls within the responsibility of the author of initial negligence for the probable consequences of that negligence in relation to a person who causes damage as a result of his normal state of mind having been upset by circumstances brought about by the original wrong-doer.

APPEAL by defendant from the decision of MANSON, J. of the 23rd of January, 1937 (reported, 51 B.C. 388), in an action for damages resulting from a collision between the plaintiff's automobile and that of the defendant. On Sunday, the 10th

of November, 1935, the plaintiff was driving his car easterly on St. John's Road through Port Moody with his wife, two children and a girl named Sato, at about 9 o'clock in the morning. There was an asphalt pavement in the centre of the road about eighteen feet wide with gravel strips about twelve feet wide on each side. The defendant, with three passengers, driving his car in the same direction, came from behind and passed the plaintiff's car, but cut in so sharply in front that he struck the left front fender of the plaintiff's car. Both cars were travelling at a moderate speed, but the defendant accelerated his speed to from 35 to 40 miles an hour in order to pass the plaintiff. On being struck the plaintiff attempted to apply the foot-brake but evidently stepped on the accelerator. That increased the speed of the car as it turned to the left, went over the gravel portion of the road, ran over a small tree up on to the sidewalk, sideswiped an electric-light pole with its left fender and running board, was thrown over against a terrace and some steps on the south side of the sidewalk, and continued on easterly until it collided with a second electric-light pole about 180 feet from where the collision took place. Mrs. Fujiwara, the two children and Miss Sato were badly injured.

The appeal was argued at Vancouver on the 2nd, 3rd, 4th and 7th of June, 1937, before Martin, C.J.B.C., McPhillips and McQuarrie, JJ.A.

Bull, K.C. (*Ray,* with him), for appellant: The plaintiff's lack of control and of not using the skill and standard of care required of him in controlling the car was responsible for the accident: see *Shust* v. *Harris,* [1936] 2 W.W.R. 54; *McGinitie* v. *Goudreau* (1921), 59 D.L.R. 552; *Pelle* v. *Bersea and Beatty Bros. Ltd.* (1936), 50 B.C. 546. They rely on *Harding* v. *Edwards and Tatisich* (1929), 64 O.L.R. 98, affirmed on appeal, [1931] S.C.R. 167, but that was a case admittedly close to the line and the facts differ to such an extent as make it of no value as a precedent in this case: see Clerk & Lindsell on Torts, 8th Ed., 133.

Nicholson, for respondent: There was ample evidence that

Fujiwara was forced off the road by the defendant. As a consequence we were driven into the gravel portion of the road. This threw Fujiwara into a nervous excitement, he became confused and evidently stepped on the accelerator instead of the brakes: see *Limb* v. *Stewart,* [1929] 2 D.L.R. 349. The hand of the wrong-doer was still upon him: see *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241; *Latham* v. *R. Johnson & Nephew Limited,* [1913] 1 K.B. 398 at p. 413; *Hodge* v. *Geil & County of Middlesex* (1924), 27 O.W.N. 290.

Bull, in reply: There is no claim set up that complies with the finding of the trial judge: see *Carter* v. *Van Camp et al. Van Camp* v. *Carter and Anderson,* [1930] S.C.R. 156; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304 at p. 314.

Cur. adv. vult.

14th September, 1937.

MARTIN, C.J.B.C.: *Per curiam*: The appeal is dismissed, our brother MCQUARRIE dissenting.

So far as my brother MCPHILLIPS and myself are concerned, we take the view that the learned judge has reached the right conclusion.

A somewhat unusual question arises, *viz.*: that what was apparently regarded by the plaintiff below and by my brother MCPHILLIPS and myself as a cardinal fact of the case, *i.e.,* the alleged impact, it is submitted, found in favour of the plaintiff, but Mr. *Bull* on behalf of the appellant presented a strong argument to the effect that the expression of opinion of the learned trial judge in regard to that impact, which, if it occurred, was the proximate cause of the accident, was not definitely found by the learned judge and that all he said was "I think it did" happen. Under ordinary circumstances Mr. *Bull* was prepared to admit that "I think" would be a judicial finding, but he submitted that in view of the fact that the learned judge had proceeded after that expression to deal elaborately with the rest of the case apart from impact, therefore it should be regarded as a mere passing expression of his mind and not as a judicial

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finding; but on the other hand Mr. *Nicholson* presented very strongly to us his submission that we should regard it as a finding. My brother McPHILLIPS and I, in view of that, have examined this aspect of the case very carefully and we find that even if it could be said, and there is something to support it, that perhaps it was not as definite a finding as is usual, nevertheless we feel that in giving his judgment the learned judge ought to have found that primary fact in favour of the plaintiff, and that the expression he used "I think it did" (take place) should be regarded as being used in the same way as, for example, the House of Lords used the word "think" repeatedly in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co. Griffiths Lewis Steam Navigation Co.* v. *Paterson, Zochonis & Co.*, [1924] A.C. 522. Such being the case, in our opinion, the judgment can be primarily sustained upon that fact of impact, as well as upon the other facts on which the learned judge relied.

McPHILLIPS, J.A.: At the outset I have no hesitation in stating that I am in complete agreement with the judgment here under appeal, being a judgment relative to an automobile accident delivered after a trial without a jury by MANSON, J. The facts may be shortly stated as follows: The plaintiff Dr. Fujiwara was driving his automobile in the Port Moody neighbourhood close to the City of Vancouver and had with him his wife and other passengers. The highway was paved in the travelled way with gravel strips on each side. The defendant came along in the rear of the doctor's automobile and proceeded to pass and in so doing greatly increased his speed, and, coming up alongside the doctor's automobile, suddenly cut in towards the doctor's automobile in a diagonal course and at great speed which greatly startled the doctor as there was apparent and imminent likelihood of a dire tragedy. Excited as he naturally would be, and in the agony of an apparent likely collision, the doctor attempted to swerve off and in the agony of the moment unfortunately put his foot on the accelerator and the car raced up a slight incline and over the sidewalk and in its course struck an electric-light pole and serious injuries ensued to the passengers in the automobile for which the plaintiffs sued in

this action and for which the learned trial judge has awarded damages and against which this appeal is brought. The case is one which does not differ from many such actions of a more or less similar character occurring now so frequently. That the defendant was negligent there can be no question. There is evidence that the automobile of the defendant actually struck the doctor's automobile although the learned trial judge does not make a very pronounced finding to that effect, yet he did say "I think it did." Upon the facts, as I read them, there was an impact but, in my view, to support the action, that is not a needed finding—there need be no actual impact—the negligence really arises by the defendant putting the plaintiffs in imminent peril of their lives, a likelihood of loss of life—in truth a dire tragedy—and that was this case. I do not consider it necessary to further cite any of the surrounding facts and so completely set forth in the evidence which is at length in the appeal book. I will now proceed to refer to some of the decisions which in my opinion fully support in law the conclusion at which the learned trial judge arrived and which I consider warrants the upholding of the learned trial judge's judgment. I would refer to *Rowan* v. *The Toronto Railway Company* (1899), 29 S.C.R. 717 at 723, Sir Henry Strong, C.J.; *Armand* v. *Carr,* [1926] S.C.R. 575 and at p. 580; *Harding* v. *Edwards and Tatisich* (1929), 64 O.L.R. 98 (affirmed by the Supreme Court of Canada, [1931] S.C.R. 167) at pp. 99-100, Hodgins, J.A., at 101 and Middleton, J.A., at p. 104; *Canadian Pacific Railway Co.* v. *Kelvin Shipping Co. Lim.* (1927), 138 L.T. 369; *"Singleton Abbey" (Owners)* v. *"Paludina" (Owners)* (1926), 95 L.J.P. 135; [1927] A.C. 16 at p. 26. It is to be noted that Davie in his work, Common Law and Statutory Amendment in Relation to Contributory Negligence, at pp. 254-56, discusses the *Harding* case above referred to, also the *"Singleton Abbey"* case and also referred to the words of Hamilton, L.J. in *Latham* v. *R. Johnson & Nephew Limited* (1912), 82 L.J.K.B. 258; [1913] 1 K.B. 398 at p. 413; and a quotation appears at p. 255 by Davie of what Middleton, J.A. said in *Harding* v. *Edwards and Tatisich,* 64 O.L.R. 98 at p. 108; [1929] 4 D.L.R. 598 at pp. 606-7:

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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 Limited.*

Davie also, at pp. 255-56 of his work above referred to has this to say relative to the *Harding* case, [1931] S.C.R. 167:

In the Supreme Court of Canada the Chief Justice stated that the question involved was merely a question of fact on which the Court had the explicit finding of the trial judge, confirmed by the majority of the Appellate Division, that question of fact being whether Edwards had recovered sufficiently from the condition of nervous excitement, into which the rash act of Mrs. Tatisich had thrown him, to be held responsible for what subsequently occurred, or whether he should be regarded as still acting involuntarily under the influence of that condition; and the Court took the view that nothing had been shown which would entitle it to determine the question otherwise than had been decreed by the judgments below.

Consequently it is not necessary for a person to be actually in the physical throes of collision in order to fall within the protective principle of the agony of collision rule. If the excitement of the situation has robbed a person of conscious volition and, while labouring under this impediment, he plunges into danger instead of avoiding it, or as it is said, jumps from the frying pan into the fire, the principle which exonerates from liability is the same whether the victim's injurious actions occur immediately before, during, or immediately after collision became imminent. And the determination of the question as to whether a person is overwhelmed with this "agony of doubt" is a question of fact for the jury.

The following is a foot-note in Davie's work at p. 256:

33. The reader will find an able discussion by the learned jurists of the Appellate Divisional Court upon the law as declared in *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560; 90 L.J.K.B. 1353, and followed in *Hambrook* v. *Stokes Brothers*, [1924] W.N. 296, with especial reference to the responsibility of the author of initial negligence for the probable consequences of that negligence in relation to a person who causes damage as a result of his normal state of mind having been upset by circumstances brought about by the original wrongdoer.

It is evident that the cases I have referred to amply support the judgment of MANSON, J., here under appeal and I have no hesitancy in arriving at the conclusion that the judgment should be sustained. I would, therefore, dismiss the appeal.

MCQUARRIE, J.A.: In this case, with due deference to the learned trial judge, I consider that the real issue involved is, whether the appellant's automobile when passing it came into

contact with the automobile in which the respondents were riding. If it did not do so there was clearly no excuse for the respondent Asa J. Fujiwara running off the roadway and taking the remarkable course which eventually led to the collision with the pole on the boulevard causing the damages complained of nor was there any excuse for the said respondent putting his foot on the accelerator instead of on the brake and thereby increasing his speed when he was endeavouring to stop the car. As to contact there is no finding by the learned trial judge who in his reasons for judgment says at p. [389, 51 B.C.]:

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 sidewalk, 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.

If my view be correct it is essential that this Court should weigh the evidence and arrive at a conclusion as to whether there was contact or otherwise. I should also draw attention to the further statement of the learned trial judge at [pp. 389-90] as follows:

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 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

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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.

He evidently depends on his own experience to some extent as there is apparently no evidence supporting this statement in its entirety. I refer particularly to the learned trial judge's assertion that (p. 390):

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.

Whether the experience was disconcerting or not must surely depend upon the speed at which the two automobiles respectively were travelling at the time. It is here to be noted that there is no finding of excessive speed by the learned trial judge nor would such a finding have been warranted by the evidence. The appellant in his factum submits that the evidence does not support the finding of the learned trial judge that the appellant "cut in" sharply in front of the respondent Asa J. Fujiwara's car and in substance I think that contention is worthy of consideration. By "cutting in" I presume the learned trial judge meant that the appellant after passing the said respondent's automobile turned sharply to the right side of the road in front of the respondent's automobile thereby causing the said respondent to lose control of himself and his car. As I see it any such "cutting in" should not have produced such disastrous results under the circumstances. The respondent, Asa J. Fujiwara, in his evidence in chief, says that he noticed that the appellant's car was travelling twice as fast as his own when it passed him:

Nicholson: Yes, just continue, doctor? First I noticed this car passing twice faster than my car.

With only two cars involved I cannot see that there was anything to bother the said respondent. By the time the appellant's car

was in front of the respondent's it would have been so far ahead as to eliminate any possible danger of the respondent's car coming into contact with it. But even if the respondent were disconcerted by the appellant driving so close to his car or "cutting in" ahead of his car that was not responsible for the damages complained of. The respondent admits that after he went off the roadway, for which I consider there was no good reason, he put his foot on the accelerator instead of on the brake as previously mentioned and after travelling some 180 feet on the boulevard and sidewalk ran into the pole on the boulevard. As I see it the respondent's negligent driving was the real cause of the damages and the appellant should not be held responsible therefor. In other words the ultimate cause of the accident was the lack of care and skill of the respondent Asa J. Fujiwara. Here I might refer to the unanimous judgment of the Court of Appeal in Alberta—*McGinitie* v. *Goudreau* (1921), 59 D.L.R. 552.

As to the essential feature referred to by me, namely, whether the appellant's car, in passing it, came into contact with the respondent Asa J. Fujiwara's car, I am of opinion that the weight of evidence is strongly in favour of the appellant's contention that it did not do so. In that connection the undisputed fact, that after the appellant's car passed the other car the appellant's car kept to an unswerving course on his right side of the roadway until stopped by the appellant, has influenced me to some extent as it does not seem possible that it could have done so if it had struck the respondent's motor-car. I would, therefore, allow the appeal and dismiss the action.

Appeal dismissed, McQuarrie, J.A. dissenting.

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

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

C. C.
1938
Jan. 18, 26.

BENING v. SINGER.

Practice—County Court—Summons and plaint—Service of on defendant—Death of plaintiff before service—Validity—County Court Rules, Order I., r. 2D; Order II., rr. 41 and 49.

The summons herein was issued on the 3rd of December, 1936. The plaintiff died on the 13th of December, 1936. The defendant was served with a copy of the summons on the 18th of November, 1937, and no order of revivor was made by the Court until the 14th of December, 1937. On an application by the defendant to set aside the service of the summons:—

Held, that the service of the summons on the 18th of November, 1937, was a nullity and the summons ceased "to be in force" after the expiration of twelve months from the date of the summons.

APPLICATION to set aside the service of the summons and plaint in this action on the ground that the plaintiff had died prior to such service. The facts are set out in the reasons for judgment. Heard by SWANSON, Co. J. at Kelowna on the 18th of January, 1938.

H. V. Craig, for the application.
Bredin, contra.

Cur. adv. vult.

26th January, 1938.

SWANSON, Co. J.: This is an application to set aside the service of the summons and plaint herein, on the ground that on the date of service the plaintiff named in this action was no longer living, and as no order of revivor was made, and no order made for the renewal of the summons within one year from the date of issue of the summons, that the summons is no longer in "force."

The summons herein was issued on the 3rd of December, 1936. The plaintiff was living at the date of the issuance of the summons, dying on the 13th of December, 1936. Letters of administration to the estate of the deceased plaintiff Charles Herman Bening were granted by this Court on the 21st day of September, 1937, to James Malcolm Brydon, as administrator. On the 18th of November, 1937, the defendant Singer was served with a copy

of the summons, bearing the name of Charles H. Bening as plaintiff, no order of revivor having been made by this Court until December 14th, 1937, the formal order being signed on December 31st, 1937.

The summons on the date of the service thereof bore the name of a dead man as plaintiff, and it is submitted by the learned counsel for the defendant that such a service is a "nullity" and that an order should now be made setting aside such service. If this service of the summons is held to be illegal (as I think it must be so held), the argument then is that by virtue of the County Court Rules, 1932, Order I., r. 2D the summons having ceased to have any "force" the action should be dismissed.

Order I., r. 2D reads in part as follows:

No summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date, without being served, provided that the plaintiff may before the expiration of twelve months apply to the judge for leave to renew the summons; . . . , and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuance of the original summons.

In the present case "the cause of action survives" on the decease of the plaintiff. Order II., r. 41 states:

A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties if the cause of action survive or continue. . . .

By Order II., r. 49 the fact of abatement is to be entered in the Plaint-book:

Where any cause or matter becomes abated or in the case of any such change of interest as is by this Order provided for, the solicitor for the plaintiff or person having the conduct of the cause or matter, as the case may be, shall certify the fact to the proper officer, who shall cause an entry thereof to be made in the Plaint and Procedure Book opposite to the name of such cause or matter.

No such action was taken by the solicitor having the conduct of the cause as required by this rule.

It was held by Russell, J. in *Tetlow* v. *Orela,* [1920] 2 Ch. 24 that where an action is commenced in the name of a dead man his representative cannot be substituted as plaintiff. The writ had been issued in the mistaken belief that the plaintiff Joseph Tetlow was alive, and the widow applied that she might

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be substituted as plaintiff. The order was refused. His Lordship, in dealing with r. 2 of Order XVI. said (p. 26):

> But it does not justify the Court in creating a plaintiff in an action for the first time.

In dealing with r. 11 of Order XVI. the learned judge said (p. 27):

> It so far contemplates only causes or matters having living persons or parties actually before the Court.

He added that:

> In my opinion the names of "parties improperly joined" and the names of "parties who ought to have been joined" are, within the meaning of that rule, the names of living persons. I do not think, therefore, that r. 11 carries us any further.

He followed the principle laid down in *Clay* v. *Oxford* (1866), L.R. 2 Ex. 54; 36 L.J. Ex. 15. The head-note reads as follows (Law Journal report):

> The Court has no power to amend the writ and subsequent proceedings in an action commenced in the name of a deceased person, by striking out the names of the plaintiff and substituting those of his executors.

Kelly, C.B. said (p. 16):

> There is certainly no power at common law, nor is power given by any of the Procedure Acts, to substitute one plaintiff for another, so as to create a party, and give effect to proceedings which are in fact a nullity.

The other judges Bramwell, Channell, and Pigott, BB. concurred. Now it is quite true that in the case before me the plaintiff was living at the date of the issuance of the summons, dying ten days thereafter. It is true that proceedings could have been quite properly taken to revive the action on the decease of the plaintiff if taken in due time. Such proceedings were not taken as they should have been taken before the service of the summons on the defendant. At the date of the service, the plaintiff being then dead, I think that the service was a "nullity," to use the language of Chief Baron Kelly. The case of *Jackson* v. *North Eastern Railway Co.* (1877), 5 Ch. D. 844 was referred to by counsel. It was held by the Court of Appeal (Jessel, M.R., James and Baggallay, LL.J.) that although an action is not abated by the bankruptcy of a sole plaintiff he can himself take no further steps in it, but the trustee in bankruptcy may obtain an order of course to continue it.

Order I., r. 2D of our County Court Rules is slightly different

in wording from Order VIII., r. 1 (marginal rule 45) of our Supreme Court Rules. The latter adopts the English Rule of the same number. The Annual Practice, 1938, at p. 56 commenting on this rule, " 'No . . . Writ shall be in force,' &c.," states:

This means shall be in force for the purpose of service for twelve months, not that the writ ceases to be efficacious for any purpose whatever. And after an undertaking by solicitors to accept service and appear (see O. 9, r. 1, it would require a very strong case to induce the Court to refuse renewal (*per* Stirling, L.J., *Re Kerly,* [1901] 1 Ch. p. 479 (C.A.).

Mr. Justice MANSON in an unreported decision has just held *(Beck* v. *Armstrong)* [(1937), *ante,* p. 377] that the service of a notice under section 28 of our Mineral Act by advertising a notice addressed to W. T. Hoover (then deceased), in his lifetime a part-owner of mineral claims, was a "nullity."

I hold that the service of the summons in the case before me on the 18th of November, 1937, was a nullity. I think therefore that Order I., r. 2D is operative automatically. In my opinion the service in question being a "nullity" the summons has ceased "to be in force" after the expiration of twelve months from the date of the summons, to wit December 3rd, 1936.

A new summons can be taken out in the name of the administrator of the estate of the deceased as plaintiff, but it appears that the new action will then be barred by the Statute of Limitations. It is very much to be regretted that the Court cannot accordingly go into the merits of this matter. But that responsibility must fall on other shoulders than those of this Court. The defendant's counsel will be entitled to the costs of this application.

I might add that at the hearing I gave permission to the defendant's counsel to amend his notice of application setting forth fully the grounds on which he seeks to set aside the proceedings in question.

Application granted.

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REX v. SAFEWAY STORES LIMITED.

Hours of Work Act, 1934—Charge under—Dismissed—Appeal—Practice—Notice of appeal out of time—Application to extend time for service—"Avoidance of injustice"—Application refused—R.S.B.C. 1936, Caps. 42, Sec. 188, and 122, Secs. 11 and 13—Rule 967.

The deputy police magistrate at Vancouver dismissed a charge against the defendant company "that being an employer within the meaning of the Hours of Work Act, and having notified its employees the hours at which work begins and ends, unlawfully did employ a person outside the hours so notified." An appeal to a County Court judge was dismissed on the 18th of May, 1937. The defendant company's accountant was served with a notice of appeal on the 3rd of June, 1937, and on the 12th of June following a copy of the notice of appeal was left at the office of the defendant company. On the hearing of the appeal the respondent raised the preliminary objection that the service of the notice was out of time and it was not served on the defendant as required by section 188 of the Companies Act. The appellant then moved for an extension of time for service of the notice of appeal.

Held, that applications for extension of time depend upon the circumstances in each case. The object of the rule is to give the Court a discretion to extend time with a view to the avoidance of injustice. The charge against the respondent in this case was twice dismissed, and in the circumstances the application should be refused.

Fraser v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70, applied.

APPEAL by the Crown from the decision of LENNOX, Co. J. of the 18th of May, 1937, dismissing an appeal from the decision of deputy police magistrate McQueen, of the 31st of March, 1937, dismissing an information against Safeway Stores Limited, Vancouver, on a charge of being an employer within the meaning of the Hours of Work Act, 1934, and amendments thereto, and having notified its employees the hours at which work begins and ends by the posting of a notice in its works at 1915 Cedar Street, unlawfully did employ a person, to wit, Bud Esplin, outside the hours so notified. The appellant being out of time in service of the notice of appeal applied for an extension of time for service of the notice of appeal.

The appeal was argued at Victoria on the 27th and 28th of September, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Wyness, for appellant.

Nicholson, for respondent, raised the preliminary objection that the respondent was not served with notice of appeal. This is a charge under the Hours of Work Act. Under section 14 of the Court of Appeal Act the respondent must be served within fifteen days after judgment. The respondent is an extra-provincial company and must be served as set out in section 188 of the Companies Act. The judgment was delivered on the 18th of May and the appellant served the accountant in the office of Safeway Stores Limited on the 3rd of June. This was the 17th day after judgment, but it was not proper service under section 188 of the Companies Act. On the 12th of June a copy of the notice of appeal was left at the registered office of the company. This was over three weeks after the judgment and it was not served on the company's solicitor as required by said section 188 of the Companies Act. The parties were at arm's length and the statute must be strictly complied with. Serving notice of appeal is the bringing of the appeal. Service was out of time and the appeal should be quashed: see *Ex parte Saffery. In re Lambert* (1877), 5 Ch. D. 365; *Christopher* v. *Croll* (1885), 16 Q.B.D. 66; *Re Ellard* (1892), 2 B.C. 235; *Rex* v. *Chow Wai Yam et al.* (1936), 50 B.C. 347 at p. 349. The appeal is not brought by the informant but is brought on behalf of the Attorney-General who is not a party to the original proceeding. He did not appeal to the County Court.

Wyness, contra: The learned judge followed *Rex* v. *Brearley* (1930), 48 B.C. 458. Section 6 (*d*) of the Court of Appeal Act gives us the right of appeal. Section 3 of the Attorney-General Act sets out the powers of the Attorney-General. Service on the accountant in the store is good service. It was allowed as good service for the County Court appeal and it was assumed it would be allowed for the Court of Appeal. Notice is sufficient if filed and not served: see *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70; *McEwan* v. *Hesson* (1914), 20 B.C. 94. It is admitted notice was not served within fifteen days and I ask now for an extension of time for service. It is in the interest of justice to do so: see *Splan* v. *Barrett-Lennard* (1931), 44 B.C. 371. In this case there is conflict as to the

interpretation of the Hours of Work Act. There is no suggestion that this man worked more than 44 hours per week but they must employ another man to do extra work.

Nicholson, in reply: There is a distinction between making a slip before judgment and a slip after judgment. Once judgment is pronounced a vested right arises, the slip rule then does not apply. There must be special circumstances: see *International Financial Society* v. *City of Moscow Gas Company* (1877), 7 Ch. D. 241 at pp. 247-8 Ignorance of the law is no excuse. The history of the law does not justify an extension: see *Reinhard* v. *McClusky* (1897), 5 B.C. 226 at p. 228; *Koksilah* v. *The Queen* (1897), *ib.* 600. The case was dismissed on the merits: see *Schafer* v. *Blyth*, [1920] 3 K.B. 140 at p. 143.

MARTIN, C.J.B.C.: In respect to the motion for leave to extend the time to give notice of appeal, that is to say, to serve it, our opinion is, our brother MCPHILLIPS dissenting, that the motion should be refused. Speaking for myself, I should say nothing more than that I adhere to the decision of this Court in *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70 at p. 76, which, putting it briefly, says that the matter must be disposed of having regard to the interests of justice, which means, of course, primarily that of the litigants concerned, and must be decided upon the special circumstances of each case. I see no reason for holding that there are any special circumstances here which would warrant our granting this motion. I therefore dismiss it.

MCPHILLIPS, J.A.: I cannot arrive at the same conclusion as my learned brother the Chief Justice. In the style of cause the appellant is *Rex* and there is only one true representative of the Crown who can come into Court, that is the Attorney-General or counsel retained by him. I view this case on the plane that the Attorney-General is here in the interests of justice. The statute under consideration has to do with the hours of work, an important matter where our people—the working people—are deeply concerned. The wisdom of the Legislature is

demonstrated by the statute and indicates clearly the policy of the law—that is that as many workmen as possible may have employment. Here there was a flagrant breach of the statute in my opinion. Now I know of no reason that could be of a stronger nature, in the interests of justice, than what we have before us and I do not wonder that the Attorney-General is taking steps to have the judgment reversed. I note in this particular case that the learned counsel before us was the counsel for the respondent in the Court below. We have the statement of counsel for the Crown that he advised this same counsel that the Crown was going to appeal. Now can a technicality of the nature here pressed, in view of the facts, have merit? When the public interest is at stake I would say it should not prevail. The interests of justice is the principle under which we must proceed. This case is one clearly where the interests of justice must be considered. I think it is eminently a case for the Court to grant leave to appeal and the order made *nunc pro tunc,* the appeal to be proceeded with at this sitting.

SLOAN, J.A.: I am in agreement with my learned brother the Chief Justice. As pointed out in *Roddy* v. *Fraser* (1924), 35 B.C. 70, these applications depend upon the circumstances of each case. In my view this is not a case where an extension should be granted.

I would like to add to the authorities cited the case of *Schafer* v. *Blyth,* [1920] 3 K.B. 140. At p. 143 Mr. Justice Lush, in considering a rule similar in principle to this, said:

> The object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice.

What injustice would we be avoiding here by extending time to appeal? I see none.

It must not be forgotten in the consideration of this application that the respondent has now been twice placed in jeopardy. It was tried and successfully defended in the police court. The Crown appealed from the police court to the County Court, not on a point of law but on the question of fact involved. On this appeal, in form a trial *de novo,* the respondent was again found guiltless of any breach of the statute in question.

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It is from that second adjudication in favour of the respondent that the Crown now seeks a further appeal to this Court on a point of law.

Having in mind all the circumstances of this case I would not extend the time and consequently refuse the motion.

Motion dismissed, McPhillips, J.A. dissenting.

HAZELTON v. HAZELTON.

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1937

Sept. 20; Nov. 2.

Husband and wife—Alimony—Former husband—Failure to prove his death —Action dismissed with leave to bring another action—Costs—Order LXXA, r. 6.

The plaintiff was married to one Ledlin in 1901. In 1907 Ledlin left her and although she made enquiries through the police in Vancouver where they lived she heard nothing of him afterwards. In 1920 she married the defendant in Vancouver where they lived together until 1923 when the husband went to Stave Falls, where he obtained work. The plaintiff visited him from time to time but in 1928 the visits ceased and from that time the husband made no provision for his wife. In an action for alimony it was held that the plaintiff failed to prove the validity of the marriage alleged to have taken place in 1920, and the action was dismissed with costs with leave to the plaintiff to bring another such action upon payment of the costs of this action, if and when she can adduce evidence of the death of Ledlin.

Held, on appeal, varying the decision of FISHER, J., that the judgment below should not be disturbed except as to costs, namely: that pursuant to Order LXXA, r. 6, the defendant pay to the plaintiff the amount of the cash disbursements made by the plaintiff's solicitor in the suit, and that the defendant is entitled to the general costs of the appeal subject to a set-off in favour of the plaintiff of those costs of the issue on which she is successful.

APPEAL by plaintiff from the decision of FISHER, J. of the 26th of May, 1937, in an action for alimony. The plaintiff and defendant were married in 1920 and lived together until 1928, when the plaintiff alleges her husband left her without cause and has since failed to provide her with any money by way of alimony, maintenance or otherwise. Mrs. Hazelton had been married three times. She married her second husband (one Ledlin) in Australia in 1901. They came to Vancouver some time later and in 1907 her husband left her and she has not seen nor heard of him since. She made enquiries from the police in Vancouver but she received no information as to his whereabouts. She married her present husband in 1920. They lived together in Vancouver for some time and then the husband got a position at Stave Falls where his wife visited him from time to time until 1928, when the visits ceased. From that time the husband did not provide her with any money. It was held on

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the trial that the plaintiff had failed to prove the validity of the marriage to Hazelton and the action was dismissed with costs, with leave to bring another action upon payment of the costs of this action if and when the plaintiff can adduce evidence of the death of the second husband.

The appeal was argued at Victoria on the 20th of September, 1937, before MARTIN, C.J.B.C., McPHILLIPS and SLOAN, JJ.A.

C. F. MacLean, for appellant: The learned judge below was in error in holding that the plaintiff had failed to prove the validity of her marriage, and secondly he had no discretion to award costs against the plaintiff. Her husband Ledlin left her in 1907. She informed the police of his disappearance but never heard of him again. She married Hazelton in 1920. This was thirteen years after the disappearance of Ledlin. In law the marriage to Hazelton in 1920 must be presumed valid: see Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 630 and 632; *Watson* v. *England* (1844), 14 Sim. 28; *Bowden* v. *Henderson* (1854), 2 Sm. & G. 360. More recent decisions cast doubt on the restriction of seven years: see *Willyams* v. *Scottish Widows Fund Life Assurance Society* (1888), 52 J.P. 471; *Wills* v. *Palmer* (1904), 53 W.R. 169; *In re Benjamin. Neville* v. *Benjamin,* [1902] 1 Ch. 723. The length of time that has elapsed since the marriage of 1920 may be taken into consideration in determining whether the 1920 marriage is valid: see *Hogton* v. *Hogton* (1933), 103 L.J. P. 17; *Wilcox* v. *Wilcox* (1914), 24 Man. L.R. 93. The Court should presume validity of the 1920 marriage until the defendant has proved that the former husband was alive when the 1920 marriage took place: see *Homanuke* v. *Homanuke,* [1920] 1 W.W.R. 673, and on appeal [1920] 3 W.W.R. 749. On the question of costs see *Keith* v. *Keith* (1877), 25 Gr. 110.

G. A. King, for respondent: I agree that the order should not have awarded costs against the plaintiff. As to the defendant paying the plaintiff's disbursements, that is in the discretion of the Court: see Order LXXA, r. 6. After Ledlin left his wife she made substantially no enquiry as to his whereabouts. They came from Australia but she made no enquiry as to whether he

had gone back there: see *Irwin* v. *Irwin*, [1926] 1 W.W.R. 849 at pp. 851-2. Adequate search for the husband must be made: see *Prudential Assurance Company* v. *Edmonds* (1877), 2 App. Cas. 487 at p. 509; *Re Pinsonneault* (1915), 34 O.L.R. 388 at p. 391; *In re Creed* (1852), 1 Drew. 235; *M'Mahon* v. *M'Elroy* (1869), 5 Ir. R. Eq. 1 at p. 12; *Wilcox* v. *Wilcox* (1914), 16 D.L.R. 490 at p. 499; *Deakin* v. *Deakin* (1869), 33 J.P. 805.

MacLean, in reply: Every extra year adds to the assumption of the validity of the marriage. The presumption is in our favour and the burden is on the other side to negative this: see *The King* v. *The Inhabitants of Twyning, Glocestershire* (1819), 2 B. & Ald. 386.

Cur. adv. vult.

On the 2nd of November, 1937, the judgment of the Court was delivered by

SLOAN, J.A.: Upon consideration we would not disturb the judgment of FISHER, J., except on the question of costs. Counsel for the respondent conceded that the learned judge below was in error in directing that the plaintiff pay the costs.

We would therefore allow the appeal to this extent and direct, pursuant to Order LXXA, r. 6, that the defendant pay to the plaintiff, the amount of the cash disbursements made by the plaintiff's solicitor in the suit.

As the respondent has succeeded on the only issue apart from costs we would give him the general costs of the appeal subject to a set-off in favour of the appellant of those costs of the issue on which she was successful.

Appeal dismissed, except as to costs.

Solicitors for appellant: *Fleishman & MacLean.*
Solicitor for respondent: *G. A. King.*

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Sept. 20, 21;
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IN RE PENDING ACTION: McKEE v. HALVERSON AND HALVERSON.

Prohibition—Interlocutory judgment in County Court—Writ prohibiting further proceedings—Set aside on appeal—Appeal from interlocutory judgment proper course.

Through a real-estate agent the plaintiff sold a boarding-house in Vancouver. The parties executed a preliminary contract known as an "interim receipt" which contained a term that the plaintiff would give up possession and the defendants paid $100 to bind the bargain. The plaintiff gave up possession, and after she had moved out the defendants declined to proceed with the transaction. The plaintiff then moved back into possession and the real-estate agent demanded full commission for bringing about the sale. The agent brought action and recovered $350 as his commission. This sum was paid by the plaintiff. The plaintiff then brought action to enforce the agreement and for payment of the purchase price of the property, but the defendants could not be found and the plaintiff sold the property for $360 less than the amount the defendants agreed to pay. Subsequently the defendants were found and the plaintiff brought action for damages for breach of contract in the County Court. The defendants did not file a dispute note and interlocutory judgment was signed. On the hearing to assess damages, judgment was entered for $520. A motion by the defendants in the County Court to set aside the interlocutory judgment was dismissed. The defendants then applied for an order that a writ of prohibition do issue prohibiting the plaintiff from further proceeding with the action, which was granted.

Held, on appeal, reversing the decision of McDONALD, J., that the extraordinary remedy of prohibition cannot be invoked as a means of appealing from the decision of the County Court judge when the question which he decided was within his jurisdiction to determine. The proper procedure to be adopted is an appeal to the Court of Appeal.

APPEAL by plaintiff from the order of McDONALD, J. of the 23rd of June, 1937, that a writ of prohibition do issue prohibiting the plaintiff from further proceeding with a certain action in the County Court of Vancouver between the plaintiff and the defendants. The plaintiff was the owner of a boarding-house property in Vancouver. She entered into an agreement to sell the property to the defendants for $7,000. The agreement for sale was arranged through a firm of real-estate agents in Vancouver with whom the plaintiff listed the property for sale. The plaintiff and defendants executed a binding prelim-

inary contract known as an "interim receipt" which contained a term that the plaintiff would give up possession of the property immediately and the defendants paid $100 to bind the bargain. The plaintiff gave up possession in pursuance of the agreement, but after she had moved out the defendants declined to proceed with the transaction. The plaintiff then moved back into the premises again and the real-estate agents then made demand for their full commission in arranging the sale. The plaintiff refused to pay the commission but the agents brought action and obtained judgment for their full commission which was $350. This sum the plaintiff was obliged to pay. The plaintiff then brought action in the Supreme Court to enforce the agreement and payment of the purchase price, but the defendants could not be found and the action was discontinued. The plaintiff then sold the property for $360 less than that agreed to be paid by the defendants. Some time later, when the whereabouts of the defendants was discovered, the plaintiff brought action in the County Court of Vancouver against the defendants for damages for breach of contract. The defendant Mary Halverson was served personally by the plaintiff with the plaint, and the defendant Joseph Halverson was served substitutionally. The defendants did not file a dispute note and interlocutory judgment was signed against them. Later a hearing was held before HARPER, Co. J. to assess the damages suffered by the plaintiff, and the learned judge assessed same at $520.20 and final judgment was entered for that amount. On being threatened with execution the defendants applied on motion to HARPER, Co. J. to set aside the interlocutory and final judgment and to obtain leave to defend on the ground that the plaint and particulars filed in the action were bad in law and did not disclose any cause of action, and the application was dismissed. The defendants then applied in the Supreme Court for a writ of prohibition and obtained the order from which this appeal is taken.

The appeal was argued at Victoria on the 20th and 21st of September, 1937, before MARTIN, C.J.B.C., McQUARRIE and SLOAN, JJ.A.

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IN RE PENDING ACTION: MCKEE v. HALVERSON AND HALVERSON

T. E. H. Ellis, for appellant: If there is not a clear lack of jurisdiction on the face of the proceedings prohibition will not lie. There is no lack of jurisdiction on the face of the pleadings; jurisdiction is shown: see *Re Rex* v. *Hamlink* (1912), 26 O.L.R. 381 at p. 399; *Grass* v. *Allan et al.* (1866), 26 U.C.Q.B. 123 at p. 126; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 820. An inferior Court cannot be restrained by prohibition no matter how erroneous its decision may be: see *Lexden and Munster Union* v. *Southgate* (1854), 10 Ex. 201 at p. 202; *Canadian Northern Railway Co.* v. *Wilson,* [1918] 3 W.W.R. 184 at p. 191; *Brown* v. *Cocking* (1868), 37 L.J.Q.B. 250 at p. 258; *Re Wilton Farmers' Co-op. Ass'n* v. *Burgess,* [1924] 4 D.L.R. 435 at p. 438; *Re Errington* v. *Court Douglas, Canadian Order of Foresters* (1907), 14 O.L.R. 75 at p. 76. If the lack or excess of jurisdiction is not on the face of the proceedings application for prohibition must be made before judgment: see *Ex parte Cowan* (1819), 3 B. & Ald. 123. The granting of a writ is discretionary and may be refused especially where another remedy is available: see *In re Nowell and Carlson* (1919), 26 B.C. 459 at p. 461; *In re Bowen* (1851), 21 L.J.Q.B. 10. They acquiesced in the jurisdiction by launching a motion to set aside the judgment and be allowed in to defend; this was refused: see *Re Independent Electric Ltd.* v. *Goldfields Drug Store* (1930), 65 O.L.R. 185 at p. 186; *Gibbins* v. *Chadwick* (1892), 8 Man. L.R. 213 at p. 218; *Grevas* v. *Almas* (1936), 50 B.C. 491; *In re Jones* v. *James* (1850), 19 L.J.Q.B. 257 at p. 258. The main ground urged below was that there was a contravention of the principles of the common law to grant a default judgment where a good cause of action is not shown on the face of the proceedings, but the cases dealing with this is where prohibition is directed to the Ecclesiastical Courts: see *Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424; *Veley* v. *Burder* (1841), 12 A. & E. 265. The County Court judge found there was a good cause of action. It is the right of the Court to decide as to this after the property was sold at a loss: see *Toft* v. *Rayner* (1847), 5 C.B. 162. We had a good and just cause of action for damages for breach of the agreement: see *Harold Wood Brick Co.* v. *Ferris,* [1935] 1

K.B. 613. We do not have to show good title, as there is no question of title involved: see *Lilley* v. *Harvey* (1848), 17 L.J.Q.B. 357 at p. 358; *Bank of Montreal* v. *Gilchrist* (1881), 6 A.R. 659 at pp. 664-5.

J. A. MacInnes (*C. F. MacLean*, with him), for respondents: In principle the Court has a right of regulation and control to prevent an injustice whether in excess of jurisdiction or wrong conception of the law: see *Burder* v. *Veley* (1840), 12 A. & E. 233 at p. 311. She had her right in this case when the property was sold: see Williams on Vendor and Purchaser, 4th Ed., Vol. 2, p. 1010; *Henty* v. *Schroder* (1879), 12 Ch. D. 666. They must prove title to the land and there is want of jurisdiction on the face of the proceedings: see *Ellis* v. *Rogers* (1885), 29 Ch. D. 661; *Farquharson* v. *Morgan* (1894), 70 L.T. 152 at p. 153; *Beaton* v. *Sjolander* (1903), 9 B.C. 439. The existence of other remedies does not bar granting prohibition: see *Channel Coaling Company* v. *Ross*, [1907] 1 K.B. 145; *Rex* v. *Jack* (1915), 24 Can. C.C. 385; *Clarke Brothers* v. *Knowles*, [1918] 1 K.B. 128 at p. 134. The learned judge below has exercised his discretion in the matter and should not be disturbed.

Ellis, in reply, referred to *Martin* v. *Mackonochie* (1879), 4 Q.B.D. 697 at p. 732.

Cur. adv. vult.

2nd November, 1937.

MARTIN, C.J.B.C.: So much am I in accord with the judgment of my brother SLOAN that I shall do no more than add to the cases cited therein those of *Chew* v. *Holroyd* (1852), 91 R.R. 473, and *Mountnoy* v. *Collier* (1853), 93 R.R. 317.

MCQUARRIE, J.A.: I would allow the appeal for the reasons given by my brother SLOAN.

SLOAN, J.A.: This is an appeal from an order of Mr. Justice MCDONALD directing a writ issue prohibiting any further proceedings in the County Court of Vancouver on a judgment obtained by the plaintiff Martha McKee against the defendants Joseph Halverson and Mary Halverson.

The facts are that the defendants entered into a contract with

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the plaintiff to purchase certain lands of the plaintiff but subsequently refused to complete the deal. The real-estate agents who had arranged the sale sued the plaintiff for commission and succeeded in the action. The plaintiff thereupon commenced action in the County Court of Vancouver against the defendants claiming damages for breach of the agreement for sale and purchase.

The defendants did not file a dispute note and the plaintiff entered interlocutory judgment. Thereafter His Honour Judge HARPER assessed the damages sustained by the plaintiff at $520.20 and final judgment was entered for that amount on the 17th day of March, 1936.

On the 8th day of June, 1937, the defendants applied on motion to His Honour Judge HARPER to set aside the interlocutory and final judgment and allow them in to defend on the merits on the grounds that the defendant Joseph Halverson had not been served, and "the plaint and particulars are bad in law and do not disclose any cause of action."

The learned County Court judge dismissed the application holding the plaint disclosed a good cause of action and that so far as service was concerned the defendants "finding a compromise could not be effected . . . deliberately chose to ignore these proceedings."

The defendants then launched an application in the Supreme Court for a writ of prohibition upon the following grounds which appear in the notice of motion:

> That the said Court has no jurisdiction in the said action, and upon the grounds of contravention of a principle of common law in giving judgment in default to the plaintiff upon plaint and particulars which failed to disclose any cause of action, and upon the grounds the plaintiff's cause of action, if any, arises upon a contract for the sale of land in excess of the sum of $2,500.

Upon this motion Mr. Justice MCDONALD made the order which is now the subject-matter of this appeal.

There can be no question but that the jurisdiction of the County Court to entertain the plaintiff's action was apparent on the face of the proceedings. If there is any doubt in that regard the fact the defendants applied to the County Court for leave to come in and defend on the merits should effectively put

an end to the matter. *Gibbins* v. *Chadwick* (1892), 8 Man. L.R. 209.

The contention that the plaintiff's cause of action called into question title to "corporal hereditaments" exceeding in value $2,500 and this came within that class of action not within the jurisdiction of the County Court is to my mind, with respect, untenable.

In *Thompson* v. *Ingham* (1850), 1 L.M. & P. 216, at p. 219, Patteson, J., delivering the judgment of the Court, said:

The judge has clearly jurisdiction, *prima facie*, to try a plaint for use and occupation. The pleadings, if there were any in the County Court, would not show the title is in question. The point, whether it is or not, must of necessity arise upon the evidence; and as soon as it appears that it is, the jurisdiction of the Court ceases.

Here as there the learned County Court judge has jurisdiction *prima facie* to adjudicate upon the subject-matter of the plaint and in this case I can find no suggestion that the title to the land sold by the plaintiff to the defendants is called in question.

That leaves for consideration the contention that the plaint does not disclose a good cause of action. The learned County Court judge decided that issue in favour of the plaintiff, first, when assessing the damages claimed and secondly when he dismissed the defendants' application to set aside the default judgment. There is a marked distinction, to my mind, between a latent or patent lack of jurisdiction and failure to disclose a good cause of action.

In refusing a motion for prohibition, Riddell, J., in *Re Errington* v. *Court Douglas, Canadian Order of Foresters* (1907), 14 O.L.R. 75 at 76, said:

The subject-matter of the litigation is within the jurisdiction of the division court, and such being the case the learned judge below "may . . . misdecide the law as freely and with as high an immunity from correction, except upon appeal as any other judge": *In re Long Point Co.* v. *Anderson* (1891), 18 A.R. 401, at p. 408, *per* Osler, J.A.

The question to be decided by the judge was not whether the jurisdiction of his Court was ousted, and therefore he must leave the determination of the matter at issue to the county court or High Court; but whether such an alleged cause of action gave the plaintiff any rights at all—the question was not "In which Court is the action to be brought?" but "Can such an action succeed in law?" And there I have no more right to dictate to the learned judge than he has to dictate to me—he is master in his own house.

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See also *Canadian Northern Railway Co.* v. *Wilson*, [1918] 3 W.W.R. 184, at 191; *Re Wilton Farmers' Co-op. Ass'n* v. *Burgess*, [1924] 4 D.L.R. 435, at 438.

In my opinion the extraordinary remedy of prohibition cannot be invoked as a means of appealing from the decision of a County Court judge when the question which he decided was within his jurisdiction to determine. The procedure proper to be adopted is an appeal to this Court.

I am not unmindful of the submission by counsel for the respondents that a judgment in default upon pleadings which do not disclose a cause of action is a contravention of the principle of common law and in consequence prohibition is the appropriate remedy. The cases collected in Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 820, note (*k*) however do not support, in my opinion, the respondents under the circumstances of this case.

I would allow the appeal and set aside the order made below.

Appeal allowed.

Solicitors for appellant: *F. N. Raines* and *T. E. Lawrance.*
Solicitor for respondents: *A. H. Fleishman.*

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Sept. 21, 22, 23, 24; *Nov.* 2.

CAPTAIN J. A. CATES COMPANY LIMITED AND CATES v. BANK OF MONTREAL.

Mortgagor and mortgagee—Security for advances—Quit-claim deed—Subsequent sale to cover advances—Whether improvident sale.

On the 5th of August, 1933, the plaintiff company was indebted to the Bank of Montreal in the sum of $5,398.12. As collateral security the bank held a mortgage from the company on its Crescent Beach property. In July, 1935, owing to pressure by the bank and in consideration of an extension of time for payment, the plaintiff company delivered to the bank a quit-claim deed of the property, assigned to the bank all the furniture and fixtures on the premises, also $3,000 bearer bonds of the Corporation of the District of North Vancouver. It was agreed that the plaintiffs should have fifteen months from that date to pay the bank in full. On the 1st of October, 1936, the bank fixed a price of $8,500 on the property and placed same in the hands of an agent.

Through the agent the property was sold for said sum on the 5th of October following. The company still owed the bank $700 on January 27th, 1937, and the said bonds were then sold for $726. The balance of $26 was credited to the company. An action for damages for alleged improvident sale of the Crescent Beach property and the said bonds was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that on the facts there was no improvident sale and having been made in the exercise of the power of sale in the mortgage and resulting in a sum insufficient to pay the debt, it had a right to sell the bonds. On the special facts of this case it made no difference whether the bank sold under the power of sale or under the quit-claim deed as owners. In either case it had a right to realize on the bonds which were hypothecated to secure both the mortgage debt and sums advanced subsequent to and apart from the mortgage debt.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 29th of April, 1937, in an action for damages for an alleged improvident sale of the plaintiffs' hotel property at Crescent Beach, mortgaged by the plaintiff company to the defendant, and for a declaration that the said sale released the company from any liability to the defendant, and for a further declaration that certain bonds of the Corporation of the District of North Vancouver, held by the defendant, are the property of the plaintiffs. On the 5th of August, 1933, the plaintiff company was indebted to the bank in the sum of $5,398.12, and as collateral security for said indebtedness the bank held a mortgage from the company on its Crescent Beach property and also held from the plaintiff Cates as further collateral security, $3,000 bearer bonds of the Corporation of the District of North Vancouver. In July, 1935, owing to pressure by the bank and in consideration of an extension of time for payment, the plaintiff company delivered to the bank a quit-claim deed of the said mortgaged premises and delivered to the bank a transfer and assignment of all the furniture and fixtures on the mortgaged premises. It was agreed that the plaintiffs should have fifteen months from the 1st of July, 1935, to pay the bank off in full. On the 1st of October, 1936, the bank fixed a price of $8,500 on the mortgaged property and placed same in the hands of a real-estate agent. Through the agent a purchaser was found on October 5th, 1936, and the property was sold for the above sum. On January 27th, 1937, there still remained due

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the bank the sum of $700, and the bank then sold the above-mentioned bonds for $726.

The appeal was argued at Victoria on the 21st to the 24th of September, 1937, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. A. MacInnes, for appellants: The plaintiff company is a private company, the plaintiff Captain Cates owning nearly all the shares. He was managing director and had control. The Crescent Beach property includes six lots. On two of them is the hotel with a small store beside it. The other four lots that adjoin one another contain a dwelling-house, a cottage and a gas-station. Cates purchased the hotel in 1927 and for three years did a profitable business. In 1932 he sold the hotel property to one Hadfield for $22,000 but in the following year, after paying $5,000 on the purchase price, Hadfield executed a quit-claim deed of the property to the plaintiff company. In July, 1935, the bank pressed for payment of the debt and the company gave the bank a quit-claim deed of the whole six lots, and by arrangement Captain Cates was given fifteen months to pay off the bank. On the 5th of October, 1936, the bank sold the property for $8,500 to one Young. This price was fixed arbitrarily by the bank officials without any valuation or proper investigation as to value. It is submitted that this was an improvident offer made in total disregard of plaintiff's interests. It was sold at less than half its value: see *Re Max Leiser, Deceased, and The Succession Duty Act* (1936), 51 B.C. 368; *Huson* v. *Haddington Island Quarry Co.* (1911), 16 B.C. 98 at p. 104; *Carruthers* v. *Hamilton Provident* (1898), 12 Man. L.R. 60; *Latch* v. *Furlong* (1866), 12 Gr. 303; *Kennedy* v. *De Trafford,* [1897] A.C. 180 at p. 185. They were more concerned in getting in the bank loan than in obtaining a fair price: see *Colson* v. *Williams* (1889), 58 L.J. Ch. 539 at p. 541; *Prentice* v. *Consolidated Bank* (1886), 13 A.R. 69; *Aldrich* v. *Canada Permanent Loan Co.* (1896), 27 Ont. 548; (1897), 24 A.R. 193; *Richmond* v. *Evans* (1861), 8 Gr. 508 at p. 517; *British Columbia Land and Investment Agency* v. *Ishitaka* (1911), 45 S.C.R. 302. No notice whatever was given the

mortgagor of the sale: see *Bartlett* v. *Jull* (1880), 28 Gr. 140. The conduct of the defendant clearly indicates that lack of good faith demanded of a mortgagee realizing on his secuity. It was held below that the bank had the right to claim for any deficiency arising on such sale, but the case at Bar cannot be distinguished from *Royal Bank of Canada* v. *McLeod* (1919), 27 B.C. 376, and the learned judge was in error in dismissing the claim of the plaintiff Cates in respect to the North Vancouver District bonds.

Bruce Robertson, for respondent: It was the intention of the parties when the quit-claim deed was given that the relationship of mortgagor and mortgagee should continue. As found in the Court below the quit-claim deed was given to the bank, not to complete a purchase by the bank but to enable it to more readily exercise the power of sale contained in the mortgage. This appears clearly in a resolution of the company on August 13th, 1935, and if the company had tendered payment on the 4th of October, 1936, the bank would have had to accept it: see *Barton* v. *Bank of New South Wales* (1880), 15 App. Cas. 379 at pp. 380-1; *McKean and Company* v. *Black* (1921), 62 S.C.R. 290 at pp. 302-4. The property having been so sold the company is not entitled to a distinguishment of the debt: see *Rudge* v. *Richens* (1873), L.R. 8 C.P. 358; *Gordon Grant & Co.* v. *F. L. Boos,* [1926] A.C. 781. In the case of *Royal Bank of Canada* v. *McLeod* (1919), 27 B.C. 376, the circumstances were entirely different. In that case the bank was made the absolute owner of the property by the equity of redemption being released to the bank. The cases of *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395; *Kennedy* v. *De Trafford,* [1896] 1 Ch. 762; [1897] A.C. 180; *British Columbia Land and Investment Agency* v. *Ishitaka* (1911), 45 S.C.R. 302; *Haddington Island Quarry Company, Limited* v. *Huson,* [1911] A.C. 722, establish that the sale in question was not at an undervalue entitling the company to damages.

MacInnes, replied.

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SLOAN, J.A.: This is an appeal from a judgment of Mr. Justice MURPHY dated the 29th day of April, 1937, whereby the plaintiffs' action was dismissed with costs. The facts are that the plaintiff Cates was the principal shareholder and sole managing director of the plaintiff company and the defendant bank was the banker for both Cates and the company.

In 1930 the plaintiffs owed the bank $5,000 on a promissory note and the company gave to the bank by way of security a mortgage on certain property situate at Crescent Beach. This mortgage contained a power of sale. Subsequently the bank advanced further moneys in respect of which the plaintiffs gave the bank promissory notes, upon which they were both liable, amounting to $648.12. On April 19th, 1933, the plaintiffs hypothecated to the bank bonds of the Burrard Bridge Company as further security for the general indebtedness of the company.

In April, 1935, the plaintiff company delivered to the bank a quit-claim deed of the Crescent Beach property, upon part of which a hotel was situate, together with a bill of sale of the hotel furnishings and equipment. This arrangement was made on the agreed term that the company had the sole and exclusive option to repurchase the property within fifteen months from the 1st of July, 1935, upon payment of the amount due on the mortgage "plus any sums paid in the meanwhile by the bank for taxes, insurance premiums or for repairs or improvements to the property, after deducting any amounts received by the bank for rental."

The plaintiffs made unsuccessful efforts to sell the property and the company failed to exercise its option which expired on October 1st, 1936. On October 5th, 1936, the bank sold the entire property for $8,500, registered its title by way of the quit-claim deed, and gave the purchaser a deed of conveyance to the land and a bill of sale of the chattels. The amount realized from the sale of the property was $32.33 less than the amount owing under the mortgage and the additional several promissory notes remained unpaid.

On the 27th day of January, 1937, the bank sold the Burrard

Bridge Company bonds and realized thereon $726.60. This amount liquidated all indebtedness of the plaintiffs to the bank and left a small credit balance in their favour.

On the 4th of March, 1937, the plaintiffs launched their action claiming (1) damages for alleged reckless and improvident sacrifice by the bank of the property of the plaintiff company and (2) by the plaintiff Cates for the return of the bonds in question alleging that the bank had sold them without any right or authority.

The learned trial judge held (1) that there was no improvidence in the sale and as it had been made in good faith no action would lie against the bank; and (2) that the sale in question having been made in the exercise of the power of sale in the mortgage and resulting in a sum insufficient to pay off the indebtedness to the bank it had the right to sell the bonds in question. From this decision the plaintiffs appeal.

Before us, as below, both appellants were represented by the same counsel. He submitted on behalf of the appellant company that the bank sold the property under the power of sale contained in the mortgage and in consequence must act as a prudent owner would in such circumstances. He contended that the property was worth an amount considerably in excess of the figure received by the bank and that the company was entitled to judgment against the bank for damages for an improvident sale. From this argument it follows that if the sale was made pursuant to the power of sale in the mortgage the bank would in its term, providing the sale was a proper one, have the right to realize on the bonds to make up any deficiency. When counsel came to deal with the claim of Cates personally he contended that the bank had no authority to realize on the bonds because the bank by taking title (thus uniting in itself the two estates) and selling the property put the property beyond restoration; the consequence of which was that the debt thereby became extinguished. These arguments adduced by counsel were of course mutually antagonistic.

During the argument we held we could not disturb the finding of the learned judge below that there had been no improvident sale. The claim of the company then ceased to trouble us and

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we were left with the problem of the appellant Cates to solve. Once the company's claim was out of the way the embarrassment created by the conflicting arguments of appellant's counsel also disappeared. Nor is that all, for in my opinion the determination of that issue in favour of the bank also ends this appeal so far as Cates is concerned for it does not make any difference in the result, on the special facts of this case, whether the bank sold under the power of sale or took absolute title under the quit-claim deed and dealt with the property as owners. In either case the bank would have the right to realize on the bonds which were hypothecated to secure not only the mortgage debt but those sums advanced by the bank subsequent to and apart from the moneys secured by the mortgage.

The appeal therefore, in our opinion, should be dismissed.

Appeal dismissed.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitors for respondent: *Robertson, Douglas & Symes.*

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Nov. 2, 3, 4; Dec. 10.

LUCAS *ET AL.* v. GULF LOGGING COMPANY LIMITED *ET AL.*

Woodmen's liens—Work on two separate limits—Liens on logs cut on one for work done on both—Contract with logging company—Ownership after trees are felled—Status—R.S.B.C. 1936, Cap. 310.

The G. H. Moore Timber Company Limited carried on logging operations at Forward Harbour, B.C., the operations being completed on the 1st of June, 1937. The Gulf Logging Company Limited had purchased timber licence 5259 at Wellbore Channel (about six miles away) and under agreement with the Gulf Logging Company Limited the G. H. Moore Timber Company Limited agreed to log the timber on timber licence 5259. After completion of its work at Forward Harbour the Moore Company moved to Wellbore Channel and commenced logging operations. The Gulf Logging Company assisted in the way of hauling logs and in the construction of roads. The claimants issued a writ for liens under the Woodmen's Lien for Wages Act on the 13th of July, 1937, on the logs from Wellbore Channel for the work done at both Forward Harbour and Wellbore Channel. The Gulf Logging Company

admitted the right of the claimants to a lien on said logs for the work done on the Wellbore Channel licence but not for the work done at Forward Harbour. It was *held* by the trial judge that as soon as the trees were felled on timber licence 5259 the logs became the absolute property of the Moore Company, and the Gulf Logging Company had no legal *status* to question the validity of said liens.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the learned judge took a wrong ground in holding that the Gulf Logging Company had no *status* to contest the claims of the plaintiffs, that the appeal should be allowed and a new trial ordered.

APPEAL by defendant, the Gulf Logging Company Limited, from the decision of MURPHY, J. of the 20th of September, 1937. In May, 1937, the defendant G. H. Moore Timber Company Limited was carrying on logging operations at Forward Harbour on a timber licence belonging to one Thomas. The defendant Gulf Logging Company Limited had nothing to do with the operations at Forward Harbour except that they did some hauling of logs under contract with the Moore Company. The Moore Company completed its operations at Forward Harbour about the 1st of June, 1937, and then moved to Wellbore Channel, about six miles away, the Moore Company's employees being laid off while they were moving. Timber licence 5259 at Wellbore Channel was owned by one Freeman, who sold it to the Gulf Company under agreement of January 14th, 1937, and by agreement of the 10th of March, 1937, the Moore Company agreed with the Gulf Company to log the timber on licence 5259. The Moore Company then started logging operations on licence 5259, and during the operations the Gulf Company did the hauling and constructed roads. The claimants first issued a writ on July 13th, 1937, and a receiver was appointed on July 14th, 1937. The Gulf Company admitted the right of the plaintiffs to a lien on the logs cut from timber licence 5259 for work done by the plaintiffs on these particular logs, and an order was made on August 18th, 1937, for payment to the plaintiffs of the wages owing to them for work done on the logs cut from licence 5259. The logs from licence 5259 were at all times kept in separate booms from the logs cut at Forward Harbour. The issue was whether or not the plaintiffs had a lien

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on the logs cut from timber licence 5259 for the work done on the logs previously cut at Forward Harbour.

The appeal was argued at Vancouver on the 2nd, 3rd and 4th of November, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Walkem, K.C., for appellant: The learned judge with the consent of the parties decided to try one issue only, namely, whether the plaintiffs were entitled to liens on the logs cut on timber licence 5259 for work done on the logs cut at Forward Harbour, and reserved the trial of all other issues for subsequent hearing. He tried said issue but erred in refusing to decide the same, and erred in attempting to decide an issue which was not before the Court, namely, the question of ownership of the logs as between the defendants. Where an agreement is reached between counsel and consented to by the Court that the trial shall proceed on a certain basis, it is not open to the Court to dispose of the case on another basis, and a new trial will be ordered: see *Canadian Pacific Ry. Co.* v. *Windebank,* [1917] 3 W.W.R. 99 at p. 103. A miscarriage of justice has taken place upon the trial judge dismissing an action before the plaintiff's case is closed, or prematurely stopping the trial, a new trial will be ordered: see *Barron* v. *Kelly* (1917), 24 B.C. 283; *Nantel* v. *Hemphill's Trade Schools Limited* (1920), 28 B.C. 265. Where a decision is given as in this case on a ground not pleaded and not referred to at the trial until after the close of the evidence, a new trial should be ordered: *Ogilvie & Co.* v. *Davie* (1921), 61 S.C.R. 363; *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L.T. 347. He should not have decided the issue of ownership of the logs in question as he had no jurisdiction in the proceedings in this action under the Woodmen's Lien for Wages Act. He should have found that the Gulf Logging Company was the owner of the logs cut from timber licence 5259. If the contract is ambiguous, extrinsic evidence may be given to interpret it: see *Chapman* v. *Bluck* (1838), 4 Bing. (N.C.) 187; 132 E.R. 760 at p. 762; The English & Empire Digest, Vol. 17, p. 327; *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 at p. 307; *Brandon Steam Laundry*

Co. v. *Hanna* (1908), 9 W.L.R. 570 at 576; *Burritt* v. *Stone,* [1917] 3 W.W.R. 978; Leake on Contracts, 7th Ed., pp. 145, 224-5.

Cosgrove, for respondent: We had until the 30th of July to file our liens and they were regularly filed. We say there was one continuous operation on the two locations. The learned judge properly found that ownership in the logs cut on timber licence 5259 was in the Moore Company: see *Jorgenson* v. *Sitar and Ellor,* [1937] 2 W.W.R. 251; *Mutchenbacker* v. *Dominion Bank* (1911), 21 Man. L.R. 320 at p. 326; *The Royal Bank of Canada* v. *Hodges* (1929), 42 B.C. 44. Scale bills are not documents of title: see *Lee & Rutherford* v. *Canadian Puget Sound Lumber & Timber Co.* (1924), 34 B.C. 557. As to ownership see *Haglund* v. *Derr* (1927), 38 B.C. 435. We are entitled to the lien in any event, as the employment was continuous.

Walkem, in reply: They cannot file a lien on logs cut on Wellbore Channel for work done on Forward Harbour limits.

Cur. adv. vult.

On the 10th of December, 1937, the judgment of the majority of the Court was delivered by

MARTIN, C.J.B.C.: In this case the Court, that is to say the majority, my brother MCPHILLIPS dissenting, have come to the conclusion that the appeal must be allowed, and a new trial ordered, because the learned judge acted, we say it with every respect, on a wrong ground in deciding the case on the question of the *status* of the said Gulf Logging Company, holding as he did that it had no *status* to contest the claims of the plaintiffs. We may say it is with reluctance we come to this conclusion, my brother SLOAN and myself, but we are constrained to do so by the unfortunate way the case was presented and the conclusion which resulted therefrom.

The learned judge points out in his reasons that objection was taken on behalf of the claimants that the said company had no *status* to question the liens they claimed because it had no interest, legal or equitable, in the logs cut from the timber licence, and that objection was persisted in from first to last by the plaintiffs' counsel. At one stage of the proceedings, after he

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had given his judgment, at page 51 of the appeal book, the learned judge had some doubts as to the situation—I will put it that way, on this objection, and he suggested to Mr. *Cosgrove* that it would be advisable for him to waive that point, but that suggestion was not taken, and so, in view of that position, it is impossible for us to make any order other than that which we have made. The result will be, then, that a new trial will be ordered. The costs of the first trial will abide the result of the second trial. In the question of costs we agree. My brother dissents upon the other grounds.

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Knox Walkem.*
Solicitor for respondents: *Mark Cosgrove.*

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REX v. LUM PIE.

Criminal law—Gaming—Unlawfully keeping a disorderly house, to wit, a common gaming-house — Sufficiency of information — Criminal Code, Secs. 226, 227 and 229.

An information charging that the defendant at a certain date and place "did unlawfully keep a disorderly house, to wit, a common gaming-house contrary to the form of the statute in such case made and provided" sufficiently states the offence charged and no further particulars are required.

Rex v. *Wong Gai* (1936), 50 B.C. 475, followed.
Brodie v. *Regem*, [1936] S.C.R. 188, distinguished.

APPEAL by the Crown from the decision of police magistrate Wood, at Vancouver, acquitting the defendant on a charge that he the said Lum Pie, at the City of Vancouver, on the 3rd of December, 1937, did unlawfully keep a disorderly house, to wit, a common gaming-house, situate and being at 71 East Pender Street, contrary to the form of the statute in such case made and provided.

It was not contended that the place was not a common gaming-house but the magistrate felt himself bound to acquit on the

ground that the charge was void for uncertainty. He so concluded because a conviction using exactly similar words had been quashed for uncertainty by Mr. Justice MANSON on the 30th of July, 1937, in the unreported case of *Rex* v. *Chin Jung and Tong Nin,* that learned judge having held that the case of *Rex* v. *Wong Gai* (1936), 50 B.C. 475, had been by implication overruled by *Brodie* v. *Regem,* [1936] S.C.R. 188.

The appeal was argued at Vancouver on the 10th of December, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Orr, for appellant: The learned magistrate said the charge was void for uncertainty, and referred to *Brodie* v. *Regem,* [1936] S.C.R. 188. This case is the same as *Rex* v. *Wong Gai* (1936), 50 B.C. 475. See also *Rex* v. *Roberts* (1936), 66 Can. C.C. 298; *Rex* v. *Griss & Gruber* (1936), 67 Can. C.C. 184 at p. 189. There is nothing in the *Brodie* case altering the decision in the *Wong Gai* case.

Denis Murphy, for respondent.

The judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of the opinion that there is nothing in the *Brodie* case to detract in any way from the effect of our decision in *Rex* v. *Wong Gai* (1936), 50 B.C. 475, and we note that it has been followed by the Court of Appeal of Ontario in *Rex* v. *Griss & Gruber* (1936), 67 Can. C.C. 184, at p. 189.

It follows that the appeal will be allowed, and the judgment of acquittal set aside and that a new trial be had.

Appeal allowed and new trial ordered.

Solicitor for appellant: *Oscar Orr.*
Solicitor for respondent: *Denis Murphy.*

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Nov. 18, 19, 22; *Dec.* 13.

J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY (No. 2).

Negligence—Collision—Automobiles—Crossing path of oncoming traffic—Degree of care to be taken—Excessive speed—Not keeping proper look-out—Contributory negligence—R.S.B.C. 1936, Cap. 52.

At about 4.30 p.m. on the 8th of December, 1936, B., with his brother as a passenger, drove his car north-westerly up a hill on the Pacific Highway just before reaching Wander Inn, a gas-station on the north-east side of the road at the top of the hill. On reaching the brow of the hill B. saw G. driving his car south-easterly about 500 feet away. It was dusk and both cars had their lights on. On reaching the north-westerly entrance to Wander Inn G. turned to his left across the path of oncoming traffic to go into Wander Inn for gas. He did not sound his horn or put out his left hand. B., coming across the top of the hill at a high rate of speed, ran into the right front of G.'s car and drove it back eighteen feet before it came to a stop. The evidence was conflicting as to the distance B. was away from the point of impact when G. started to cross the line of adverse traffic. It was found by the trial judge that although G. was negligent in crossing a highway in face of adverse traffic at too slow a speed and not sounding his horn, his negligence was not a contributory factor and B.'s negligence alone in driving at an excessive speed and not keeping an alert look-out, was wholly responsible for the accident.

Held, on appeal, varying the decision of MANSON, J., *per* MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A., that the Contributory Negligence Act applied and G. was responsible to the extent of 70 per cent. for the accident and B. to the extent of 30 per cent.

Per MACDONALD, J.A.: That G. was responsible to the extent of 60 per cent. and B. 40 per cent.

Per MCQUARRIE, J.A.: That the responsibility should be equally divided.

APPEAL by John W. Bailey and George R. Bailey from the decision of MANSON, J. of the 20th of July, 1937. On the 8th of December, 1936, John Bailey was a passenger in a car driven by his brother, George Bailey, in a north-westerly direction on the Pacific Highway, travelling from Blaine towards New Westminster. Before reaching the Wander Inn, a gas-station on the north-east side of the road at the top of a hill about nine miles east of New Westminster, the Bailey car had to climb a fairly steep hill, and on coming to the brow of the hill about 200 feet east of the gas-station, he was going at about 35 miles an

hour. It had been raining earlier in the afternoon and the car reached the top of the hill at about 4.35 p.m. It was dusk and the car's lights were on. On reaching the top of the hill they saw a car coming in the opposite direction about 500 feet away, the lights of this car being on dimly. This car, driven by Grogan, on coming opposite the west entrance to the Wander Inn, turned to its left to enter the gas-station and crossed the path of the oncoming Bailey car. The Bailey car was a 1935 Terraplane sedan, with brakes in good condition, and the Grogan car was a 1929 Ford. The right front of the Bailey car struck the right front of the Grogan car and shoved it a distance of about eighteen feet before it came to a stop. The evidence is conflicting as to the distance Bailey's car was from the point of impact when Grogan crossed in front of him. Grogan did not sound his horn or put out his hand when he made the turn into the gas-station. John W. Bailey sued Grogan for damages and George R. Bailey was added as a third party. Grogan then sued George R. Bailey and the actions were consolidated. It was found on the trial that Grogan was negligent in crossing a highway in face of adverse traffic at too slow a speed and not using his horn. He found George Bailey guilty of negligence in driving at an excessive speed and not keeping an alert look-out, but while the driving of Grogan was reprehensible, his negligence was not a contributory factor to the accident.

The appeal was argued at Vancouver on the 18th, 19th and 22nd of November, 1937, before MARTIN, C.J.B.C., MCPHILLIPS, MACDONALD, MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C. (*J. L. Farris,* with him), for appellant) George R. Bailey: The evidence does not support the finding that Bailey was driving at an excessive speed. A speed of from 35 to 40 miles an hour is not excessive on the Pacific Highway. The lights were on on the Bailey car and he did everything he could to avoid a collision. Grogan gave no signal when he turned. The evidence does not justify the conclusion that Bailey was not keeping a proper look-out. The respondent Grogan was guilty of negligence in not signalling his intention to make the turn. He was negligent in turning in front of

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approaching traffic when the Bailey car was only two or three car lengths away, further he turned at too slow a speed and it was so found. In face of the finding the learned judge came to a wrong conclusion: see *Zellinsky* v. *Rant* (1926), 37 B.C. 119. If both were negligent both were at fault: see *Perdue* v. *Epstein* (1933), 48 B.C. 115; *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23 at p. 24; *Swadling* v. *Cooper*, [1931] A.C. 1 at p. 5.

Clyne, for appellant John W. Bailey: If Grogan contributed to the accident John Bailey must succeed as against him: see *Battagin* v. *Bird*, [1937] 2 W.W.R. 365 at p. 370. On his own findings of fact the learned judge should have found that Grogan contributed to the accident. From the point of view of the driver of the Bailey car, his negligence and that of Grogan were contemporaneous or so nearly so that the principles laid down in *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129 at p. 137, apply, and both drivers were to blame. The learned judge erred in not holding Grogan guilty of negligence in failing to give a signal of his intention to make a left-hand turn in the face of oncoming traffic. He further erred in holding Bailey was travelling at an excessive speed. There was error in finding Bailey was 200 feet away when Grogan started to turn. The slow sign has no significance as Bailey was past the curve and on the straight road long before he reached the point of impact. There was error in the learned judge taking a view in the absence of counsel: see *Re Sing Kee* (1901), 8 B.C. 20; *McCaffry* v. *Canadian Pacific Ry. Co.*, [1924] 1 W.W.R. 1083; *Regina* v. *Petrie* (1890), 20 Ont. 317.

Bull, K.C., for respondent: The finding of the trial judge was that Bailey was travelling at an excessive speed, and that the accident took place between "slow" signs. Bailey admits he was going at 40 miles an hour. Grogan says he was going faster when 30 feet away and Grogan's car was pushed sideways for a distance of eighteen feet. The learned judge also found Bailey was not keeping a proper look-out. This is established by the fact that Bailey swears Grogan's lights were not on, whereas witnesses including the policeman swear they were on even after the accident. Grogan swears that Bailey was 212 feet away

when he made his turn and the learned judge so finds. Bailey should have seen Grogan when 200 feet away and if he had he could have stopped in plenty of time to allow Grogan to complete his crossing: see *Perdue* v. *Epstein* (1933), 48 B.C. 115 at p. 118. The further cases in point are *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719; *Parsons* v. *Toronto R.W. Co.* (1919), 45 O.L.R. 627; *Howard* v. *Henderson* (1929), 41 B.C. 441; *Paul* v. *Dines* (1929), *ib.* 49; *Jeremy and Jeremy* v. *Fontaine,* [1931] 3 W.W.R. 203; *Crosbie* v. *Wilson and Langlois* (1932), 47 B.C. 384; *Hollum* v. *Robertson* (1936), 50 B.C. 551. This Court cannot say that the learned trial judge was clearly wrong, and it is only on that basis that it can be upset: see *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37; *Galt* v. *Frank Waterhouse Co. of Canada Ltd.* (1927), 39 B.C. 241; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304 at pp. 306 and 311; *"Hontestroom (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J.P. 153 at pp. 154-5.

Farris, K.C., in reply, referred to *Zellinsky* v. *Rant* (1926), 37 B.C. 119 at p. 122; *Turner* v. *Cantone* (1929), 41 B.C. 514 at p. 518.

Clyne, replied.

Cur. adv. vult.

On the 13th of December, 1937, the judgment of the majority of the Court was delivered by

MARTIN, C.J.B.C.: In the two consolidated actions of *John W. Bailey* v. *Grogan* and *George Bailey* brought in as a third party in the consolidated action, we are of opinion that we cannot, with respect, accept the view of the learned trial judge which in effect exonerated the defendant Grogan upon a finding of what amounts to ultimate negligence, from the consequences of his own negligence, which was found by the learned judge. We feel that the case is brought within the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52, and that the accident was occasioned by the fault of those two, that is, George Bailey and Grogan, and pursuant to our view in that behalf we then have to "establish the different degrees of fault" in doing which we

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have experienced some little difficulty, because that is a question upon which a divergence of views may well occur, but the result is that the majority of the Court thinks the degree of fault should be established in this way, *viz.*, that the defendant Grogan must bear 70 per cent. thereof, and the driver of the car, George Bailey, 30 per cent.: that is the view taken by my brother MCPHILLIPS, my brother SLOAN and myself. My brother MACDONALD would establish the degree of fault at 60 per cent. against Grogan and 40 per cent. against George Bailey, and my brother MCQUARRIE would apportion the fault equally.

I might perhaps add my own opinion of this case is that upon its facts it is brought within the definition of contributory negligence as set out by Lord Chancellor Birkenhead in *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129 at pp. 136, 144, where the Lord Chancellor in a distinguished judgment, states what I think is the appropriate rule hereto. I say no more about it because it is very well considered in Salmond on Torts, 9th Ed., 481 and 482.

MACDONALD, J.A.: This, in my opinion, is a case for the application of the Contributory Negligence Act. The facts are simple. Grogan, the respondent, driving in his motor-car, turned from the right side of the Pacific Highway to enter a service-station on the other side of the paved road. At the moment he commenced to make the necessary turn to do so another car driven by the appellant Bailey was (at least it was so found) 200 feet away coming from the opposite direction on the proper side of the yellow dividing line of the highway, bearing down upon Grogan as he attempted to make the crossing referred to. The collision occurred when the front end of the Grogan car got three feet beyond the edge of the 18-foot pavement.

Sole responsibility for the accident was placed on Bailey by the learned trial judge. He said [*ante*, p. 248]:

> Reprehensible as the driving of Grogan was, in my view it was the negligence of George R. Bailey that really was responsible for the accident.

The negligence found against Bailey was excessive speed and failure to maintain a proper look-out. There is no finding that this excessive speed was an anterior disabling factor incapacitating him from taking the necessary steps to avoid the accident

as in *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23. On the contrary the trial judge found that he could have stopped his car within 125 feet notwithstanding his excessive speed and because he had as indicated a distance of 200 feet to travel from the moment he saw, or should have seen, that Grogan was about to cross his path and did not stop he was solely responsible for the accident. I assume too that it was, in the opinion of the trial judge, Bailey's failure to keep a proper look-out that prevented him from stopping within the distance referred to.

Detailed reasons were not given showing why Bailey, rather than Grogan, had the last opportunity of averting the accident, except as stated the finding that Bailey might have stopped. On the facts as found, however, that by no means follows. It could be said with at least equal—I think greater—confidence that Grogan might have stopped before he completed the crossing when he realized or should have realized his peril. He was travelling slowly and could do so within a few feet.

One in Grogan's position, desirous of turning across the stream of traffic against him for his own purposes, should exercise the greatest care and not expose to danger or even to inconvenience others driving on their own side of the highway. He should not compel an oncoming driver, proceeding at a reasonable rate of speed, to apply his brakes or to stop his car to permit him to pass in front. In this case Grogan was not only courting disaster but acting, as the trial judge found, in a highly negligent and "reprehensible" manner.

While there is no finding as to the rate of speed at which the Bailey car was travelling (simply a finding of excessive speed) having regard to the slow speed at which Grogan, as found, crossed the highway, and their respective positions when he started to do so, Bailey must have been travelling at least over 68 miles an hour and possibly 77 dependent upon whether or not we take Grogan's speed to be seven, eight or eight and one-half miles an hour. There is no evidence to support so high a rate of speed on Bailey's part.

The trial judge found, as intimated, that Bailey was 200 feet away when Grogan started to traverse the last 22 feet. Mr. *Bull*

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suggested that it should be 212 feet. If that is so Bailey's speed would be still higher. The finding of the trial judge was "approximately 200 feet." That means, more or less, not necessarily more. Mr. *Bull* agreed, as I understood him, that while Bailey covered the 200 or 212 feet referred to Grogan drove 22 feet at seven or eight miles an hour. In other words when Grogan started to traverse the last 22 feet of his course before the accident Bailey was 200 feet away. At all events I interpret the findings of fact in that way.

At 65 miles an hour one travels over 95 feet in a second: at 77 miles per hour over 112 feet. If Bailey was travelling over 65 miles an hour Grogan should have realized it and should have permitted him to pass before crossing in front of what was virtually a projectile. Not having done so, it is inconceivable that his act in passing slowly in front at seven or eight miles an hour was not, at least a factor in creating a situation of imminent peril which led to the collision.

With the greatest deference I am satisfied that the true facts were not found by the trial judge. I would prefer to accept the evidence of Brown, rather than Grogan, an interested party. However, it is the function of the trial judge to pass upon the facts and his findings should not be set aside unless it is clear that he misconceived the evidence or his conclusions are clearly wrong.

The finding of negligence on Grogan's part was driving too slowly. A more accurate conclusion would be, that, under the circumstances, it was negligent to turn suddenly in front of the other car without warning, thereby creating a situation which coupled with Bailey's excessive speed and failure to watch led to a collision. While the finding of excessive speed on Bailey's part would appear to relate to a point remote from the scene of the accident and therefore not a factor still the further finding as to the respective distances of 22 feet and 200 feet at the crucial moment together with Grogan's speed, necessarily involved a finding of a highly dangerous or excessive rate of speed on Bailey's part at a point where it would be an element in the case.

The trial judge accepted Grogan's evidence; at least he said [*ante*, p. 246]:

Upon consideration of the whole of the evidence, I have definitely more confidence in Grogan's account of what occurred than I have in the account given by the Bailey brothers. Grogan's evidence was more specific. . . .

To have "more confidence" does not necessarily mean full acceptance but we may take it that in the main Grogan's evidence was believed. This finding leads to difficulties impossible to surmount. If Grogan's evidence was accepted, then, as the trial judge finds [*ante*, pp. 245-6]

he [Grogan] says . . . that as he crossed the northerly half of the pavement in his turn into the service-station [*i.e.*, to cover the 22 feet already referred to]. his speed was further reduced [it was first 25 and later 12 miles per hour] to six or seven miles per hour.

Six or seven miles an hour is an extremely slow pace for a motor-car. This evidence is not, I think, credible. That, however, is Grogan's statement. The trial judge, although apparently accepting his evidence, treated his rate of speed as slightly higher. Later he said [*ante*, pp. 246-7]:

He would traverse approximately 22 feet in making the turn. If his average speed in making the crossing was eight miles per hour it would take him 1.41 seconds, [*i.e.*, to travel 22 feet] or if his average speed was nine miles per hour his crossing would take him 1.16 seconds.

With respect, there is a mathematical error and an understatement of the true facts in the periods of time referred to in the foregoing extract taken from the reasons for judgment seriously affecting the conclusion arrived at by the learned trial judge. At 8 miles an hour it would take Grogan not 1.41 but 1.87 seconds to travel 22 feet; at 9 miles an hour not 1.16 as stated but 1.66 seconds. Travelling 60 miles an hour one covers 88 feet in a second; at 45 miles an hour 66 feet and at 77 miles 112 feet. The importance therefore of an error in even a fraction of a second is apparent.

The trial judge goes on to say [*ante*, p. 247]:

In 1.25 seconds—upon the assumption that Grogan was travelling at an average rate of speed across the pavement [the 22 feet] of eight or nine miles per hour—Bailey at 45 miles per hour would travel 82½ feet.

It is true that in 1.25 seconds a car would travel 82½ feet if going 45 miles an hour, but the figure 1.25 should be increased to 1.76, if, as I assume, the learned judge meant by referring to a speed of eight or nine miles per hour on Grogan's part an average of these two figures or eight and one-half miles per hour. If eight and one-half was meant it would take Grogan not 1.25

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but 1.76 seconds to traverse 22 feet. I do not think it follows from the foregoing extract that the learned trial judge meant to find Bailey's speed to be 45 miles per hour or that he was only 82½ feet away when Grogan started to cross. That would not fit the specific findings of fact in respect to relative distances already referred to when Grogan started to turn. This is borne out too by the statement immediately following, *viz.*:

> If Bailey was distant when Grogan started to make his turn, [*i.e.*, commenced to cover the 22 feet] approximately 200 feet, as I conclude he was, he should have been able to bring his car to a full stop. . . .

or to slow down to enable Grogan to complete his crossing.

Four figures were given as Grogan's speed in travelling the last 22 feet, two by Grogan himself, *viz.*, six or seven miles per hour and two by the trial judge, *viz.*, eight or nine miles per hour. If we take the average of all these figures or seven and one-half miles an hour as Grogan's speed he would cover that last 22 feet, before the collision, in exactly two seconds. If too, as found, Bailey was 200 feet away when Grogan started to cross, and the impact took place two seconds later, Bailey must have been travelling slightly over 68 miles per hour. If on the other hand the finding is that the distance travelled, as Mr. *Bull* suggested, was more than 200 feet, *viz.*, 212 feet, Bailey's speed would be still greater. Again if Grogan's speed was higher, *viz.*, eight and one-half miles an hour, as the trial judge presumably found (the average of eight or nine miles per hour) Bailey must have travelled the last 200 feet in 1.76 seconds or at slightly over 77 miles an hour.

Substantially the foregoing truly represents the conclusion that must be arrived at from the findings of fact upon which the judgment is based and, with respect, there is no evidence in the book to support it. I do not think the trial judge meant to hold that Bailey was travelling at such an excessive rate of speed and yet it necessarily follows when the necessary corrections are made. At this speed the Grogan car would in all likelihood, have been upset and completely wrecked; not merely pushed back, as the evidence shows, about eighteen feet without being overturned. The driver too probably would have been killed. I do not think these findings of fact can be accepted. In the alternative, if they should be accepted, there was no evidence

brought to our attention to show that at so high a speed Bailey could stop his car within 200 feet. He would only have 1.76 or at the most two seconds to do so.

If we should conclude—as I do—that the evidence was misconceived a new trial might be directed to secure the benefit of proper findings of fact. I do not think that is necessary or desirable. I would apply the Contributory Negligence Act. I think the speed of Grogan's car in making the turn was higher than found and Bailey's speed lower. I am also of the opinion that Grogan erred in placing the cars in the respective positions he did relative to the time he began to make his turn—the cars were then closer to each other than his evidence disclosed. On the other hand Bailey's evidence erred in the opposite direction: he put the cars too close together. The witness Brown was more likely to be reasonably accurate and his evidence removes to a great extent the confusion—and as I think—the errors in regard to respective speeds. Bailey had a clear road before him as he rounded the slight curve at or near the top of the grade and had no reason to anticipate this negligent turn to the left across his path on Grogan's part. When that turn was made, having regard to all the evidence, including that of Brown, both parties were so close that neither could avoid the other's negligence and as in *Swadling* v. *Cooper,* [1931] A.C. 1, the contemporaneous negligence of both caused the accident. I am unable to find that either driver, after the situation of peril became imminent, could have done anything to avoid the consequences of each other's negligence. On this state of facts, unsatisfactory though it may be for want of specific findings that will stand analysis and thus enable one to deal in a more definite way with the question of ultimate negligence, I think substantial justice will be done by applying the Act. A new trial should not be directed unless justice requires it. I inclined to the view that 60 per cent. only of the loss should be borne by Grogan: I will not however dissent from the findings of the majority on this point. Two actions were consolidated and tried together. With these findings the rights of the various parties may be determined.

I would allow the appeal.

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MCQUARRIE, J.A.: The facts are sufficiently stated in the reasons for judgment of the learned trial judge. He found that both the respondent and the appellant, George R. Bailey, were guilty of negligence. The evidence is remarkably voluminous for a case of this nature which has no unusual nor complicated features. Fortunately, as I see it, there is no necessity for us to scrutinize the evidence in detail. The conclusion which I have come to herein is based on the findings of the learned trial judge and the legal effect thereof. Concerning the respondent the learned trial judge made findings as follows [*ante,* pp. 245-6]:

Grogan says that he did not give the hand signal for his turn into the service-station by reason of the fact that it was so dark that it could not have been seen even if he had. That it was dusk is agreed by all the witnesses but I cannot arrive at a conclusion upon the evidence as to whether dark had so far advanced as to prevent a hand signal being seen by an oncoming car. In passing I only observe that drivers are well advised to give a hand signal at all hours of day and night—in other words, it is the part of wisdom to err on the safe side. . . . Grogan says that he was travelling as he came along from Westminster about 25 miles per hour, that several hundred feet from the gas-station he slowed down to about 12 miles per hour, that as he crossed the northerly half of the pavement in his turn into the service-station his speed was further reduced to six or seven miles per hour. The Pacific Highway is an arterial highway and quite a busy one. Highways are created arterial to speed up traffic, and on straightaway stretches speeds of from 40 to 60 miles per hour are not unusual, and with modern cars well tired a speed of even 60 miles per hour is not necessarily dangerous. Vehicles crossing adverse traffic on arterials should do so with the very greatest caution. The fact that a highway is arterial is a circumstance which every user of the highway should take into account. To cross adverse traffic at six or seven miles an hour amounts to negligence unless it be that the driver has a clear view for a considerable distance. It was dusk, and unless the adverse car was lighted Grogan could not have had a clear view even when 75 feet west of the point of impact of more than 350 feet. In actuality upon the occasion in question Grogan probably had not a clear view of the Bailey car from a point 75 feet west of the point of impact of more than 325 feet. He says that when he first saw it he just detected its dim outline, and that when he commenced to make his turn the Bailey car was still approximately 200 feet distant. Constable Mortimer's recollection is that Grogan told him that he did not see the Bailey car until after he had started to make the turn. George Bailey says that he was within two or three car lengths of Grogan—in other words 40 to 50 feet from his, when Grogan commenced his turn across the medial line, and in this he is borne out by his brother.

The learned trial judge then embarks on some mathematical calculations as to time and rate of speed, the correctness of which

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the appellants dispute, and which I am unable to follow very well. The learned trial judge proceeds to find as follows [*ante*, pp. 247-8]:

Upon the whole of the evidence I arrive at two conclusions that are material: First, Grogan in the circumstances was guilty of negligence in crossing adverse traffic on the highway at too slow a speed, and of minor negligence in not using his horn. Secondly, Bailey in the circumstances, coming up a hill with a turn at the brow of the hill with which he was familiar, was travelling at an excessive rate of speed and without keeping such an alert look-out as the circumstances demanded, and in these respects he was guilty of negligence. It is the part of wisdom to never come over the brow of a hill on a highway at a high rate of speed. There may be an intersection at the brow of the hill as there was in this case, or there may be a service-station into which the public have a right to turn, as there was in this case. Furthermore if Bailey had his lights on as he says he did he should have seen the warning slow sign, and even if his lights were not on he knew he was coming up a steep hill. Grogan had not the advantage of a modern high-speed car with quick pick-up and powerful brakes, nevertheless he had a right to be on the highway and he had a right to make the turn, providing always he exercised caution.

While both drivers were negligent the question arises as to whether the negligence of Grogan amounted to contributory negligence.

The learned trial judge further finds as follows: [*ante*, p. 248]:

Reprehensible as the driving of Grogan was, in my view it was the negligence of George R. Bailey that really was responsible for the accident.

While accepting his other findings as being accurate I cannot agree with his said last finding or conclusion. In an endeavour to fix the responsibility for the accident I cannot comprehend by what method of reasoning he could entirely absolve the respondent Grogan from all responsibility. I note that earlier in his reasons for judgment the learned trial judge expressed himself as follows [*ante*, p. 243]:

The accident was one which clearly ought not to have occurred but the fixing of the responsibility therefor gives considerable difficulty.

In view of that statement by the learned trial judge and his other findings of fact I am afraid, with due deference, that his conclusion was rather abrupt and should have been the subject of further explanation. Both drivers shared the responsibility for the accident and in my opinion the Contributory Negligence Act should be applied. My one difficulty is apportionment. I am unable to differentiate between the negligence of the two drivers in producing the accident. In other words, having regard to all the circumstances of the case, it is not possible in my

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opinion to establish different degrees of fault. Consequently, I would have recourse to subsection (*a*) of section 2 of the Contributory Negligence Act which reads as follows:

(*a.*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

I would, therefore, allow the appeal and apportion the liability equally between the appellant George R. Bailey and the respondent Grogan.

Solicitors for appellant J. W. Bailey: *Macrae, Duncan & Clyne.*

Solicitors for appellant G. R. Bailey (Third Party): *Mark Cosgrove* and *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

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

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CANADIAN LINEN COMPANY LIMITED v. MOLE.

Contract—Subsequent variation—Work continued under varied agreement—Accord and satisfaction—Violation of agreement—Damages—Injunction—Appeal.

The plaintiff manufactured linen supplies and carried on the business of laundering, dry cleaning and calling for unlaundered goods from customers and delivering laundered goods to them, including coats, dresses, towels and other such supplies. A number of salesmen were employed who drove the plaintiff's supply trucks and acted as collectors and deliverymen in connection with the business. The defendant was employed as a salesman in 1930, and on July 14th, 1931, entered into a written agreement with the plaintiff whereby he was to receive $30 per month and commissions, and that upon the termination of the employment he would not carry on any business akin to that carried on by the plaintiff or solicit any of its business for one year after the termination of his employment, within a radius of 55 miles from the city of Vancouver. On the 2nd of June, 1933, on the proposal of the plaintiff and assented to by the defendant, his salary was cut to $27 per month, and he continued in the employ of the plaintiff on that basis until December, 1935, when his salary was increased to $28 per month. He continued in the plaintiff's service until the 26th of May, 1937, when he voluntarily quit the plaintiff's employ. The plaintiff claims he violated said agreement by immediately carrying on a like business in Vancouver and soliciting the plaintiff's customers, and

brought action for damages for violation of the agreement and for an injunction. An injunction was granted and damages were assessed at $750.

Held, on appeal, varying the decision of MORRISON, C.J.S.C., that the injunction in the circumstances was not justified and should be set aside, but the case can be properly maintained on the original contract based upon the fact that there was no rescission of it, and the judgment for $750 damages should not be disturbed.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 1st of November, 1937, in an action for damages and for an injunction restraining breaches of covenants in an agreement between master and servant. The plaintiff is a company with head office and chief place of business in Vancouver. It has been in business since 1925. Its business consists of furnishing and laundering towels, coats, aprons and linen supplies generally. It weaves certain of its goods and manufactures practically all its garments specially to the order of a customer, and has a large and extensive plant. It has a fleet of trucks with salesmen, drivers and deliverymen. These outside men establish close contact with customers and are in a position to persuade customers to shift their business. The defendant entered the plaintiff's employ on May 1st, 1930, as a driver, salesman and deliveryman. He delivered parcels of linen, solicited new customers and took care of customers' business. He operated throughout the city of Vancouver and in the Fraser Valley area. On July 14th, 1931, defendant entered into a written agreement with the plaintiff whereby he was to receive $30 per month with certain commissions, and that either party could terminate the agreement on two weeks' notice. The agreement further provided that upon the termination of the agreement the defendant was not to carry on any business akin to that carried on by the plaintiff or solicit the plaintiff's customers for one year after the termination of the agreement. On the 2nd of June, 1933, the defendant was advised that there would be a ten per cent. cut in his salary to $27 per month, and he agreed to work at the lower remuneration, and in December, 1935, his salary was increased to $28 per month. The defendant left the plaintiff's employ on May 26th, 1937, when he engaged in the linen supply business with the Independent Linen Supply

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Company, which carried on business in the city of Vancouver and elsewhere in the Province, and the plaintiff claims he solicited the business of the plaintiff's customers.

The appeal was argued at Vancouver on the 6th and 7th of December, 1937, before MARTIN, C.J.B.C., McQUARRIE and SLOAN, JJ.A.

Nicholson, for appellant: The agreement of the 14th of July, 1931, was changed in June, 1933, by a ten per cent. cut in the defendant's salary. The defendant agreed to this and it operated in law as a rescission of the 1931 agreement. That the 1931 agreement cannot be varied by parol see *Marshall* v. *Lynn* (1840), 6 M. & W. 109; 151 E.R. 342; *Giraud* v. *Richmond* (1846), 15 L.J.C.P. 180; *Morris* v. *Baron & Co.* (1917), 87 L.J.K.B. 145. A variation of a material term of an agreement operates as a rescission: see *Stead* v. *Dawber and Stephenson* (1839), 10 A. & E. 57. The plaintiff sought to prove a combination of the two agreements of 1931 and 1933. This cannot be done: see *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; *Vezey* v. *Rashleigh,* [1904] 1 Ch. 634; Leake on Contracts, 7th Ed., p. 596; Salmond & Winfield on Contracts, 323; *British & Beningtons* v. *North Western Cachar Tea Co.* (1922), 92 L.J.K.B. 62. It should have been held that the agreement of 1931 was unreasonable and contrary to public policy: see *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company,* [1894] A.C. 535 at 565; *Mason* v. *Provident Clothing and Supply Co., Lim.* (1913), 82 L.J.K.B. 1153; *Herbert Morris, Lim.* v. *Saxelby* (1916), 85 L.J. Ch. 211 at p. 216; *Hall* v. *More* (1928), 39 B.C. 346.

Beeston, for respondent: The agreement of 1931 was never rescinded. The learned trial judge accepted the plaintiff's evidence as to this. The defendant continued in plaintiff's employment after the 1933 agreement. Even if changed, it would not prevent the original contract being enforced: see *Vezey* v. *Rashleigh* (1904), 73 L.J. Ch. 422. There was an accord and satisfaction: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 234; *Lavery* v. *Turley* (1860), 6 H. & N. 239. He is estopped from denying that the agreement is in force: see

Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 399-400; *Cornish* v. *Abington* (1859), 4 H. & N. 549; Spencer Bower on Estoppel, p. 117, sec. 132. Even if he did accept the cut under protest, that makes no difference: see *Davenport* v. *The Queen* (1877), 3 App. Cas. 115; *Strong* v. *Stringer* (1889), 61 L.T. 470. That the change was not in writing makes no difference: see *Rex* v. *Paulson,* [1921] 1 A.C. 271. The verbal understanding to accept less does not prevent specific performance: see *Robinson* v. *Page* (1826), 3 Russ. 114 at p. 121; *Price* v. *Dyer* (1810), 17 Ves. 356 at p. 363; Leake on Contracts, 8th Ed., 615. There was a dispute as to the defendant's commissions. He has elected his remedy: see *Ellen* v. *Topp* (1851), 6 Ex. 424; *Behn* v. *Burness* (1863), 32 L.J.Q.B. 204; *Graves* v. *Legg* (1854), 23 L.J. Ex. 228. The defendant has adopted a billhead closely resembling that of the plaintiff: see *Amber Size and Chemical Company, Limited* v. *Menzel,* [1913] 2 Ch. 239 at p. 244; *Robb* v. *Green* (1895), 64 L.J.Q.B. 593; *Measures Brothers, Limited* v. *Measures,* [1910] 1 Ch. 336. The agreement is limited to one year and is a reasonable restraint of trade: see *Millers, Lim.* v. *Steedman* (1915), 84 L.J.K.B. 2057; *Skeans* v. *Hampton* (1914), 25 O.W.R. 865. It is limited as to space and to the area in which the defendant worked: see *Mason* v. *Provident Clothing and Supply Company, Limited,* [1913] A.C. 724. Contracts should not be violated: see *E. Underwood & Son, Limited* v. *Barker,* [1899] 1 Ch. 300 at 305; *Canadian Linen Company, Limited* v. *Graham* (1937), [*ante,* p. 287].

Nicholson, replied.

Cur. adv. vult.

On the 13th of December, 1937, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are of opinion that the appeal should be allowed in so far as concerns the injunction which we are of opinion, under the circumstances, should not have been granted. The case is one which can, we think, be properly maintained upon the original contract based upon the fact that there was no rescission of it as found by the learned judge below; but as regards the injunction, which we find was in the most sweeping

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and unreasonable terms, that cannot stand; and we see no ground, under the circumstances, for attempting a severance, although it might possibly have at the outset been open to do so, because the position of the plaintiff taken throughout and persisted in until after the trial, and taken also in the judgment before us, was that which it had from the very start advanced as its interpretation of the contract, and such being the case, we feel it would not be proper to allow an amendment, which indeed was not asked for, or to allow it to depart from the course which it deliberately took.

As to damages, nothing was said about them, and we see no reason to disturb the judgment for $750 which was given against the defendant.

We think the costs should follow the event in the usual way. There are no circumstances here by which we are really justified in departing from it.

Appeal allowed in part.

Solicitors for appellant: *Brazier & Fisher.*
Solicitors for respondent: *Noble & Beeston.*

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Jan. 11.

THE CANADIAN BANK OF COMMERCE v. THE YORKSHIRE & CANADIAN TRUST LIMITED AS ADMINISTRATOR OF THE ESTATE OF NELLIE GRACE SILK, DECEASED.

Banks and banking—Indebtedness to bank—Moneys owing on agreement for sale — Assignment to bank as additional security — To secure future indebtedness—Further advances by bank—R.S.C. 1927, Cap. 12, Secs. 75 and 79—R.S.B.C. 1936, Cap. 148.

In March, 1928, Mrs. Silk purchased a property in Vancouver with her own funds for $19,000, which was registered in the names of Mr. and Mrs. Silk as joint tenants. Mrs. Silk died in October, 1928, and in December, 1928, letters of administration of her estate were granted to Mr. Silk. In March, 1929, the above-mentioned property was registered in Mr. Silk's name as surviving joint tenant. In June, 1929, Silk sold the property to Nanson, Rothwell & Company, Limited under agreement for sale for $30,500. In June, 1929, two of the next of kin of Mrs. Silk

notified Mr. Silk that the property having been purchased with Mrs. Silk's money, it was held by him in trust for her estate. In July, 1929, Silk being indebted to The Canadian Bank of Commerce, he assigned to the bank the money owing under the agreement for sale to Nanson, Rothwell & Company, Limited and notice of the assignment was given to said company. At the time of the assignment Silk owed the bank $500. At the commencement of this action on April 23rd, 1936, Silk owed the bank $6,758.90. In August, 1929, the next of kin of Mrs. Silk brought action against Mr. Silk for a declaration that said property belonged to Mrs. Silk's estate when a *lis pendens* was filed in the Land Registry office, and they recovered judgment on the 30th of May, 1930. Nanson, Rothwell & Company, Limited paid the bank $5,000 on the 18th of September, 1929, and a further sum of $4,338.92 on the 23rd of June, 1930. On the 27th of June, 1930, The Yorkshire & Canadian Trust Limited was appointed administrator of the estate of Mrs. Silk in the place of Mr. Silk. On the 1st of December, 1930, the bank received notice of the defendant's claim that the moneys due under said agreement for sale were the property of Mrs. Silk's estate, and in April, 1931, the defendant received notice that the bank claimed the money under said assignment. The said bank recovered judgment in an action against the administrator of the estate of Mrs. Silk for a declaration of ownership of money owing by Nanson, Rothwell & Company, Limited under the said agreement for sale.

Held, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that the assignment in question reads "As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain agreement for sale, . . . , are hereby assigned to the said bank." Under the relevant sections of the Bank Act the bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business, but the bank cannot take such an assignment as security for an anticipated future indebtedness.

The assignment is valid in respect to which it was taken as additional security for the debt of $500, but invalid in respect to which it purported to be security for any future indebtedness. The bank having received payment of the $500 debt, has no claim under the assignment upon any moneys now owing by Nanson, Rothwell & Company, Limited upon the agreement for sale.

APPEAL by defendant from the decision of FISHER, J. of the 14th of June, 1937 (reported, *ante*, p. 16), in an action against The Yorkshire & Canadian Trust Limited as administrator of the estate of Nellie Grace Silk, deceased, for a declaration of ownership of money owing by Nanson, Rothwell & Company, Limited under an agreement for sale between the said Nanson,

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Rothwell & Company, Limited and George Baillie Silk, dated the 14th of June, 1929, and also for a declaration that the assignment by the said George Baillie Silk to the plaintiff of the 23rd of July, 1929, of the moneys owing under the said agreement for sale is a good and valid assignment, and for payment by the defendant to the plaintiff of the sum of $574.87. On the 8th of March, 1928, Mrs. Silk purchased with funds forming part of her separate estate a certain property in Vancouver for $19,000. The property was registered in the names of Mrs. Silk and her husband George Baillie Silk as joint tenants. On the same day they mortgaged the property to the London & British North America Company Limited for $12,500. Mrs. Silk died on the 20th of October, 1928, and on the 11th of December following letters of administration to the estate of Mrs. Silk were granted to the husband. On March 28th, 1929, Silk applied to register the title to said property in himself as surviving joint tenant and the title to said property was registered in his name. On June 14th, 1929, Silk sold the property under agreement for sale to Nanson, Rothwell & Company, Limited for $30,500. On June 26th, 1929, the next of kin of Mrs. Silk notified Silk that they claimed the said property was purchased with Mrs. Silk's money and the property and the proceeds of sale thereof were the property of Mrs. Silk and were held by him in trust for her estate. On July 23rd, 1929, Silk being indebted to The Canadian Bank of Commerce and in anticipation of future loans, executed and delivered to the bank an assignment of the moneys owing under the said agreement for sale, and on the following day notice of the assignment was given to Nanson, Rothwell & Company, Limited. On July 23rd, 1929, Silk gave the bank a duplicate original of the agreement for sale between himself and Nanson, Rothwell and Company, Limited but the bank did not attempt to register its assignment of the moneys owing under said agreement. At the time of the execution of the assignment Silk owed the bank $500, and at the date of the commencement of the action Silk owed the bank $6,758.90. On August 22nd, 1929, Miss E. T. Walker and Miss I. McL. A. Roberts, next of kin of Mrs. Silk, brought action against Silk for a declaration that the property in question was

bought with Mrs. Silk's money and that the property was the property of Mrs. Silk's estate, and on the same day a *lis pendens* was filed in the Land Registry office on behalf of the plaintiffs in that action. On the 18th of September, 1929, Nanson, Rothwell & Company, Limited paid the bank $5,000 on account of the purchase price of the property, $3,500 of which was applied against the loans made by the bank to Silk and the balance was deposited to his credit in the bank. On June 23rd, 1930, Nanson, Rothwell & Company, Limited paid the bank a further $4,338.92, and of this $4,000 was applied against loans by the bank to Silk and the balance was deposited to his credit. On the 20th of May, 1930, the two next of kin above mentioned obtained judgment against Silk for a declaration that all moneys received by Silk from Mrs. Silk since December 31st, 1926, were held by him as her agent and that all properties purchased by him with said moneys were held by him in trust for her estate and that there be an accounting. On the 27th of June, 1930, an order was made appointing The Yorkshire & Canadian Trust Limited administrator of Mrs. Silk's estate. On the 1st of December, 1930, the bank received notice of the defendant's claim that the moneys due under the agreement for sale to Nanson, Rothwell & Company, Limited were the property of the estate of Mrs. Silk. On the 5th of December, 1930, Silk assigned to the bank his share in the estate of Mrs. Silk to secure the debt due by him to the bank, notice of which was given to the defendant. On the 19th of June, 1935, the defendant received $574.87 from Nanson, Rothwell & Company, Limited being two and one-half years' interest owing on the aforesaid agreement for sale. This was paid without prejudice to the plaintiff's position and was to be held by the defendant until the legal ownership of the said money had been determined by the Court.

The appeal was argued at Vancouver on the 8th, 9th and 10th of November, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Clyne (*Macrae, K.C.*, with him), for appellant: In the case of *Walker and Roberts* v. *Silk* (1930), 43 B.C. 43, it was held

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that the moneys due under the agreement for sale from Silk to Nanson, Rothwell & Company, Limited are trust funds. These funds can be followed and recovered unless acquired by a third person for value without notice: see Halsbury's Laws of England, Vol. 28, p. 88, sec. 195, and p. 207, sec. 415. If the respondent only acquired an equitable interest in the agreement for sale on the funds arising therefrom, the equity of the administrator of Mrs. Silk's estate must prevail as arising out of a prior time to that of the respondent: see *Newton* v. *Newton* (1868), L.R. 6 Eq. 135, and on appeal 4 Chy. App. 143. The sole question is whether the assignment to the respondent is legal or equitable. The definition of legal assignment is contained in section 2 (25) of the Laws Declaratory Act. The assignment does not come within that section. First the assignment was by way of charge only as it is expressed to be "by way of security": see Halsbury's Laws of England, 2nd Ed., Vol. 4, pp. 432 and 438. The bank was simply taking security. The assignment contemplated future indebtedness and liability and is therefore equitable: see *Jones* v. *Humphreys*, [1902] 1 K.B. 10. Secondly the assignment did not pass to the respondent all the legal rights and remedies of the assignor. The assignor must be completely eliminated from the transaction: see *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q.B. 613. In *The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 29 B.C. 407 at p. 423, it was held that a covenant to pay money under an agreement for sale may be assigned without assigning the vendor's interest in the land itself, but such assignment only operates as an equitable assignment. Silk is not completely eliminated from the transaction and the assignment is therefore equitable only: see *Magrath* v. *Collins*, [1917] 1 W.W.R. 487; *Read* v. *Brown* (1888), 22 Q.B.D. 128 at p. 131; *Hughes* v. *Pump House Hotel Company*, [1902] 2 K.B. 190 at pp. 193 and 197. It is submitted that the assignment in question contravenes the Bank Act: see section 75, subsection 2 (*c*) of Cap. 12, R.S.C. 1927. The bank is entitled to take as additional security the rights of vendors in agreements for sale of land, but there is nothing

disclosed here to indicate that the assignment was taken as "additional security."

Hossie, K.C. (*Ghent Davis*, with him), for respondent: The only claim the appellant has is that the beneficiaries are entitled to follow funds which subsequent to the assignment were held to be trust property: see Halsbury's Laws of England, Vol. 28, p. 207, sec. 415. The question is whether there was an absolute assignment and an absolute assignment is defined in section 2 (25) of the Laws Declaratory Act, R.S.B.C. 1936, Cap. 148; also in Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 431, sec. 796. The test is laid down in Odgers's Broom's Common Law, 3rd Ed., Vol. 2, p. 125. This assignment has all the requirements of an absolute assignment as set out in Halsbury and in Odger's Broom's Common Law. The fact that the assignment was given as security does not prevent it from being an absolute assignment: see *Durham Brothers* v. *Robertson*, [1898] 1 Q.B. 765 at p. 772; *Hughes* v. *Pump House Hotel Company*, [1902] 2 K.B. 190 at p. 197; *Clarkson* v. *Lancaster* (1926), 38 B.C. 217; *Burlinson* v. *Hall* (1884), 12 Q.B.D. 347; *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239; *Comfort* v. *Betts*, [1891] 1 Q.B. 737 at pp. 738-9; *Re Bland and Mohun* (1913), 30 O.L.R. 100 at p. 103; *Wilton* v. *The Rochester German Underwriters Agency Co.*, [1917] 2 W.W.R. 782 at 786; *Farney* v. *Canadian Cartage Co.*, [1917] 3 W.W.R. 758; *Okell Morris & Co.* v. *Dickson* (1902), 9 B.C. 151; *McQuade* v. *Moncrieff*, [1929] 1 D.L.R. 782; *MacDonald* v. *Royal Bank of Canada*, [1934] 1 W.W.R. 732 at pp. 735 and 740; *Rimmer* v. *Webster*, [1902] 2 Ch. 163 at pp. 169 and 173; *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63 at p. 70; *Abigail* v. *Lapin*, [1934] A.C. 491 at pp. 503 to 508; *Burgis* v. *Constantine*, [1908] 2 K.B. 484 at p. 503; *Lloyds Bank, Limited* v. *Bullock*, [1896] 2 Ch. 192. As to the contention that the bank had no power to take the assignment in question there is nothing in section 75 of the Bank Act which prevents a bank from lending money on the security of moneys owing under an agreement for sale, and if said section does prohibit such an assignment section 79 permits a bank to take an assignment of additional security for debts already contracted. Silk

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owed the bank $500 when the assignment was taken: see *Molsons Bank* v. *Carscaden* (1892), 8 Man. L.R. 451; *Re Wiarton Lumber Co.*, [1924] 2 D.L.R. 160; *Re Shaw*, [1925] 3 D.L.R. 1205. The Land Registry Act does not apply as the respondent received no registerable title. The property was registered in Silk's name: see *The Canadian Bank of Commerce* v. *The Royal Bank of Canada* (1921), 29 B.C. 407.

Clyne, replied.

Cur. adv. vult.

On the 11th of January, 1938, the judgment of the majority of the Court was delivered by

SLOAN, J.A.: This appeal turns upon questions of law arising out of a special case stated for the opinion of the Court. The facts as agreed upon may be summarized as follows:

In 1928 Nellie Grace Silk purchased with funds from her separate estate, certain real estate situate in the city of Vancouver and caused the title thereto to be registered in the names of her husband George Silk and herself as joint tenants. Some months afterwards Mrs. Silk died and letters of administration to her estate were granted to her husband. In March, 1929, George Silk registered the title to the property in himself as surviving joint tenant and in June of 1929 sold the property under an agreement for sale to Nanson, Rothwell & Company, Limited for the sum of $30,500.

A few days after this sale was made two of the next of kin of the deceased Nellie Grace Silk notified Silk that they claimed that the property and the proceeds thereof were the property of her estate and were held by him in trust for the said estate.

Paragraph 7 of the special case then stated as follows:

7. On the 23rd day of July, 1929, the said George Baillie Silk being indebted to the plaintiff, and in anticipation of future loans, executed and delivered to the plaintiff an assignment of the moneys owing under the said agreement for sale, which assignment was in the words and figures following:

"As Security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned, under a certain agreement for sale, *re* lot 18, block 41, District Lot 541, group 1, N.W.D., dated the 14th June, 1929, made between George Baillie Silk and Nanson, Rothwell & Co., Ltd., are hereby assigned to the said bank, and the bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by

or for the undersigned the same shall be received as trustee for the bank, and shall be paid over to or accounted for by the undersigned to the bank. Dated at Vancouver, B.C., this 23rd day of July, 1929.

"(Signed) G. B. Silk."

At the time of the execution of the assignment referred to in said paragraph 7, Silk was indebted to the plaintiff bank in the sum of $500. Further moneys were advanced to him by the bank and on September 18th, 1929, the sum owing by Silk to the bank amounted to $3,500. This sum was paid off on that day by an amount of $5,000 received by the bank from Nanson, Rothwell & Company, Limited; the balance of $1,500 being credited to Silk's current account.

In May of 1930, the said two next of kin obtained a judgment in the Supreme Court against Silk the effect of which was that the property in question was held to be the property of his wife's estate and that in so far as it was in Silk's name he held it in trust for the said estate.

In June of 1930, by order of Court, the defendant trust company was appointed administrator of the estate of Nellie Grace Silk in the place and stead of George Silk and title to the property was registered in the name of the defendant as administrator.

Silk since October, 1929, had been borrowing from the bank and at the date of the commencement of this action was indebted thereto in the sum of $6,758.90.

This contest between the bank and the trust company arises from their respective claims to the balance owing under the agreement for sale by Nanson, Rothwell & Company, Limited. The bank claims the fund by reason of the assignment; the trust company as administrator resists this contention and raises two objections to the bank's claim. The first objection taken by the trust company is that the assignment to the bank was not an absolute but an equitable assignment by way of charge only and is therefore postponed to the prior equity represented by the trust company as administrator of the estate of Nellie Grace Silk.

The second objection is that the assignment is contrary to the Bank Act and in consequence void as it was not taken as additional security for a past due debt.

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Two questions were submitted for the opinion of the Court as follows:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the defendant, as personal representative of the Estate of Nellie Grace Silk deceased and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the defendant?

The learned judge below answered the first question in the affirmative and the second by stating that in his opinion the said sums should be paid to the bank. From this determination of the special case the trust company now appeals to us.

I propose to deal with the objection taken that the assignment in question is in contravention of the Bank Act and as I base my opinion on this point it will be unnecessary for me to consider the other objection raised.

The relevant sections of the Bank Act (R.S.C. 1927, Cap. 12) are 75, subsection 2 (*c*) and 79 (*b*). Section 75, subsection 2 (*c*) reads as follows:

2. Except as authorized by this Act, the bank shall not, either directly or indirectly, . . .

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

And section 79 (*b*):

79. The bank may take, hold and dispose of, by way of additional security for debts contracted to the bank in the course of its business, . . .

(*b*) the rights of vendors or purchaser under agreements for the sale or purchase of real and personal, immovable and moveable property.

It seems clear to me that unless the assignment in question can be said to come within section 79 it is in contravention of section 75. Does such assignment come within section 79? In my opinion it does not except with respect to the indebtedness of $500 for which debt the assignment was made and taken as additional security.

At the risk of repetition I would again refer to the wording of the assignment itself as follows:

As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain agreement for sale . . . are hereby assigned to the said bank, . . .

It is my view of the relevant sections of the Bank Act that the bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business but that the bank cannot take such an assignment as security for an anticipated future indebtedness.

In my opinion therefore the assignment is valid in respect to which it was taken as additional security for the debt of $500 but invalid in respect to which it purported to be security for any future indebtedness. The bank having received payment of the $500 debt in September, 1929, has no claim under the assignment upon any moneys now owing by Nanson, Rothwell & Company, Limited upon the agreement for sale.

I would therefore, with respect, allow the appeal and answer the questions submitted in accordance with the opinion I have expressed.

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Macrae, Duncan & Clyne.*
Solicitors for respondent: *E. P. Davis & Co.*

FIELD AND FIELD v. DAVID SPENCER LIMITED.

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Negligence—Permanent-wave machine—Application—Injury to customer—Charge to jury—No objection taken—Onus of proof—"Res ipsa loquitur"—Costs—R.S.B.C. 1936, Cap. 56, Sec. 60.

The female plaintiff attended the beauty parlour operated by the defendant for the purpose of having her hair permanently waved. This treatment involves the application of heat to the hair through the agency of a machine. She alleged that during this operation, through no fault of her own, she was burned by the machine. The operator admitted that if the machine is properly applied and left on for a proper length of time there is no danger of a burn. The trial judge charged the jury without objection being taken, that the *onus* of proof throughout was upon the plaintiff, and upon the jury's verdict the action was dismissed. The plaintiffs appealed, and on the opening of the appeal the appellants

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were allowed to amend the notice of appeal by setting up that the learned judge erred in his direction to the jury as to the *onus* of proof, and that he should have instructed the jury that the doctrine of "*res ipsa loquitur*" applied.

Held, that the doctrine of "*res ipsa loquitur*" applies and the *onus* is upon the defendant to establish affirmatively inevitable accident or absence of negligence on his part. The learned judge below misdirected the jury on the law relative to the burden of proof, and there should be a new trial.

Held, further, that as counsel for the appellants did not object below to the charge of the learned trial judge, the defendant is entitled to the costs of the appeal under section 60 of the Supreme Court Act, the costs of the abortive trial to follow the event of the second trial.

APPEAL by plaintiffs from the decision of MCDONALD, J. of the 19th of February, 1937, in an action for damages for personal injuries sustained owing to the negligence of the defendant. On the 23rd of December, 1935, the plaintiff Edna Field went to the store of the defendant company in Vancouver and obtained a permanent wave in the beauty parlor operated and conducted by the defendant. Said plaintiff claims that owing to the negligence of the defendant's servants she received in the course of such treatment, severe burns on her scalp, causing her pain and suffering and permanent injury to her health. She claims that the operators in charge did not take due care in giving the treatment in question and allowed the apparatus used to become extremely hot, causing the burn in question. The jury found that there was nothing to show that the burns on Mrs. Field's head were the result of negligence, but rather accidental, and as to the effect of the shock and infections on Mrs. Field's present condition, they found no connection. They then awarded her $500. On this verdict the action was dismissed.

The appeal was argued at Vancouver on the 2nd and 3rd of December, 1937, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

G. L. Fraser (*D. M. Brown*, with him), for appellants: Mrs. Field was badly burned in the course of an operation for a permanent wave in the beauty parlour of the defendant company. The two grounds of appeal are: (1) The verdict was perverse; (2) there was misdirection. As to the first, the woman

who did the work admitted that if she had operated the machine properly the burn would not have occurred. There was negligence in not paying any attention to the warning Mrs. Field gave that the machine was burning her. If there is undisputed evidence of negligence the verdict will be set aside: see *Robson* v. *Suter* (1888), 1 B.C. (Pt. 2) 375; *McCannell* v. *McLean,* [1937] S.C.R. 341 at pp. 346-7. He said the burden of proof was on the plaintiff but this is a case of *"res ipsa loquitur"*: see *Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690; *Ballard* v. *North British Railway Co.,* [1923] S.C. (H.L.) 43; *Rideau Lawn Tennis Club* v. *Ottawa,* [1936] 3 D.L.R. 535 at pp. 537-8; *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440 at p. 456; Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 671, sec. 956; *Wake-Walker* v. *S.S. Colin W. Ltd.,* [1937] 2 D.L.R. 753 at pp. 759-60. In all the cases the Admiralty rule has been applied: see *Dozois* v. *Pure Spring Co.,* [1935] 3 D.L.R. 384 at p. 387. On the burden of proof see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 543, sec. 612; *De Paoli* v. *Richardson,* [1936] 3 D.L.R. 351; *Clark* v. *Regem* (1921), 61 S.C.R. 608. On the charge there was misdirection and there should be a new trial.

W. B. Farris, K.C. (*Ray,* with him), for respondent: The doctrine of *"res ipsa loquitur"* does not apply. It was not pleaded and was not argued on the trial. It was first raised in the amended notice of appeal. In the conduct of the trial it was not mentioned throughout: see *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925), 95 L.J.K.B. 237 at p. 241; Salmond on Torts, 4th Ed., 470; Phipson on Evidence, 7th Ed., 30. The charge on the burden of proof was sufficient: see *Beck* v. *Dexter,* [1935] 2 D.L.R. 335; *Mitchell* v. *Campbell,* [1937] 2 W.W.R. 497. The case of *Curry* v. *Sandwich, Windsor and Amherstburg R. Co.* (1914), 18 D.L.R. 685 was overruled by *Neal* v. *The T. Eaton Co. Ltd.,* [1933] O.R. 573; *Penman* v. *Winnipeg Electric R. Co.,* [1925] 1 D.L.R. 497; *Drew* v. *Mack,* [1931] 4 D.L.R. 395 at p. 400; *United Motors Service, Inc.* v. *Hutson et al.,* [1937] S.C.R. 294 at p. 296. The finding was right on the evidence and there was proper direction. It is not a case for a new trial. If the Court is against us judgment should be

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entered for $500. When the issue was not raised before we are entitled to costs: see *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at p. 467.

Fraser, in reply: There is evidence of a burn, and the doctrine of *"res ipsa loquitur"* need not be pleaded: see [1936] 1 D.L.R. 609.

Cur. adv. vult.

11th January, 1938.

MARTIN, C.J.B.C.: A new trial is ordered. I am in agreement with the reasons given by our brother SLOAN.

MCQUARRIE, J.A.: At the trial it was stated by the appellant Edna Field that she went to the respondent's beauty parlour in Vancouver in the usual way to get a permanent wave; that she submitted herself in good faith to the operator assigned to her and who had charge of one of the electrical machines used by the respondent for that purpose. The process was a rather lengthy one, lasting about two and one-half hours, which required the attention of an experienced, skilful and careful operator in order to protect customers from serious injury. The operator assigned to the said appellant was impliedly represented by the respondent to be fully qualified for the work.

It is to be noted that according to the said appellant, previous to this experience, she had never been sick, had never had a doctor and had not had one day off work for eight years. She had never had any trouble of any kind in connection with her health. This evidence of the said appellant was not contradicted.

Her story was that when she went to the beauty parlour she intimated that she wished to have a permanent wave and she was placed on a chair under an electrical machine in charge of Miss Ferguson, an operator. After the usual preliminaries were attended to the curlers were placed on her head and the current turned on. In a comparatively short time the said appellant complained to Miss Ferguson that it was too hot, meaning, I presume, that she felt too much heat on her head. Miss Ferguson said she did not think so. I now quote from the said appellant's evidence as follows:

Yes.

Yes? And then I waited a little while, and I said it again, it getting

hotter, getting hotter. Then she said she knew because she has been in this business so long that she knows what she is doing, she said to me.

She had been in the business so long she knew what she was doing? And then I didn't say nothing for a little while again. Then I said, "Now, I am burning. I am being burned now, I can't stand it any longer." And then she walked away and left me all alone.

THE COURT: "Later I said, now, I am burning."

Wismer: She said, "Now, I am burning," "and she walked away and left me all alone."

Witness: Yes.

Yes, well, what happened next now, Mrs. Field? Then I was crying loud when she came back.

You were crying loud and she came back? Yes.

Yes? And then—then when I was crying, she said, "You not cry any more," she had already turned the electric off.

She had already turned the electric off, yes? But it was still awful hot.

It was still awful hot, yes? And then she put some kind of blower on when she came back.

She put some kind of blower on? Yes.

Yes, that made it a little cooler—cooler, do you mean? Yes.

Yes? Then she started taking the curlers off.

She started to take the curlers off, yes? Yes, then she fixed up everything the way she was going to fix it, but she didn't say nothing about burn marks.

She didn't say anything about the burns? No.

Yes? Then I asked her if you please take a look how big the burn mark is, anyway.

You asked her to take a look how big the burn mark is? Yes.

And she did so? Yes, she looked and then she said "It is blistered all right."

It is what? Then she said, "It is blistered all right."

"It is blistered all right." Yes.

Yes? Then I asked if she please put something on, it is hurting.

Yes? Then she went away and came back with a little oil can and she put oil on it.

She put oil on it, yes. What did you do then? I felt awful, I could hardly put my coat on, but I left—I left soon after.

You left soon after? Yes.

You said you felt awful, you could hardly put your coat on. Did you go home? Yes, I went home slowly then.

Yes? And I carried my hat in my hands, because I couldn't put it on.

Many of the said appellant's statements are uncontradicted by Miss Ferguson who was called by the respondent, and she admitted that the said appellant had complained to her about being hot; that she had asked Miss Ferguson to look at her head, that the said appellant might have complained it was burning her and that she wanted something done about it; that

Miss Ferguson saw the redness or irritation on the said appellant's head and applied the cooler to counteract the heat and that when the said appellant returned in the evening she took her to the respondent's nurse. The nurse, Olive Esther Walker, was also called by the respondent. She admitted that she examined the alleged burn and had found a small slightly reddened area on the back of the said appellant's head; that the skin was broken as if there had been a blister. I might quote the following extract from the nurse's evidence, regarding the treatment applied by her:

> *Farris*: What did you do? Mrs. Field was complaining of severe pain, and in order to give her relief and to protect the area from infection it was necessary to put on a dressing. So I cleansed the area very carefully, the area round about, with alcohol and applied a moist boracic compress for a minute or so until it was clean, and then put on a sterile dressing.

It is to be assumed that the reason for the nurse going to all that trouble was the condition she found the said appellant's head to be in. The said appellant claimed that her injuries caused an infection and shock which sent her to hospital for about two months and that she had not at the time of the trial fully recovered. There was considerable difference of opinion among the medical men called on both sides as to whether the illness of which the said appellant complained was a result of the permanent wave operation or not and I do not consider it necessary at this stage to deal with such evidence in detail. It is indisputable, however, that while she was in the chair in the respondent's beauty parlour the said appellant's head was burned (and the jury so found) or irritated. That fact was uncontradicted by respondent's witnesses.

It seems clear that the appellants were entitled to some damages the amount of which should have been fixed by the jury. On the part of the respondent, however, it was contended by its counsel on the hearing before us that no precaution could have been taken or adjustment made to prevent the injury to the appellant Edna Field; also that when getting a permanent wave customers have to take their chances and if they are injured they have no right to complain. According to Mildred Macdonald who had charge of the beauty parlour the machine was in good order and the operator handled it properly. She could

offer no explanation for the injury complained of, although she had known head burns to happen on other occasions some of which had resulted in actions for damages. She put it this way:

> It is just one of those things you cannot account for—no fault of the operator and no fault of the machine.

Certainly there was no fault on the part of the injured woman. If the proposition stated by counsel for the respondent be good law, as to which I cannot agree, a most extraordinary and alarming situation would exist. In these days when short hair for women is the fashion a permanent wave is more or less a necessity for the well-groomed woman who can afford it, and, even according to counsel for the respondent, thousands of women are getting permanent waves regularly. He states that they appreciate the danger and are willing to take the chances of being seriously injured in an effort to improve their beauty. On the face of it such a proposition is obviously ridiculous. I take it that he would invoke the maxim of *volenti non fit injuria* but surely that does not apply here where there is no evidence that the appellant Edna Field when she submitted herself to the ministrations of the operator had any knowledge that she was taking chances or that the machine was dangerous. On the contrary I think it must be presumed that when she went to a reputedly first-class establishment such as the respondent's she would take it for granted that it was perfectly safe and that she would not be injured. Such a defence was not pleaded but even if it had been or even if it were not necessary to plead it on the evidence it could not succeed. The law is well settled as stated by Bowen, L.J., in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 at p. 696:

> It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not "*scienti non fit injuria*," but "*volenti*."

That case was commented on in *Smith* v. *Baker & Sons*, [1891] A.C. 325 but the principle of law above quoted does not appear to have been disturbed.

The verdict of the jury was as follows:

> It is our opinion that there has been nothing to show that the burns on Mrs. Field's head was the result of negligence, but rather accidental. As to

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the effect of the shock and infections on Mrs. Field's present condition, we find no connection. We award her $500.

It will be seen that this verdict amounts to:

(1) a finding that there were burns on the appellant Edna Field's head; (2) a finding that such burns were not the result of negligence but rather accidental; and (3) an award of $500 to the appellant Edna Field. If that verdict as interpreted by the learned trial judge amounts to a finding that the appellants are not entitled to any damages in my opinion it shows that the jury disregarded material undisputed facts in evidence and in that case there should be a new trial. See *Robson* v. *Suter* (1888), 1 B.C. (Pt. 2) 375.

With all due deference I consider that a new trial is also rendered necessary by reason of misdirection by the learned trial judge inasmuch as he erred in his direction to the jury as to the *onus* of proof and that he should have instructed the jury that the doctrine of *res ipsa loquitur* applied to the facts of the case. On that point I may say that I have had the privilege of reading the reasons for judgment delivered herein by my learned brother SLOAN and agree therewith. I also agree as to his disposition of the costs here and in the Court below.

SLOAN, J.A.: The facts in this case are simple. On the 23rd of December, 1935, the female plaintiff attended the beauty parlor operated by the defendant for the purpose of having her hair permanently waved. This treatment involves the application of heat to the hair through the agency of a machine. The female plaintiff alleged that during the course of the treatment she suffered severe burns on her scalp and that such burns were caused by the negligent operation of the machine in question by an employee of the defendant company. The action brought by her husband and herself was tried before a jury.

The verdict of the jury was as follows: [already set out in the judgment of MCQUARRIE, J.A.].

Upon this verdict the learned trial judge dismissed the action.

The Fields, husband and wife, appeal from this result alleging in their original notice of appeal that the verdict of the jury was perverse in finding no negligence on the part of the defendant.

On the opening of the appeal counsel for appellants moved that the notice of appeal be amended by adding certain other grounds of appeal thereto which motion was allowed. In the amended notice of appeal the appellants set up (*inter alia*) the following two new grounds of appeal:

5. That the learned trial judge erred in his direction to the jury as to the *onus* of proof.

9. That the learned trial judge should have instructed the jury that the doctrine of "*res ipsa loquitur*" applied to the facts of the case, or alternatively that once the damage from use of the machine in question was established, the plaintiffs (appellants) had discharged any burden of proof resting upon them.

In directing the jury as to the burden of proof the learned trial judge in his charge said:

Counsel for the defence is right in saying that when an action is brought, then the *onus* lies upon the plaintiff to prove her case or his case. That is not very difficult, and there is nothing really to worry about. It simply means this: The burden lies on Mr. and Mrs. Field, the burden throughout lies on them to prove to you that she was injured by negligence, and that that negligence caused that illness, and also to prove to you that she is entitled to damages for that negligence. And the *onus* is on her to establish the amount of the damages. That is as you would expect to find it, because if the action had never been brought no judgment could be given against the defendant.

The plaintiff must not only show that he suffered harm in such a manner that it might be caused by the defendant's negligence; he must also show that it was so caused, and to do this he must prove facts inconsistent with due diligence on the part of the defendant. Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury at all; and if I did not think there was some evidence here on which it was open to you to find that there was negligence here, it would be my duty to take the case from you; and I am not taking the case from you, I am leaving it to you because I think it is eminently a case for a jury to decide.

The first question for determination is whether or not the doctrine *res ipsa loquitur* is applicable to the facts of this case. It seems to me that it is because as I view this case it falls within the principle stated in *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596, wherein at p. 601, Erle, C.J., said:

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

It is common ground that the permanent-wave machine was

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under the management of the defendant or its servants and in the cross-examination of the operator of the machine the following appears:

What kind of a machine was it you were using? A croquignole machine —a ringlet croquignole machine.

And have you had lots of experience in that? Yes.

And you know how to run it properly? Yes.

And if the machine is properly applied and is left on for a proper length of time there is no danger of a burn in giving a permanent wave, is there? No.

That is correct, is it? That means it was a combination wave. I looked up my records later and found it was a combination wave.

But I say, "There is no danger of a burn in giving a permanent wave if the machine is properly applied and is left on for a proper length of time," and you agreed with that. Do you still stand by that? Yes.

If properly applied. I asked you again on that same point, and you said the same thing at question 79: "Now if the modern machines are properly applied, you don't have burns, do you? No." You remember giving that answer, do you Miss Ferguson? Yes.

In *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925), 95 L.J.K.B. 237, Scrutton, L.J., at p. 241, said:

The doctrine of *res ipsa loquitur*, as I understand it, is this: where you have a subject-matter entirely under the control of one party and something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence.

Lord Shaw of Dunfermline in *Ballard* v. *North British Railway Co.*, [1923] S.C. (H.L.) 43, at p. 56 said, in dealing with *res ipsa loquitur*:

If that phrase had not been in Latin, nobody would have called it a principle. My views about it and its use and application are simply these: (1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, *i.e.*, that a thing tells its own story—not always, but sometimes. (2) But, although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem relevant—to use the expression of one of your Lordships—relevant to infer liability for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains: *res ipsa loquitur*.

Winnipeg Electric Co. v. *Geel*, [1932] A.C. 690 is very much in point. In that case the Judicial Committee of the Privy Council was called upon to consider the effect of section 62 of the Motor Vehicle Act of Manitoba. That section provides that where an injury is caused to a person by a motor-vehicle the *onus* of proof that the injury did not arise through his negligence

is upon the owner or driver of the motor-vehicle. Their Lordships were of opinion that this statutory burden of proof was the same as that arising from the application of the doctrine *res ipsa loquitur*. We may take it therefore that the judgment of the Board relative to the burden of proof imposed by the section referred to also defines the extent to which the application of the doctrine *res ipsa loquitur* effectively shifts the *onus* to the defendant, in that class of case to which the language used may be properly applied.

Lord Wright in delivering the judgment of the Board said at pp. 695-96:

Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements—*i.e.*, that he was injured by the defendant and the extent of his damages; as to the second, the *onus* is removed from his shoulders, and if he establishes the two matters in respect of which the *onus* still remains on him, he may close his case, because it is then for the defendant to establish to the reasonable satisfaction of the jury that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame, because neither party could avoid the other. But the *onus* which the section places on the defendant is not in law a shifting or transitory *onus*: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory *onus*, whereas in that event but for the statute the plaintiff would fail, because but for the statute the *onus* would be on him. *A fortiori* the defendant will be held liable if the evidence actually establishes his negligence. No doubt the question of *onus* need not be considered if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury.

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Winnipeg Electric Co. v. *Geel, supra,* was considered by the Supreme Court of Canada in *United Motors Service, Inc.* v. *Hutson et al.*, [1937] S.C.R. 294. Duff, C.J.C., after reference to *Scott* v. *London Dock Co., supra,* said at pp. 297-8:

Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff. . . .

The phrase *res ipsa loquitur* is, however, used in connection with another class of cases, where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor. The rule of law in such a case is set forth by Fry, L.J., in *The Merchant Prince,* [1892] P. 179, at 189:

"It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (1886), 11 P.D. 114 it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to show inevitable accident."

That appears to be the kind of case contemplated by the passage in the judgment of the Judicial Committee delivered by Lord Wright in *Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690. There appears to be no satisfactory ground for thinking that their Lordships in that passage intended to say that where the circumstances, in the absence of explanation, afford reasonable ground for negligence, the *onus* is in the strict sense always shifted and that, in point of law, the burden always rests upon the defendant to establish affirmatively that he is not guilty of negligence. The fair construction of that passage seems to be that their Lordships there are dealing with cases in which there is a presumption of law established by the law itself that, certain facts being established, the defendant is liable. When that is so, to recur to the passage quoted above from Fry, L.J., the *onus* is upon the defendant to establish affirmatively inevitable accident or, in other words, absence of negligence on his part.

Mr. Justice Davis concurred in what was said by Chief Justice Duff and I do not read the judgment of the majority of the Court delivered by Mr. Justice Kerwin as in any material way affecting the passages I have quoted.

In my view this case falls within that class of case where "the *onus* is upon the defendant to establish affirmatively inevitable accident, or in other words, absence of negligence on his part."

The female plaintiff attended the place of business of the defendant to have her hair permanently waved. She alleged that during this operation through no fault of her own she was burned by the machine; the operator admitted that if the

machine is properly applied and left on for a proper length of time there is no danger of a burn. Upon the jury finding these facts to be true it seems to me they must then look to the defendant to establish to their reasonable satisfaction that the injury suffered by this woman, under these circumstances, was not caused by any negligent operation of the machine but by an occurrence within the realm of inevitable accident. Failing this, in my opinion, the jury is entitled to find against the defendant. *Winnipeg Electric Co.* v. *Geel, supra, Abel* v. *Cooke and Lloydminster and District Hospital Board and Lloydminster Municipal Hospital Board,* [1938] 1 W.W.R. 49.

It follows therefore in my view, with respect, the learned trial judge under the circumstances misdirected the jury on the law relative to the burden of proof.

Counsel for the respondent urged upon us that as the plaintiffs had pinned their case to a specific cause of the injury they could not rely upon the doctrine *res ipsa loquitur.* I am not satisfied that such was the fact but assuming it to be so the objection cannot prevail. *Neal* v. *The T. Eaton Co. Ltd.,* [1933] 3 D.L.R. 306 at 309.

Counsel for the appellants did not object below to the charge of the learned trial judge and while section 60 of the Supreme Court Act in this case, lifts him over the obstacle erected by *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 76; *Caldwell et al.* v. *Davys* (1900), 1 M.M.C. 387 at 389; *Johnston & Ward* v. *McCartney,* [1934] S.C.R. 500, and other decisions of a like nature (see in this regard *Alaska* v. *Spencer* (1904), 10 B.C. 473; *Scott* v. *Fernie* (1904), 11 B.C. 91) nevertheless the aid of section 60 cannot be invoked without paying the penalty therefor in terms of costs.

In the result I would allow the appeal and direct a new trial. Costs of this appeal to be paid by the appellants; the costs of the abortive trial to follow the event of the second trial.

Appeal allowed and new trial ordered.

Solicitor for appellants: *G. S. Wismer.*
Solicitor for respondent: *W. W. Walsh.*

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MANN v. AMERICAN AUTOMOBILE INSURANCE COMPANY.

Discovery — Production and inspection of documents — Communications between legal adviser and client—Adjuster's and doctor's reports—Privilege—Effect of solicitor of indemnity company acting for defence in former action.

Judgment for damages having been recovered by the present plaintiff against S. and J. in a former action for which S. and J. were held equally responsible, this action was brought on a policy of indemnity issued by the present defendant to S., and the plaintiff herein sought an order for the production for inspection of certain documents for which in its affidavit on production the defendant claimed privilege. The solicitors for the defendant acted for S. in the original action, but the present defendant had before action repudiated any liability to S. under the policy and subsequently S. had retained the services of said solicitors to conduct his defence. The documents in question may be classified generally as the various reports of the company's adjuster or claims representative, doctor's reports, confidential communications passing between the chief legal adviser of the company for the Northwest at Seattle and the adjuster, confidential communications between the legal adviser at Seattle and the company's general legal adviser at St. Louis, and confidential communications between the company and its Vancouver solicitor. The order was granted.

Held, on appeal, reversing the decision of McDONALD, J., that such documents were prepared for the purpose of being laid before the legal advisers of S. and the insurance company with a view to obtaining advice relative to the defence of existing or anticipated claims which might arise out of the motor accident and the insurance policy. Proper grounds for privilege are set forth in the affidavit of documents and the plaintiff is not entitled to the production thereof.

APPEAL by defendant from the order of McDONALD, J. of the 21st of October, 1937, whereby the plaintiff through her solicitors was allowed to inspect and take copies of and extracts from the documents enumerated in the second part of the first schedule of the affidavit of documents sworn on the 6th of October, 1937, on behalf of the defendant. On the 15th of October, 1936, the plaintiff and her brother, Guido Mann, were passengers in a car driven by C. N. Strugnell, an infant, easterly on 64th Avenue in the city of Vancouver. When crossing the intersection at Oak Street he was run into by a car driven by one D. E.

Johnson who was driving northerly on Oak Street. The plaintiff and her brother were injured and they brought action for damages against C. N. Strugnell, Albert E. Strugnell (his father) and D. E. Johnson. The plaintiffs in that action recovered judgment against C. N. Strugnell and D. E. Johnson, but the action was dismissed against Albert E. Strugnell. It was further held that C. N. Strugnell and D. E. Johnson were equally responsible for the accident. On the 14th of October, 1936, the defendant in this action, the American Automobile Insurance Company, issued to C. N. Strugnell its motor-vehicle liability policy No. 632756, and in and by the said policy the defendant for the consideration therein mentioned covenanted, promised and agreed to insure the said C. N. Strugnell as therein set out against liability for loss or damage, and indemnify the said C. N. Strugnell against any loss or damage resulting from bodily injury to any persons being carried upon the said motor-vehicle. The said Strugnell and Johnson failed to satisfy the judgment against them and the said Ellen Mann brought action against the insurance company, suing as well on her own behalf as on behalf of all other persons having judgment or claim against C. N. Strugnell. The documents in the second part of the first schedule to the affidavit on production, the defendant refused to produce, on the ground that these were privileged communications between solicitor and client.

The appeal was argued at Vancouver on the 8th and 9th of December, 1937, before McPHILLIPS, McQUARRIE and SLOAN, JJ.A.

Nicholson, for appellant: The action is under section 175 of the Insurance Act. They proceed against the insurance company on the judgment against the insured. My firm acted both for the insurance company and for Strugnell. We say all communications and letters between the insurance company and the solicitors are privileged: see Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 381 *et seq.;* Bray on Discovery, 350; *Southwark Water Co.* v. *Quick* (1878), 3 Q.B.D. 315; *Maritime Electric Co., Ltd.* v. *General Dairies, Ltd.,* [1937] 1 W.W.R. 591. Adjusters' reports are privileged: see *Gillespie Grain Co.,*

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Ltd. and Grain Insurance & Guarantee Co. v. *Wacowich,* [1932] 1 W.W.R. 916; *Northwestern Utilities Ltd.* v. *Century Indemnity Co.,* [1934] 3 W.W.R. 139.

J. A. MacInnes, for respondent: By electing to defend they cannot turn around and repudiate: see *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110; *McKnight* v. *General Casualty Insurance Co. of Paris, France* (1931), 44 B.C. 1; *England* v. *Dominion of Canada General Insurance Co.,* [1931] O.R. 264. There is the question whether the company did conduct the defence or not: see Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 400, sec. 482. The privilege is allowed only when the parties and the subject-matter are the same. The parties are not the same and the subject-matter is different: see Phipson on Evidence, 7th Ed., 199; *Kerry Co. C.* v. *Liverpool Salvage Ass'n and Ensor,* [1905] 2 I.R. 38 at p. 42. The documents are all in connection with the first action which is disposed of and that is preliminary to the second action against the insurance company: see *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675 at p. 681; *Feigenbaum* v. *Jackson and McDonell* (1900), 7 B.C. 171; *Jones* v. *Great Central Railway,* [1910] A.C. 4; *Crown Bakery Ltd.* v. *Preferred Accident Insurance Co. of New York,* [1933] 2 W.W.R. 33 at p. 45; Phipson on Evidence, 7th Ed., 201; *Irish Society* v. *Crommelin* (1868), I.R. 2 C.L. 501 at p. 503. The issue is whether the insurance company took the defence or not: see *Manley* v. *O'Brien* (1901), 8 B.C. 280 at p. 287.

Nicholson, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 381, sec. 462 and p. 386, sec. 468.

Cur. adv. vult.

11th January, 1938.

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

MCQUARRIE, J.A.: The facts are sufficiently stated in the judgment of my learned brother SLOAN. Certain documents are set out in the second part of the first schedule to the defendant's affidavit of documents. The defendant objected to produce

these documents claiming that they were privileged. The learned judge below on application by the plaintiff ordered production of the said documents. As I see it the only question with which we are concerned is whether the said documents were privileged or not. The law is well settled that correspondence, memoranda, reports and other documents passing between solicitor and client or prepared for the purpose of instructing counsel for trial purposes are professionally privileged and production thereof cannot be enforced.

With due deference I am afraid the learned judge erred in making the order appealed from and I would therefore allow the appeal.

SLOAN, J.A.: The respondent Ellen Mann, and another whom she now represents, recovered judgment in the Supreme Court of British Columbia on the 25th of March, 1936, against C. N. Strugnell and D. E. Johnson for sums totalling $4,831.45 for damages and costs arising out of a motor-car accident.

The judgment remaining unpaid the respondent now brings action against the appellant insurance company alleging that the judgment debtor Strugnell was insured by the appellant and claiming a judgment ordering that the insurance moneys payable under the policy of insurance in question be applied toward satisfaction of the judgment for damages and costs.

The appellant in its defence alleges that Strugnell violated certain statutory conditions of the policy of insurance and in consequence it is not liable thereunder.

Strugnell's policy provided for extended coverage, or passenger hazard insurance, and therefore this defence is open to the appellant by virtue of the Insurance Act then in force (Cap. 20, B.C. Stats. 1925, and amending Acts (now R.S.B.C. 1936, Cap. 133).

The respondent in her reply to this defence alleges, in effect, that the appellant defended the original action in the name, and on behalf of the said Strugnell, and that therefore the appellant admitted its liability under the said policy and is now estopped from raising any question as to the invalidity thereof or its liability thereunder. Upon this reply issue was joined.

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The appellant filed an affidavit of documents in which it objected to produce certain documents on the ground, broadly speaking, that such documents were privileged communications. The respondent thereupon applied for an order for production, free from privilege, which order was made, and it is this order from which the appellant company now appeals.

The order made was a discretionary one and the burden is upon the appellant to convince us that the learned judge proceeded on a wrong principle.

From material before the learned judge, and before us, it appears that the solicitors for the appellant did act for Strugnell in the original action but it is submitted, and letters are produced to prove, that the appellant had before action repudiated any liability to Strugnell under the policy and that subsequently Strugnell had retained the services of the said solicitors to conduct the defence of the action on his own behalf.

One issue of fact then for determination at the trial will be whether the solicitors in question conducted the defence of Strugnell on his own behalf or whether they were in reality acting for the appellant insurance company in defending the action.

It is not my desire, at this stage, to express any opinion on the result which would follow in law if it is determined by the trial judge that, in fact, the solicitors were acting for the appellant in the defence of the original action, but as counsel for the appellant pressed the point upon us, I only wish to say that the question of whether or not the doctrine of estoppel can operate against the provisions of the Insurance Act requires careful consideration, in this case, in view of the language of the Judicial Committee of the Privy Council in *Maritime Electric Co., Ltd.* v. *General Dairies, Ltd.*, [1937] 1 W.W.R. 591.

I consider the proper course to be adopted by us at this stage of this action is to regard the issue as one of substance and to examine the question of the production of the documents on that basis.

That leaves one question for determination: Are the documents in question privileged from production?

The documents can be classified generally as the various

reports of the company's adjuster, or claims representative, doctor's reports, confidential communications passing between the chief legal adviser for the appellant for the Northwest at Seattle and the adjuster, confidential communications between the legal adviser at Seattle, and the company's general legal adviser at St. Louis, and confidential communications between the appellant and its Vancouver solicitors.

After careful consideration I am of the opinion that these documents are privileged communications and that the respondent is not entitled to the production thereof.

Counsel for the respondent conceded that, apart from the adjuster's and doctor's reports the remaining documents in question would have been privileged from production in the original action. In this action he is pressing for production of all documents for the one purpose of endeavouring to prove from such documents that the appellant company was the real defendant in the original action.

I fail to see how the reports of medical practitioners could have any bearing on this issue and consequently I do not concern myself with them.

With respect to the adjuster's reports this question has been decided adversely to the contention of counsel for the respondent in *Gillespie Grain Co., Ltd. and Grain Insurance & Guarantee Co.* v. *Wacowich,* [1932] 1 W.W.R. 916. These reports of the adjuster would be therefore privileged from production in the first action.

When this stage of the inquiry is reached the conclusion seems clear. To my mind the principle enunciated in *Pearce* v. *Foster* (1885), 15 Q.B.D. 114 applies. Brett, M.R. in that case said at p. 119:

I do not think, if they were privileged in relation to the first action, that the privilege ceases in relation to another action. The case of *Bullock* v. *Corry,* [(1878)] 3 Q.B.D. 356 seems to me to be an authority for that conclusion, and the judgment of Cockburn, C.J., in that case, lays down a most valuable principle on this subject. There the documents in question were being inquired about in a different action from that in relation to which they originally came into existence, and the Lord Chief Justice said: "The privilege which attaches by the invariable practice of our Courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged always privileged. This

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will apply *a fortiori* where the succeeding action is substantially the same as that in which the documents were used." This is a clear intimation of opinion that, if a document is once so privileged, the fact that it is another action in which it is being inquired about will not destroy the privilege. It seems to me that the expressions used by Lord Lyndhurst in the case of *Holmes* v. *Baddeley*, [(1844)] 1 Ph. 476, at p. 482 really imply that he was of the same opinion. On principle I agree with the opinion so expressed. The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired. The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action.

I am satisfied that the proper grounds for privilege have been set forth in the affidavit of documents and that such documents which are not clearly professional confidential communications passing between the legal advisers of the appellant are documents which came into existence for the purpose of litigation existing or contemplated, and were prepared for the purpose of being laid before the legal advisers of Strugnell, and the appellant insurance company, with a view to obtaining advice relative to the defence of existing or anticipated claims which might arise out of the motor accident and insurance policy in question.

Mr. Justice Ewing had occasion to consider a question similar to this in *Northwestern Utilities Ltd.* v. *Century Indemnity Co.*, [1934] 3 W.W.R. 139, and, if I may say so, the conclusion to which he came appears to me to be in accordance with the law on this subject as I understand it.

With great respect I am of the opinion the learned judge below proceeded on a wrong principle and I would therefore allow the appeal and set aside his order.

Counsel for the respondent is not without means of eliciting information from the appellant company. He has a powerful weapon at his disposal in his right to administer interrogatories and if the appellant company answers insufficiently may apply to the Court or judge below for an order requiring further answers by *viva voce* examination under rule 353. *Shannon* v. *King* (1931), 45 B.C. 7. I would not, however, because of any

difficulty on the part of the respondent in the matter of adducing evidence to substantiate her pleading, relax the salutory rule which protects professionally privileged communications and documents from production.

Appeal allowed.

Solicitor for appellant: *W. S. Lane.*
Solicitor for respondent: *C. S. Arnold.*

REX v. SAM CHOW.

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Criminal law—Sale of lottery tickets with Chinese characters—Selection of characters by purchaser—Draw—Successful purchaser paid money—"Disposing of property"—Mode of chance—Criminal Code, Sec. 236 (b).

The accused sold tickets upon which were written eighty different Chinese characters. The purchaser selected and marked ten of the characters on the ticket and later from a bag containing eighty balls upon each of which one of the said characters was written, the accused drew ten balls. If the purchaser paid 15 cents for the ticket and he selected and marked five characters which corresponded with those upon the ten balls drawn from the bag he was paid 30 cents, if he marked six correctly he was paid $1.80, and larger sums for marking more than six correctly. A complaint that the accused "did unlawfully sell tickets for disposing of property by a mode of chance" contrary to section 236 (*b*) of the Criminal Code, was dismissed.

Held, on appeal, reversing the decision of police magistrate Wood, that irrespective of whether the purchaser is successful or not in marking a sufficient number of characters correctly to win a payment of money, the intention and purpose for which the tickets are sold is the test, and in this case the intention and purpose for which the tickets were sold is the disposing of property, *i.e.*, money. The Crown succeeded in bringing the accused within the provisions of section 236 (*b*) upon proof of three relevant essentials, *viz.*: (a) the sale of the tickets; (b) for (*i.e.*, with the intention of) disposing of property; (c) by a mode of chance, and the appeal is allowed.

APPEAL by the Crown from the decision of police magistrate Wood, Vancouver, dismissing a charge against the accused that he did unlawfully sell tickets for disposing of property by a mode of chance, contrary to section 236 (*b*) of the Criminal Code.

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The appeal was argued at Vancouver on the 8th of November, 1937, before MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A.

Orr, for the Crown: The accused sells lottery tickets with eighty Chinese characters on them. The buyer marks any ten of the characters and later from a bag that contains eighty balls with one of the eighty characters on each of them, he draws out ten balls and the buyer who marks five or more characters that are the same as are on the balls drawn from the bag is paid so much money in accordance with the amount paid for the tickets. We say it is a betting proposition and a game of chance. The learned magistrate was in error in following *Rex* v. *Robinson* (1917), 29 Can. C.C. 153, which is clearly distinguishable: see *Rex* v. *Brewerton* (1936), 67 Can. C.C. 60. Our law is not the same as the English law with relation to this charge: see *Taylor* v. *Smetten* (1883), 11 Q.B.D. 207.

Accused did not appear.

Cur. adv. vult.

11th January, 1938.

MARTIN, C.J.B.C.: The judgment of the Court allowing the appeal and directing a new trial will be delivered by our brother SLOAN.

SLOAN, J.A.: This is an appeal by the Attorney-General from the dismissal by police magistrate Wood at Vancouver of a complaint that Sam Chow "did unlawfully sell tickets for disposing of property by a mode of chance," contrary to section 236, subsection (*b*) of the Criminal Code.

The facts are not in dispute and may be shortly stated. The tickets in question have eighty Chinese characters marked thereon. The purchaser of a ticket selects and makes a mark of his own upon any ten of the characters. At a certain time ten balls, each bearing a character marked thereon, are drawn from a bag. The successful ticket holder is paid a sum of money, the amount of which is determined by the sum originally paid for the ticket and the number of characters he selected, which correspond with those upon the balls drawn from the bag.

If the ticket holder has selected and marked five characters

correctly on a ticket for which he paid fifteen cents he is paid thirty cents, if he marked six correctly he receives $1.80, if seven $18; if eight $90 and so on.

It may be that of the eighty characters the purchaser of a ticket may be unfortunate enough to select ten none of which appears on the ten balls drawn from the bag. In this case he receives nothing. It is this last feature that led the learned magistrate to acquit the accused. In the reasons he gave for dismissing the complaint he says, *inter alia,* (after quoting section 236 (*b*) of the Code):

The contention of counsel for the defence is that a case is not made out under this section because it is not proven that there is any property to be disposed of; that the allegation amounts to a charge of selling tickets in a lottery and that in order to create a lottery there must be consideration—prize and chance. While in this case there is no doubt consideration and chance, there is no prize to be disposed of—that while it might be that this man could be successfully prosecuted for running a gaming-house of some kind, he cannot be held to be running a lottery and that you must prove a lottery in order to fall within this section.

In the report of the learned magistrate to us he says:

The charge was laid under section 236 of the Criminal Code dealing with lotteries, and the question was whether the so-called Chinese lottery is a method for the disposal of property within the meaning of that section. In view of the decision in *Rex* v. *Robinson* (1917), 29 Can. C.C. 153, I held that there was no prize, and therefore that the charge was not made out.

We did not have the benefit of argument of counsel for the respondent as no one appeared for him, but Mr. *Orr* for the appellant very fairly stated the submission made below by the respondent.

Upon consideration of this matter I am, with respect, of the opinion that the learned magistrate erred.

In my view *Rex* v. *Robinson* (1917), 29 Can. C.C. 153, is clearly distinguishable and has no application to the facts of this case.

As I read section 236 (*b*) of the Code and apply it to the facts here the Crown succeeded in bringing the accused within its provisions upon proof of three relevant essentials, *viz.,* (a) the sale of the tickets, (b) "for" (*i.e.,* with the intention of) disposing of property, (c) by a mode of chance. Factors (a) and (c) are not disputed and I am satisfied that there is in this operation "the disposing of property," *i.e.,* money. That

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"property" includes money and need not be a specific sum is decided in *Rex* v. *Brewerton* (1936), 67 Can. C.C. 60.

To say that when all purchasers of tickets are unlucky enough to select characters not drawn from the bag the tickets were not sold for "disposing of property" or that there was no prize is to my mind to apply an erroneous test.

In my opinion the intention and purpose for which the tickets were sold is the proper test to be applied.

It may happen that when so many purchasers are successful in marking the tickets correctly that the vendor has not sufficient funds to meet his obligations and cannot pay out the amount due to the successful ticket holders or alternatively it may happen that none is successful and no money paid out but to my mind the happening of either of these events does not change the fundamental character of the transaction between vendor and purchaser, nor alter the intention and purpose for which the tickets were sold, *i.e.*, the disposing of property.

I would allow the appeal.

Appeal allowed.

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Jan. 11, 24.

J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY (No. 3).

Practice—Costs—Consolidated actions—Application of Contributory Negligence Act, R.S.B.C. 1936, Cap. 52.

As a result of George R. Bailey, with his brother as a passenger, being in collision with Grogan, Bailey (passenger) brought action against Grogan for damages and Bailey (driver) was added as a third party. Grogan then brought action against Bailey (driver) for damages. The actions were then consolidated for trial and Bailey was held solely responsible for the accident. On appeal the majority of the Court held that the Contributory Negligence Act applied, and Grogan was 70 per cent. responsible for the accident and Bailey (driver) was 30 per cent. responsible.

On motion before the Court of Appeal to settle the minutes as to costs:—

Held, that in the action of *Bailey* (passenger) v. *Grogan*, Bailey should get his full costs here and below. In the action of *Grogan* v. *Bailey* (driver) in the third-party proceedings, Grogan should get his costs in full of

the appeal and 30 per cent. of the costs below. In the second consolidated action of *Grogan* v. *Bailey* (driver), Bailey (driver) should get his full costs of the appeal and 70 per cent. of the costs below.

MOTION to the Court of Appeal to settle the minutes of judgment of the Court with relation to costs. Heard at Victoria on the 11th of January, 1938, before MARTIN, C.J.B.C., MCPHILLIPS, MACDONALD, MCQUARRIE and SLOAN, JJ.A.

Merritt, for the application.

McAlpine, K.C., contra.

Cur. adv. vult.

On the 24th of January, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: The form that the judgment should take as regards costs has given us some difficulty, but we have arrived at the following conclusion, *viz.*: In the action of *John Bailey* v. *Grogan,* John Bailey should get his full costs here and below: in the action of *Grogan* v. *George Bailey,* in the third-party proceedings, Grogan should get his costs in full of this appeal, but only 30 per cent. of the costs below; in the second consolidated action, *Grogan* v. *George Bailey,* the appellant, George Bailey, should get his full costs of this appeal and 70 per cent. of the costs below, and Grogan should get 30 per cent. of the costs below; and appropriate set-offs between the parties of the respective amounts due for damages and costs will be made: the judgment will be drawn up accordingly.

Judgment accordingly.

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Jan. 18.

REX v. JAMES.

Criminal law—Living in part on the earnings of prostitution—Criminal Code, section 216, subsection 2 and section 216, subsection (l)—Application—One offence.

On a charge that the accused, being a male person, unlawfully did live in part on the avails of prostitution, subsection 2 of section 216 of the Criminal Code applies to subsection (*l*) of said section. Two distinct offences are not created by said subsections, they only define one offence in two different ways. The conviction should be sustained.

MOTION to the Court of Appeal by the accused for an order granting leave to appeal from his conviction by police magistrate Wood, Vancouver, on a charge that at the city of Vancouver, between the 6th of November, 1936, and the 6th of November, 1937, being a male person, unlawfully did live in part on the earnings of prostitution.

The motion was heard at Victoria on the 18th of January, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Pelton, for appellant: The accused does not come within section 216 (*l*) as "procuring" is an essential element to bring him within subsection 2 of section 216. It is to be noted that the words "in part" are not in that subsection. Said subsection 2 does not apply to said subsection (*l*). There are two distinct offences: see *Reg.* v. *Riley* (1898), 2 Can. C.C. 128. There was no evidence of his receiving money or a sustained course of conduct in that regard: see *Rex* v. *Nyshimura,* [1920] 2 W.W.R. 994; *Rex* v. *Christian* (1913), 23 Cox, C.C. 541; *Reg.* v. *Davidson* (1892), 8 Man. L.R. 325. No inference can be drawn from the fact that he was living with a common-law wife who afterwards turns out to be a prostitute: see *Rex* v. *Kolenczuk* (1914), 23 Can. C.C. 265. No particulars of the offence are given: see *Rex* v. *Quinn* (1918), 43 O.L.R. 385 at p. 388.

Lowe, for the Crown: The inference is from the evidence that accused lived on the earnings of prostitution, which brings him within the provisions of section 216, subsection 2 of the Code, and the Court will not upset the finding when there is

evidence to support it: see *Rex* v. *Faulkner* (1911), 16 B.C. 229 at p. 236. There is the one offence only to which both sections 216 (2) and 216 (*l*) may be applied: see *Rex* v. *Hill; Rex* v. *Churchman* (1914), 24 Cox, C.C. 150 at p. 152; *Rex* v. *Royal* (1925), 36 B.C. 178.

Pelton, replied.

The judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all agreed that the appeal should be dismissed because the learned magistrate took the right view of the facts and it is unnecessary to go over them because it now appears that the charge based thereon is in the form provided by the statute. As to the submission that subsection 2 of section 216 does not apply to subsection (*l*) of 216, we do not take that view because it is perfectly apparent that there are not two distinct offences created thereby, but only the definition of one offence in two different ways, *i.e.*, "wholly or in part," as therein mentioned.

Appeal dismissed.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND THE ESTATE OF DONALD ALEXANDER MACDONALD, DECEASED. DALTON *ET AL.* v. MARY GERTRUDE MACDONALD.

C. A.
1938
Jan. 12, 14.

Testator's Family Maintenance Act—Nothing in estate of deceased—Two insurance policies—Children of deceased designated as beneficiaries—Will—Preferred beneficiaries—Petition by wife for adequate provision—Insurance so designated not part of "estate"—R.S.B.C. 1936, Cap. 133, Secs. 101 to 105; Cap. 285, Sec. 3.

The estate of Donald A. Macdonald at the time of his death was insolvent. There were two insurance policies on his life. One was for $14,494 which originally was made payable to his wife but was subsequently changed and made payable to his children; a second policy for the same amount was made payable to his children. After payment of certain charges the balance, which was paid into Court, was $26,400. By his will deceased left five-fifteenths of said amount to his daughter and two-fifteenths each to his wife and four sons. Upon the petition

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of the wife under the Testator's Family Maintenance Act for adequate provision for her maintenance, it was ordered that $10,000 be paid to the wife and that the balance be divided equally amongst his children.

Held, on appeal, reversing the decision of McDonald, J., that the insurance money under the circumstances in this case does not form part of "the estate of the testator" and the Testator's Family Maintenance Act does not apply.

APPEAL by the preferred beneficiaries being the five children of Donald Alexander Macdonald, deceased, from the order of McDonald, J. of the 22nd of December, 1937, whereby the trust moneys created by certain life-insurance policies alleged to have been made for the benefit of the appellants as designated preferred beneficiaries, were reapportioned and reallotted under the Families' Compensation Act by giving Mary Gertrude Macdonald, the wife of the deceased, the sum of $10,000, the remainder of said moneys to be divided among the children in the proportions to which they are entitled under the will.

The appeal was argued at Victoria on the 12th of January, 1938, before Martin, C.J.B.C., Macdonald and McQuarrie, JJ.A.

McCrossan, K.C., for appellant: There was nothing in the estate, in fact deceased was encumbered with debts to a large amount at the time of his death. We are dealing only with the proceeds of two insurance policies of equal amount. The total of the two policies is paid into Court, namely, $26,200. Originally one of these policies was made payable to the wife and the other to the children, but later the deceased changed the one payable to the wife and made it also payable to the children. Under section 101 (3) of the Insurance Act the Court can look at the will as a declaration only. The Testator's Family Maintenance Act does not apply to insurance. The Act only gives the right to make provision out of the estate, but this is not part of the estate. It is trust funds and he cannot violate the trust. Preferred beneficiaries have been designated by the policy: see *McCoubrey* v. *National Life Assurance Co. of Canada* (1926), 36 B.C. 428 at p. 432; [1926] S.C.R. 277 at pp. 281-3; 6 C.E.D. (Ont.) 159 and 160-2. The learned judge ignored the

salient provisions set out in the Insurance Act: see *Re Whyte* (1926), 59 O.L.R. 546, and on appeal (1927), 60 O.L.R. 323; *Neilson* v. *Trusts Corporation of Ontario* (1894), 24 Ont. 517; *Fisher* v. *Fisher* (1898), 25 A.R. 108 at p. 112; *Doull* v. *Doelle* (1905), 10 O.L.R. 411 at p. 417; *Campbell* v. *Dunn* (1892), 22 Ont. 98 at p. 102; *In re Clegg Estate* (1933), 47 B.C. 447 at p. 448. This money not being part of the estate there is no jurisdiction to deal with it.

J. A. MacInnes (*Woodworth*, with him), for respondent: Deceased must make proper provision for his dependants and the Testator's Family Maintenance Act is passed to safeguard and protect descendants. It is limited to the exclusion of the creditors but it is not taken out of the estate: see Halsbury's Laws of England, Vol. 28, p. 710, sec. 1320; Stroud's Judicial Dictionary, 2nd Ed., Vol. II., p. 642. The wife is in the same class of preferred beneficiaries as the children. There is only one case referred to by appellant that applies to the Testator's Family Maintenance Act to compel a fair distribution of the estate. The first words of section 3 of said Act must be adhered to. In the sense of the Testator's Family Maintenance Act, the insurance is part of the estate: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 394-5; Endlich on the Interpretation of Statutes, p. 94, sec. 73.

McCrossan, in reply: The meaning of the word "estate" is the same in both Acts.

Cur. adv. vult.

On the 24th of January, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of the opinion, with every respect to the learned trial judge, that this insurance money, under these circumstances at least, clearly does not form part of "the estate of the testator" and therefore it is not subject to disposition under section 3 of the Testator's Family Maintenance Act: this appeal consequently will be allowed.

Appeal allowed.

Solicitors for appellants: *McCrossan, Campbell & Meredith.*
Solicitor for respondent: *C. M. Woodworth.*

C. A.
1938
Jan. 21, 25.

REX v. TURNER.

Criminal law—Speedy trial—Charge of living on the avails of prostitution—Dismissal of charge—Mixed question of law and fact—Appeal by the Crown—Jurisdiction—Criminal Code, Sec. 216, Subsecs. (l) and 2; Sec. 1013, Subsec. 4.

The accused was charged with living in part on the earnings of prostitution under section 216, subsection (*l*) of the Criminal Code. The evidence disclosed that at the time of his arrest he had on his person $73, and it was held that having this sum he could not be said to have "no visible means of support" under section 216, subsection 2 of the Criminal Code, and following *Rex* v. *Sheehan* (1908), 14 B.C. 13, the charge was dismissed.

Held, on appeal, that as the only ground on which the Crown has a right of appeal under section 1013, subsection 4 of the Criminal Code is one involving a question of law alone, and the question presented to the Court is one of mixed law and fact, the appeal must be dismissed for lack of jurisdiction.

Rex v. *Grotsky*, [1935] 3 W.W.R. 257, applied.

APPEAL by the Crown from the decision of HARPER, Co. J. of the 10th of December, 1937, dismissing a charge against the accused that being a male person unlawfully did live in part upon the earnings of prostitution.

The appeal was argued at Victoria on the 21st of January, 1938, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

W. S. Owen, for appellant: This is a charge under section 216 (*l*) of the Criminal Code, and a question arises as to the interpretation of subsection 2 of said section 216. It is proved that this man was habitually in the company of a prostitute and lived with her, but when arrested he had $73 in his possession. The question is whether he comes within the words "has no visible means of support." The learned judge below followed the decision of HUNTER, C.J. in *Rex* v. *Sheehan* (1908), 14 B.C. 13, in which it was held that when an accused had $27.20 in his possession he did not come within said clause. My submission is that the mere possession of money does not take him out of the statute: see *Rex* v. *Munroe* (1911), 25 O.L.R. 223 at pp. 224-5; *Rex* v. *Royal* (1925), 36 B.C. 178. The general

trend of the life of the accused must be considered. See also *Regina* v. *Bassett* (1884), 10 Pr. 386. The Court of Appeal affirmed the judgment of Chancellor Boyd in *Rex* v. *Munroe, supra.*

McAlpine, K.C., for respondent: This is not a vagrancy case and the cases referred to do not apply. The *Munroe* case is under the begging section of the Vagrancy Act. Having $73 in his possession discloses "visible means of support."

Owen, replied.

Cur. adv. vult.

On the 25th of January, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of opinion that the appeal should be dismissed because we cannot say that the question involved is a "question of law alone" which is required by section 1013, subsection 4 of the Criminal Code in order to give the Crown the right of appeal. At the most we feel that the question presented to us is one of mixed law and fact, but that is not sufficient. The objection was taken that it was pure fact, but assuming it was mixed law and fact at most, even that is not sufficient because the statute confines it, as has been already said, to questions of law alone, and therefore we are unable to entertain the appeal for lack of our jurisdiction so to do. Compare *Rex* v. *Grotsky,* [1935] 3 W.W.R. 257.

Appeal dismissed.

Solicitor for appellant: *W. S. Owen.*
Solicitor for respondent: *C. L. McAlpine.*

S. C.
In Chambers

1938

Jan. 6.

REX v. CHIN JUNG AND TONG NIN.

Criminal law—Money seized in common gaming-house—Order forfeiting—Based on conviction of keepers—Conviction quashed—Effect on order forfeiting seizure—Criminal Code, Sec. 641 (3).

Certain moneys were seized in a gaming-house. Upon the keepers of the house being convicted for keeping a common gaming-house, an order was made forfeiting the money so seized. Subsequently the conviction was quashed. On an application for a writ of *certiorari*:—

Held, that as the foundation for the order of forfeiture fails, it should be quashed.

APPLICATION for a writ of *certiorari*. Heard by FISHER, J. in Chambers at Vancouver on the 6th of January, 1938.

Mellish, for the application.

Creagh, for the Crown.

FISHER, J.: This is an application for a writ of *certiorari*. It is really an application not only to remove into this Court a certain order made, but also to quash the order, as the matter has been fully argued upon this application.

The order in question is an order made on July 15th, 1937, forfeiting certain money amounting in all to approximately $555. The order states that such moneys are confiscated "by reason of Chin Jung and Tong Nin each having been convicted on the 8th of July, 1937, of being the keeper of a common gaming-house situate and being" as therein stated. It is first suggested on behalf of the applicants that the conviction referred to in this order of confiscation has been quashed by the order of my brother MANSON dated July 30th, 1937, and it is suggested that such conviction was quashed on the ground that there was no jurisdiction in the magistrate to make the conviction, the information or the charge as laid not being sufficient, for reasons similar, as I understand it, to the reasons that I gave for a similar decision in the case of *Rex* v. *Soo Kit Sang* (1936), 50 B.C. 386.

It may be pointed out that in the case of *Rex* v. *Lum Pie*, an unreported* decision of the Court of Appeal of December 10th,

* Since reported, *ante*, p. 420.

1937, and in *Rex* v. *Wong Gai* (1936), 50 B.C. 475, the decision in the *Soo Kit Sang* case was held not to be well founded. But the fact remains that the decision in *Rex* v. *Chin Jung and Tong Nin* stands, and the conviction of Chin Jung and Tong Nin has been quashed and remains quashed.

The argument therefore on behalf of the applicants is that the jurisdiction to make the conviction of Chin Jung and Tong Nin was not present, and that therefore the jurisdiction to make the order of forfeiture did not attach. I might say that that argument appeals to me, but I am not resting my judgment upon that basis.

The case of *Rex* v. *Glenfield,* [1934] 3 W.W.R. 465; 62 Can. C.C. 334, might be put forward as authority for the proposition that, regardless of whether anyone is convicted or not, there may be an adjudication which is sufficient to give jurisdiction to make the order of forfeiture, and that the adjudication necessary would be along the lines that the moneys found on the premises and seized had been used or had been intended for use for the illegal purpose or business in question, and it is pressed upon me by the counsel for the Crown that in the present case such adjudication may be found in what might be called part of the record, or the proceedings before the magistrate. I find, however, upon the face of the order of confiscation here what I have already pointed out, and I would say that in this case the order is obviously based on the conviction by which Chin Jung and Tong Nin had been each convicted on July 8th of being the keeper of a common gaming-house. That is the basis upon which the order for confiscation is based by the very wording of the order. It is suggested by counsel on behalf of the Crown that I should amend that order and change the obvious basis of the order. I do not think I have jurisdiction to do so, or should do so if I have. It is the conviction of the said persons, and not that of the things found as suggested in the *Glenfield* case, *supra,* at p. 470, that is clearly stated to be the reason for the order and it may be said that that was the adjudication which, upon the face of the order, was the one considered to give jurisdiction to make the order of forfeiture, and that conviction having been quashed and set aside the obvious foundation for the order fails.

S. C. In Chambers 1938

REX v. CHIN JUNG AND TONG NIN

Fisher, J.

I would say in this case, as was said in the *Glenfield* case, that the adjudication which is necessary to give jurisdiction to make the order of forfeiture must appear on the face of the proceedings, and the only adjudication which appears on the face of the order here is the conviction as I have stated, and such conviction having been quashed, in my view the order of forfeiture should also be quashed.

The application is granted and order of confiscation quashed.

Application granted.

IN RE GRAHAM ESTATE. NOLAN v. GRAHAM *ET AL.*

S. C.
1937
Sept. 27.

Devolution of estates—First wife of deceased obtained divorce in foreign Court—Claim by—Her right to question jurisdiction of foreign Court—Right of second wife to share in estate—Deceased domiciled in British Columbia at time of divorce.

The first wife of deceased sued for and obtained a divorce in the State of Washington. In proceedings to determine her right to share in her husband's estate, it was

Held, that she cannot be heard to question the jurisdiction of said Court to grant the divorce.

Held, further, that as the deceased husband was domiciled in British Columbia at the time his first wife obtained a divorce in the State of Washington, his second marriage was invalid and the woman he then married could not share in his estate in British Columbia.

ORIGINATING SUMMONS by the administrator of the estate of Samuel W. Graham, to determine who are the rightful heirs of Samuel W. Graham, to whom payment and distribution of the estate should be made, what amount should be paid to those legally entitled, and whether the proceeds of a certain lot in Fernie are personal estate or real estate. Heard by MANSON, J. at Fernie on the 25th of May, 1937.

D. M. Mitchell, for official guardian.

Spreull, K.C., for widow, Mary G. Graham.

Alan Graham, for children of deceased other than Mabel E. Dow.

Cur. adv. vult.

27th September, 1937.

MANSON, J.: Originating summons.

The plaintiff, the administrator of the estate of the late Samuel W. Graham, seeks answers to three questions:

(1) Who are the rightful heirs of the deceased Samuel W. Graham and to whom should payment be made and to whom should distribution be made of the estate of the deceased Samuel W. Graham? (2) What amounts should be paid to those legally entitled to a portion of the estate? (3) Whether the proceeds of the sale of lot 8, block 33, Fernie, map 734, are personal estate or real estate?

At the outset it is to be noted that prior to the issue of the

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Manson, J.

originating summons on April 13th, 1937, to wit, on January 26th, 1935, His Honour Judge THOMPSON, a local judge of this Court, ordered that moneys amounting to the sum of $1,782.10 in the hands of the administrator be distributed amongst the heirs and next of kin of the estate according to their legal rights under the Administration Act of the Province of British Columbia, R.S.B.C. 1924, Cap. 5, and further that the balance of the assets of the estate consisting of lot 8 above mentioned be transferred by the administrator to the said heirs and next of kin and further that upon this being done the administrator be discharged. This order was not appealed from. From the material the following facts appear: (1) That on March 26th, 1887, deceased married Mary G. Ott, one of the above-named defendants, at Lethbridge, Alta.; (2) that the deceased and his wife Mary were domiciled at Fernie, B.C., from 1898 to 1907; (3) that the deceased and his wife Mary separated under deed of separation bearing date January 5th, 1904; (4) that the deceased and his wife Mary resumed cohabitation at Fernie in the fall of 1905 and continued to live and cohabit together until sometime in the year 1908; (5) that the deceased and his wife Mary moved from Fernie and took up residence at Bellingham, State of Washington, U.S.A., in 1907 or 1908 and lived there together for about a year when the deceased returned to the city of Fernie; (6) that the deceased was domiciled in Fernie from the time of his return from Bellingham for 14 or 15 years; (7) that on August 19th, 1910, on the petition of the wife Mary a decree of divorce was pronounced in the Superior Court of the State of Washington for Whatcom County; (8) that on September 17th, 1913, the deceased married the defendant Lilly B. Graham at Fernie, B.C.; (9) that on October 26th, 1915, the first wife Mary married one DeVore at Bellingham, Washington, U.S.A.; (10) that in 1923 the deceased and his second wife Lilly sold their business in Fernie and removed to the State of California; (11) that subsequently the deceased left his wife Lilly in Los Angeles, California, and went to Bellingham; (12) that on February 2nd, 1928, the deceased obtained an interlocutory decree of divorce from his wife Lilly in the Courts of the State

of Washington; (13) that on May 9th, 1928, prior to the decree having become final the deceased died at Bellingham; (14) that on July 23rd, 1925, DeVore, the second husband of the original Mrs. Graham, died at Bellingham; (15) that on June 25th, 1928, Mabel E. Graham, daughter of the deceased by his first marriage and one of the above-mentioned defendants, was appointed the administrator of the estate of the deceased by the Superior Court of the State of Washington; (16) that on March 19th, 1929, G. G. Moffatt, the official administrator for the Fernie electoral district in the county of Kootenay, B.C., was appointed administrator of the estate of the deceased; (17) that the present plaintiff Nolan, having succeeded Moffatt as official administrator for the Fernie electoral district, succeeded the said Moffatt as administrator of the estate of the deceased; (18) that on January 26th, 1935, His Honour Judge THOMPSON made the order above recited; (19) that on May 14th, 1935, His Honour Judge THOMPSON approved the sale of lot 8 hereinbefore mentioned for $225 cash.

The law of the State of Washington as to divorce has not been proved and although I am satisfied upon the material that the deceased was domiciled in British Columbia at the time that his first wife obtained a decree of divorce from him in the Superior Court of the State of Washington, namely, in 1910, it might well have been that the deceased at a time when he was domiciled in Washington deserted his wife and that under the laws of Washington she retained the Washington domicil of the deceased and a *status* to take divorce proceedings in that jurisdiction. One questions too whether at this late date and after the decease of the husband the wife can attack the decree. But I do not think it necessary to consider either of these questions for I think the contention that the first wife is entitled to claim upon the estate is settled upon another ground. The Washington proceedings were taken by the wife and she cannot now be heard to question the validity of the decree of the Court whose jurisdiction she invoked. *Vide Swaizie* v. *Swaizie* (1899), 31 Ont. 324, where Meredith, C.J. said at p. 330:

It may perhaps be sufficient to hold, as I think we are warranted in doing, that the defendant has by his conduct precluded himself from

objecting to the jurisdiction of the Wisconsin Court to pronounce the judgment sued on.

The English Courts, at all events for the purpose of the exercise by them of jurisdiction, hold that a party may be so precluded . . .

If a respondent may be so precluded in an English Court, it seems to me that *a fortiori* a plaintiff who has instituted the proceedings in a foreign Court must be taken to have submitted to its jurisdiction and to have precluded himself from setting up the want of jurisdiction of that Court to make any such decree or pronounce any such judgment, as according to the law of the State by which the Court was constituted, it had jurisdiction to pronounce.

It was not without some doubt that the learned Chief Justice gave expression to the views quoted, as will be observed from his further discussion of the matter at pp. 330-31; and, alternatively he found as a fact that the foreign Court had jurisdiction to pronounce the decree which it did despite the denial of the defendant husband that he was ever domiciled in the foreign jurisdiction. Rose and MacMahon, JJ., concurred in the judgment of Meredith, C.J. without comment and the views expressed by the learned Chief Justice have therefore the sanction of their approval. Anglin, J. (as he then was) very definitely followed the *dictum* of Meredith, C.J. in *In re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482, where, after discussing the very doubtful validity of a divorce *a vinculo* in the State of Massachusetts where the respondent husband was domiciled in Ontario at the time of the Massachusetts proceedings, he observed at p. 485:

But it is unnecessary in the present case to determine this interesting question, because whatever may be the effect of the Massachusetts' decree as to others, the claimant Mary J. Williams, who obtained the divorce, cannot be heard to impugn the jurisdiction which she invoked.

Vide quoque Bater v. *Bater,* [1906] P. 209, where Sir Gorell Barnes, at p. 220, says:

But where a person endeavouring to complain in a case is the person who is a party to what has been done, I do not think it right to help him, and that he should be allowed to come forward and quarrel with what has been done and then endeavour to set aside a decree which he has recognized, taken advantage of, and acted upon for years, and then seek to invalidate it upon exceedingly technical and refined grounds;

Burpee v. *Burpee,* 41 B.C. 201; [1929] 2 W.W.R. 128, where my brother McDONALD, J. said at p. 202:

I cannot see any answer to the contention of the plaintiff's counsel that the present defendant having brought his action in the Washington Court and having chosen his forum is now bound by the decision of that Court.

and *Carter* v. *Patrick,* 49 B.C. 411; [1935] 1 W.W.R. 383 (a very similar case to the one at Bar in so far as the claim of the first wife, Mary G.—in the proceedings referred to as Mary G. Graham—is concerned).

The defendant Mary G. Graham cannot share in the estate. In fairness to her and her counsel, Mr. *Spreull,* I should perhaps add that she did no more in the proceedings than to state the facts baldly.

The material discloses that the administratrix in the State of Washington, the daughter, Mabel E. (then Armstrong, now Daw, *nee* Graham) completed her work as administratrix and was duly discharged by order of a judge of the Superior Court of the State of Washington by final order of August 4th, 1932, and supplementary order of September 1st, 1932. It appears further that under the Washington administration the bonds and stocks of the estate being all the personal property belonging to the estate in Washington, after payment of the costs of administration and all other proper disbursements in the administration by the administratrix, were transferred to the second wife of the deceased, the defendant Lilly B. Graham. The value of the stocks and bonds transferred to the said defendant was either $1,405 or $1,505—the material does not make it perfectly clear, but I think $1,405. The administratrix being unable to sell the Washington real estate it was ordered that the real estate and the equity of the deceased in the real estate in the State of Washington be distributed as follows: To Lilly B. Graham an undivided one-third interest and to each of the five children of the deceased (all by the first marriage) an undivided two-fifteenths interest. That order was complied with. The Washington administratrix withdrew from The Canadian Bank of Commerce, Fernie, the sum of $727.04 which amount was on deposit at the credit of the deceased in the said bank at the time of his death. These moneys were administered in Washington. All the debts of the deceased were paid by the Washington administratrix. There remains to be administered the proceeds of the sale by the administrator of lot 8, block 33, city of Fernie, $225, and the further sum of $1,265.43. It is not clear from the material from what source the latter amount was realized.

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NOLAN v. GRAHAM

Manson, J.

In *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517; 64 L.J. P.C. 97, it is recognized, in all Courts administering English law, that [head-note [1895] A.C.]:

> The permanent domicil of the spouses within the territory is necessary to give to its Courts jurisdiction [as] to divorce *a vinculo* [so] that its decree to that effect shall by the general law of nations possess extra-territorial authority.

And as Anglin, J. pointed out in *In re Williams and Ancient Order of United Workmen, supra,* p. 484:

> For the purposes of divorce jurisdiction the domicile of the married pair is that of the husband: *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, 528; *Magurn* v. *Magurn* (1885), 11 A.R. 178.

I have found as a fact that the deceased was domiciled in British Columbia at the time that his first wife instituted her proceedings and obtained her decree in Washington and while for the reasons above given, the first wife may not be heard to impugn the validity of that decree, it was, nevertheless, in so far as the defendant Lilly B. Graham is concerned, an invalid decree. It follows that she cannot share in the estate in this jurisdiction.

The material does not disclose the facts sufficiently to warrant a finding of fact that the deceased acquired a new domicil after leaving British Columbia in 1923. It does disclose that, with the defendant, Lilly B. Graham, he resided in the State of California for a time immediately after his departure from British Columbia in 1923 and that later he went to Bellingham in the State of Washington to visit relatives and there remained until his death. There is no satisfactory evidence that the deceased had any *animus manendi* in the State of Washington and, in the absence of that evidence, I cannot find that there was change of domicil. His domicil at the time at his death was British Columbia.

That being true no occasion arises to determine whether the funds in the hands of the administrator are realty or personalty. The devolution is the same in either case. The assets in this jurisdiction will be distributed among the children pursuant to section 113 of the Administration Act.

The administrator will have his costs out of the estate. There will be no costs to the parties.

Order accordingly.

J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY. (No. 4).

C. A.
In Chambers
1938
Feb. 10.

Practice—Appeal to Supreme Court of Canada—Two actions consolidated for trial and appeal—Motion to approve security—Order for one judgment—R.S.C. 1927, Cap. 35, Sec. 70.

On an application to approve security for costs to the Supreme Court of Canada, the fact that a single judgment is an adjudication upon the rights of three parties in two consolidated appeals in different causes of action arising out of the same collision of motor-cars, does not confer the right to treat the single judgment pronounced as being divisible into two or more distinct judgments for the purposes of appeal. It follows that the usual order should be made approving the security.

MOTION to approve security for costs of appeal to the Supreme Court of Canada. Two actions were consolidated for the purpose of trial and for the purpose of appeal. First there was the action of John W. Bailey (a passenger in his brother's car) against Grogan for damages for personal injuries, and secondly the action of Grogan against George R. Bailey (the driver) for damages for personal injuries. It was submitted by counsel for the respondent that there should be two sets of security for costs under section 70 of the Supreme Court Act as there were really two adjudications in the consolidated appeal and that the word "judgment" on the application should be understood as "adjudication" and not as referring to a formal document. Heard by MARTIN, C.J.B.C. in Chambers at Victoria on the 10th of February, 1938.

Haldane, for the motion.
Beckwith, contra.

MARTIN, C.J.B.C.: Putting my view of the question raised briefly (for the present) it is that section 70 of the Supreme Court Act, Cap. 35, R.S.C. 1927, does not make provision for security for more than a single sum of $500 in the case of a single judgment drawn up, as herein. The fact that said single judgment is an adjudication upon the rights of three parties in two consolidated appeals in different causes of action (here third

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party) arising out of the same collision of motor-cars, does not confer upon me the right to treat the said single judgment we pronounced, with appropriate adjudications, in determining the rights of the three litigants involved as being divisible into two or more distinct judgments for the purpose of appeal. It follows that the usual order will be made approving the security.

Order accordingly.

S. C. In Chambers 1933 *Oct.* 12, 28.

IN RE BANKRUPTCY OF LYTTON CANNERS LIMITED, DEBTOR AND *IN RE* TYEE LUMBER COMPANY LIMITED AND SELECT LUMBER COMPANY, CLAIMANTS.

Conditional sale agreements—Sale of goods—Property to remain in vendor—Agreements not registered — Bankruptcy of purchaser — Trustee—Creditors—No judgments, attaching orders or writs of execution obtained by creditors—Secured creditors—R.S.B.C. 1924, Cap. 44, Sec. 3—B.C. Stats. 1929, Cap. 13, Sec. 2.

The claimants sold goods to the debtor under conditional sale agreements dated September 22nd, 1931. The agreements provided that the property in the goods should remain in the seller but the agreements were not registered. At the time of the bankruptcy of the debtor in 1932 the goods passed into the possession of the trustee in bankruptcy. The creditors of the debtor had no notice of the provisions in the conditional sale agreements, but none of the creditors obtained any judgment or attaching order or issued a writ of execution. On an issue as to whether the claimants are preferred creditors:—

Held, that notwithstanding the provisions of section 3 of the Conditional Sales Act as amended by section 2 of the Conditional Sales Act Amendment Act, 1929, at the date of the authorized assignment made herein the said claimants were entitled to rank as secured creditors against the estate in bankruptcy of the above-mentioned debtor.

ISSUE as to whether at the date of the authorized assignment made herein, the said claimants were or were not entitled to rank as secured creditors against the estate in bankruptcy of the

above-mentioned debtor. Argued before ROBERTSON, J. in Chambers at Vancouver on the 12th of October, 1933.

Todrick, for debtor.
I. A. Shaw, for trustee.

Cur. adv. vult.

28th October, 1933.

ROBERTSON, J.: On the 5th of October, 1933, an order was made by McDONALD, J. that an issue be tried and inquiry made before the presiding judge in Chambers to determine a number of questions arising in the bankruptcy of the Lytton Canners Limited and accordingly the matter came before me in Chambers and counsel have asked me to decide the first of these questions, which is as follows:

Whether at the date of the authorized assignment made herein, the said claimants were or were not entitled to rank as secured creditors against the estate in bankruptcy of the above-mentioned debtor, and if entitled to rank as secured creditors, the amounts for which they respectively are entitled to rank as such secured creditors.

The claimants, the Tyee Lumber Company Limited, and Select Lumber Company, sold goods to the debtor under conditional sale agreements dated 22nd September, 1931, in respect of one of which there is due to the Tyee Lumber Company the sum of $413 and in respect of the other, to the Select Lumber Company, the sum of $100. Each of the conditional sales provided that the property in the goods should remain in the seller. The said conditional sale agreements were not registered.

Lytton Canners Limited took possession of the goods at the time of the sale and at the time of bankruptcy, 1932, the goods passed into the possession of its trustee in bankruptcy. Apparently, the creditors of the debtor had no notice of the provisions above mentioned in the conditional sale agreements and no creditor appears to have obtained any judgment or attaching order or issued a writ of execution and the claimants now affirm, and the trustee in bankruptcy denies, that they are preferred creditors.

The rights of the parties depend upon the construction of section 3 of the Conditional Sales Act, R.S.B.C. 1924, Cap. 44, as amended by section 2 of Cap. 13, B.C. Stats. 1929, which section, as amended, reads as follows:

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In Chambers
1933

IN RE BANKRUPTCY OF LYTTON CANNERS, LTD. AND IN RE TYEE LUMBER CO. LTD. AND SELECT LUMBER CO.

Robertson, J.

3. (1.) After possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property in the goods remains in the seller shall be void as against subsequent purchasers or mortgagees claiming from or under the buyer in good faith, for valuable consideration and without notice, and as against creditors of the buyer who at the time of becoming creditors had no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized, *and, for the purpose of enforcing the rights of such creditors but not otherwise, shall be void as against a creditor suing on behalf of himself and other creditors, and as against an assignee for the general benefit of creditors, and as against a trustee under the Bankruptcy Act of the Dominion, and as against a receiver of the estate and effects of the buyer, and as against a liquidator of a corporation under the Winding-up Act of the Dominion or under any statute of the Province in a compulsory winding-up proceeding, without regard to whether or not the creditor so suing had at the time of becoming a creditor notice of the provision or whether or not the assignee, trustee, receiver, or liquidator at the time of his appointment had notice of the provision,* and the buyer shall, notwithstanding such provision, be deemed as against such persons the owner of the goods, unless the requirements of this Act are complied with.

The italics in the section are mine and are inserted for the purpose of distinguishing the 1929 amendment.

Counsel for the trustee refers to *In re Melliday* (1931), 12 C.B.R. 430, a decision on section 3 of the Conditional Sales Act of the Province of New Brunswick which appears to be the same as our own, prior to the amendment of 1929, in which it was held that an unregistered conditional sale did not give a secured claim as against a trustee in bankruptcy. In that case it was held that, although the trustee was not "a subsequent purchaser or mortgagee," yet it was his duty, as representing the creditors, to resist any claim of priority or otherwise.

The point raised here, *viz.*, that the unregistered conditional sale is only void against creditors who have obtained judgment or an attaching order or issued a writ of execution, does not appear to have been raised in that action, probably because in that case, although it does not so appear from the report, the creditor had obtained a judgment, attaching order or issued a writ of execution.

It seems clear to me that the section, as it stood prior to the 1929 amendment, did not affect the validity of the provision as to the property not passing except in favour of creditors who,

inter alia, had obtained a judgment, attaching order or issued a writ of execution.

Then does the 1929 amendment, which is that part of the section *supra* included in italics, affect this question?

It is submitted by counsel for the trustee that the amendment adds to the cases mentioned in the earlier part of the section, where the condition in the conditional sale is void, by providing that such provision shall be void in an action brought by a creditor suing on behalf of himself and other creditors and as against a trustee under the Bankruptcy Act and the other persons therein mentioned; but it will be noticed that the amendment provides that it is for the purpose of enforcing the rights of "such creditors" and these words "such creditors" refer to creditors of the buyer who at the time of becoming creditors had no notice of the provision and who subsequently obtained judgment, execution or an attaching order. There must be, therefore, in every case a creditor who comes within these requirements.

The amendment provides, in part, that the provision

"shall be void as against a creditor suing on behalf of himself and other creditors, . . . , without regard to whether or not the creditor so suing had at the time of becoming a creditor notice of the provision."

The reason for this was because if, in such an action, it turned out that the creditor had such notice, then without this provision he could not succeed in the action, for, in an action of that sort "he must succeed by his own merits"—see *Towers* v. *African Tug Company,* [1904] 1 Ch. 558 at p. 572.

The trustee in bankruptcy (see *Canadian Credit Men's Trust Association* v. *Reaume et al.* (1931), 12 C.B.R. 429) can have no greater rights than the bankrupt buyer. Any action on behalf of the creditors must be taken by and in the name of the trustee, etc., subject to certain exceptions, of no importance here. The section provides with regard to these that the fact that the trustee "at the time of his appointment" had notice of the provision "shall not affect his right to sue." I do not understand this provision because I do not see how, apart from the statute, the knowledge of the trustee at the time of his appointment could possibly affect the question. However, I am of the opinion that the words, "for the purpose of enforcing the rights of such

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creditors," govern the whole of the amendment and, as there were no such creditors as above mentioned, the provisions in the conditional sale agreements are good against the trustee and therefore I think that the Tyee Lumber Company Limited is a secured creditor in the sum of $413 and the Select Lumber Company in the sum of $100.

The question of costs will be dealt with when the balance of the questions are disposed of.

Order accordingly.

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POWER AND POWER v. HUGHES.

Negligence—Duty of owner of premises to licensee—Railing of balcony in state of disrepair—Gives way when leaned against—Injury to plaintiff —Trap.

The plaintiffs occupied a suite of rooms on the second floor of an apartment-building owned by the defendant. The suite of rooms was entered through a door leading from a balcony on said floor. While the plaintiffs were using the balcony they leaned against the railing, and owing to its defective condition the railing suddenly gave way, precipitating both plaintiffs to the ground below, causing them personal injuries. In an action for damages:—

Held, that the balcony was a trap in the sense of a concealed danger to the licensee. The defendant is responsible for the damages caused by her negligence in allowing the trap to exist which ought to have been known to her.

ACTION for damages for injuries sustained by the plaintiff in falling from a balcony owing to a defective railing giving way. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 8th of December, 1937.

Fleishman, and *C. F. MacLean*, for plaintiffs.
Tysoe, for defendant.

Cur. adv. vult.

27th January, 1938.

FISHER, J.: I accept the evidence of the plaintiffs with respect to the circumstances under which they sustained the

injuries complained of herein while on the balcony of the apartment-building or rooming-house owned by the defendant. I find that they were making an ordinary and reasonable use of the balcony at the time the accident occurred and that the railing of the said balcony was in such a condition of hidden decay and disrepair as to constitute a trap in the sense of a concealed danger to both of them. I find that, while the plaintiffs were lawfully using the said balcony, the railing of the balcony, in consequence of its defective condition as aforesaid, suddenly gave way precipitating both the plaintiffs to the ground and causing them personal injuries.

The said building had two storeys and twenty suites. Suite numbered 17 on the second floor was rented to the male plaintiff (husband of the female plaintiff) at the time in question herein. There was a door leading from suite 17 on to the said balcony which was on the side of the building, and here I would like to set out a portion of the examination for discovery of the defendant with respect to said balcony, reading, in part, as follows:

And there are also doors from ten other suites on to the same balcony, leading to the same balcony? Yes, five each side of the stairway.

. . . . .

From the stairway you go to a hall which leads to the balcony, is that right? Yes.

Is that the only way of getting to the suites, through the balcony? The second floor, yes.

In other words, the only way to get to the suites on the second floor is by the balcony? Up the stairway and then on to the balcony and each one leads off the balcony.

For anyone to go to suite 17, they have to go on to the balcony? Certainly.

And that applies to the other suites on that floor? Yes.

You have a caretaker, I believe, in the premises, by the name of Kane? Yes.

While you were landlord of the premises you made whatever repairs were necessary to the balcony? I certainly have.

As a matter of fact, you made repairs to the balcony since the plaintiff, Wilma Power, suffered this accident? Mr. Kane did.

. . . . .

You always repair everything? Kane does.

On your instructions? On my instructions it is always repaired.

That is in connection with the balcony? Anything about the place, not only the balcony. I kept the place in repair.

I find that the aforesaid balcony and common stairway remained in the possession and control of the defendant and

though I cannot find that the trap, that is, the concealed danger, was known to the defendant I do find that it ought to have been known to her. I also find that with respect to the defendant the female plaintiff would be in the position of a licensee. There may be some question as to whether her husband, the male plaintiff, would be in a better position but, as it is or must be admitted that if the defendant is liable for the injuries to the female plaintiff she is also liable for those to her husband, which were very slight, the chief issue in the present case is as to the duty owing by the defendant to a bare licensee. Counsel for the defendant strenuously contends that, even though I should find the circumstances to be as above set out, there is no liability on the part of the defendant to a bare licensee. Counsel cited *Dymond* v. *Wilson* (1936), 50 B.C. 458 (see on appeal, 51 B.C. 301) and, as reliance is placed upon what is said by ROBERTSON, J. in that case and what was said in many other cases referred to by him, I would like to set out here a considerable portion of the judgment in the *Dymond* case.

[His Lordship quoted from the first line on p. 461, beginning with the words, "I find that Dymond had an easement" to the words "known to the occupier" in the last line of the second paragraph on p. 466, and continued.]

Having set out this considerable portion of the judgment of ROBERTSON, J. in the *Dymond* case, for the reason aforesaid, I have to say that it is quite apparent that the submission on behalf of the defendant, who relies on same, is that the statements of a great many of the learned judges, beginning with Lord Atkinson and Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50; [1923] A.C. 74; and including Lord Hailsham, who laid down the law on this point in *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; 98 L.J.P.C. 119, in the same way as Lord Atkinson and Lord Wrenbury, were *obiter dicta* made *per incuriam.* What Lord Hailsham said in the *Addie* case (pp. 364-5) with reference to the duty of the occupier to the licensee would appear to have been treated by ROBERTSON, J. in the *Dymond* case, *supra,* as having been spoken *"obiter per incuriam."* Though I did not so treat it in the case of *Hauser* v.

McGuinness (1934), 49 B.C. 289, it is suggested by counsel on behalf of the defendant that I should follow the conclusion of my brother ROBERTSON after his review of the cases, no matter what my own opinion may be, but I think I should not do so unless in my view my learned brother's conclusion is right. It may be noted that in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at 223, MARTIN, J.A., as he then was, after setting out the very same passage and more from Lord Hailsham's speech in the *Addie* case, *supra,* does not apparently treat the declaration therein contained with reference to the duty of the occupier to the invitee as though Lord Hailsham had spoken *"obiter per incuriam,"* even though it might be suggested that the Court in the *Addie* case was not concerned with the liability of an occupier to the invitee as all the law Lords taking part agreed that the boy in that case was a trespasser (compare Crocket, J. in *Hambourg* v. *T. Eaton Co., Ltd.,* [1935] S.C.R. 430). MARTIN, J.A. (now C.J.B.C.) says at p. 223:

> This declaration of the duty of the occupier to the invitee at last clears up the "unfortunate ambiguity" in *Indermaur* v. *Dames* [(1866), L.R. 1 C.P. 274, 288] pointed out by Salmond [on Torts, 7th Ed.,] p. 461.

In *Morgan* v. *Girls' Friendly Society,* [1936] 1 All E.R. 404, at p. 405, Horridge, J. said:

> Having found that the plaintiff was a bare licensee, the defendants' whole duty was as described by Lord Hailsham in *Addie, R., & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 at page 365.

Counsel on behalf of the defendant also refers to an article on "Licensees" by Prof. A. L. MacDonald in 8 C.B. Rev., pp. 184 to 195, and to another article by Prof. MacDonald on "Invitees" in the same volume, pp. 344 to 366. In the latter article the learned writer says at p. 345 in part as follows:

> An analysis of the principle laid down by Willes, J., in *Indermaur* v. *Dames (supra)* indicates that to succeed in an action of this kind, the invitee must show: . . .
>
> Taking up in order the elements necessary to the plaintiff's case: he must first prove that the danger was "unusual." This question brings up one of the most difficult points in the application of the principle, namely, the effect of the plaintiff's knowledge of the danger. It is frequently stated that if the plaintiff knows of the danger, he cannot recover, because the danger cannot be termed, as to him, "unusual." Thus, in *Cavalier* v. *Pope,* [1906] A.C. 428, at 432, Lord Atkinson said:
>
> "The case does not come within the principle of *Indermaur* v. *Dames* . . . because one of the essential facts necessary to bring a case within

that principle is that the injured party must not have had the knowledge or notice of the danger through which he has suffered. If he knows of the danger and runs the risk, he cannot recover."

At p. 346:

The truth seems to be that the words "unusual danger" in the sense in which they are commonly understood, cannot be used consistently with the tests proposed by Willes, J., in the latter part of his principle. According to the latter part of the principle, even though a plaintiff has notice of the danger, he may still reach a jury and have them consider whether, by giving notice, the defendant has exercised reasonable care. According to the first part of the principle the plaintiff is helpless unless he can show unusual danger. What is unusual danger and what amounts to knowledge of such danger by the plaintiff?

At p. 350:

If the term "unusual danger" be taken to mean unusual as regards such premises, consistency within the principle itself is attained. A danger may in this sense be known and still be unusual. It may be that this was the sense in which Willes, J. used the term, but it has not been so interpreted in subsequent decisions.

Finally, or rather intermediately, the jury must determine whether the occupier knew or ought to have known of the unusual danger. The words *ought to have known* mark the fundamental distinction between the duty to invitees and the duty to licensees. To the latter, there is no duty of inspection in order to discover unusual dangers. The statement to the contrary in *Fairman* v. *Perpetual Investment Building Society* [*supra*] has already been commented upon (8 C.B. Rev. 187) and suggested to be unsound. To the former there is such a duty.

In his article on "Licensees," p. 190, Prof. MacDonald said:

In an instructive article in the Law Quarterly Review Mr. W. H. Griffith shows that the word "trap" in its origin, was used to define the liability of licensors, and that its use in cases of invitor and invitee though sanctioned by some eminent judges is inaccurate and misleading. The invitee is not required to show that a "trap" has been laid for him. Of course if he can show that there was a trap, he establishes an *a fortiori* case, for even a licensee could recover on such a state of facts. "Trap" as used by Willes, J., carries with it the idea of concealment—deliberate concealment—"something like fraud." Hence, to speak of traps of which the occupier does not know, is to disregard the idea of fraud, and to overlook the good faith that we require from a licensor, as distinct from the further duty of inspection which is binding on the invitor. Therefore, when the term "unknown trap" is used, we may be referring to an actual state of facts but we cannot give our phrase any proper legal significance.

In his article on "Licensors and 'Traps,'" in 41 L.Q.R., Mr. W. H. Griffith, at pp. 260-61, says, in part, as follows:

And there can be no doubt that at the time of *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; (1867), L.R. 2 C.P. 311 and *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371, and for many years after no one ever thought of

applying "traps" or the "setting of traps" or the "laying of traps" to anyone but a licensor.

Who, then, has led us astray? It is putting a severe strain upon that courteous trust and confidence, which readers extend to a writer until he has betrayed them, to suggest that the blame must be attributed to no less an authority than Vaughan Williams, L.J. The scene of action was *Lowry* v. *Walker*, [1910] 1 K.B. 173. . . . There is no further room for doubt. Vaughan Williams, L.J., one of the most learned lawyers of his time, has here spoken of cases of the class of *Indermaur* v. *Dames* [*supra*] as "trap cases." He says they had been frequently so called. It may be so; but not by anyone of the weight and authority of the learned Lord Justice.

In a memorable judgment in *Latham* v. *Johnson*, [1913] 1 K.B. 398, 416, Lord Sumner, then Hamilton, L.J., speaks of a trap as a word having a double sense of being "fascinating and fatal." It is the fascination of the word that has led to its misapplication, or the inherent fascination of the word coupled with the fact that a hoist-hole, which has been called a trap-door, caused the accident in *Indermaur* v. *Dames*. Very eminent judges have followed Vaughan Williams, L.J. in describing as a trap what Willes, J. described as an unusual danger.

If it is admitted then that the sense in which Willes, J. used the term "unusual danger" is doubtful and that in any event we have been led astray by some eminent judges in the use of the word "trap," it may not be amiss to consider if we will not be led further astray if we continue to insist upon "trap" carrying with it the idea of "deliberate concealment" or "something like fraud." As used by Willes, J., in *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371, at 375; 36 L.J.C.P. 191, the word "trap" may have carried such a meaning. As already pointed out, however, what was called by Scrutton, L.J. "the classical judgment of Willes, J. in *Indermaur* v. *Dames*" (see *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746, at 758; 94 L.J.K.B. 113) has been found to contain an unfortunate ambiguity (see Salmond on Torts, *supra*, at p. 461) which has been cleared up by what Lord Chancellor Hailsham said in *Robert Addie & Sons (Collieries)* v. *Dumbreck*, *supra*. (See MARTIN, J.A. in the *Gordon* case, *supra*.) What Lord Chancellor Hailsham said in the *Addie* case would appear to recognize the rule, apparently approved of by Prof. MacDonald and Mr. Griffith, that the word "trap" should be used to define the liability of licensors and should not be used in cases of invitor and invitee. If this rule is followed and, if it is also conceded, as I think it must be, that the clearing up of the "unfortunate ambiguity"

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by Lord Hailsham means that the duty of the occupier to the invitee is to take reasonable care that the premises are safe, then such duty is not to be defined in accordance with the restricted interpretation of *Indermaur* v. *Dames* said to have been adopted by Lord Atkinson in *Cavalier* v. *Pope, supra,* and it follows that the duty towards an invitee would not be exactly the same as the duty towards a licensee even if the latter duty is defined as Lord Hailsham, L.C. defined it in the *Addie* case as the occupier might incur liability to the invitee long before the existence of a trap known or "unknown" had been proved. I therefore would take the liberty of suggesting that what has been said by Lord Chancellor Hailsham as aforesaid, cited by Greer, L.J. without comment, in *Liddle* v. *Yorkshire (North Riding) County Council,* [1934] 2 K.B. 101; 103 L.J.K.B. 527, and apparently approved by Slesser, L.J. in *Weigall* v. *Westminster Hospital (Governors),* 52 T.L.R. 301; [1936] 1 All E.R. 232, and Horridge, J. in *Morgan* v. *Girls' Friendly Society,* [1936] 1 All E.R. 404 (see also Williams on Landlord and Tenant, 2nd Ed., art. 94, p. 357) shows that our law has been "reviewed in the light of modern conditions rather than in the shadow of ancient cases" (see Prof. MacDonald's article at p. 365, *supra*) and the word "trap" no longer necessarily carries with it the idea of "deliberate concealment" or "something like fraud" on the part of the occupier.

It may be noted that in *Sutcliffe* v. *Clients Investment Co., supra,* the question left to the jury by the trial judge, who would appear to have been of the opinion that the plaintiff was a bare licensee (see p. 749) with its answer, was as follows (see p. 748):

Did the balcony at the time of the accident constitute a trap to the deceased? That is, was it a concealed danger? Yes.

In my view the first question to be settled in the present case, assuming it to be one of occupier and licensee, is whether or not the balcony was a trap in the sense of a concealed danger to the licensee and this question I have answered in the affirmative. Then the next question is as to the duty of the occupier to the licensee and in my view it is no longer "settled law" that the owner who has retained possession and control of a balcony has no duty to a licensee lawfully using it to protect him against a

trap or concealed danger therein unless it is known to the owner in such a way as to amount to something like fraud if he does not disclose it. On the contrary, I hold that the law has come to where it is recognized that, where a tenant of a suite in an apartment-building has no possession or control over the common entrances or passageways, then the owner who has retained such possession and control in order to permit access to the premises to other tenants, owes a duty to licensees lawfully using the premises to protect them against a trap which is known or ought to be known to him. This duty cannot be placed upon someone who has no right of inspection or control and, if it is not placed on the person who has retained possession and control of the common entrances or passageways, then many innocent persons lawfully using such entrances or passageways under modern conditions may suffer serious injuries without redress against any person and the law of negligence will not serve its purpose. My conclusion therefore, with the greatest respect, is that such duty was properly placed by Lord Chancellor Hailsham upon the owner under such circumstances; that Lord Hailsham stated the law on the question of occupier and licensee in unmistakable language, and that his statement of the law has been approved so often as aforesaid that it should now be considered as settled law. The relationship of master and servant existing between the defendant and the janitor in the present case, no such question arises here as arose in the *Morgan* case, *supra,* where an independent contractor had been employed by the owners to advise them. The defendant is, therefore, responsible for the damages caused by her negligence in allowing the trap to exist, which, as I have held, ought to have been known to the defendant.

There will be judgment in favour of the plaintiffs against the defendant as follows:

Terence Power—	General..............	$ 25.00
	Special	151.95
	Loss of services of wife..	50.00
	Loss of *consortium*.....	50.00
Wilma Power—	General	800.00
		$1,076.95

Judgment for plaintiffs.

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LITRAS v. MATTERN.

Landlord and tenant—Agreement for lease—Sufficiency of memorandum—Identity of proposed lessee—Offer by agents of both parties—Statute of Frauds—Specific performance—Estoppel.

Real-estate agents wrote a letter addressed to the defendant in which they said, *inter alia*, "We are authorized on behalf of a client to make you the following offer. . . . The premises will be used by the lessee as a restaurant. . . . We enclose herewith our cheque for $100 as a deposit . . . to be applied on account of the first month's rent." On submission of the letter to the lessor, she signed acceptance at the bottom of the letter and was given a cheque for $100 by the agent. Two days later the agent told the defendant the name of the proposed lessee. In an action for specific performance of the agreement it was contended by the defendant that the proposed lessee was not sufficiently identified by the letter to satisfy section 4 of the Statute of Frauds.

Held, that the proposed lessee was so described that his identity could not have been fairly disputed and therefore the statute was satisfied.

Held, further, that after the plaintiff was informed that defendant had accepted his offer, he desisted in his efforts to obtain other premises, and the defendant was estopped from denying that the memorandum was sufficient with respect to the identity of the proposed lessee.

ACTION for specific performance of an agreement for the lease of a portion of a premises at 724 Hastings Street West in Vancouver, or alternatively for damages. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 24th and 25th of January, 1938.

F. C. Hall, for plaintiff.
J. Oliver, for defendant.

Cur. adv. vult.

1st February, 1938.

MANSON, J.: The plaintiff seeks specific performance of an agreement for a lease of a portion of the premises known as 724 Hastings Street West, Vancouver, B.C., alternatively damages. The defendant pleads the Statute of Frauds, R.S.B.C. 1936, Cap. 104, and contends that the memorandum relied upon by the plaintiff is not sufficient under the statute. The memorandum, Exhibit 2, is set forth hereunder:

October 30, 1937.

Mrs. Louise S. Mattern,
724 Hastings St. W.,
Vancouver, B.C.

Dear Madam:

Re Lower Portion of Building on Lot 6, Block 22,
District Lot 541—724 Hastings St. West.

With reference to our recent conversations with regard to the abovementioned premises, we are authorized on behalf of a client to make you the following offer:—

To lease the premises for 5 years from 1st December, 1937, at a rental of $350 per month for the first 3 years, $375 per month for the 4th year, and $400 per month for the 5th year, the lessee to pay the water rates and to do his own repairs. The lessee also to heat the upstairs portion of building.

The premises will be used by the lessee as a restaurant.

We enclose herewith our cheque for $100 as a deposit. If you accept this proposal, this cheque is to be applied on account of the first month's rent. If you do not accept this proposal, the cheque is to be returned to us.

Will you kindly signify your acceptance of this proposal by signing below.

Yours very truly,
Sgd. Macaulay, Nicolls, Maitland & Co. Ltd.
Per F. W. Dick.

FWD:MC
Encl.
Accepted Sgd. Louise Swain Mattern.

The neat point taken by counsel for the defence is that the identity of the proposed lessee does not sufficiently appear in the memorandum. It is contended that there is an insufficient identification of the proposed lessee in the phrase "we are authorized on behalf of a client." The plaintiff contends that the phrase, "We are authorized on behalf of a client," is supplemented in the matter of the identification of the proposed lessee by the sentence which occurs at a later point in the memorandum: "The premises will be used by the lessee as a restaurant."

It appears from the evidence that Macaulay, Nicolls, Maitland & Co. Ltd. had been in touch with the defendant for some three years with regard to the property mentioned in the memorandum, Exhibit 2, "First of all either to sell the premises and in the alternative to get her a good lease—a good tenant for the property" (*vide* evidence witness Dick). On October 22nd, 1937 (Friday), the defendant 'phoned Mr. Dick of Macaulay, Nicolls, Maitland & Co. Ltd. with respect to an option to sell, which she had given to another real-estate firm. She stated that a sale had not been made and that she was ready to enter into a

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lease. She was told by Dick that he had a prospective tenant. On the Monday following the defendant called at the office of the estate agents and enquired as to why she had not heard from them on the 23rd, and it was explained to her that Dick had not been able to contact his man. On the morning of Saturday, October 30th, Dick took to the defendant, at her office, the memorandum, Exhibit 2, and on that occasion after discussion it was agreed that the estate agents should be paid by the defendant a commission of $300 for negotiation of the lease. The defendant signed the acceptance of the proposal and made no enquiry as to the identity of the estate agent's client. After the addition of a clause in the proposal as appears in pen in the memorandum, Exhibit 2, and after the insertion of the initial "S" in her name the memorandum was signed in duplicate and a copy was kept by the defendant. On that occasion Dick handed the defendant his firm's cheque in the sum of $100 (Exhibit 3). The cheque was endorsed on the back: "Deposit *re* lease lower portion 724 W. Hastings St., as per letter to you dated October 30/37." On November 1st Dick saw the defendant again and told her that he was having the lease drawn and she remarked: "You have not yet told me the name of your client." Dick at once told her that it was the plaintiff and that he was the owner of three or four restaurants about town, that he knew him, that he had been a tenant of his firm and that he always paid his rent promptly and was a good tenant. The defendant said "that will be all right" and it was arranged that Dick was to present the lease to her for signature on the following afternoon at 3 o'clock. She enquired as to when the balance of the first month's rent would be paid and was assured that it would be paid upon the execution of the lease. On the afternoon of the following day the defendant repudiated and sought to return the estate agents' cheque for $100.

Upon the evidence there can be no doubt that the estate agents were the agents of both parties, and in the circumstances that the knowledge of the defendant's agents as to the identity of the proposed lessee was the knowledge of the defendant.

The plaintiff testified at the trial that, when he was advised by the estate agents that the defendant had accepted the offer

which he had authorized to be made, he desisted in his efforts to get other premises which he regarded as desirable for his purposes. As it seems to me, it is unimportant to weigh the extent to which he changed his position as a result of what the defendant had done. His evidence stands uncontradicted that he did change his position to his prejudice, and that being true, the rule of estoppel comes into operation as against the defendant and she cannot now be heard to deny that she was aware of the identity of the proposed lessee. It is to be borne in mind that section 4 of the Statute of Frauds is no more than a statutory rule of evidence. It does not invalidate a contract, a memorandum of which has not been reduced to writing. In my view the rule as to estoppel and the statutory rule—one no more effective than the other—must be applied together in the consideration of the matter. But while the defendant is estopped from denying her knowledge of the identity of the proposed lessee the plaintiff is still confronted with section 4 of the Statute of Frauds.

"No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The identity of the parties to the agreement is one of the things, upon the authorities, which must appear in the memorandum which the statute requires. Keeping in mind the rules of evidence and applying them cumulatively, it seems to me that it is open to grave doubt as to whether the defendant can be heard to say that the identity of the proposed lessee is insufficiently disclosed in the memorandum. If it were necessary to rest my decision on this point alone I would hold that the defendant is estopped from denying that upon the matter of identity the memorandum is sufficient.

I shall now proceed to a discussion of the further defence upon section 4 of the Statute of Frauds. Many cases were cited by counsel but I find it necessary only to refer to some of them. Other cases cited can be readily distinguished from the case at Bar. Sir George Jessel, M.R. in *Potter* v. *Duffield* (1874),

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L.R. 18 Eq. 4, at 7; 43 L.J. Ch. 472, after quoting from the judgment of Sir John Taylor Coleridge in the case of *Williams* v. *Byrnes* (1863), 1 Moore, P.C. (N.S.) 154; 9 Jur. (N.S.) 363, at 364; 15 E.R. 660, adds these words:

I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed.

I think there can be no doubt upon the authorities that that is a correct statement of the law. Sir George Jessel, M.R., in *Commins* v. *Scott* (1875), L.R. 20 Eq. 11; 44 L.J. Ch. 563, again gave effect to that view of the law, and in discussing the last-mentioned case Riddell, J. observed in *Standard Realty Co.* v. *Nicholson* (1911), 24 O.L.R. 46, at 54:

Sir George Jessel's laconic statement of the law in *Commins* v. *Scott* . . . has frequently been cited and never overruled.

In *Morris* v. *Wilson* (1859), 5 Jur. (N.S.) 168, at 169, Sir W. P. Wood, V.C. observed:

Where an agent contracts, parol evidence may be given to show who is his principal.

Nothing can be clearer than that in the case the learned Vice-Chancellor was considering the agents did not contract on their own behalf. There the defendant made an offer in writing addressed to the plaintiff's agents. The agents replied: "In answer to your letter of the 17th inst. we beg to state that we have received instructions to accept your offer." The phrase, "we have received instructions" implies beyond argument, as it seems to me, that they were mere agents for third parties. I direct attention to the facts of this case because Younger, J. in *Lovesy* v. *Palmer,* [1916] 2 Ch. 233, at 244; 85 L.J. Ch. 481, mistakenly, as it seems to me, with respect, suggests "that Wood, V.C. was there of opinion that the agent had made himself personally liable." The statement of the Vice-Chancellor, when read in the light of the facts which he was considering, is a somewhat broader statement than that of Sir George Jessel, above quoted. I refer again to *Commins* v. *Scott, supra.* There property had been put up to auction. It was not sold. The defendants approached the agent of the plaintiffs (the vendors) and agreed upon terms of purchase. A memorandum of the agreement was written upon a copy of the conditions of sale and was signed by the defendants and by Edward Commins, the

solicitor of the plaintiffs, as their agent. Neither the particulars nor the conditions of sale disclosed the names of the vendors. Sir George Jessel, M.R. held that the conditions of sale upon which the memorandum was written showed a great deal more than the mere fact that Edward Commins was agent of the vendors. The learned Master said at p. 17:

In my opinion, the only fair inference from these conditions is, that the vendors are a company in possession of the property, who have been carrying on operations there; it is admitted that the plaintiffs are such a company; and I am of opinion, therefore, that there is a good contract.

It is to be observed that it was evidence outside the memorandum, and not referred to in it, which established "that the plaintiffs are such a company"—in other words, that the plaintiffs were the company referred to in the conditions upon which the memorandum was written. It is also to be noted that while the memorandum was written upon the conditions of sale those conditions were not referred to in the memorandum. Certain particulars annexed thereto and marked "A" were referred to, but it was not upon the particulars but upon the conditions of sale that the learned Master founded his decision. I shall now consider *Filby* v. *Hounsell,* [1896] 2 Ch. 737; 65 L.J. Ch. 852. There a property was put up for sale by Messrs. Frank Jolly & Co., auctioneers, subject to conditions of sale. The conditions and particulars of sale did not state the name of the vendor, but stated that it would be sold by auction by Messrs. Frank Jolly & Co. No sale took place at the auction, but on the day of the auction the defendant wrote the auctioneers, addressing his letter to them, making an offer for the property. The auctioneers on the following day replied: "On behalf of our client, Mrs. M. A. Filby, we beg to accept . . ." Romer, J. observes at p. 853 (L.J. report):

The defence of the Statute of Frauds certainly gives rise to some nice questions. But I have come to the conclusion that it does not avail the defendant. The point arising on the plea of the statute is that which concerns the name of the vendor. The defendant says that he has signed nothing which directly or by sufficient reference sets forth in writing who the vendor is. And true it is that the plaintiff's name as vendor does not appear in the offer of purchase of September 24, 1895, signed by the defendant, and that you cannot gather who the vendor is from the auction form of contract or particulars, which are sufficiently referred to for identification in the offer. But the offer does contain the names of the

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contracting parties. The offer is to Frank Jolly & Co., and I think it makes no difference that the offer is made to them as agents for an undisclosed principal. For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parol—that is well settled.

The learned judge then refers to *Morris* v. *Wilson, supra,* and *Commins* v. *Scott, supra,* and observes further at p. 854:

And I cannot see that it makes any difference that they disclose at the time of acceptance the name of the principal or accept directly on behalf of the principal instead of first simply accepting it and then stating who the principal is.

Riddell, J. in the *Standard Realty* case, *supra,* at p. 54, cites with approval the statement of the law by Romer, J. in *Filby* v. *Hounsell, supra,* quoting particularly that portion of the passage above quoted: "For the purpose of satisfying the Statute of Frauds . . . Who the principals are may be proved by parol." In *Pulford* v. *Loyal Order of Moose* (1913), 23 Man. L.R. 641 at pp. 646-7; 25 W.L.R. 868; 5 W.W.R. 452, Perdue, J.A. makes this observation:

But, in order to satisfy the Statute of Frauds, it is immaterial that the parties named in the memorandum are in fact agents. Parol evidence is admissible to prove who are the principals. A person may enforce a contract which his agent has made for him in the agent's own name. These principles are stated in *Commins* v. *Scott,* [(1875)] L.R. 20 Eq. 15; *Morris* v. *Wilson,* [(1859)] 5 Jur. (N.S.) 168; *Filby* v. *Hounsell,* [(1896)] 2 Ch. 737.

The cases cited by the learned judge do more than lay down that, "A person may enforce a contract which the agent has made for him in the agent's own name"—as pointed out in my discussion of those cases. In the *Pulford* case, *supra,* the offer was addressed to the agent of the owners to the knowledge of the defendant, as is to be clearly inferred from the offer itself, which will be found at p. 456 of the report cited.

Rathom v. *Calwell* (1911) 16 B.C. 201 is readily distinguishable from the case at Bar. There there was clearly nothing in the memorandum signed by the defendant to enable identification of the vendor. I think, too, that *Newberry* v. *Brown* (1914), 20 B.C. 483; (1915), 21 B.C. 556, may be distinguished. There the memorandum signed by the purchaser read

in part: "I, John M. Brown of Vancouver do hereby make the following offer to client of P. N. Anderson." There was nothing further in the memorandum to identify the prospective vendor. In *Lovesy* v. *Palmer, supra,* Younger, J. canvasses the *Filby* v. *Hounsell* decision at very considerable length as he does also some of the other authorities quoted. There the word used was "clients" and the learned judge at p. 241 says:

I think, therefore, in truth that the word "clients" as used throughout the correspondence was either used to mean a group of persons of whom the plaintiff was one or to signify the company to be formed to take over the theatre. . . . The action, however, I think, also fails on the ground that there is no evidence to show that the plaintiff was in truth the principal of Harraway in the transaction. But I may be wrong on this last conclusion of fact, and accordingly I proceed to deal with the other questions on the footing that I am.

Without reviewing the whole of the discussion of the *Filby* v. *Hounsell* case by Younger, J., with regard to which he seems to have some doubt, he comes to the conclusion that the latter case "cannot be allowed to affect the result of the present action." Of *Mahler* v. *Barker* (1924), 34 B.C. 136, suffice it to say that it is entirely in accord with the law as laid down by Sir George Jessel. *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; 48 L.J. Ch. 10, does not greatly assist. There one of a group of "proprietors" (the plaintiffs) accepted an offer of the defendant and it was held that the word "proprietors" was a sufficient identification of the vendor. It was suggested by Younger, J. in the *Lovesy* case, *supra,* that Romer, J.'s decision in the *Filby* case was not consistent with *Rossiter* v. *Miller.* I do not take that view and I think the *Filby* case was consistent with *Potter* v. *Duffield, supra.* In *Andrews* v. *Calori* (1907), 38 S.C.R. 588, Maclennan, J. held the defendant Andrews liable despite the fact that his letter was addressed to an agent and he knew nothing of the identity of the prospective purchaser other than that he was offering through the agent $13,000 and had made a deposit of $500 cash. The decision of the Supreme Court affirmed that of the Full Court of this Province, which will be found in (1906), 12 B.C. 236. In *Lewis and Sills* v. *Hughes* (1906), 13 B.C. 228 at p. 231, DUFF, J. (now C.J.C.) cited with approval from Benjamin on Sale, 5th Ed., 233, the following passage:

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"It must be steadily borne in mind that the Statute of Frauds was not enacted for cases where the parties, either in person or by agents, have signed a written contract, for in those cases the common law affords quite as sufficient a guarantee against frauds and perjuries as is provided by the statute."

And now applying Sir George Jessel's test to the facts of the case at Bar it cannot be said that the parties are so insufficiently described that their identity can be fairly disputed. I am of the view that the identity of the parties cannot be disputed. Referring to the memorandum of October 30th, Exhibit 2, it is clear that the offer to the defendant was made on behalf, not of the clients of the estate agents, but on behalf of a definite client —a client who wanted the premises for a restaurant, and a client on whose behalf the estate agents enclosed a cheque for $100 which was to be applied on account of the first month's rent. In my view there was a very definite identification of the prospective lessee. The plaintiff is entitled to succeed.

It was suggested at the trial that the defendant had given a lease of the premises to other parties and that therefore specific performance was an inappropriate remedy. There will be leave to the defendant, if she so desires, to have the case set down within on week for further hearing upon this point. Alternatively, the plaintiff may put the case on the list within ten days from this date in order that the *quantum* of damages may be assessed.

Order accordingly.

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Statutes—Interpretation—Ejusdem generis rule—Mortgagors' and Purchasers' Relief Act, 1934—Leave to take proceedings—For personal judgment on covenant—Must be specifically applied for—B.C. Stats. 1934, Cap. 49, Sec. 4.

An appointment under section 5 of the Mortgagors' and Purchasers' Relief Act recited that the purpose of an inquiry was to determine whether the intended plaintiff should be granted leave "to foreclose a certain agreement for sale of lands." The registrar's report on the inquiry recommended that leave be granted the intended plaintiff "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of principal moneys, interest, etc., payable under said agreement and the indenture of assignment of said lands of the 6th of September, 1928. The order then made gave the intended plaintiff leave "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of the principal moneys, interest, etc., payable under said agreement and said assignment. The plaintiff claims in his statement of claim (a) to have an account taken of all moneys due for principal and interest, etc., payable under an agreement in writing of the 1st of May, 1926, for the sale by the plaintiff to the defendants Lee Foo, Lee Lip and Lee Wing of certain lands; (b) for personal judgment against the defendants Fiorenza and Fagundies for the amount found due by virtue of the covenants of said defendants contained in the assignment of said lands of the 6th of September, 1928, made by the above-mentioned purchasers to the said defendants.

Held, that effect must be given to all the subsections of section 4 (1) of said Act. The expressed intention of the section is that the leave required before taking proceedings for personal judgment upon any such covenant should be specifically applied for and specifically granted by the order before such proceedings can be taken. In the present case, while leave to take proceedings for foreclosure and other remedies supplementary or incidental to foreclosure with respect to the said lands was applied for and granted, leave was not specifically applied for or granted to take proceedings for personal judgment, therefore the said order did not grant the leave required for taking proceedings for personal judgment on said covenants.

ACTION by way of foreclosure for recovery of principal, interest, taxes and insurance premiums payable under an agreement for the sale of land and for personal judgment against the defendants Giuseppe Fiorenza and Josephine Fagundies by virtue of covenants of said defendants contained in a certain

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indenture of the 6th of September, 1928, and made between the defendants Lee Foo, Lee Lip and Lee Wing as assignors, and the said Giuseppe Fiorenza and Josephine Fagundies. Tried by FISHER, J. at Vancouver on the 28th of October, 1937.

Walkem, K.C., for plaintiff.

J. W. deB. Farris, K.C., and *J. A. Grimmett*, for defendants.

Cur. adv. vult.

6th December, 1937.

FISHER, J.: In this matter the plaintiff claims in its statement of claim, *inter alia*:

(*a*) To have an account taken of the moneys due and owing for principal, interest, taxes, insurance premiums, costs and expenses and other moneys payable under and by virtue of certain articles of agreement in writing and under seal dated the 1st day of May, 1926, made between the plaintiff as vendor and Lee Foo, Lee Lip and Lee Wing as purchasers whereby the plaintiff agreed to sell and the said purchasers agreed to purchase of and from the plaintiff all and singular those certain parcels or tracts of land and premises . . .

(*b*) For personal judgment against the defendants Giuseppe Fiorenza, also known as Joe Celona, and Josephine Fagundies, also known as Josephine Celona and as Josephine Long, for the amount found to be due and owing to the plaintiff on the taking of such account under and by virtue of the covenants of the said defendants contained in a certain indenture dated the 6th day of September, 1928, and made between the said Lee Foo, Lee Lip and Lee Wing as assignors, the said defendants Giuseppe Fiorenza and Josephine Fagundies as assignees and the plaintiff as vendor of the third part, wherein the said defendants do jointly and severally covenant with the plaintiff to pay the said sums of purchase-money and interest and to do, observe and perform all other acts and things which the said Lee Foo, Lee Lip and Lee Wing covenanted in the articles of agreement of the 1st day of May, 1926, to do, observe and perform, together with such costs as would have been incurred if this action had been brought for payment only.

(*c*) For a decree that, in default of payment to the plaintiff of the amount found to be due on the taking of such account, together with the costs of this action, the defendants do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the lands and premises in the said articles of agreement of the 1st day of May, 1926, named.

(*c*) (1) In the alternative a declaration of the plaintiff's lien, and that in default of payment of the said judgment the plaintiff be at liberty to apply to this Court to enforce such lien and for such other relief in this action as it may be advised.

Counsel on behalf of the plaintiff cites *Buckley and Schell* v. *Heckert*, [1932] 1 W.W.R. 831, which held that a vendor suing

a purchaser in default under an agreement for the sale of land is entitled to apply for personal judgment with leave to issue execution thereon and with liberty to apply, in the event of it being found impossible to realize the amount of the judgment, for further relief which might take the form of a sale of the land or rescission of the agreement, depending on what had been done under the execution issued on the judgment.

Counsel on behalf of the said defendants Giuseppe Fiorenza and Josephine Fagundies, apparently, does not dispute this statement of the law but contends that in the present case the plaintiff is not entitled to take proceedings for the recovery of the principal money or interest payable under the said indenture upon any covenant, that is, for personal judgment on the covenant against the said defendants, even on the assumption that they did covenant which is denied, and the contention is based on the ground that the plaintiff has not complied with the provisions of the Mortgagors' and Purchasers' Relief Act, 1934, B.C. Stats. 1934, Cap. 49, and amending Acts, and in particular sections 4, 5 and 6 thereof with regard to the taking of such proceedings. Said section 4 (1) reads, in part, as follows:

No person shall:—

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

. . . . .

(*d*) Take or continue proceedings in or out of any Court for the recovery of principal money or interest thereon payable under any instrument by a mortgagor or purchaser upon any covenant or agreement as principal or guarantor or otherwise, whether express or implied,—
except by leave of a judge granted upon application as hereinafter provided.

It is argued on behalf of the said defendants that the plaintiff has not obtained leave of a judge granted upon application as provided in said Mortgagors' and Purchasers' Relief Act, 1934. In reply to such argument the plaintiff relies upon an order (Exhibit 1) made by my brother MANSON, dated May 6th, 1937, prior to the issuance of the writ herein on May 11th, 1937, such order reading, in part, as follows:

Upon the application of the above named intended plaintiff . . . and upon reading the report of the district registrar of this Court made herein

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the 1st day of May, 1937, . . . It Is Further Ordered that the above named intended plaintiff be at liberty to take proceedings by way of foreclosure or sale or otherwise for the recovery of the principal money, interest, taxes, insurance premiums and other moneys payable under a certain agreement dated the 1st day of May, 1926, and made between the above named intended plaintiff, then known as The Yorkshire and Canadian Trust, Limited, as vendor and Lee Foo, Lee Lip and Lee Wing as purchasers, for the sale of those certain parcels or tracts of land and premises . . . and also under a certain indenture dated the 6th day of September, 1928, and made between the said Lee Foo, Lee Lip and Lee Wing as assignors of the first part, the above named intended defendants Giuseppe Fiorenza and Josephine Fagundies as assignees of the second part, and the above named intended plaintiff as vendor of the third part, being an assignment of the said purchasers' interest in the said agreement of the 1st day of May, 1926, and in and to the said lands, and registered in the said Land Registry office under No. 64202-H.

It may be noted that the appointment before the district registrar, dated March 24th, 1937 (Exhibit 9) reads, in part, as follows:

I hereby appoint . . . as the time and place for the holding of an inquiry, pursuant to section 5 of the Mortgagors' and Purchasers' Relief Act, 1934, for the purpose of determining whether the intended plaintiff should be granted leave to foreclose a certain agreement for sale dated the 1st day of May, 1926 . . . .

The said report of the registrar (Exhibit 10) recommends that the above named intended plaintiff be granted leave to take proceedings by way of foreclosure or sale or otherwise for the recovery of the principal moneys, interest, insurance premiums, taxes and other moneys payable under the said agreement for sale of the 1st day of May, 1926, and the indenture of assignment dated the 6th day of September, 1928.

The question therefore arises as to the effect of the aforesaid order. After considering the words used in the appointment, and those used in the report as well as the words used in the order as aforesaid, I hold that the interpretation to be placed upon the words "take proceedings by way of foreclosure or sale or otherwise" in the said order should be the same as would be put upon these words as used in said section 4 of the Mortgagors' and Purchasers' Relief Act, 1934.

Upon the argument reference was made by counsel to Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 355, which reads, in part, as follows:

General words in a statute are *prima facie* to be taken in their usual sense.

General words following specific words in a statute are *prima facie* to be taken in their general sense unless the reasonable interpretation of the

statute requires them to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before.

If the particular words exhaust the whole *genus* the general word must refer to some larger *genus*.

Counsel on behalf of the said defendants also refers to Beal's Cardinal Rules, at p. 425, reading in part as follows:

General provisions in the same statute or other statutes are not to control or repeal the special provisions. The special provisions are to be read as excepted out of the general.

. . . . .

"It may be laid down as a rule for the construction of statutes, that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby, and not by the terms of the general provision."—*Dryden* v. *Overseers of Putney* (1876), 1 Ex. D. 223, at 232, Quain, J. . . . ."

Counsel for the said defendants also refers to *Skinner & Co.* v. *Shew & Co.* (1892), 62 L.J. Ch. 196, where at pp. 204-5, Bowen, L.J. says, in part, as follows:

There is no doubt of the existence of the rule *ejusdem generis;* it cannot be denied that the general words ought to be construed with reference to the words which are immediately around them. But there is an exception to that rule—if it be a rule, and not a maxim of common sense—which is, that although the words immediately around and before the general words are words which are *prima facie* confined to a class, if you can see from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, you must give effect to the intention of the Legislature as gathered from the entire section; and here the question is whether the entire section, when you have regard to the special subject-matter it is applied to, does not lead you to the view that the larger meaning must be put upon the words "or otherwise," and that they are rather extended by the words which precede them than are themselves confined by them. What is the subject-matter in the first place of this section? It is a threat about a patent action.

It may also be noted that in *Skinner & Co.* v. *Shew & Co., supra,* Lindley, L.J. says, in part, as follows at p. 203:

Now I will read the section: "Where any person claiming to be the patentee of any invention, by circulars, advertisements, or otherwise threatens any other person with any legal proceedings." Now, Mr. Bousfield has urged upon us that, although the letters to which I have referred may be regarded as threats, they are not threats by circulars, advertisements, or otherwise, if you read "otherwise," as he says you ought, *ejusdem generis* with circulars or advertisements—that is to say, by some published notice, or some public way more or less like a circular or an advertisement. If you so read it, it strikes me you miss the substance of the section—that is to say, you allow a man to make all sorts of threats, provided he does not do

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it by circular or advertisement, or by some method more like a circular or advertisement. The object of the section is to prevent threats even, as I say, in a general way by circular or advertisement, which might or might not be construed or regarded as a threat. You are not to do it; but the proviso shows that if you do it, you are not liable if you bring an action. Is this the construction which has been put on this section before? It appears to be that it is, and has been for some few years past . . . and they have all adopted the view that a threat by a letter is sufficient, although you cannot call a mere letter something like an advertisement or a circular. My own opinion is that that construction is the correct one.

The case of *Barker* v. *Edger,* [1898] A.C. 748; 67 L.J.P.C. 115, is also relied upon by counsel for the said defendants and the head-note (in 67 L.J.P.C.) reads, in part, as follows:

According to the maxim "*Generalia specialibus non derogant,*" the presumption is that where special statutory provision has been made for a specified class of cases, a subsequent general enactment is not intended to interfere with such provision.

Reference might also be made to the case of *Monck* v. *Hilton* (1877), 2 Ex. D. 268; 46 L.J.M.C. 163, where Pollock, B. says at p. 168:

The words of the Act are, "every person pretending or professing to tell fortunes, or using any subtle craft, means or device by palmistry or otherwise to deceive and impose on any of his Majesty's subjects." And the well-known rule of construction was urged upon us that in giving effect to the words "or otherwise" we must read the statute as if it had used the words by palmistry or other act of a like kind. The principle upon which this rule is founded is thoroughly established, and the only difficulty which arises is in the mode and extent of its application to the provision in question.

In *In re The Commercial Bank of Australia Limited* (1893), 19 V.L.R. 333, at 375, Holroyd, J. says, in part, as follows:

When an Act is divided and cut up into parts or heads, *prima facie* it is, we think, to be presumed that those heads were intended to indicate a certain group of clauses as relating to a particular subject . . . The object is *prima facie* to enable everybody who reads to discriminate as to what clauses relate to such and such a particular subject matter. It must be perfectly clear that a clause introduced into a part of an Act relating to one subject matter is meant to relate to other subject matters in another part of the Act before we can hold that it does so.

After a perusal of the authorities above referred to, I am of the opinion that the words used in section 4 (1) (*a*) as aforesaid cannot be read as if the words contained in 4 (1) (*d*) were omitted altogether. The whole section must be looked at, and some effect must be given to all the subsections. The section being divided into subsections it is *prima facie* to be presumed

that subsection (*d*) was intended to deal with taking proceedings for the recovery of money payable under any instrument by a mortgagor or purchaser upon a covenant and subsection (*a*) should not be held to relate to the same subject-matter unless it is perfectly clear that it was so intended. In my view it is not perfectly clear that it was so intended. On the contrary it seems clear to me that the words "or otherwise" were not intended to make subsection (*a*) relate to the same subject-matter as subsection (*d*), that the *genus* is not exhausted by the particular words and the word "otherwise" should be read *ejusdem generis* with "foreclosure or sale" as if the words in said subsection (*a*) were "by way of foreclosure or sale or other action of a like kind." As to such words in the said order itself, I have already indicated that I think the words should be interpreted in the same way as the words in the statute and I have also to say that I think the spirit and expressed intention of the section of the statute is that the leave required before taking proceedings for personal judgment upon any such covenant should be specifically applied for and specifically granted by the order before such proceedings can be taken. In the present case the appointment as aforesaid gave to the parties served notice of an inquiry to determine "whether the intended plaintiff should be granted leave to foreclose" and I think a fair inference is that, while leave to take proceedings for foreclosure and for other remedies supplementary or incidental to foreclosure with respect to the lands and premises referred to was applied for and granted, leave was not specifically applied for or granted to take proceedings for personal judgment which is what is now asked for primarily herein along with liberty to apply for further relief. (See *Buckley and Schell* v. *Heckert, supra.*)

My conclusion, therefore, is that such order (Exhibit 1) does not grant the leave required for taking proceedings for personal judgment with liberty to apply for further relief as aforesaid and, such being my conclusion, I do not find it necessary to consider the other pleas of the said defendants. The provisions of the Mortgagors' and Purchasers' Relief Act, 1934, not having been complied with, the plaintiff's claim, so far as it is for personal judgment with liberty to apply for further relief as

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aforesaid, is dismissed with costs to the said defendants after the time the statement of defence was served and costs as against the said defendants up to that time. The claim, so far as it is simply to have an account taken and for foreclosure or sale or other remedies against the lands and premises referred to, is allowed.

Judgment accordingly.

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March 9, 11.

REX v. CROWE.

Criminal law—Control of automobile while intoxicated—Charge dismissed —Appeal—Notice of by informant—Sufficiency—Prohibition—Criminal Code, Sec. 749.

A charge against the accused that "whilst intoxicated [he did] unlawfully have control of an automobile contrary to the Criminal Code" was dismissed. The notice of appeal of the informant was "TAKE NOTICE that I, S. T. Dunnell, of Victoria, British Columbia, the informant and complainant, intend to enter and prosecute an appeal to the County Court of Victoria." On an application for a writ of prohibition on the submission that under section 749 of the Criminal Code only a complainant who is "aggrieved" by the dismissal, can appeal, and that the notice of motion should set out in addition to the fact that Dunnell was the informant and complainant, that he was the "aggrieved."

Held, that the complainant had the necessary *status* to launch and carry on an appeal and the writ of prohibition was refused.

Rex ex rel. Danby v. *Prince Albert Mineral Water Co.*, 15 Sask. L.R. 332; [1922] 1 W.W.R. 945, applied.

MOTION for a writ of prohibition. One S. T. Dunnell was informant and complainant on a charge against the accused, under section 285, subsection 4, of the Criminal Code, of having control of an automobile whilst intoxicated. The justice of the peace who tried the matter dismissed the charge. The informant and complainant took an appeal to the County Court at Victoria. The notice of appeal did not allege that S. T. Dunnell was a person "who thinks himself aggrieved," and the appeal was not taken at the instance of the Attorney-General's Department. The motion for prohibition by accused was on the ground that

the notice of appeal did not show that S. T. Dunnell was a "person who thinks himself aggrieved," within the meaning of section 749 of the Criminal Code and that the appeal had not been launched by the Crown. Heard by ROBERTSON, J. at Victoria on the 9th of March, 1938.

R. D. Harvey, for the motion, referred to *Looker* v. *Halcomb* (1827), 4 Bing. 183; *Rex* v. *Palmer, Ex parte Gormerly* (1933), 60 Can. C.C. 227; Crankshaw's Criminal Code, 6th Ed., 808; *Rex* v. *Hong Lee* (1920), 28 B.C. 459; *Rex* v. *Lee Tan* (1920), *ib.* 49; *Rex* v. *Suckling,* [1920] 3 W.W.R. 89; Daly's Canadian Criminal Procedure and Practice, 3rd Ed., 229; *Harrup* v. *Bayley* (1856), 6 El. & Bl. 218; *Rex ex rel. Danby* v. *Prince Albert Mineral Water Co.* (1922), 38 Can. C.C. 47; *The King* v. *The Justices of the West Riding of Yorkshire* (1828), 7 B. & C. 678; *Rex* v. *Hatt* (1915), 25 Can. C.C. 263; Halsbury's Laws of England, 2nd Ed., Vol. 21, pp. 714-715; *Rex* v. *Stone* (1932), 58 Can. C.C. 262. Prohibition lies even if application could be made to the judge appealed to: *Re Buchanan* (1913), 22 Can. C.C. 199; *Re Favretto,* [1938] 1 D.L.R. 230.

C. L. Harrison, contra: The writ should be sparingly applied and only in a plain case: see *Rex* v. *Hamlink* (1912), 19 Can. C.C. 493, at pp. 502 and 512. If there is a doubt in fact and law, prohibition should be refused: see *Rex* v. *Hamlink, supra,* 514; *In re Birch* (1855), 15 C.B. 743; *Foster* v. *Foster* (1863), 32 L.J.Q.B. 312, at 314; *Gagen* v. *Gagen* (1934), 48 B.C. 481, at 488; *Neary* v. *Credit Service Exchange* (1929), 41 B.C. 223. The case of *Rex ex rel. Danby* v. *Prince Albert Mineral Water Co.* (1922), 38 Can. C.C. 47 did not follow *Rex* v. *Hong Lee* (1920), 28 B.C. 459 and *Rex* v. *Suckling,* [1920] 3 W.W.R. 89, and the complainant does not have to be a person "aggrieved." In the history of the section the words "prosecutor or complainant" were inserted in order that the older cases requiring that an informant should allege or prove that he was "aggrieved" was no longer necessary. If it were necessary that the prosecutor or complainant should be aggrieved, then the words prosecutor or complainant would be superfluous. The

section as it now reads must refer to three different classes of persons entitled to appeal: 1. Any person who thinks himself aggrieved. 2. The prosecutor or complainant. 3. The defendant. See also *Grevas* v. *Almas,* [1936] 2 W.W.R. 128; affirmed 50 B.C. 491; *Re Wakeford and Yeomans,* [1937] O.W.N. 338 and *Continental Marble Co. Ltd.* v. *Langs* (1937), 52 B.C. 47.

Cur. adv. vult.

11th March, 1938.

ROBERTSON, J.: S. T. Dunnell laid an information against Herbert F. Crowe that "whilst intoxicated [he did] unlawfully have control of an automobile contrary to the Criminal Code." The information was dismissed and Dunnell has appealed to the County Court. Crowe now applies for a writ of prohibition on the ground that the notice of appeal does not show that he has the necessary *status* to appeal. The notice of appeal reads in part:

TAKE NOTICE that I, S. T. Dunnell, of Victoria, British Columbia, the informant and complainant, intend to enter and prosecute an appeal to the County Court of Victoria . . .

It is submitted that under section 749 of the Criminal Code only a complainant who is "aggrieved" by the dismissal can appeal; and that the notice of motion should have set out in addition to the fact that Dunnell was the informant and complainant, he was "aggrieved." I have considered all the cases and in my opinion the matter is disposed of by the judgment of Mr. Justice Mackenzie in *Rex ex rel. Danby* v. *Prince Albert Mineral Water Co.,* [1922] 1 W.W.R. 945 in which the learned judge considered all the previous decisions on this point and came to the conclusion that the complainant had the necessary *status* to launch and carry on an appeal from dismissal. If I may say so, I respectfully agree with this decision. Moreover, the proper practice is to follow the decisions of other like Courts of Canada on Federal statutes, particularly criminal, with the intention of harmonizing the decisions and securing uniformity of application thereof throughout Canada: see *Rex* v. *Sam Jon* (1914), 20 B.C. 549, and *Rex* v. *Glenfield et al.* (1934), 62 Can. C.C. 334.

The motion is dismissed with costs.

Motion dismissed.

PUTNAM v. MACNEILL.

S. C.
1938
March 3, 10.

Negligence—Motor-vehicles—Collision—Two cars travelling in same direction—One passing the other—Passing car cutting in to right side of road too sharply—Necessity of other car to apply brakes.

Where one car passes another going in the same direction it is the duty of the passing car to be clear of the other car before cutting in to his right side of the road. There is no obligation on the driver of the slower car to put on his brakes when the other car is passing or cutting in ahead of him.

ACTION for damages resulting from a collision between the automobile of the plaintiff and that of the defendant. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 3rd of March, 1938.

G. L. Fraser, and *D. M. Brown,* for plaintiffs.
Nicholson, and *Yule,* for defendant.

Cur. adv. vult.

10th March, 1938.

ROBERTSON, J.: On August 2nd, 1937, a bluish-green 1936 Oldsmobile car owned, and driven, by the plaintiff E. D. Putnam, and a tan-coloured 1934 Chevrolet car, driven by the defendant, came into collision on the Trans-Canada Highway at a point some distance east of its intersection with Brown Road. The day was clear and bright and the road was dry. From Brown Road east to a point where the defendant's car finally came to rest in the ditch the highway runs east and west, almost perfectly straight and there is a yellow centre line. The highway is paved with black-top 19 feet wide and there are gravelled shoulders on the north and south sides of this pavement, respectively 6 feet and 9 feet wide. Putnam's car was proceeding east. In the car were his wife, on his right, his son Douglas, aged 13, behind him and his daughter, Lorraine, aged 18, behind her mother. Just before coming to Brown Road Putnam looked in his rear vision mirror and saw a black car about 40 feet behind his car and about the same distance

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behind the black car was the defendant's car both travelling east. At Brown Road the black car increased its speed and passed Putnam's car and then returned to its proper side of the road. The defendant then sounded the horn, increased her speed to about 35 miles per hour and endeavoured to pass Putnam's car and the collision occurred. Putnam says his car was never on the north side of the yellow line until after the collision which he says was caused by the defendant's car cutting sharply in front of his car thus coming over to the south side of the yellow line. The defendant says that her car was never south of the yellow line until after the impact took place; that the accident was caused by Putnam's car turning at an angle of 45 degrees and coming on to the north side of the yellow line and striking the rear end of her car; and that she was never on the south side of the yellow line until the plaintiff's car had come to a full stop in the ditch.

[After reviewing the testimony of plaintiff and defendant and of the latter's husband, ROBERTSON, J. continued:] There is thus a direct contradiction of those in the Putnam car and those in the defendant's car. The plaintiff called two garage men who swore the accident could have happened in the way the plaintiff says it did. The defendant called two garage men who supported the defendant's evidence as to how the accident happened. All the garage men agree that the cars must have come into collision at an angle of somewhere in the neighbourhood of 45 degrees. As far as I can see the marks on the car might have been caused either in the way described by the plaintiff's witnesses or by the defendant's witnesses. When cars, going as fast as these cars were, come into collision on a highway their positions do not remain constant, *i.e.*, while the impact may be at a certain angle, both cars or one of them may slew around or skid so that there may be marks made while the cars were separating which would not appear if the cars came into collision and at once came to a stop. However Putnam's version of the accident except as to the west-bound car is corroborated by the evidence of an independent witness Jonathan Powell who was called by the defendant. He says he was working at his place about 300 yards west of where the

accident took place. He had a clear view of the scene of the accident. He saw the Putnam car "going leisurely" before it reached the intersection of Brown Road; he saw the dark car overtake the plaintiff's car and pass it. He then saw another car, which turned out to be the defendant's car, overtake the Putnam car and pass it in the ordinary manner and then go over to the right side, that is, the south side of the road; then he saw the green car "wobble and zig-zag" and finally run into the ditch. On cross-examination he said he saw the defendant's car pass the Putnam car and get to its right side of the road and then the Putnam car appeared to be in trouble; that the defendant's car appeared to turn over to its own side rather quickly; that the Putnam car came over, that is, to the north of the centre line, after it was apparently hit; that the Putnam car was going straight and did not cut in, and that the Putnam car did not pass the defendant's car at any time. He says the west-bound car was not near the scene of the accident at the time it occurred. His son W. G. Powell saw the plaintiff's car when it went into the ditch. He corroborates his father as to the west-bound car. He came with his father to the scene of the accident. He was not asked as to whether or not he saw the defendant moving her car as she and her husband alleges. It is rather extraordinary that she should have moved her car three times after the impact without either of the Powells seeing this.

On the preponderance of evidence I find the west-bound car had nothing to do with the accident. I further find the defendant's car suddenly cut in in front of the Putnam car and it was this negligence which caused the accident. It was submitted by counsel for the defence that Putnam was negligent, and that even if I should find the defendant negligent, it was Putnam's ultimate negligence which caused the accident, in that he appreciated the danger caused by the defendant's negligence and could have prevented the accident by putting on his brakes. In support of this the defendant relies upon Putnam's evidence which is as follows:

He says he was alarmed when the defendant's car pulled up alongside of his car because he thought it could not get by owing

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to the presence of the west-bound car and he thought something was going to happen. On his examination for discovery he said that when the defendant's car drew up alongside his he held his car in the same position because he thought he was as safe as he could be; that he had no idea that the driver would cut across him the way she did; that he thought "she could squeeze in and that there was plenty of room for her to pass; that she might snap in a little closer of course." Later on in the same examination he said he was not startled or upset when the defendant's car pulled up opposite him but he did not think she was "going to snap in the way she did"; he thought "she would squeeze in." His evidence would thus seem to be rather contradictory. However, he said that things happened so quickly that he did not have time to apply his brakes. From the above evidence it is clear that while he thought a dangerous condition existed it was because of the alleged position of the west-bound car. He had no idea that the defendant's car would turn in front of his car. It was the sudden "cutting in" of the defendant's car which brought about the accident. Whether my finding as to the west-bound car is correct or not I think Putnam was not negligent. In the absence of a west-bound car the defendant had plenty of room and Putnam had no reason to fear her car would cut in. On the other hand let it be assumed that there was a west-bound car as Putnam alleges. In view of the speed of the two cars it would take about one and one-half seconds from the time the front of the defendant's car would come opposite to Putnam's car until its rear would be at the front end of Putnam's car. This would not give Putnam much time in which to make up his mind and to act. In the circumstances I do not think the failure of the plaintiff to apply his brakes was negligence on his part. I do not think it was a step that a reasonably careful man would fairly be expected to take in the circumstances.

There was no contest as to the *quantum* of the special damages. The plaintiff Edgar Putnam is entitled to the special damages amounting to $1,978.55. I assess the general damages to which Ethel Alice Putnam is entitled at the sum of $1,250.

I assess the general damages to which Lorraine Putnam is entitled at $3,000. There will be damages for the respective plaintiffs for these amounts, with costs.

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Judgment for plaintiffs.

BRITISH COLUMBIA INTERIOR VEGETABLE MARKETING BOARD *ET AL.* v. KAMLOOPS PRODUCE COMPANY.

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In Chambers
1938
Feb. 8, 10.

Injunction — Interim — Action — Discontinuance — Marketing Board and agency—Status to sue for injunction—Damages because of injunction —Inquiry as to—R.S.B.C. 1936, Cap. 165.

The plaintiffs, both Board and agency, brought action and obtained an *interim* injunction restraining the defendant from marketing potatoes. The plaintiffs gave notice before expiry of the *interim* injunction to have the *interim* injunction continued, but before it came on for hearing they wholly discontinued the action as they were advised that they had no *status* to bring it. The defendant then applied for an inquiry as to the amount of damages sustained by it as a result of the *interim* injunction, claiming it had suffered damage in respect of eight cars of potatoes through loss of profit, costs of unloading, storage and reloading, and loss of market, also loss of business connections.

Held, that in the exercise of its judicial discretion the Court should order an inquiry.

Held, further, that the contention that the Court, before directing an inquiry, must decide whether the defendant was acting illegally in carrying on its business, must be rejected.

APPLICATION by defendant for an inquiry as to the amount of damages sustained by it in consequence of an *interim* injunction obtained by the plaintiffs. The plaintiffs had brought action against the defendant and applied *ex parte* and obtained an *interim* injunction restraining the defendant for a limited period from continuing to market potatoes. The injunction contained the usual undertaking on behalf of the plaintiff to abide by any order as to damages which the Court might make in case the defendant sustained any by reason of the injunction. Notice of motion was given by the plaintiffs before

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the period for which the *interim* injunction had been granted had elapsed, to have the *interim* injunction continued, but before the motion came on for hearing the plaintiffs wholly discontinued the action. Heard by Murphy, J. in Chambers at Vancouver on the 8th of February, 1938.

Nicholson, for plaintiffs.
Norris, K.C., for defendant.

Cur. adv. vult.

10th February, 1938.

Murphy, J.: Plaintiff, the British Columbia Interior Vegetable Marketing Board, hereinafter referred to as the Marketing Board, was duly constituted under the Natural Products Marketing (British Columbia) Act, now R.S.B.C. 1936, Cap. 165, to administer the British Columbia Interior Vegetable scheme, a scheme for the control and regulation within the area designated by the said scheme of the transportation, packing, storage and marketing of vegetables and certain other farm products grown in such area.

By the provisions of said Act and the regulations issued thereunder the Marketing Board has power to designate the agency through which any regulated product shall be packed, stored or marketed. In pursuance of these powers the Marketing Board designated the other plaintiff, Interior Vegetable Marketing Agency, Limited, hereinafter referred to as the Marketing Agency, as the agent through which regulated products were to be marketed. Potatoes are amongst such regulated products. The Marketing Board had power to appoint sub-agents.

The defendant in December, 1937, was marketing potatoes within the area designated as being under the jurisdiction of the Marketing Board although it had not been appointed a sub-agent. Plaintiffs sued defendant and applied *ex parte* and obtained an *interim* injunction restraining it for a limited period from continuing to market, *inter alia,* potatoes. The injunction contained the usual undertaking on behalf of plaintiffs by their counsel to abide by any order as to damages which the Court might make in case it should thereafter be of the

opinion that the defendant had sustained any by reason of said injunction.

As a result of the injunction being granted, defendant alleges that it has suffered damage in respect of some eight cars of potatoes which were detained at Kamloops, through loss of profit, cost of unloading, cost of storage, cost of reloading and loss of market.

Defendant also alleges that it has suffered loss as a result of said injunction because of loss of business connections in the City of Vancouver and loss of producer connections.

Notice of motion was given by plaintiffs before the period for which it had been granted had elapsed, to have the *ex parte* injunction continued but before this came on for hearing they wholly discontinued this action. Their reason for so doing was that they were advised that they had no *status* to bring it, the Attorney-General for British Columbia being the only person who could do so. Defendant now applies for an inquiry as to the amount of damages sustained by it in consequence of said injunction. The nature of the undertaking given on behalf of plaintiffs is set out in *Re Hailstone*; *Hopkinson* v. *Carter* (1910), 102 L.T. 877, by Farwell, L.J., at 880:

> It is not a contract between the parties which either party can sue upon or be sued upon. It is an undertaking given to the Court, and to be enforced by the Court, and the Court only.

It is consequently for the Court in the exercise of judicial discretion to say whether or not in any given case there is to be an inquiry as to damages. The principle on which such judicial discretion is to be exercised is set out in *Graham* v. *Campbell* (1878), 7 Ch. D. 490, at 494; 47 L.J. Ch. 593 at 596:

> The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so.

There is no need for a hearing to determine that the injunction was wrongly asked for. Plaintiffs by discontinuing the action admit this is so. On the facts here I see no special circumstances which would justify me in refusing an inquiry.

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On the contrary, to my mind, plaintiffs acted wholly without justification in bringing this action since admittedly they had no *status* to do so. The only person who had a cause of action against the defendant was the Attorney-General of British Columbia. Under such circumstances, why should plaintiffs be allowed to hail defendant into Court, and inflict possibly heavy loss upon it through an interlocutory injunction obtained *ex parte*, without being called upon to redress such damage? It is argued that they acted in the interests of public policy. But the law has placed in the hands of the Attorney-General, and in his hands only, the right to question the acts of defendant by such proceedings as are in question herein. Plaintiffs are in law by their own admission utter strangers to the cause of action alleged in these proceedings. It is not for them to say on the ground of public policy, or on any other ground, that legal proceedings, such as these, are to be instituted against the defendant, much less had they any right to bring such proceedings themselves in their own name.

Then it is argued that the Court before exercising its discretion, whether or not it will direct an inquiry as to damages, must decide whether or not defendant was acting illegally. This would involve an actual trial of the action. To my mind it is tantamount to saying that the Court must decide whether the judge who granted the *interim* injunction was right or wrong in so doing. But the law is that defendant is entitled to the benefit of the undertaking as to damages, even though it should afterwards be decided that the injunction was wrongly granted owing to the mistake of the Court itself: *Griffith* v. *Blake* (1884), 27 Ch. D. 474; 53 L.J. Ch. 965; *Re Hailstone; Hopkinson* v. *Carter, supra.* Further, defendant was exercising its common-law right to carry on a business which was perfectly legitimate at common law. If said business was illegal it was so by virtue of the provisions of the Natural Products Marketing (British Columbia) Act. Admittedly the only person who can agitate the question of such illegality in the civil Courts is the Attorney-General. How can plaintiffs by committing against the defendant the civil wrong of suing it, when they had no *status* to do so, and by committing against it

the further civil wrong of obtaining an *ex parte* injunction against it, thereby possibly inflicting heavy loss upon it, acquire the right (unless indeed defendant chooses to make no claim to be indemnified under plaintiffs' undertaking for such possible heavy loss) to have that determined which the law says shall only be determined on the responsibility and by the act of the Attorney-General? Again, if effect be given to the argument put forward, the following anomalous situation would result. If plaintiffs, having instituted these proceedings against defendant, did not apply for and obtain an *interim* injunction defendant could have the action immediately struck out by following the procedure substituted by our Rules for the old demurrer procedure. If, however, plaintiffs had obtained such injunction they would thereby acquire the right to carry on their litigation against defendant, unless it was content to take no steps to compel plaintiffs to fulfil their undertaking to be responsible for the possibly heavy loss inflicted upon it. In other words, in the one case the Court would strike out plaintiffs' action because it was wrongfully conceived but if plaintiffs were astute enough to add to their already wrongful conduct the additional civil wrong of obtaining an *interim* injunction the Court would be powerless to compel plaintiffs to fulfil an undertaking given to the Court itself, as a condition upon which said injunction was obtained, unless it first conceded to plaintiffs the right to carry on litigation which the Court would otherwise terminate immediately once the fact that plaintiffs were without *status* to pursue it was brought to its attention.

In the exercise of judicial discretion I hold that defendant is entitled to the inquiry asked for.

Defendant requests that this inquiry take place before the registrar at Kamloops. In my opinion the nature of the proposed inquiry is such that the making of it cannot be referred to the registrar. Important points of law may well arise. It is impossible for me at this stage to instruct the registrar on the legal basis upon which the proposed inquiry must be made. I, therefore, direct that such inquiry must take place before a judge. The matter of where it is to take place may be further spoken to, if desired.

Application granted.

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1938
March 9;
April 30.

FUNK v. PINKERTON: McKINLEY, Third Party.
McKINLEY AND McKINLEY v. PINKERTON.
WILSON, WILSON AND MacKAY v. PINKERTON AND McKINLEY.
MITCHELL AND MITCHELL v. PINKERTON AND McKINLEY.

Negligence—Automobiles—Collision—Both drivers at fault—Contributory Negligence Act—Evidence—R.S.B.C. 1936, Cap. 52, Sec. 2.

In the case of two persons using the highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other, a duty arises to take care.

Two cars collided in the full light of day in the centre of a highway in the country where there were no intervening distracting conditions existing at the time. The driver of each car was on an equal footing, both being experienced drivers, and the cars of which they had full control were adequately equipped. They had a clear and sufficient field of vision at all material times.

Held, that they were both in an equal degree guilty of negligence that caused the collision.

CONSOLIDATED ACTION resulting from a collision between two automobiles. The facts are set out in the reasons for judgment. Tried by Morrison, C.J.S.C. at Vancouver on the 9th of March, 1938.

W. S. Owen, and *J. A. McLennan*, for plaintiff Funk.

G. Roy Long, for plaintiffs Mitchell and Mitchell.

Marsden, for plaintiffs Wilson and MacKay.

D. J. McAlpine, for plaintiffs McKinley and McKinley, and defendant and third party McKinley.

Locke, K.C., and *Yule*, for defendant Pinkerton.

Cur. adv. vult.

20th April, 1938.

Morrison, C.J.S.C.: This is a consolidated action. The occupants of the cars, other than the drivers, were passengers. The two cars collided in the full light of day in the centre of a highway in the country where there were no intervening distracting conditions existing at the time. The defendant Pinkerton was accompanying his friends, the occupants of his car, to a theatre. The defendant McKinley was on his way to Harrison Hot Springs. The driver of each car was on an equal footing. Both were experienced drivers. The cars, of which they had full control, were adequately equipped. They had a

clear and sufficient field of vision at all material times. I find they were both in an equal degree guilty of negligence that caused the collision. The law applicable can be put compendiously in the words of Lord Esher, M.R., in *Lane* v. *Cox*, [1897] 1 Q.B. 415 at 417:

> [Where] two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other, a duty arises to take care.

This duty is reciprocal. The duty, a breach of which gives rise to cause of action in negligence cases, is to take due care under the circumstances. I find that both drivers committed a breach of that duty on the occasion in question. On the one hand, there is the evidence of the constables as to the position of the cars where, after recoiling, they stood, which evidence I accept; and that of the eye-witness, George C. Chournair, as to the approximate speed at which the defendant Pinkerton was driving and the course he was following shortly before the accident. I had a critical view of the locality, applying certain tests on the ground. I disregard the photographs which do not give a true picture, particularly of the growth at the material points nor of the field of vision available to both drivers. The growth consisted, as a matter of fact, of rather tall ferns or bracken and was not, as the photographs might indicate, a growth of trees or thick tall shrubbery. A man driving a car going either way could easily see over the growth a car approaching sufficiently far away to avoid a collision. If any degree of ordinary care were taken I do not find that the place was in any way a dangerous part of the thoroughfare. One of the tests to be applied in determining the degree of credence to be attached to evidence of witnesses is to see if they are interested in either the parties involved or in the outcome of the trial. I attach very little importance to the evidence, if any, of the occupants of the cars, either as to the rate of speed or particularly as to what part of the road the cars were taking up. On the other hand, theories were advanced by several expert witnesses and gravely submitted as to the reaction of the two cars based upon their appearance from photographs and the positions in which it was put to them the cars were found after the collision. This kind of evidence, which was conflict-

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ing is nearly, but not quite, just as futile as to theorize about the vagaries and place of lodgement of a collar button after it slips from the fingers of one dressing for dinner. I do not think that the driver McKinley was under the influence of intoxicating liquor at the time. He had without mishap come that far through the city and suburban traffic.

I cannot leave the case without expressing extreme disapproval of the method adopted by the insurance investigator and the defendant of going in pursuit and securing the statement of patients, victims of the accident, whilst they were in the hospital, placed in the hands of counsel, and with which they are confronted at the trial with a view to displace evidence given on oath. It is a matter of surprise and regret that hospital authorities would allow access in this way to their patients, although it may be difficult where the pursuer, as here, is a medical man identified with hospital work and involved in the cause of the patients' injuries. An extract from the evidence of one of them on cross-examination will, I submit, suffice to justify this observation:

Cross-examination of Mrs. Jean Wilson by Mr. *Locke*:

On the day following did Dr. Pinkerton come with a man named Caron and introduce him to you? . . . . .

Locke: Now, will you answer my question. Did Dr. Pinkerton come into your room and introduce Mr. Caron to you? Yes.

And did he tell you at the time who they were?—who Mr. Caron was? He just said it was Mr. Caron. Miss Cant told us before it was his lawyer.

Did he not tell you on the Monday when he was there with Mr. Caron that Mr. Caron was the adjuster of his insurance company? No, he never did.

Did he tell you before that that his adjuster would come to see you? No, an adjuster was never mentioned.

Now, in the presence of Dr. Pinkerton, did you say to Mr. Caron that Dr. Pinkerton was not to blame for the accident in your opinion? Well, I was under the impression . . . . .

Locke: Did you not say to Mr. Caron in the presence of Dr. Pinkerton that Dr. Pinkerton was not to blame at all for the accident, in your opinion? I don't remember.

Did you not say that the other car was on the wrong side of the road and that there was nothing that Dr. Pinkerton could have done? I don't remember saying it.

Did not your daughter say the same thing? No.

To Mr. Caron and Dr. Pinkerton in your presence at that time? I don't know. I was too sick that day—

Didn't your daughter say in your presence that the other car was travelling about 40 miles an hour? I never heard her say it.

Did Mr. Caron say to you that he would have a statement typewritten, and that he would bring it back for you to sign? I don't know whether he said that or no, but he brought it back.

Did he come back, and did he show you this statement that I now show you? Yes.

And did you sign it? I could not read it. I had no glasses.

THE COURT: But did you sign it? Yes.

Is that your signature? Yes, that is how I signed my name years ago.

Well, just look at it.

Locke: I see it is signed "Jean Wilson"? Yes.

Did you write that? Yes.

And Jean Patterson, how did that come to be there? Well, I guess I was nervous at the time and made a mistake.

I accede to the request of counsel for the defendant Pinkerton to deliver one judgment to cover all the other cases. There will be judgment for the plaintiffs for $37,135.77 to be distributed in accordance with the Contributory Negligence Act:

Mrs. McKinley,	General damages $	200.00	$ 200.00
Mr. McKinley,	Special "	837.67	
	Consortium	50.00	887.67
Jean Wilson,	Special damages	322.10	
	General "	1,250.00	1,572.10
Jean P. Wilson,	Special "	397.55	
	General "	900.00	1,297.55
Mrs. MacKay,	Special "	328.95	
	General "	1,500.00	1,828.95
Mrs. K. Mitchell,	Special "	943.10	
	General "	7,000.00	7,943.10
Mr. Funk,	Special "	4,096.40	
	General "	19,310.00	23,406.40
			$37,135.77

I will hear counsel, if necessary, as to the manner in which the sum of $19,310 is arrived at.

Judgment for plaintiffs.

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Feb. 21, 22; *March* 3.

BRUNE v. STENSTO.

Husband and wife—Alienating wife's affections—Loss of consortium—Damages—Wrongful harbouring—Onus on plaintiff.

If a person persuades a wife to leave her husband or induces her to leave or incites her to leave, or procures her leaving, then he is liable in an action for damages. Adultery is no part of the action in such a case.

In an action by a husband for the enticing away of his wife he must prove that it was the defendant's enticement which caused her to cease from cohabiting and consorting with her husband. Where the only evidence is that it was she, rather than the defendant, who was the enticer, the action fails.

On the claim for damages for wrongful harbouring:—

Held, that on the facts the claim has not been made out.

ACTION for damages for loss of *consortium*, the plaintiff alleging that the defendant alienated his wife's affections, also for wrongfully harbouring her. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 21st and 22nd of February, 1938.

Adam S. Johnston, for plaintiff.
Cunliffe, for defendant.

Cur. adv. vult.

3rd March, 1938.

ROBERTSON, J.: The plaintiff alleges the defendant alienated his wife's affections and sues for damages for loss of *consortium* and for wrongfully harbouring her. Mrs. Brune had been married to a man named Maland. While Maland was absent she became the plaintiff's mistress. Later she divorced Maland and married the plaintiff on June 24th, 1935.

On June 28th, 1937, the plaintiff, who is a fisherman, left for the west coast of Vancouver Island to engage in his occupation, expecting to be away some months. He left his wife in their home. She alleges that there was a quarrel between her and her husband just before he left and this affected her love for him. The husband denies this. It is clear from the wife's letters to the plaintiff written during July and August, 1937, that they were still on affectionate terms. On this and all

other points in which his evidence is in conflict with that of his wife I accept his evidence.

In December, 1936, the defendant met the plaintiff's wife at Alberni. He did not see her again until July, 1937, when she was playing whist at the same table and reminded him of their having met before. That night he took her and a friend of her's home in his motor-car. The defendant saw her again early in August, every day, for a short period. They motored to Harrison Hot Springs one day, returning the same day. The result was that they became too friendly. The plaintiff's wife says she asked the defendant to take her to Victoria. He met her at Nanaimo and took her in his car to Victoria where they spent the night in the same hotel room. She says she then told him that she "did not have any husband." She says that later in the month she telegraphed the defendant asking him to meet her, with his car, at the boat on arrival at Nanaimo on August 15th to take her to Alberni, at which point she expected to take the boat to Ucluelet to see her husband. Her sister went with her. The defendant met them at Nanaimo and took them to Alberni. The wife and her sister took the boat to Ucluelet, having arranged with the defendant that they would return by the same boat, spending only one night at Ucluelet and that he would drive them to Nanaimo. When they got to Ucluelet the plaintiff was absent. His wife, instead of waiting for him, returned with her sister and the defendant drove them to Nanaimo. She says that she told the defendant after the Ucluelet trip that she was going to leave her husband and that she would kill herself rather than live again with the plaintiff. In view of her letters of August 17th and 18th to her husband I am quite sure this was not her feeling towards him, but it is in line with what she now says, and what the defendant says is the case, *viz.*, that the plaintiff's wife was pursuing the defendant. From her letter of August 19th, 1937, it is apparent that her feelings had changed towards him on that date because of two letters he wrote her.

The defendant and the wife met again in Vancouver in September. She says that at this time she suggested to him that she should go and live with him at Sproat Lake. He said that

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she had a nice home and should remain there and that he did not want her. She said she cried and told him that he did not want to see her again and that she wanted to "come and be where you are." The result was he remained over in Vancouver. She asked him to buy her a ring. He bought a diamond ring on September 13th on which was engraved the words "din George," meaning "Your George." On that night the defendant returned to Sproat Lake. There was then no arrangement about her going to Sproat Lake. At a later date the wife says she wrote to the defendant saying she was going to Sproat Lake to live with him and to meet her at Nanaimo. She says the defendant replied telling her not to come, that there was no place for her there. She again wrote and said she was coming and asked the defendant to meet her at Nanaimo. She went, paying her own expenses to Nanaimo. The defendant met her at Nanaimo and took her to Sproat Lake where he had secured a cabin and they lived there as man and wife.

The defendant says that he met the plaintiff's wife in December, 1936, and again in July, 1937, as related by her. He again saw her towards the end of July or beginning of August. They went to Victoria together. He supplied the motor-car and paid the hotel bill. She paid for some of the meals. Later she told him that her sister was coming for a holiday and asked him to take them in his motor-car to Alberni and he agreed to do so. He met them at Nanaimo on August 14th, 1937, and took them to Alberni from whence they proceeded to Ucluelet. Within a day or so later he motored them to Nanaimo. He says that he came to Vancouver on Saturday, September 11th. The plaintiff's wife met him at the boat and they arranged to meet the next day. He intended to leave Sunday night. She prevailed upon him to stay saying: "If you leave now you will never come back to see me. Buy me a ring to prove that you will come back again." He said he could not do that on Sunday. As a result of her entreaties he agreed to stay and did stay until the next day and bought her the ring. He says on several occasions the plaintiff's wife told him her husband was not treating her well; that he came home drunk now and then and beat her; that he had transferred some insurance in which

she was the beneficiary to his son; that he had also brought a loose woman into their home and when she objected, the woman said she would have her thrown out and her husband did not do anything about it; and that he was spending money on his family which should have been kept for their use. The impression he got was that she had not a happy home. After the trip to Ucluelet she told him she wanted to leave her husband. He told her not to do so. Later as I have mentioned she wrote asking if he would take her to Sproat Lake, that she wanted to go up to live with him. He replied that there was no place for her; that she had better stay at home; that her house looked all right and it would be better for her. He stated there was no persuasion on his part to leave her husband. On the contrary he told her to stay and to make the best of it. Later on when she wrote asking to come to Sproat Lake he told her she could come if she wanted to come, that he would get a cabin and if she thought it all right she could come but that it was better for her to stay in Vancouver. He got a letter from her saying that she would be in Nanaimo on Saturday night. He met her and took her to his cabin at Sproat Lake.

Mr. and Mrs. Orr say that they were at the plaintiff's house in North Vancouver the day she left Vancouver to go to Sproat Lake to live with the defendant. They say that on that date they saw the plaintiff's wife receive a letter from the defendant in which was $20. She told them that she was going to leave her husband. The plaintiff's wife and the defendant denied that the defendant sent her $20. I find that he did. These are the facts. I now turn to the law.

If a person persuades a wife to leave her husband or induces her to leave, or incites her to leave, or procures her leaving then he is liable—see *Smith* v. *Kaye* (1904), 20 T.L.R. 261; *Place* v. *Searle,* [1932] 2 K.B. 497, at 514; 101 L.J.K.B. 465. Adultery is no part of the cause of action in this case: *Marson* v. *Coulter* (1910), 3 Sask. L.R. 485; 16 W.L.R. 157. Osler, J.A. said in *Lellis* v. *Lambert* (1897), 24 A.R. 653 at p. 664:

The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium,* never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her

home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no "procuring and enticing," or "harbouring and secreting" of the wife, no action lay at the suit of the husband against the man.

Middleton, J. was unable to accept this statement of the law. See *Bannister* v. *Thompson* (1913), 29 O.L.R. 562, at 565, and on appeal (1914), 32 O.L.R. 34.

In *Ballard* v. *Money* (1920), 47 O.L.R. 132, Hodgins, J.A. points out that the *Bannister* decision is contrary to what was said by Osler, J.A., *supra,* and which he says is in line with certain American cases but is contrary to the view expressed by Mr. Bishop in his New Commentaries on Marriage. The latest case I have been able to find is *Newton* v. *Hardy* (1933), 149 L.T. 165. In that case the action was by Newton's wife against a Mrs. Hardy. Swift, J. after drawing attention to the form of declaration before 1863 in an action of this sort—Bullen and Leake's Precedents of Pleadings, 3rd Ed., 1868, p. 340 (which is practically the same as the allegations in Bullen and Leake, 9th Ed., 409)—says (p. 167):

In this case it seems to me that the allegations against the defendant is and must be that she enticed him, not to make love to her, not to commit adultery with her, not to go and stay with her, but to give up cohabitation with his wife and to abandon the *consortium* to which the wife was entitled.

At p. 168 he says:

I hold it is not enough, merely for a woman to make another woman's husband love her or even to alienate the affection of a husband from his wife. Before there can be a cause of action she must go further, and, in the words of the statement of claim, she must "procure or entice him to cease from cohabiting and consorting with the plaintiff," . . .

In that case the defendant and the plaintiff's husband swore that it was the plaintiff's husband's suggestion which brought about the adulterous relationship between the defendant and the plaintiff's husband. With reference to that he says (p. 168):

It is no use saying that I cannot believe that, that I must be very credulous if I do believe it, and that common sense and a knowledge of human nature picked up in this court or in the adjoining Division prevents me allowing myself to believe such a thing. That may be perfectly true, but the answer is, it is the only evidence that I have got. It is the plaintiff who has got to prove that it was Mrs. Hardy who enticed Mr. Newton, and the only evidence I have got of it is that it was he who seduced her, and I cannot say that she enticed him.

And at p. 169:

> . . . but in order that this case may succeed I must be satisfied that his leaving the house on the 8th Oct. was in consequence of some advice, some persuasion, some enticement by Mrs. Hardy. It is not enough that Mrs. Hardy has committed adultery with him. It is not enough if Mrs. Hardy were to say: "If you like to come and see me in London we will repeat the experiences of the Waldorf Hotel." It is not enough that Mrs. Hardy says: "I love you very much; come and be with me at Cloughton for a week, or let us have a week together in London." In order that this case may succeed the plaintiff must prove that his finally leaving her house and breaking off *consortium* on the 8th Oct. was caused or procured, or induced by some action of Mrs. Hardy's as opposed to his own voluntary going in his pursuit of Mrs. Hardy. It comes to this, she must prove that he was enticed rather than that he was the seducer, and, to my mind, she has not proved that.

The gift of the ring and the $20 are important but it must be borne in mind that this was some time after the plaintiff's wife had become the defendant's mistress; also according to the evidence of the plaintiff's wife and the defendant, the ring was not given as an inducement for the wife to leave the husband but as a pledge that the defendant would return to see the plaintiff's wife. The $20 was given not as an inducement for the wife to leave the husband but to assist her in carrying out the intention which she had already formed against the wishes of the defendant.

On the crucial point I find myself in the same position as Mr. Justice Swift. The only evidence on this is the evidence given by the defendant and the plaintiff's wife. In my opinion the plaintiff has failed to make out a case on his first cause of action.

As to the claim for harbouring, the plaintiff accompanied by Johnson and another went to the cabin at Sproat Lake. While the defendant first of all said the plaintiff's wife was not there he finally admitted that she was in the cabin and shouted to the wife, "Do you want to talk to them?" Without any real opposition the plaintiff saw his wife. Johnson says that the plaintiff asked his wife several times to come back and she told him to get out. Johnson then told the plaintiff he could do nothing there and to come away and he did. There was no refusal on the part of the defendant to deliver the plaintiff's wife to him as the plaintiff did not request the defendant to do so. See

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form of statement of claim for harbouring—Bullen and Leake's Precedents of Pleadings, 9th Ed., 409, and 3rd Ed., 340. The defendant says that when the plaintiff asked his wife to go with him she said to leave her alone; that she didn't want to go home, and then she ran out of the house. Later on he told her to go back to her husband and she said she would kill herself before she would live with him. On these facts I think the case of harbouring is not made out.

The action is dismissed with costs.

Action dismissed.

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Mar. 11, 18.

BOOTH v. CANADIAN PACIFIC RAILWAY COMPANY.

Carriers—Steamship—Drunken passenger—Assaults passenger late at night while asleep in saloon—Duty to protect passengers from drunkards.

Where a carrier allows a passenger who is obviously drunk to come on board his vehicle or vessel it becomes the duty of the carrier to take due and reasonable care, having regard to his condition, to prevent any inconvenient or injurious consequences to other passengers arising from his condition. What this duty and reasonable care must be in any given case depends upon the circumstances.

H., a logger, was noticeably drunk when he, with a companion, went on board the "Princess Mary" at about 11.30 at night. They went to the purser's office where they secured a stateroom, and a waiter took them to the room where they drank beer for some time. At about 2 a.m. H. left the stateroom and wandered into the saloon where he took hold of the foot of a passenger who was asleep and gave it a wrench and then kicked the passenger in the ribs. He then went to the smoking-room but soon came back to the saloon, where he attempted to lie down on a settee beside the plaintiff. She shoved him away, whereupon he struck her violently two or three times. The watchman passed through the saloon at 12 o'clock, 1 o'clock and 2 o'clock, and at each time saw the plaintiff asleep as he passed through. In an action for damages for negligently permitting an obviously drunken passenger to assault her during the voyage:—

Held, that under the circumstances the defendant had filled its legal duty with respect to caring for the safety of its passengers when it caused the passenger quarters to be patrolled and reported upon every hour, and the action was dismissed.

ACTION for damages, the plaintiff alleging that while a passenger on the vessel "Princess Mary" the defendant company negligently permitted an obviously drunken passenger to assault her during the voyage. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 11th of March, 1938.

A. M. Whiteside, K.C., and *Washington*, for plaintiff.
McMullen, K.C., for defendant.

Cur. adv. vult.

18th March, 1938.

MURPHY, J.: On the evening of September 23rd, 1937, a logger named Hamilton, in company with another logger named Hudemka, went to the C.P.R. dock to go on board the "Princess Mary." They came down the steps accompanied by a woman. The two men did not go on board at once but sat on the dock drinking beer and singing. The boat was to sail at 11.45 and apparently did so. About 11.30 the two started to go aboard. Ganest, the ticket collector, was at the wharf end of the gang-plank and took their tickets. I find that Hamilton was noticeably drunk when he passed Ganest and that Ganest knew, or ought to have known, of his condition. There is no evidence that his behaviour was other than quiet and peaceful from the time he started to go aboard until he took hold of Murray's foot as hereinafter narrated. He had a large pack which he was carrying when he boarded the vessel and I find he did not fall as he went up the gang-plank. When he and Hudemka came on board they met Bonner who was acquainted with Hamilton but did not know Hudemka. As Hudemka and Hamilton had considerable baggage Bonner assisted them in carrying it. Shortly after going on board Hudemka and Hamilton went to the purser's office to get a stateroom. This they secured. It was to be occupied by both of them. A waiter took the three men to this stateroom. When Hamilton went on board the purser was in his office, the chief steward was on the main passenger deck as were also five or six waiters who were there to show passengers to staterooms when directed so to do by the purser. All these people retired at about 12.30, at which time

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everything was quiet on the ship. Plaintiff had gone on board early and had later lain down upon a settee in the ship's saloon and gone to sleep.

After 12.30 the only servants of defendant company who made any tour of the ship were the watchman and Graham, the second steward. The watchman's duties were primarily in connection with protecting the ship from fire. He had to go all over it each hour and punch clocks in various parts of it. In fulfilling this duty he would pass through the saloon in which plaintiff was asleep. There were several other passengers in this saloon who were also asleep. The watchman had no specific duties in connection with the passengers but doubtless, if he saw any disturbances on his rounds, it would be his duty to report same to the chief officer on watch. Graham, the second steward, was concerned with the passengers. It was his duty to patrol the passenger-quarters portion of the ship both outside and inside once every hour and to report to the chief officer on watch if all was well. He made this tour on the night in question passing through the saloon about 12 o'clock and again at 1 o'clock and 2 o'clock and reported on each occasion to the chief officer. He saw plaintiff asleep on the settee each time he passed through the saloon. I do not accept the evidence that he had been drinking. In my opinion he was perfectly sober. He had many other duties beside that of touring the passenger portion of the ship. Each tour would occupy him for about ten minutes. In the intervals he had to prepare meals for the officers, answer bells rung by passengers, clean up the companion-way and do various other things. He was quite deaf. He uses a mechanical device to assist his hearing but even with this his hearing was quite defective as was evident when he was in the witness box.

When Hamilton, Hudemka and Bonner went to the stateroom, which was to be used by Hudemka and Hamilton, a carton of beer was produced and some beer was drunk; Bonner says a bottle each although he states he did not finish his bottle as he says he does not like beer. According to his evidence the three of them remained in the stateroom talking until a little after 1 o'clock when Hamilton left saying he was going to the

coffee-room to get some coffee. Bonner says he remained for about 20 minutes and then left. I think it is highly probable that more than one bottle of beer was consumed, at any rate by Hamilton and Hudemka. This seems to be indicated by Hamilton's extreme state of intoxication at the time of the assault and by Hudemka's refusal to get up when told that Hamilton had got into trouble. I think also that Bonner is mistaken when he says that Hamilton left the stateroom shortly after 1 o'clock. In my opinion it was considerably later. The assault complained of herein I find took place between 2 and 2.30. Hamilton, when he came out of the stateroom, passed through the saloon where plaintiff and others were sleeping. As he did so he took hold of the foot of a passenger named Murray, who was asleep, and gave it a wrench and also kicked Murray in the ribs. Murray got up and Hamilton grabbed his hands and mumbled something unintelligible and remained for a moment or two and then went aft to the smoking-room. At this time Hamilton was so drunk that Murray could not tell what he was talking about. After he had left, the latter heard him talking to someone in the smoking-room. He came back into the saloon, probably, a short time afterwards; at any rate Murray had not yet fallen asleep again but was dozing. On this return trip he attempted to lie down on the settee beside the plaintiff. She shoved him off, whereupon he struck her violently in the face two or three times. A passenger who was sleeping opposite jumped up and grabbed him. Plaintiff ran towards the front of the boat shouting for help but finding no one returned and went down the companion-way towards the dining-room. She pushed open a door there but did not enter. Then she saw Hamilton at the top of the companion-way, apparently coming down. She felt that he was following her so she ran behind the companion-way and there found a towel which she used to wipe the blood from her face. Hamilton came down and went into the dining-room. Plaintiff passed behind him, went up the companion-way and then up to the wheel-house to report the matter to the chief officer as she could find no one below. A passenger was already there and had reported to the chief officer what had happened. The chief officer put her into his own room

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back of the wheel-house and sent the deck-hand for Graham, the steward. Graham was apparently in the galley back of the dining-room when the assault took place. Owing to his deafness he would not hear the plaintiff's screams. Graham went up to the wheel-house and was directed by the chief officer to take plaintiff to a stateroom and to care for her. When Bonner left the stateroom he went to the coffee-room in search of Hamilton. He did not find him there and went down to the dining-room to get something to eat. There he saw Hamilton sitting at the table. He went to Graham, the second steward, to order coffee and was informed by Graham of the assault. This shows that Bonner came to the dining-room well after 2 o'clock since I am convinced it took place between 2 and 2.30 o'clock. It would seem to follow that he did not leave the stateroom until nearly 2 o'clock, if not later. He came back and told Hamilton of it who said he did not remember anything about it. He then looked after Hamilton, walking him about in order to sober him up. Finally, apparently, Hamilton went to his stateroom. On arrival at Powell River, the next port of call, the captain handed Hamilton over to the police.

Plaintiff now brings this action against defendant the owner and operator of the "Princess Mary," the vessel on which the assault occurred, alleging that defendant negligently permitted an obviously drunken passenger to assault her during the voyage. It is not denied that she was a passenger and had duly paid her fare. The legal obligation of a carrier to passengers is set out in *Canadian Pacific Rway. Co.* v. *Blain* (1903), 34 S.C.R. 74, at 79, as follows:

> "Whenever a carrier, through its agents or servants, knows or has opportunity to know of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions or to use proper means to prevent or mitigate such injury, the carrier is liable." [5 A. & E. Encycl. of L., 2nd Ed., 553, quoted and approved.]

A more specific statement as to duty in connection with a drunken passenger appears in *Adderley* v. *Great Northern Railway Co.*, [1905] 2 I.R. 378, at 406. It is there laid down that where a carrier allows a passenger who is obviously drunk to come on board his vehicle or vessel it becomes the duty of the

carrier to take due and reasonable care, having regard to his condition, to prevent any inconvenient or injurious consequences to other passengers arising from his condition. What this duty and reasonable care must be in any given case depends upon the circumstances. To allow a man obviously drunk to go to the top deck of an omnibus which was overcrowded with passengers as was done in *Murgatroyd* v. *The Blackburn and Over Darwen Tramway Company* (1887), 3 T.L.R. 451, is clearly a different thing from allowing a passenger likewise obviously drunk, but quiet and peaceful, to go on board a vessel which has stateroom accommodation late at night on the passenger deck of which vessel there were two ship's officers and several waiters present to care for passengers. As stated, in my opinion, the ticket collector, Ganest, knew or ought to have known that Hamilton was obviously drunk when he allowed him to go on board. After he came on the vessel there was no need for defendant to do anything for he and his companion, Hudemka, secured a stateroom almost at once and they were shown to it by a waiter. In my opinion the defendant was reasonably entitled to conclude that he would remain there and go to bed. There is no evidence that any of the defendant's servants were aware that Hamilton and his companions had any intoxicating beverage with them when they went to the stateroom nor that there was any noise or loud talking by anyone in the party. The purser, first steward and the waiters were about the boat to look after passengers until about 12.30. All was then quiet on the boat as was shown by Murray's evidence. Under these circumstances I do not think it can be reasonably said that the defendant should anticipate that Hamilton would, after the lapse of an hour and a half or more after he was shown to his stateroom, leave it and commit a violent assault on a passenger. This assault was so sudden that it could not have been prevented unless a person were standing within reaching distance of Hamilton. I accept Capt. Fogg's evidence that he said nothing to the effect that the boat was unsafe to travel on because of rowdy behaviour. I also accept his statement that he had no previous experience of trouble on board resulting from passengers' actions. Under all the circumstances, since everything was quiet on the boat and

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the passengers settled down for the night, as seems to have been the case on the night in question when the purser, first steward and waiters retired at 12.30, and Hamilton was in his stateroom with no noise emanating therefrom, it would appear to me that defendant was fulfilling any legal duty incumbent upon it to care for the safety of passengers in accordance with the law above cited when it caused the passengers' quarters to be patrolled and reported upon every hour.

The action is dismissed with costs. If I am in error I assess the damages at $500.

Action dismissed.

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Jan. 19; *Feb.* 23.

IN RE GOUGE ESTATE.

Estate—Testator's Family Maintenance Act—Petition of wife—Adultery and desertion by wife alleged—Evidence insufficient—Provision by will inadequate—R.S.B.C. 1936, Cap. 285.

Deceased left an estate of about $11,000. By will he devised $1,000 to his widow and the balance of the estate to a nephew, two nieces and a sister-in-law. On an application by the widow for adequate provision for maintenance under the Testator's Family Maintenance Act:—

Held, that although the evidence showed that she and her husband had not been living together for over ten years, it was not sufficient to show that she had deserted him. It was found also that the allegation of her adultery had not been sustained, and that the $1,000 left the widow by the will was not adequate provision for her.

PETITION by the widow of deceased for an order for adequate provision for her maintenance under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 20th and 21st of December, 1937.

Reid, K.C., for the petitioner.
L. H. Jackson, for the executor.
Carew Martin, for the beneficiaries.

Cur. adv. vult.

19th January, 1938.

ROBERTSON, J.: Frederick Pitcairn Gouge died on April 26th, 1937, leaving an estate valued at about $11,000. By his will he devised $1,000 to his widow and the balance of his estate to two nieces, a nephew and his sister-in-law. The widow is now 60 years of age. She applies under the provisions of the Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285, for an order for adequate provision for her proper maintenance and support. There was no issue of the marriage. The petition is opposed on the ground that the widow's character or conduct was such that an order should not be made. It is alleged that the widow was guilty of adultery with a man named Ferguson.

[After reviewing the evidence, ROBERTSON, J. continued:] After careful consideration of all these facts I am unable to find that the petitioner was guilty of adultery with Ferguson. It is also suggested that the petitioner deserted the deceased in 1916. It appears at that time the petitioner and her husband were operating a hotel in Nanaimo. When prohibition came in, it could not be operated at a profit. The petitioner remained at Nanaimo and the deceased went to Vancouver where he obtained employment in a brewing company. That employment continued up to his death. The material filed contains statements alleged to have been made by the deceased to the deponents that he had separated from his wife because of her misconduct and her refusal to live with him. On the hearing, objection was taken to this evidence and also to *viva voce* evidence of a like nature. I reserved consideration on this point, stating that I thought that the evidence was admissible for the purpose of showing the state of mind of the deceased but not as proof of the facts stated by him and I think it is the true view. No evidence was led to prove these alleged facts. Upon my finding as to adultery, it follows that the deceased was wrong as to his suggestions, which I had held were not proved, that the petitioner was guilty of misconduct. Now as to the desertion, it must be borne in mind that the right of a wife to support and maintenance by her husband is only suspended by her voluntary desertion of him without any proper cause—see *Jones* v. *Newtown and Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; *Burrow*

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IN RE GOUGE ESTATE

Robertson, J.

v. *Burrow* (1930), 143 L.T. 679; and *Markovitch* v. *Markovitch* (1934), 151 L.T. 139—yet in an application under the Act, this fact may be of great importance if the deceased had suffered by reason of such desertion. There is no express evidence that he did. The petitioner admits that they had not lived together as man and wife since 1926. She says that she had no quarrel with her husband, that in 1926 he paid a $300 fine for her; that in 1931 he paid her board for three or four months and about two years ago he paid $35 for two pairs of spectacles for her. In 1931 she says she asked him for a regular allowance which he refused, saying he had not more than enough for himself. She further says that from time to time he sent her small sums of money and he always helped her out when she applied to him. As against this it is urged that a declaration made by her in 1933, when applying for relief, in which she stated that she was "married" but said she was a "widow," and a similar declaration, made in 1934, in which she said she was "not married" but she was a "grass widow," and her letter of April 19th, 1937, to the deceased in which she says: "I came over to see you but you told me you did not want to see me," show they must have been separated and on bad terms.

On the whole I do not think that there is sufficient here to show desertion by the wife. There is sufficient to show that they were not living together, but apparently the husband never made any demand upon her to return and live with him. When she asked for an allowance, according to her, he did not say he would not make an allowance because she was not living with him but gave the excuse he only had enough for one. I find that the deceased did not make adequate provision for the proper maintenance and support of the petitioner. There is no doubt that the petitioner is in bad health. The $1,000 left to her will not keep her very long. Material filed shows that she will require at least $75 per month. I make the following order: (1) The petitioner is to receive $75 per month until further order, these payments to be charged on the whole estate. As the petitioner must use her legacy of $1,000 until exhausted for her support the monthly payments will not commence until October

1st, 1938; (2) Further consideration is reserved; (3) All parties to have costs out of the estate.

I think the executor was entitled to be represented on the hearing. He was served with the petition. His counsel produced evidence which was of assistance. Further it seems to me advisable that he should appear on this application so that the Court may be fully advised.

23rd February, 1938.

On January 19th, 1938, I handed down reasons for judgment [*supra*] as I understood counsel for the beneficiaries did not wish to file further material on the question of the amount to be allowed to the petitioner, in the event of her application being successful. I was mistaken in this and consequently I gave leave to file further material. Upon consideration of all the material on this point, I fix the monthly allowance at $60 per month.

Petition granted.

LONG v. CITY OF VANCOUVER.

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1938
March 9;
May 5.

Negligence—Damages—Injured by falling post—Liability of city—Vancouver Incorporation Act, 1921, Amendment Act, 1936, B.C. Stats. 1936, Cap. 68, Sec. 26—Limitation of time for bringing action.

Section 26 of the Vancouver Incorporation Act, 1921, Amendment Act, 1936, provides: "(1.) Every public street, road, ... shall be kept in reasonable repair by the city, and in case of default the city shall, . . . , be liable for all damages sustained by any person by reason of such default. (2.) No action shall be brought against the city for the recovery of damages occasioned by such default, whether the want of repair was the result of misfeasance or non-feasance, after the expiration of three months from the time when the damages were first sustained."

The city had erected a sign post about nine feet high on the boulevard just off the travelled portion near the north-east corner of Cambridge and Kootenay Streets. As the plaintiff was walking from a house to her automobile, which was standing on the travelled portion of the street, the post fell and injured her. In an action for damages:—

Held, that the case was one of negligence to repair, but as the writ was issued more than three months after the damages were sustained, the action must be dismissed.

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ACTION for damages for injuries sustained owing to the falling of a post erected by the city on one of its streets in Vancouver. Tried by MORRISON, C.J.S.C. at Vancouver on the 9th of March, 1938.

Bray, for plaintiff.
McTaggart, for defendant.

Cur. adv. vult.

5th May, 1938.

MORRISON, C.J.S.C.: On a date before 1937, the city erected on the boulevard near the north-east corner of Cambridge and Kootenay Streets, a wooden sign post of a height of about nine feet above the ground. This part of the boulevard was away from the travelled part of the highway or street. On the 28th of May, 1937, Mrs. Long alighted from her automobile and crossed to visit some friends who lived nearby this part of the highway. When returning to her car, and before she reached the boulevard, the post fell and injured her. The statement of claim alleges that the defendant suffered this post to become and to remain in a decayed and dangerous condition, whereby it became a nuisance and a source of danger to persons using the highway and adjacent lands. It does not appear when the post was placed there—nor how it came to fall—nor how often, if at all, the post was inspected or replaced or repaired.

The defendant pleads that it had had no notice or knowledge of its dangerous or unsafe condition and that it had no reason to anticipate the existence of such condition nor any reasonable opportunity to remedy such condition and that the injury suffered by the plaintiff was the result of an inevitable accident without any default or negligence on its part. And it further pleads subsection (2) of section 320 of the Vancouver Incorporation Act, 1921, as re-enacted by section 26 of the Vancouver Incorporation Act, 1921, Amendment Act, 1936: [already set out in head-note].

Subsection (25) of section 2 of the city charter defines "street," as used throughout, to

include highways, roads, lanes, alleys, avenues, thoroughfares, drives,

bridges, viaducts, squares, triangles, courts, courtyards, boulevards, sidewalks, rights of way, mews, and all other places open to the use of the public for the purpose of traffic except private rights of way on private property, and the space above and the soil beneath the surface of the same respectively.

The city council have power by section 163, subsection (64) to pass by-laws for regulating the width of streets and roads and of

surveying, settling, and marking the boundary-line on all streets, roads, and other public communications, and for giving names thereto, and affixing such names at the corners thereof on either public or private property; and no by-law for altering the name of any street, square, road, lane, or other public communication shall have force or effect, unless and until the by-law has been registered in the Land Registry Office of the Vancouver Land Registration District:

A plan of the place where the post was erected was filed as an exhibit showing the boundary-line of Kootenay Street as surveyed, settled and marked in accordance with this power.

The action was brought after the expiration of three months. Mr. *McTaggart* for the defendant raised the point *in limine* that as this, if anything, is a case of non-feasance—non-repair the plaintiff is met by the above section 320, subsection (2).

Mr. *Bray,* in order to get over that obstacle, submits that it is a case of nuisance and therefore not affected by that provision in the charter.

I do not think that this is a case of nuisance. The defect was latent. The post *in situ* did not interfere with the use by the public of the highway. There was no sidewalk on the boulevard. The plaintiff was not on city property at the time the post fell. She must prove that the damage received by her was the result of a breach of a legal duty owed her by the defendant. What was that duty? As between the parties, she was a stranger to whom the defendant owed no legal duty at the time. However, as I view the case as one of negligence to repair, I sincerely regret to hold that the action was brought too late. The question of nuisance is fully dealt with in Salmond, particularly at pp. 136, 234, 240, 299 and it would be supererogation on my part to encumber my judgment with extracts and citations. The references are to pages in the 8th edition.

The action fails. As I think the plaintiff has brought her

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action *bona fide* and upon grounds which she was instructed she could do so with success unfortunately the time limit *supra* having been no doubt inadvertently overlooked each party will pay their own costs.

Action dismissed.

C. C. 1938 *March* 29.

REX v. CROWE. (No. 2.)

Practice—County Court—Dismissal of charge by justice of the peace—Motion to quash appeal—Objection that it must be by way of application in Chambers and not by Court motion—Criminal Code, Secs. 749 and 750—Order VII., r. 3 (a).

Upon the respondent moving to quash an appeal by the informant from the dismissal of a complaint against him, the appellant raised the preliminary objection that under the County Court Rules the motion to dismiss should have been made by way of application to a judge in Chambers and not by Court motion.

Held, that in all matters of practice and procedure the County Court Rules apply. Under clause (*a*) of Rule 3 of Order VII. of said Rules interlocutory applications are made according to Form 9A. Form 9A states that the application is to be made to a judge in Chambers. The respondent must strictly comply with the County Court Rules and having issued a notice of motion to the Court instead of making an application in Chambers, the motion is dismissed.

MOTION by respondent for an order that the appeal by the informant from the dismissal of a charge against the respondent be quashed on the ground that the appellant did not comply with the provisions of section 750 of the Criminal Code. There was also a motion to amend the said notice of motion. The respondent was tried summarily on a charge that while intoxicated he did unlawfully have control of an automobile and the charge was dismissed. Counsel for the appellant raised the preliminary objection that the application was an interlocutory one and that clause (*a*) of Rule 3 of Order VII. of the County Court Rules was applicable, and that Form 9A was the only form in which the respondent could apply, and that the applica-

tion should be made to a judge in Chambers instead of a motion to the Court. Heard by SHANDLEY, Co. J. at Victoria on the 29th of March, 1938.

R. D. Harvey, for the motion.
C. L. Harrison, *contra*.

Cur. adv. vult.

29th March, 1938.

SHANDLEY, Co. J.: A charge against the respondent upon summary conviction, that while intoxicated he did unlawfully have control of an automobile contrary to the Criminal Code, was dismissed. The appellant herein, who was the informant and complainant, appealed to this Court against the order of dismissal. The trial is set for next Tuesday.

The respondent on the 22nd instant, issued a notice of motion returnable this day for an order that the appeal be quashed or dismissed on the ground that the appellant did not comply with all of the provisions of section 750 of the Criminal Code. On the 26th instant, the respondent issued a second notice of motion for an order that he be at liberty to amend his first notice of motion adding further grounds why the appeal should be quashed or dismissed. On the return of the motion the appellant raised the preliminary objection that under the County Court Rules the motion of dismissal should have been made by way of an application to a judge in Chambers and not by Court motion.

The appeal is launched under section 749 of the Criminal Code and under clause (*d*) of that section the appeal is to the County Court. I therefore take it that in all matters of practice and procedure the County Court Rules apply. If I am right in that contention then under clause (*a*) of Rule 3 of Order VII. of the County Court Rules interlocutory applications may be made either *ex parte* or by notice of application according to the form in the Appendix (Form 9A), and notice of the application shall be served on the opposite party one clear day at least before the hearing of the application. Form 9A states that the application is to be made to a judge in Chambers.

It has been held in all appeals under said section 749 that

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the appellant must strictly fulfil all of the provisions of the procedure in appeals as outlined in section 750 of the Code. As I have already said the notices of motion are for an order that the appeal be quashed or dismissed on the ground that the appellant has not strictly complied with said section 750. I am of the opinion that the rule works both ways and that the respondent must strictly comply with the County Court Rules and this he did not do when he issued a notice of motion to the Court instead of making an application to a judge in Chambers.

The motions are therefore dismissed; costs to the appellant in any event.

Motions dismissed.

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1938
April 5, 12.

NATIONAL TRUST COMPANY LIMITED v. VANCOUVER KRAFT COMPANY LIMITED *ET AL.*

Companies—Trustee for bondholders—Trustee's conduct—Remuneration of trustee—Duties and responsibilities of trustee.

The plaintiff's application to the Court to adopt the recommendation of the district registrar that $27,000 less $5,000 already paid on account, be fixed as the amount of remuneration payable to the plaintiff as retiring trustee under a trust deed executed by the defendant to secure a bond issue of $1,250,000, was opposed by the company, first because of the trustee's conduct, and secondly as to *quantum*. There was no charge of bad faith or dishonest conduct on the part of the trustee, but that it was not acting in the interest of the bondholders when it took steps in March, 1935, to enforce the provisions of the trust deed in their behalf, and because it did not retire from its position as trustee when the bondholders' meeting held in June, 1935, pursuant to a Court order, expressed the opinion that the proposed enforcement proceedings should not be proceeded with, but continued to act until it was requested to resign in the summer of 1936, and that during said interval its conduct was not in the interests of the bondholders.

Held, that the plaintiff's conduct in carrying out the trust was not open to criticism and the amount recommended as remuneration was a fair and reasonable one, and should be approved, but there should be deducted therefrom a profit made by the plaintiff in making certain arrangements with other companies for the purpose of preserving the assets of the defendant company, although said arrangements were

made in the interest of the bondholders and resulted beneficially to them, the making of them was not part of the services which plaintiff rendered as trustee, and as such should be regarded as compensated for by the sum hereinbefore awarded to the plaintiff.

APPLICATION for the adoption of the recommendation of the district registrar at Vancouver that certain sums be fixed as remuneration payable to the plaintiff as retiring trustee under a trust deed executed by the Vancouver Kraft Company Limited to secure a bond issue. The facts are set out in the reasons for judgment. Heard by MURPHY, J. at Vancouver on the 5th of April, 1938.

J. W. deB. Farris, K.C., and *Stockton*, for plaintiff.
Burns, K.C., for defendants.

Cur. adv. vult.

12th April, 1938.

MURPHY, J.: Application to the Court to adopt the recommendation of the district registrar at Vancouver that the sum of $27,500, less $5,000 already paid on account, be fixed as the amount of remuneration payable to the plaintiff as retiring trustee under a trust deed executed by the defendant the Vancouver Kraft Company Limited to secure a bond issue of $1,250,000. Said bonds were duly issued and on May 15th, 1931, $1,143,000 of said bonds were outstanding and continued to be so outstanding during the period of plaintiff's trusteeship. The company opposes the adoption of the district registrar's recommendation on two grounds: First, because of the trustee's conduct; second, on the question of *quantum*.

The relevant facts are not in dispute and are set out in the voluminous affidavits used before the district registrar. Since these affidavits must necessarily be perused by an appellate tribunal, before which this decision may come for review, it would serve no useful purpose to again set them out herein.

With reference to the plaintiff's conduct, as trustee, the company makes two complaints. First: That plaintiff was not acting in the interest of the bondholders when it took steps in March, 1935, to enforce the provisions of the trust deed in their behalf and, second, because it did not retire from its

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position as trustee when the bondholders' meeting held in June, 1935, pursuant to a Court order, expressed the opinion that the proposed enforcement proceedings should not be proceeded with but continued to act until it was requested to resign in the summer of 1936, and that during said interval its conduct was not in the interests of the bondholders. Since under our law trustees are held to the strictest account for the manner in which the trust is carried out the formulation of such complaints would seem to amount to an accusation of a breach of trust. Counsel for the company, however, expressly disclaimed any charge of bad faith or dishonest conduct on the part of the trustee but argued that, apart from any question of breach of trust, the Court should examine into the trustee's conduct and, if same was not found to be in accordance with the high standard required by the law to be lived up to by trustees, the remuneration to which the trustee would otherwise be entitled to should be reduced, even though such conduct did not amount to a breach of trust.

As to the first ground of complaint in regard to conduct, it arises, in my opinion, because of confusing the Leadbetter interests with the interests of the bondholders as a whole. The Leadbetter interests were the originators of the enterprise, which was to be carried on by the Vancouver Kraft Company Limited, and were, as shareholders, heavily interested in the equities owned by that company. The amount of bonds represented by the Leadbetter interests during almost the entire period of plaintiff's trusteeship aggregated only about $100,000 as against a total outstanding of $1,143,000. Those interests now control about 82 per cent. of all outstanding bonds, the balance having been acquired during the reorganization negotiations. Default took place in the payment of interest and in the provision of sinking fund in May, 1931. The Vancouver Kraft Company Limited proposed to engage extensively in the lumber business and in the manufacture of Kraft paper. When said default took place its plant was not completed. A sum of $300,000 to $400,000 would be required for such completion. An unprecedented depression was in full force at the time of the default and continued to be operative until towards the fall

of 1934. At that time the outlook for the proposed business became much improved. During this interval plaintiff had conserved the assets of the Kraft Company and was actively assisted in so doing by the Leadbetter interests. Numerous attempts had been made to either dispose of these assets or to obtain money through reorganization, necessary to place the Kraft Company in a position to meet its obligations and to proceed with its venture. In these attempts plaintiff also had the active assistance of the Leadbetter interests. Attempts with this end in view were also made independently by the Leadbetter interests. All had ended in failure. When the outlook improved, late in 1934, the trustee was in a difficult position. The essential carrying charges were being obtained through an arrangement made with the Leadbetter interests. It was a term of this arrangement that the parties furnishing the money should have a claim for same in priority to the bonds. Taxes were likewise accumulating and were of course an additional charge having priority over the bonds. When plaintiff proposed to begin enforcement proceedings the Leadbetter interests expressed strong opposition.

Leadbetter informed plaintiff that he had excellent prospects of interesting English capital in the venture but these were merely prospects, not concrete propositions. Interested as the Leadbetter interests were in the Kraft Company's equity in its holdings, and secured as they were by a prior charge to the bonds for the moneys they were advancing to carry the Kraft Company's assets, it would seem but natural that they should wish the existing situation to continue in the hope that time might improve the outlook for the company. Plaintiff, however, had to have regard primarily to the interests of the bondholders and to the interests of the whole body of the bondholders. The Leadbetter interests, as stated, represented then only a small minority of the outstanding bonds. In view of the length of the depression, prior to the improvement towards the end of 1934, and in view of the precarious business conditions existing throughout the world, which were so pronounced that I think judicial notice can be taken of them, rendering it quite possible that the improved outlook would

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shortly disappear, it would seem to me that the decision of the trustee to begin enforcement proceedings is not only not open to criticism but that had the trustee allowed the opportunity to pass without action it might well have found itself called to account by individual bondholders for dereliction of its duty as a trustee. A body of bondholders, represented by attorneys in Spokane, had filed a large number of suits against Leadbetter seeking rescission of their purchase of the Kraft Company bonds on the ground of fraudulent misrepresentation. These attorneys notified the trustee, prior to the time when the trustee started enforcement proceedings, that they would advise their clients against approving of the trustee's proposed action and this fact is put forward as an additional ground in support of the attack on the trustee for persisting in its course. It is argued that under the circumstances plaintiff should have consulted the bondholders. On this point it is to be noted that under our law the trustee is held responsible for the conduct of the trust and is accountable for same to each individual bondholder and that it cannot divest itself entirely of such responsibility by calling bondholders' meetings. A bondholders' meeting had been called in 1932 which was attended by only a small minority of holders of bonds. The house that had issued these bonds had disappeared. The majority of them were held in small amounts by parties scattered up and down the Pacific Coast States. No record was available to the trustees as to their names and addresses. Under all the facts, as set out in the affidavits, I see no reason for criticism of the trustee in proceeding without calling a bondholders' meeting. Trustees for bondholders frequently, if not usually, do so where breaches of the trust agreement have taken place.

It is further urged that the trustee was informed by Leadbetter that the taking of enforcement proceedings would militate strongly against a favourable arrangement being made with the prospects he had in view, inasmuch as, if such steps were taken, it would be known to everyone that the company's assets might eventually be purchased at a forced sale. It would seem, however, that any one proposing to invest money in such a venture would make enquiries not only as to the value of the

assets but as to the position of the company and would thereby become aware that enforcement proceedings would probably not be long delayed.

It is urged that the Court should hold from the circumstances surrounding the trustee's decision that there was a conflict between the trustee's interest and its duty to the bondholders. In my opinion there is no ground to be found on the record for such a contention. It is suggested that the trustee feared that delay in taking enforcement proceedings would result in endangering the recovery of its fees. But I am of opinion that if there were any foundation for such fear—and I can see none in the affidavits filed—it would be the duty of the trustee to act at once in the hope that something could be salvaged for the bondholders rather than by further delay to allow preservation expenses and trustee fees to eat up all the assets since of course its fees must be paid before the bondholders could receive anything. Moreover, it is important to keep in mind what the decision to take such enforcement proceedings really amounted to. A moratorium Act was in force in British Columbia at the time. What that decision amounted to then was that plaintiff placed before the Court the whole situation. All parties interested would be heard on the application for permission to begin such proceedings and were in fact so heard. It is urged that weight should be given to the fact that the Court-directed meeting of bondholders refused to sanction the continuation of enforcement proceedings. It is, however, to be borne in mind that the situation had changed from the time when the plaintiff decided to make an application under the Moratorium Act and the holding of such meeting. As soon as notice of such application was given the company called a meeting of the bondholders on its own behalf to be held on the same day as was the Court-directed meeting. At this meeting a tentative scheme of reorganization was laid before the bondholders. Further, there was far from a full representation of the outstanding bonds at the Court-directed bondholders' meeting.

On consideration of all the facts set out in the voluminous affidavits I am of the opinion that the trustee acted in the best interests of the whole body of bondholders in deciding to make an application under the Moratorium Act.

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As to the second ground of attack on the trustee's conduct, that it did not resign after the Court-directed bondholders' meeting had refused to sanction its action in applying under the Moratorium Act, and that it did not thereafter act in the bondholders' interest, it is to be noticed in the first place that no request for such resignation was made. On the contrary the trustee's assistance was sought and obtained in carrying out the proposed scheme of organization. A perusal of the material convinces me that the trustee co-operated in every way with the company to bring to a successful issue the tentative reorganization proposals submitted in the summer of 1935. In the outcome a scheme of reorganization which resulted in the bondholders obtaining a substantial payment on their bonds and preference and common shares in the company, which is to be incorporated to carry on the Kraft Company enterprise, was successfully accomplished in the summer of 1936. Throughout the intervening time plaintiff was actively engaged in assisting in perfecting such scheme of reorganization though it is true that said scheme was initiated and in its financial aspects carried out not by plaintiff but by the Leadbetter interests. Plaintiff's conduct, however, throughout this interval was, in my opinion, actuated solely by a desire to protect the bondholders as a body. It co-operated fully with the Leadbetter interests in seeing that the legal requirements of such reorganization were fully complied with and saw to it, in so far as it was possible to do so, that the bondholders were fully cognizant of what the reorganization scheme meant to them. I find that plaintiff's conduct in the carrying out of the trust imposed upon it by the trust deed is not open to criticism. On the contrary it seems to me to have realized fully the heavy responsibilities resting upon it as such trustee and to have faithfully discharged its duties.

On the question of *quantum*: Having regard to the extent of the trust, the care, trouble and responsibility imposed upon the trustee, the time occupied in performing its duties, the skill and ability displayed and the success which has attended the execution of the trust, I am of opinion that the amount recommended by the district registrar is a fair and reasonable

compensation to the trustee for the care, pains, trouble and time expended in and about the execution of the trust in question. A mere perusal of the voluminous affidavits detailing the trustee's actions, coupled with the fact that the trustee successfully preserved the assets of this company through an unprecedented depression and that its trusteeship in the outcome secured substantial benefits to the bondholders, together with some share holdings in the reorganized project, would seem to justify this view. The fact that the Leadbetter interests brought about the reorganization scheme finally adopted does not in my opinion militate against the view that it was plaintiff's trusteeship as carried out by it which secured the favourable outcome for the bondholders. Further, as already stated, the fact must be kept in mind that plaintiff was trustee not only for the Leadbetter interests but for the whole body of bondholders and would be held to strict account by the Court for its action in relation to the bondholders as individuals. In other words, this trust entailed a heavy responsibility upon the trustee which was in no degree lessened by its relations with or any assistance obtained by it from the Leadbetter interests. But in addition I think the weight of evidence justifies my acceptance of the recommendation of the district registrar. With regard to the affidavits made by residents of the United States, filed on this aspect on behalf of the company, it is admitted that trustees in that country, occupying a position such as was occupied by the plaintiff in this matter, are regarded by the law there as stake-holders. Under our law, however, the position of a trustee is very different. It places upon the trustee the primary responsibility for the protection of all the bondholders and holds such trustee to strict account at the suit of any particular bondholder suing on behalf of himself and other bondholders for all his actions in the carrying out of the trust. As to the affidavits made by persons, who have acted as individuals in a similar trustee capacity in Canada, it is to be noted that there are advantages to a company in having a corporation act as trustee for bondholders under a trust deed which are not existent if such trustee is an individual. In the first place continuity is an important factor. In the next place the

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fact that the trustee is a well-known financial corporation carrying on an extensive trust business is likely to be an assistance in the selling of the bonds. Further, a trustee, such as the plaintiff herein, has, through its extensive business relations and through its organization of a complete trust department, and maintenance of same for many years, advantages in carrying out the trusts beneficially for the bondholders which are not always or indeed frequently possessed by individual trustees. On the other hand, I have the affidavit of an officer of a nationally known trust company, apparently a business competitor of plaintiff, to the effect that the amount recommended is reasonable. I would allow plaintiff the sum of $22,500 in addition to the $5,000 already paid as a proper remuneration for its service. I would, however, deduct therefrom the sum of $1,678.19. This is an agreed amount of profit accruing to plaintiff as a result of arrangements made by it with the Columbia River Paper Mills and the Columbia River Paper Company whereby these companies furnished in part the moneys necessary to preserve the assets of the Kraft Company. It is not suggested that there was anything improper on the part of the trustee in the making of these arrangements and I find as a fact that they were in the interests of the bondholders and resulted beneficially to them. It is true that this profit was paid not by the Kraft Company but by companies advancing some of the funds for preservation expenses. The making of these arrangements, however, was part of the services which plaintiff rendered as trustee and as such should, in my opinion, be regarded as compensated for by the sum hereinbefore awarded to plaintiff. In arriving at my conclusion, I have treated the district registrar's report as merely informatory and have decided this matter as if it had come before me in the first instance without any reference having been ordered.

Plaintiff is entitled to costs.

Application granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

DALLAS v. HINTON AND HOME OIL DISTRIBUTORS LIMITED (p. 106).—Affirmed by Supreme Court of Canada, 25th March, 1938. See [1938] 2 D.L.R. 673.

FUJIWARA *et al.* v. OGAWA (p. 383).—Affirmed by Supreme Court of Canada, 17th February, 1937. See [1938] S.C.R. 170.

REOPEL AND REOPEL v. ROSS (p. 333).—Reversed by Supreme Court of Canada, 17th February, 1937. See [1938] S.C.R. 171.

REX v. PICKEN (p. 264).—Reversed by Supreme Court of Canada, 18th March, 1938. See [1938] 3 D.L.R. 32.

Cases reported in 51 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

LAND REGISTRY ACT AND ROBERT H. BAIRD, *In re* (p. 487).—Reversed by Supreme Court of Canada, 15th December, 1937. See [1938] S.C.R. 25; 1 D.L.R. 61; 7 F.L.J. 291.

STALEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 499).—Reversed by Supreme Court of Canada, 17th May, 1938. See [1938] 3 D.L.R. 81.

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ALIENS—*Convictions under The Opium and Narcotic Drug Act, 1929 — Deportation—Effect of section 26 thereof—Applicability of section 43 of the Immigration Act—Signature of acting deputy minister — Sufficiency—R.S.C. 1927, Cap. 93, Secs. 42 and 43—Can. Stats. 1929, Cap. 49, Secs. 4 and 26—R.S.C. 1927, Cap. 22, Secs. 2 (c) and 8.*] Before one convicted under The Opium and Narcotic Drug Act, 1929, can be detained in custody for deportation, an inquiry must be held to determine, first, that the convict has been convicted under one of the clauses of section 4 as specified by section 26 of said Act, and secondly that he is an alien. This inquiry my be entered upon only after the determination of sentence. Before section 43 of the Immigration Act can become operative it must be established that the inmate is an alien. The only machinery for enabling that to be done is that provided in section 42 of said Act. Section 43 cannot therefore become operative until after sentence determined and until the Board has made its finding and order for deportation. As the applicant is held under an order of the Minister of Justice issued under section 43 before said section became operative, he is illegally held and must be discharged. The acting Deputy Minister of Immigration has the capacity to sign an order under section 42 of the Immigration Act. REX v. LOW KEE. REX v. WONG KIT CHOW. **151**

ALIMONY. - - - - - **401**
See HUSBAND AND WIFE. 2.

APPEAL—Jurisdiction. - - **140**
See CRIMINAL LAW. 7.

2.——*Leave to—From sentence.* - **240**
See CRIMINAL LAW. 14.

3.——*Motion to quash—Objection that it must be by way of application in Chambers and not by Court motion.* - - **550**
See PRACTICE. 4.

4.——*Notice of by informant—Sufficiency —Prohibition.* - - - - - **516**
See CRIMINAL LAW. 4.

5.——*Practice—Notice of appeal out of time — Application to extend time for service.* - - - - - - **396**
See HOURS OF WORK ACT, 1934.

APPEAL—*Continued.*

6.——*To Supreme Court of Canada—Two actions consolidated for trial and appeal—Motion to approve security—Order for one Judgment.* - - - - - - **487**
See PRACTICE. 1.

ARTERIAL HIGHWAY. - **241, 422**
See MOTOR-VEHICLES. 1.
NEGLIGENCE. 2.

ASSAULT—On passenger. - - **538**
See CARRIERS.

AUTOMOBILE—Accident—Driving home in evening—Liability of employer—"Arising out of and in course of employment"—Interpretation. **106**
See NEGLIGENCE. 11.

2.——*Accident resulting in death of person injured—Action by parents—Compensation in respect of death—Measure of damages.* - - - - - - **83**
See FAMILIES' COMPENSATION ACT.

3.——*Boy injured crossing highway—Excessive speed—Evidence of—Expert opinion—Skid marks.* - - - - - **333**
See NEGLIGENCE. 16.

4.——*Entrusted by owner to a driver—Automobile driven to the common danger—Liability of owner.* - - - - - **1**
See CRIMINAL LAW. 2.

5.——*In control of while intoxicated.* - - - - - - - - - **516**
See CRIMINAL LAW. 4.

AUTOMOBILES—Collision — Both drivers at fault—Contributory Negligence Act. - - - - - **528**
See NEGLIGENCE. 1.

BANKS AND BANKING—*Indebtedness to bank—Moneys owing on agreement for sale—Assignment to bank as additional security—To secure future indebtedness—Further advances by bank—R.S.C. 1927, Cap. 12, Secs. 75 and 79—R.S.B.C. 1936, Cap. 148.*] In March, 1928, Mrs. Silk purchased a property in Vancouver with her own funds for $19,000, which was registered in the names of Mr. and Mrs. Silk as joint tenants. Mrs. Silk died in October, 1928, and in December, 1928, letters of administration of her estate were granted to Mr. Silk. In March, 1929, the above-mentioned property was registered in Mr. Silk's name as surviving joint tenant. In June, 1929, Silk sold the property to Nanson, Rothwell & Company, Limited under agreement for sale for $30,500. In June,

BANKS AND BANKING—*Continued.*

1929, two of the next of kin of Mrs. Silk notified Mr. Silk that the property having been purchased with Mrs. Silk's money, it was held by him in trust for her estate. In July, 1929, Silk being indebted to The Canadian Bank of Commerce, he assigned to the bank the money owing under the agreement for sale to Nanson, Rothwell & Company, Limited and notice of the assignment was given to said company. At the time of the assignment Silk owed the bank $500. At the commencement of this action on April 23rd, 1936, Silk owed the bank $6,758.90. In August, 1929, the next of kin of Mrs. Silk brought action against Mr. Silk for a declaration that said property belonged to Mrs. Silk's estate when a *lis pendens* was filed in the Land Registry office, and they recovered judgment on the 30th of May, 1930. Nanson, Rothwell & Company, Limited paid the bank $5,000 on the 18th of September, 1929, and a further sum of $4,338.92 on the 23rd of June, 1930. On the 27th of June, 1930, The Yorkshire & Canadian Trust Limited was appointed administrator of the estate of Mrs. Silk in the place of Mr. Silk. On the 1st of December, 1930, the bank received notice of the defendant's claim that the moneys due under said agreement for sale were the property of Mrs. Silk's estate, and in April, 1931, the defendant received notice that the bank claimed the money under said assignment. The said bank recovered judgment in an action against the administrator of the estate of Mrs. Silk for a declaration of ownership of money owing by Nanson, Rothwell & Company, Limited under the said agreement for sale. *Held,* on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that the assignment in question reads "As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain agreement for sale, ... , are hereby assigned to the said bank." Under the relevant sections of the Bank Act the bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business, but the bank cannot take such an assignment as security for an anticipated future indebtedness. The assignment is valid in respect to which it was taken as additional security for the debt of $500, but invalid in respect to which it purported to be security for any future indebtedness. The bank having received payment of the $500 debt, has no

BANKS AND BANKING—*Continued.*

claim under the assignment upon any moneys now owing by Nanson, Rothwell & Company, Limited upon the agreement for sale. THE CANADIAN BANK OF COMMERCE v. THE YORKSHIRE & CANADIAN TRUST LIMITED AS ADMINISTRATOR OF THE ESTATE OF NELLIE GRACE SILK, DECEASED. - - - - **438**

2.——*Security on land—When valid—Assignment of moneys under agreement for sale of land—Chose in action—Assignment of—When absolute—Can. Stats. 1934, Cap. 24, Sec. 75 (2) (c)—R.S.B.C. 1924, Cap. 135, Sec. 2 (25).*] The prohibition against taking security on land in the Bank Act is only against the taking of security to secure future advances at a time when no advance has been made, it does not apply when additional security is taken after an advance has once been made. An assignment of moneys due and to become due under an agreement for sale of land was found to have been taken as additional security for a past debt, and it was held that it did not become invalid through the fact that payments received thereunder paid off the debt of the assignor to the bank as it existed at the times when said payments were received. Whether an assignment of a chose in action is an equitable assignment or an absolute assignment within the meaning of the Laws Declaratory Act, all the terms of the instrument must be considered and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention of the parties was to give a charge only upon the debt or other legal chose in action the assignment is not absolute, while, on the other hand, if it is clear that the intention was to transfer all the debt or other legal chose in action to the assignee and to give him complete control, then the assignment is absolute. It is the real intention of the parties that must be ascertained and it is to be ascertained from the document itself. CANADIAN BANK OF COMMERCE v. YORKSHIRE & CANADIAN TRUST LIMITED. - - - - - - - - - **16**

BENEFICIARY—Designation of — Condition 19, Insurance Act—Designation by will—Change of beneficiary. **224**
See INSURANCE, ACCIDENT. 1.

CARRIERS—*Steamship — Drunken passenger—Assaults passenger late at night while asleep in saloon—Duty to protect passengers from drunkards.*] Where a carrier allows a passenger who is obviously drunk to come on board his vehicle or vessel it becomes the

CARRIERS—*Continued.*

duty of the carrier to take due and reasonable care, having regard to his condition, to prevent any inconvenient or injurious consequences to other passengers arising from his condition. What this duty and reasonable care must be in any given case depends upon the circumstances. H., a logger, was noticeably drunk when he, with a companion, went on board the "Princess Mary" at about 11.30 at night. They went to the purser's office where they secured a stateroom, and a waiter took them to the room where they drank beer for some time. At about 2 a.m. H. left the stateroom and wandered into the saloon where he took hold of the foot of a passenger who was asleep and gave it a wrench and then kicked the passenger in the ribs. He then went to the smoking-room but soon came back to the saloon, where he attempted to lie down on a settee beside the plaintiff. She shoved him away, whereupon he struck her violently two or three times. The watchman passed through the saloon at 12 o'clock, 1 o'clock and 2 o'clock, and at each time saw the plaintiff asleep as he passed through. In an action for damages for negligently permitting an obviously drunken passenger to assault her during the voyage:—*Held,* that under the circumstances the defendant had filled its legal duty with respect to caring for the safety of its passengers when it caused the passenger quarters to be patrolled and reported upon every hour, and the action was dismissed. BOOTH v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - - **538**

CERTIORARI.
146, 140, 158, 321, 280
See CRIMINAL LAW. 3, 7, 9.
HABEAS CORPUS. 2.
SUMMARY CONVICTION.

CHAMBERS—County Court — Motion to quash appeal—By way of application in Chambers and not by Court motion. - - - - - **550**
See PRACTICE. 4.

CHARGE TO JURY—No objection taken. - - - - - - **447**
See NEGLIGENCE. 17.

CHILDREN—Beneficiaries. - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

CHINESE GIRL—Claim of birth. **79**
See CHINESE IMMIGRATION ACT.

CHINESE IMMIGRATION ACT — *Chinese girl—Claim of birth in Victoria—Examina-*

CHINESE IMMIGRATION ACT—*Cont'd.*

tion by controller—Order for deportation—Dismissal of appeal—Habeas corpus—Order for examination by Court to determine place of birth—Appeal—56 Geo. III., Cap. 100, Sec. 3 (Imp.)—R.S.C. 1927, Cap. 95, Sec. 37.] A Chinese girl seeking admission into Canada, and claiming that she was born in Canada, was examined by the Controller of Chinese Immigration who then ordered that she be deported. An appeal from the order was dismissed. On an application for a writ of *habeas corpus* with *certiorari* in aid, an order was made that an examination do proceed before a judge of the Court to determine whether the applicant was in fact born in Canada. On appeal from the order:—*Held*, that this appeal should not now be heard because it is premature. The application before the learned judge should be proceeded with in accordance with the ruling that he has given to admit evidence of the Canadian citizenship of the respondent under section 37 of the Chinese Immigration Act, and "in a summary way" pursuant to section 3 of the Habeas Corpus Act of 1816, Cap. 100. THE KING v. SHIN SHIM. - - **79**

CHOSE IN ACTION—Assignment of—When absolute. - - - - - **16**
See BANKS AND BANKING. 2.

COLLISION—Automobiles—Both drivers at fault — Contributory Negligence Act. - - - - - **528**
See NEGLIGENCE. 1.

2.——*Automobiles—Crossing path of oncoming traffic—Degree of care to be taken—Excessive speed—Not keeping proper lookout—Contributory negligence.* - **422**
See NEGLIGENCE. 2.

3.——*Motor-vehicles — One car passing another when going in same direction—Passing car cutting in too sharply—Damages.* - - - - - - - - - - **383**
See NEGLIGENCE. 16.

4.——*Motor-vehicles — Two cars travelling in same direction — One passing the other—Passing car cutting in to right side of road too sharply—Necessity of other car to apply brakes.* - - - - - **519**
See NEGLIGENCE. 15.

COMMISSION—Right of — Sale of warehouse—Negotiations with purchaser—Subsequent sale through other agent on same terms — Efficient cause of sale. - - - - **9**
See PRINCIPAL AND AGENT.

COMMON GAMING-HOUSE—Money seized in—Order forfeiting. - **478**
See CRIMINAL LAW. 13.

COMPANIES — *Trustee for bondholders—Trustee's conduct—Remuneration of trustee—Duties and responsibilities of trustee.*] The plaintiff's application to the Court to adopt the recommendation of the district registrar that $27,000 less $5,000 already paid on account, be fixed as the amount of remuneration payable to the plaintiff as retiring trustee under a trust deed executed by the defendant to secure a bond issue of $1,250,000, was opposed by the company, first because of the trustee's conduct, and secondly as to *quantum*. There was no charge of bad faith or dishonest conduct on the part of the trustee, but that it was not acting in the interest of the bondholders when it took steps in March, 1935, to enforce the provisions of the trust deed in their behalf, and because it did not retire from its position as trustee when the bondholders' meeting held in June, 1935, pursuant to a Court order, expressed the opinion that the proposed enforcement proceedings should not be proceeded with, but continued to act until it was requested to resign in the summer of 1936, and that during said interval its conduct was not in the interests of the bondholders. *Held*, that the plaintiff's conduct in carrying out the trust was not open to criticism and the amount recommended as remuneration was a fair and reasonable one, and should be approved, but there should be deducted therefrom a profit made by the plaintiff in making certain arrangements with other companies for the purpose of preserving the assets of the defendant company, although said arragements were made in the interest of the bondholders and resulted beneficially to them, the making of them was not part of the services which plaintiff rendered as trustee, and as such should be regarded as compensated for by the sum hereinbefore awarded to the plaintiff. NATIONAL TRUST COMPANY LIMITED v. VANCOUVER KRAFT COMPANY LIMITED *et al.* - - - - - - - - **552**

COMPANY—*Action—Style of cause—Name of company—The abbreviation "Co." used for word "company"—Judgment—Order for committal — Prohibition—Appeal—R.S.B.C. 1924, Cap. 1, Sec. 23, Subsec. 13 (a); Cap. 53, Sec. 25—County Court Order VII., r. 6.*] In an action for money loaned, the defendant not having entered a dispute note, judgment by default was entered against him in December, 1931. In the style of cause the plaintiff was described as "Continental

COMPANY—*Continued.*

Marble Co. Limited." In September, 1936, on being summoned to appear for examination as a judgment debtor, the defendant was examined and committed to gaol for twenty days. Before his actual arrest the defendant applied to the Supreme Court for a writ of prohibition restraining the plaintiff from enforcing its judgment by attachmennt, on the ground that the corporate nam e of the company was "Continental Marble Company Limited" and the "Continental Marble Co. Limited" having no existence in fact there was no plaintiff, and consequently all proceedings were void and the County Court was without jurisdiction. It was ordered that a writ of prohibition do issue. *Held*, on appeal, reversing the decision of MORRISON, C.J.S.C., that the writ of prohibition cannot be supported if the Court has jurisdiction to cure the irregularity complained of, which consists in a trifling misnomer or clerical error in the name of the plaintiff, whereby the word "company" in its corporate name was contracted to "Co." The powers of amendment apply to companies in like manner as to private persons, and the abbreviation in question is a matter of amendment well within the powers conferred by section 25 of the County Courts Act and Order VII. of the County Court Rules. CONTINENTAL MARBLE COMPANY LIMITED v. LANGS. - - - - - **47**

COMPENSATION—In respect of death. **83**
See FAMILIES' COMPENSATION ACT.

CONDITIONAL SALE AGREEMENTS—*Sale of goods—Property to remain in vendor—Agreements not registered—Bankruptcy of purchaser — Trustee — Creditors—No judgments, attaching orders or writs of execution obtained by creditors—Secured creditors—R.S.B.C. 1924, Cap. 44, Sec. 3—B.C. Stats. 1929, Cap. 13, Sec. 2.*] The claimants sold goods to the debtor under conditional sale agreements dated September 22nd, 1931. The agreements provided that the property in the goods should remain in the seller but the agreements were not registered. At the time of the bankruptcy of the debtor in 1932 the goods passed into the possession of the trustee in bankruptcy. The creditors of the debtor had no notice of the provisions in the conditional sale agreements, but none of the creditors obtained any judgment or attaching order or issued a writ of execution. On an issue as to whether the claimants are preferred creditors:—*Held*, that notwithstanding the provisions of section 3 of the Conditional Sales Act as amended by section 2 of the Conditional Sales Act Amendment Act,

CONDITIONAL SALE AGREEMENTS—*Continued.*

1929, at the date of the authorized assignment made herein the said claimants were entitled to rank as secured creditors against the estate in bankruptcy of the above-mentioned debtor. *In re* BANKRUPTCY OF LYTTON CANNERS LIMITED, DEBTOR AND *In re* TYEE LUMBER COMPANY LIMITED AND SELECT LUMBER COMPANY, CLAIMANTS. - - **488**

CONSOLIDATED ACTIONS. 487, 470
See PRACTICE. 1, 3.

CONSORTIUM—Loss of. - **532**
See HUSBAND AND WIFE. 1.

CONSTITUTIONAL LAW—*Natural Products Marketing (British Columbia) Act—Validity—R.S.B.C. 1924, Cap. 46, Sec. 3—B.C. Stats. 1934, Cap. 38; 1936, Cap. 34; 1936 (Second Session), Cap. 30—R.S.B.C. 1936, Cap. 165.*] The following question was referred to the Court of Appeal for hearing and consideration pursuant to section 3 of the Constitutional Questions Determination Act: "Is the Natural Products Marketing (British Columbia) Act as amended by the Natural Products Marketing (British Columbia) Act Amendment Act, 1936, and the Natural Products Marketing (British Columbia) Act Amendment Act, 1936 (Second Session), or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* of the Legislature of the Province of British Columbia?" *Held*, that said Act and amendments thereto are not in any particular beyond the powers of the Legislature of the Province of British Columbia. *In re* CONSTITUTIONAL QUESTIONS DETERMINATION ACT AND *In re* NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT. - - - - - - **179**

2.——*Supremacy of Parliament — Construction of statute.* - - - **237**
See DAMAGES. 3.

3.——*The Natural Products Marketing Act, 1934, (Dominion) ultra vires—Money received under the Act—Liability of persons receiving same—Voluntary payments—Mistake of law—Can. Stats. 1934, Cap. 57; 1935, Cap. 64.*] By an agreement of the 20th of June, 1935, between the B.C. Coast Vegetable Marketing Board and the appellant, the Board agreed to designate the appellant as the agency through which the regulated product, as defined in the B.C. Coast Vegetable Marketing scheme, shall be marketed. Under its terms the appellant assumed obligations to the said Board and to the producers and agreed to duly account to the producers and to the Board for all regulated

CONSTITUTIONAL LAW—*Continued.*

product delivered to it. The respondent brought action for an account of all moneys received by the Board and the appellant in respect to the marketing of its vegetables between the 27th of May and the 15th of July, 1935, and for an account of all levies or tolls retained by them for marketing services. A further claim was made for labour and material supplied in the packing of vegetables and for a declaration that all levies and tolls purporting to be levied by them were illegal, first, because certain conditions defined by the statute and regulations necessary to validly constitute the Board were not complied with, and second, that The Natural Products Marketing Act, 1934, (Dominion) was *ultra vires*. It was held on the trial that The Natural Products Marketing Act, 1934, was *ultra vires*, that the plaintiff had no choice but to market its products through the defendant, and as under the agreement between "the Board" and the appellant they dealt with the money jointly, they were both liable. *Held*, on appeal, reversing the decision of FISHER, J., that the retention of levies and tolls was submitted to willingly. In the period in respect to which levies were made no question was raised; the payments were made voluntarily under an assumed liability creating in law no obligation to repay. The respondent, if not actually co-operating with the Board and this appellant, at least paid the levies under the impression that it was bound to do so, and the appeal should be allowed. VANCOUVER GROWERS LIMITED v. G. H. SNOW LIMITED. - - - - **32**

4.——*The Natural Products Marketing Act, 1934, (Dominion) — Validity — Money received under ultra vires Act—Liability of persons receiving same—Colore officii—Mistake of law—Can. Stats. 1934, Cap. 57; 1935, Cap. 64—B.C. Stats. 1936 (Second Session), Cap. 30, Sec. 5.*] Section 9c of Cap. 38, B.C. Stats. 1934, as enacted by B.C. Stats. 1936 Second Session), Cap. 30, Sec. 5, provides: "No action shall be brought against any person who at any time since March twenty-ninth, 1934, has acted or purported to act or who hereafter acts or purports to act as a member of any board appointed under or pursuant to the provisions of 'The Natural Products Marketing Act, 1934,' of the Dominion or under this Act for anything done by him in good faith in the performance or intended performance of his duties under either of the said Acts, and every action now pending which if it were brought hereafter would be within the scope of this section is hereby stayed." The three individual defendants purported to be and to act as a local Board under the provisions of said Acts, 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 plaintiff's claim is for a certain amount as money had and received by it 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. It was held on the trial that the plaintiff was entitled to judgment on both claims. *Held*, on appeal, reversing the decision of FISHER, J., that the action was pending when the above amendment to the Act was passed. The Legislature had authority either to stay a pending action or to provide that no action should be brought by one party against another for anything done by the latter in good faith or otherwise in the exercise of supposedly statutory powers. The question of good faith was not raised on the pleadings nor is there a finding of bad faith by the trial judge, and it must be assumed that good faith was exercised throughout. The above section protects the appellants herein and the appeal should be allowed. VANCOUVER GROWERS LIMITED v. MCLENAN, GILMORE AND PETERSON. - - - - - **42**

CONTEMPT OF COURT—Divorce—Order for security for wife's costs—Non-compliance with order—Order for commitment. - - **301**
See PRACTICE. 2.

CONTRACT—*Master and servant—Agreement between — Reasonableness — Restraint of trade.*] The plaintiff manufactured linen supplies and was engaged in furnishing linen supplies in Vancouver and within a radius of 55 miles therefrom. Drivers, salesmen and collectors in its employ were required to enter into a contract with the company that during their employment and for one year after its termination they would not for themselves or any other person engage in said business or call for and deliver laundered or unlaundered goods to persons who had been customers of the plaintiff during their employment, or solicit or take away any of plaintiff's customers within any territory or country in which their headquarters had been, or within any of the territories or delivery routes which had been assigned to them. There were at least eight or nine companies in the same line of business in the area in which the plaintiff carried on its business. In an action for damages and for an injunction to restrain the defendant from

CONTRACT—*Continued.*

committing a breach of his agreement:—*Held*, that the contract was not illegal nor was it unreasonable or in restraint of trade. CANADIAN LINEN COMPANY, LIMITED v. GRAHAM. - - - - - - **287**

2.——*Mining shares—Placed in escrow—Terms and conditions as to withdrawal of shares—Whether complied with by applicant—Interpretation.*] By agreement in writing of the 18th of April, 1933, as amended on September 11th, 1933, between the plaintiffs and others with the Clifton Corporation with head office in New York 2,000,000 shares of Nicola Mines & Metals Limited were placed in escrow with the defendant company upon the terms and conditions set out in the agreement. Paragraph 7 of the agreement is as follows: "On and after the 21st day of March, 1934, Donohoe Mines Corporation, *J. A. Campbell*, Hazel Bancroft, Leo Bancroft, Nick Thodos, Anna Thodos and Minnie Bancroft, and each of them may draw down every three months commencing on the 21st day of March, 1934, from the said escrow deposit, his or her *pro rata* share of 50,000 shares of the said vendors' shares provided that prior to such withdrawal he or she shall have offered to sell to the Clifton Corporation or its assignees upon fifteen days' notice to them in writing addressed by registered mail to the said Clifton Corporation, 11 West 42nd Street, New York City, such *pro rata* part of the said 50,000 shares at seventy-five per cent. (75%) of the market price of the said shares as may be determined by the closing market price on the day before the date of the said notice on any recognized stock exchange whereon the same shall be listed or traded. The Clifton Corporation or its assignee shall have the right to accept or reject the said offer within the said fifteen-day period provided in the aforesaid notice. Upon its failure to accept the said offer or any of them the said shares thus offered and rejected shall be released by the Trust Company to the persons entitled thereto." On the 19th of April, 1934, the plaintiffs sent a letter to Clifton Corporation under the terms of paragraph 7 of said agreement giving 15 days' notice of their intention to withdraw from escrow their proportion of the 50,000 shares, and offering the shares to Clifton Corporation at 75 per cent. of the then market price of the shares. There being no reply from Clifton Corporation on the 15th of May, 1934, the plaintiff demanded from the defendant delivery of said shares and delivery thereof was refused. In an action for damages the plaintiff, Leo

CONTRACT—*Continued.*

Bancroft, recovered judgment. *Held*, on appeal, reversing the decision of FISHER, J., that the question for determination is whether the notice of the 19th of April was a good notice. Nothing turns on the form of the notice the contest being limited to the time at which it must be given. The notice was ineffective as an offer in respect of the shares which would have been deliverable by the defendant to the plaintiff on the 21st of March, 1934, pursuant to the provisions of paragraph 7 of the agreement. BANCROFT v. MONTREAL TRUST COMPANY. - - - - - - - - - **54**

3.——*Subsequent variation—Work continued under varied agreement—Accord and satisfaction—Violation of agreement—Damages — Injunction—Appeal.*] The plaintiff manufactured linen supplies and carried on the business of laundering, dry cleaning and calling for unlaundered goods from customers and delivering laundered goods to them, including coats, dresses, towels and other such supplies. A number of salesmen were employed who drove the plaintiff's supply trucks and acted as collectors and deliverymen in connection with the business. The defendant was employed as a salesman in 1930, and on July 14th, 1931, entered into a written agreement with the plaintiff whereby he was to receive $30 per month and commissions, and that upon the termination of the employment he would not carry on any business akin to that carried on by the plaintiff or solicit any of its business for one year after the termination of his employment, within a radius of 55 miles from the city of Vancouver. On the 2nd of June, 1933, on the proposal of the plaintiff and assented to by the defendant, his salary was cut to $27 per month, and he continued in the employ of the plaintiff on that basis until December, 1935, when his salary was increased to $28 per month. He continued in the plaintiff's service until the 26th of May, 1937, when he voluntarily quit the plaintiff's employ. The plaintiff claims he violated said agreement by immediately carrying on a like business in Vancouver and soliciting the plaintiff's customers, and brought action for damages for violation of the agreement and for an injunction. An injunction was granted and damages were assessed at $750. *Held*, on appeal, varying the decision of MORRISON, C.J.S.C., that the injunction in the circumstances was not justified and should be set aside, but the case can be properly maintained on the original contract based upon the fact that

CONTRACT—*Continued.*

there was no rescission of it, and the judgment for $750 damages should not be disturbed. CANADIAN LINEN COMPANY LIMITED v. MOLE. - - - - - - **434**

CONTRIBUTORY NEGLIGENCE — Jury—Answers to questions—Alleged inconsistency in answers—Jury sent back—Recharge—Change of answer as to ultimate negligence—Effect of. - - - - - - - **66**
See NEGLIGENCE. 9.

CONTRIBUTORY NEGLIGENCE ACT. **528, 422, 315, 470**
See NEGLIGENCE. 1, 2, 8.
PRCTICE. 3.

CONVICTION—Amendment of. - **280**
See SUMMARY CONVICTION.

CORROBORATION. - - **264**
See CRIMINAL LAW. 12.

2.——*Conspiracy to distribute morphine —Evidence of an accomplice* . - **93**
See OPIUM AND NARCOTIC DRUG ACT, 1929., THE. 1.

COSTS. - - - **447, 470**
See NEGLIGENCE. 17.
PRACTICE. 3.

2.——*Action for damages for negligence—Cars driven by two of the defendants—One found wholly responsible—Action dismissed with costs as to the other—Entitled to costs against the plaintiff—Order LXV., r. 32.*] Order LXV., r 32 provides that "where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff." The defendant P., in the employ of the defendant G., when driving a truck, ran into the defendant I.'s car, causing it to hit the plaintiff, a pedestrian, who was injured. It was found that P.'s negligence was the sole cause of the accident. Judgment was given against the defendants P. and G., and the action was dismissed with costs as against the defendant I. Upon I.'s application that the action be dismissed as against him with costs payable by the plaintiff, and plaintiff's objection that I. recover his costs direct from the defendants P. and G., or in the alternative that the plaintiff recover from the defendants P. and G. the costs he has to pay to I.:—*Held*, that said rule 32 does not deprive a successful defendant of the right to recover his costs against the plaintiff and

COSTS—*Continued.*

he is entitled to such order under rule of Court. *Held*, further, that plaintiff's alternative application for an order that he recover from the unsuccessful defendants the costs payable by him to the successful defendant be refused as there is no jurisdicton to make it. *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75, followed. HAMPTON v. PARK *et al.* - - - **294**

3.——*Order LXXA, r. 6.* - - **401**
See HUSBAND AND WIFE. 2.

COUNTY COURT. - - - **550**
See PRACTICE. 4.

2.——*Fraudulent sale — Action to set aside—Jurisdiction — Discovery—Examination for—Trial—Putting in other parties' examination—Effect of—R.S.B.C. 1936, Cap. 58, Sec. 40 (1)—Rule 370r.*] The County Court has jurisdiction under section 40 (1) of the County Courts Act to entertain an action to set aside as fraudulent a bill of sale from a mother to her daughter where the damage sustained on the estate or fund in respect of which the relief is sought does not exceed in amount or value $2,500. In an action to set aside as fraudulent a bill of sale from the defendant Mrs. Burnett to her daughter, the defendant Mrs. Bullock, the plaintiff put in part only of the examination for discovery of the defendant Bullock, and also part only of the examination for discovery of her mother and co-defendant "in explanation of Mrs. Bullock's evidence." *Held*, taking into consideration the object sought to be accomplished by so doing, that "taken as a whole" as it ought to be, the combined testimony of the said two witnesses supports the plaintiff's case and justifies the conclusion reached by the learned judge below. W. E. SHERLOCK LTD. v. BURNETT AND BULLOCK. - - **345**

3.——*Summons and plaint—Service of on defendant—Death of plaintiff before service —Validity.* - - - - - - **392**
See PRACTICE. 5.

CRIMINAL LAW — *Abortion* — *Evidence* — *Dying declaration* — *Admissibility.*] On a charge of murder based upon the alleged acts of the accused in attempting to bring about an abortion, causing death, the evidence of deceased's husband that she told him she had of her own motion made attempts to bring about her own abortion, was withdrawn from the jury. *Held*, MACDONALD, C.J.B.C. dissenting, that this evidence was admissible and as it would go directly to

CRIMINAL LAW—*Continued.*

refute the evidence of the deceased in her dying declaration that the accused alone had done it, there should be a new trial. The dying declaration of deceased was made on the 29th of May, 1936, and she died on the 13th of July following. *Held*, MCPHILLIPS, J.A. dissenting, that the dying declaration was properly admitted in evidence by the judge below on the facts before him. *Per* MARTIN, J.A.: I hold, as I did in *Rex* v. *Louie* (1903), 10 B.C. 1, that the declarant herein had "a settled hopeless expectation of impending death" and therefore her declaration was properly admitted. There was a lapse of six and one-half weeks between the making of the declaration and declarant's death, but that interval does not render it inadmissible if at the time when it was made she had the said "hopeless expectation." REX V. MCINTOSH. - **249**

2.——*Automobile entrusted by owner to a driver—Automobile driven to the common danger — Liability of owner — Charge— R.S.B.C. 1924, Cap. 177, Sec. 34 (1).*] Section 34 (1) of the Motor-vehicle Act provides that "The person holding a licence for the use or operation of a motor-vehicle by means of or in respect of which motor-vehicle an offence against any provision of this Act or of the regulations is committed by his employee, servant, agent, or workman, or by any person entrusted by him with the possession of the motor-vehicle, shall be deemed to be a party to the offence so committed, and shall be personally liable to the penalties prescribed for the offence as a principal offender." The accused, owner of a car, rented it out to a Chinaman in the course of his business as the proprietor of a duly licensed "Drive Yourself" business. The Chinaman in driving the car exceeded the speed limit and drove to the common danger. Accused was convicted on a charge "that the said T. A. Patry, owner of Auto No. 83-458, at the said City of Vancouver, on the 20th day of May, A.D. 1934, at 8.40 p.m. unlawfully did drive an automobile to the common danger upon a public highway." On appeal to the County Court the conviction was quashed. *Held*, on appeal, reversing the decision of LENNOX, Co. J. (MCPHILLIPS and MCQUARRIE, JJ.A. dissenting), that the above section did not constitute a new offence, that the charge was properly laid against the accused and the conviction should be restored. REX V. PATRY. - - **1**

3.——*Certiorari — Summary trial — Indecent assault upon female—Jurisdiction of magistrate — Punishment — Conviction amended as to—Criminal Code, Secs. 292, 583, 773, 774, 777, 779 and 781.*] Where a person is charged before a magistrate in British Columbia with indecent assault upon a female, the magistrate has jurisdiction under section 777 of the Criminal Code, to try the accused without the accused's consent, unless in his opinion the assault charged was with intent to commit rape. The magistrate may base his opinion as to this upon such an inquiry as is indicated by section 781 of the Code, *i.e.*, by an informal examination of Crown witnesses before calling upon the accused. The conviction need not set forth the magistrate's opinion that the assault was not with intent to commit rape. The magistrate is restricted in the punishment which he may impose upon conviction by the provisions of section 779 of the Criminal Code, and the conviction was amended by deleting therefrom the words "Three months and to be whipped twice with four lashes at each whipping" and inserting in lieu thereof the words "six months." REX V. AH SING. - - **146**

4.——*Control of automobile while intoxicated—Charge dismissed—Appeal—Notice of by informant — Sufficiency — Prohibition— Criminal Code, Sec. 749.*] A charge against the accused that "whilst intoxicated [he did] unlawfully have control of an automobile contrary to the Criminal Code" was dismissed. The notice of appeal of the informant was "Take notice that I, S. T. Dunnell, of Victoria, British Columbia, the informant and complainant, intend to enter and prosecute an appeal to the County Court of Victoria." On an application for a writ of prohibition on the submission that under section 749 of the Criminal Code only a complainant who is "aggrieved" by the dismissal, can appeal, and that the notice of motion should set out in addition to the fact that Dunnell was the informant and complainant, that he was the "aggrieved." *Held*, that the complainant had the necessary *status* to launch and carry on an appeal and the writ of prohibition was refused. *Rex ex rel. Danby* v. *Prince Albert Mineral Water Co.*, 15 Sask. L.R. 332; [1922] 1 W.W.R. 945, applied. REX V. CROWE. **516**

5.——*Conviction for offence against The Opium and Narcotic Drug Act, 1929—Sentence — Adequacy — Fine in addition—Ten days' imprisonment in default of payment— Adequacy—Can. Stats. 1929, Cap. 49, Sec. 4, Subsec. (1) (d) and (i) and Subsec. (2).*] Subsection (1) (*d*) and (i) of section 4 of The Opium and Narcotic Drug Act, 1929,

CRIMINAL LAW—*Continued.*

provides "Every person who has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority; shall be guilty of an offence, and shall be liable upon indictment, to imprisonment for any term not exceeding seven years and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars, and, in addition, at the discretion of the judge, to be whipped." The accused was arrested on the 29th of July, 1937, and detained in gaol awaiting trial until the 26th of August, 1937, when he was tried and convicted of having opium in his possession and the magistrate sentenced him to a term of imprisonment for six months at hard labour from and including the day of arrest, July 29th, 1937, and imposed a fine of $200, and directed that in default of payment of the fine he serve a further term of ten days' hard labour. On appeal by the Crown that the magistrate had no power to make the direction he did, that the sentence of six months' imprisonment was inadequate and that the sentence of ten days' imprisonment on default of payment of the fine was inadequate:—*Held*, that the term of imprisonment passed on respondent is twenty-six days less than the minimum sentence prescribed by the statute and the sentence should be amended accordingly. *Held*, further, that the magistrate has a wide discretion and there are no grounds for holding that he has improperly exercised that discretion either as to the sentence imposed for the crime or the sentence to imprisonment on failure to pay the fine. REX v. JUNG QUON CHONG. - - - - **317**

6.——*Charge of murder — Accused's drunkenness as a defence—Degree of incapacity — Murder or manslaughter — Directions to jury.*] The accused killed his own eighteen-months-old child while in a state of intoxication. The defence was based solely on his alleged condition by reason of intoxication. The jury brought in a verdict of manslaughter, for which he was convicted. *Held*, on appeal, affirming the conviction by MANSON, J., that only actual insanity, the outcome of alcoholic excess, can prevent a conviction. If the condition falls short of insanity the jury may find the accused guilty of manslaughter. The learned judge rightly told the jury that only a finding of insanity could justify a verdict of acquittal, and the appeal should be dismissed. REX v. GARRIGAN. - - - - - - **89**

CRIMINAL LAW—*Continued.*

7.——*Charge of possession of opium—Conviction — Habeas corpus—Certiorari in aid—Release of accused—Appeal—Jurisdiction.*] Accused was convicted in the County Court Judge's Criminal Court on a charge of having opium in his possession. On the return of a writ of *habeas corpus* with *certiorari* in aid, the conviction was quashed and the accused was released. *Held*, on appeal, that there is jurisdiction to hear the appeal, that the writ of *habeas corpus* be set aside and the accused be apprehended and forwarded to the custody of the warden of the gaol from which he was taken. REX v. CHOW WAI YAM. REX v. JAY SONG. REX v. GEE DUCK LIM. - - - - **140**

8.——*Gaming—Unlawfully keeping a disorderly house, to wit, a common gaming-house—Sufficiency of information—Criminal Code, Secs. 226, 227 and 229.*] An information charging that the defendant at a certain date and place "did unlawfully keep a disorderly house, to wit, a common gaming-house contrary to the form of the statute in such case made and provided" sufficiently states the offence charged and no further particulars are required. *Rex* v. *Wong Gai* (1936), 50 B.C. 475, followed. *Brodie* v. *Regem*, [1936] S.C.R. 188, distinguished. REX v. LUM PIE. - - - - **420**

9.——*Habeas corpus—Certiorari—Pleaded guilty to charge of having opium in his possession—Interpreter—Misunderstood charge—Thought the charge was for smoking opium.*] The accused pleaded guilty to a charge of having opium in his possession, but on *habeas corpus* proceedings he deposed that he understood he was pleading guilty to a charge of smoking opium, and the doubt as to whether he fully understood the charge laid was not resolved by the affidavits of the Crown, which included one by the interpreter employed on the trial. *Held*, that it is incumbent on the Crown to make certain that an accused understood fully the charge against him, and if there is any doubt on the point he must have the advantage of it. The conviction is quashed and the applicant discharged. REX v. YUEN YICK JUN. - - - - - - **158**

10.——*In possession of morphine—"Mens rea"—Construction of section 17 of The Opium and Narcotic Drug Act, 1929—Onus—Can. Stats. 1929, Cap. 49, Secs. 4 (1) (d) and 17.*] Section 17 of The Opium and Narcotic Drug Act, 1929, provides that "Without limiting the generality of paragraph (*d*) of section four of this Act, any person

CRIMINAL LAW—*Continued.*

who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof." Four years prior to his arrest the accused brought two jars of Chinese brown pills from China through the Customs to his store in Vancouver, where they were openly sold as a cough medicine. Each jar contained 50 packages and each package contained 78 pills. Two years prior to his arrest he was told that it was illegal to sell them, so he took the two jars from his store to his room, where he put them under his bed. Prior to his arrest the police found two packages of the pills in a drawer in his store, and the two jars under his bed in his room. An analysis disclosed that 24 packages weighed one ounce and contained in all .83 grains of morphine. An ounce of the pills could be taken at once by a person and it would do him no harm. The accused swore he had no knowledge whatever that the pills contained morphine. Accused was convicted of having morphine in his possession. *Held,* on appeal, reversing the decision of police magistrate Wood, that "*mens rea*" is not an essential ingredient in the proof of an offence under section 4 *(d)* of The Opium and Narcotic Drug Act, 1929, standing alone, but while section 17 of said Act is not a substantive section creating an offence, its intention and effect is to shift the burden of proof to the accused and opens the door to the defence of ignorance. In this case the possession by the accused of the pills was that possession contemplated by said section 17. The learned magistrate, in closing the door to the accused making a successful defence of ignorance, even if he was satisfied that the accused did not in fact know the pills in question contained morphine, misdirected himself as to the law and there should be a new trial. REX v. WONG LOON. - - - - - **326**

11.——*Living in part on the earnings of prostitution — Criminal Code, section 216, subsection 2 and section 216, subsection (l) —Application—One offence.*] On a charge that the accused, being a male person, unlawfully did live in part on the avails of prostitution, subsection 2 of section 216 of the Criminal Code applies to subsection *(l)* of said section. Two distinct offences are not created by said subsections, they only define one offence in two different ways. The conviction should be sustained. REX v. JAMES. - - - - - - **472**

12.——*Manslaughter—Abortion — Dying declaration — Admissibility — Accomplice—Corroboration—Evidence—Charge.*] On the trial of a charge of murder based on an alleged abortion or attempts to bring about an abortion, evidence of the deceased given on an examination within one-half an hour before her death was admitted as a dying declaration. The examination commenced as follows: "Doctor: You are in full realization of the fact that you are not going to get better? Yes. Do you know what that means? Yes." A police officer then questioned her as to the facts of the case. *Held,* on appeal, that the dying declaration was properly admitted. *Held,* further (MARTIN, C.J.B.C. dissenting and would grant a new trial), that the learned judge in his charge placed the whole case clearly and in a complete manner before the jury and the appeal should be dismissed. REX v. PICKEN. **264**

13.——*Money seized in common gaming-house—Order forfeiting—Based on conviction of keepers—Conviction quashed—Effect on order forfeiting seizure—Criminal Code, Sec. 641 (3).*] Certain moneys were seized in a gaming-house. Upon the keepers of the house being convicted for keeping a common gaming-house, an order was made forfeiting the money so seized. Subsequently the conviction was quashed. On an application for a writ of *certiorari*:—*Held,* that as the foundation for the order of forfeiture fails, it should be quashed. REX v. CHIN JUNG AND TONG NIN. - - - - - **478**

14.——*Practice — Sentence — Leave to appeal—Adequate reasons—Criminal Code, Secs. 1013 (2) and 1022.*] Adequate reasons must be advanced before leave to appeal from sentence will be granted. *Rex* v. *Le Court* (1936), 11 M.P.R. 133, applied. REX v. MOLLAND. - - - - - **240**

15.——*Sale of lottery tickets with Chinese characters—Selection of characters by purchaser—Draw—Successful purchaser paid money—"Disposing of property"—Mode of chance—Criminal Code, Sec. 236 (b).*] The accused sold tickets upon which were written eighty different Chinese characters. The purchaser selected and marked ten of the characters on the ticket and later from a bag containing eighty balls upon each of which one of the said characters was writ-

CRIMINAL LAW—*Continued.*

ten, the accused drew ten balls. If the purchaser paid 15 cents for the ticket and he selected and marked five characters which corresponded with those upon the ten balls drawn from the bag he was paid 30 cents, if he marked six correctly he was paid $1.80, and larger sums for marking more than six correctly. A complaint that the accused "did unlawfully sell tickets for disposing of property by a mode of chance" contrary to section 236 *(b)* of the Criminal Code, was dismissed. *Held,* on appeal, reversing the decision of police magistrate Wood, that irrespective of whether the purchaser is successful or not in marking a sufficient number of characters correctly to win a payment of money, the intention and purpose for which the tickets are sold is the test, and in this case the intention and purpose for which the tickets were sold is the disposing of property, *i.e.,* money. The Crown succeeded in bringing the accused within the provisions of section 236 *(b)* upon proof of three relevant essentials, *viz.:* (a) the sale of the tickets; (b) for (*i.e.,* with the intention of) disposing of property; (c) by a mode of chance, and the appeal is allowed. REX v. SAM CHOW. - - - - - - - - **467**

16.——*Speedy trial—Charge of living on the avails of prostitution — Dismissal of charge—Mixed question of law and fact—Appeal by the Crown—Jurisdiction—Criminal Code, Sec. 216, Subsecs. (l) and 2; Sec. 1013, Subsec. 4.*] The accused was charged with living in part on the earnings of prostitution under section 216, subsection *(l)* of the Criminal Code. The evidence disclosed that at the time of his arrest he had on his person $73, and it was held that having this sum he could not be said to have "no visible means of support" under section 216, subsection 2 of the Criminal Code, and following *Rex* v. *Sheehan* (1908), 14 B.C. 13, the charge was dismissed. *Held,* on appeal, that as the only ground on which the Crown has a right of appeal under section 1013, subsection 4 of the Criminal Code is one involving a question of law alone, and the question presented to the Court is one of mixed law and fact, the appeal must be dismissed for lack of jurisdiction. *Rex* v. *Grotsky,* [1935] 3 W.W.R. 257, applied. REX v. TURNER. - - - - - **476**

CROWN—Appeal by—Jurisdiction. **476**
See CRIMINAL LAW. 16.

CUSTOMER—Injury to. - - - **447**
See NEGLIGENCE. 17.

DAMAGES. - - - **434, 241, 133**
See CONTRACT. 3.
MOTOR-VEHICLES. 1.
NEGLIGENCE. 4.

2.——*Automobile—Boy injured crossing highway—Excessive speed — Evidence of—Expert opinion—Skid marks.* - **333**
See NEGLIGENCE. 4.

3.——*Construction of drain on highway—Augmented flow of water resulting—Constitutional law—Supremacy of Parliament—Construction of statute.*] The cardinal principle of both the British and Canadian Constitutions is the supremacy of the Parliament or of a Legislature acting within the ambit of its powers. Where therefore, the language of a Legislature admits of but one interpretation, effect must be given to it whatever be its consequences. MURRAY v. DISTRICT OF WEST VANCOUVER. - **237**

4.——*Due to injunction.* - - **523**
See INJUNCTION. 2.

5.——*Injured by falling post—Liability of city—Vancouver Incorporation Act, 1921, Amendment Act, 1936, B.C. Stats. 1936, Cap. 68, Sec. 26—Limitation of time for bringing action.* - - - - - - - **547**
See NEGLIGENCE. 6.

6.——*Measure of.* - - - **83, 166**
See FAMILIES' COMPENSATION ACT.
NEGLIGENCE. 3.

7.——*Motor-vehicle.* - - - **315**
See NEGLIGENCE. 8.

8.——*Motor-vehicle — Collision with pedestrian—Excessive speed—Ignoring stop sign at intersection — Alleged insanity of defendant—Liability.* - - - - **359**
See NEGLIGENCE. 7.

9.——*Wrongful harbouring.* - **532**
See HUSBAND AND WIFE. 1.

DECEASED CO-OWNER. - - - **377**
See MINES AND MINING.

DEED—Not registered—Sale of small portion of a block of land for school site—Subsequent agreement for sale of whole block—Agreement registered—Knowledge of former sale—Fraud. - - - - - **99**
See REAL PROPERTY. 2.

DEPORTATION. - - - - - **151**
See ALIENS.

DEVOLUTION OF ESTATES—*First wife of deceased obtained divorce in foreign Court—*

DEVOLUTION OF ESTATES—*Continued.*

Claim by—Her right to question jurisdiction of foreign Court—Right of second wife to share in estate—Deceased domiciled in British Columbia at time of divorce.] The first wife of deceased sued for and obtained a divorce in the State of Washington. In proceedings to determine her right to share in her husband's estate, it was *Held,* that she cannot be heard to question the jurisdiction of said Court to grant the divorce. *Held,* further, that as the deceased husband was domiciled in British Columbia at the time his first wife obtained a divorce in the State of Washington, his second marriage was invalid and the woman he then married could not share in his estate in British Columbia. *In re* GRAHAM ESTATE. NOLAN v. GRAHAM *et al.* - - - - - **481**

2.——*Widow—Inheritance by—Administration Act—Adultery as a bar to wife's sharing in husband's estate—R.S.B.C. 1924, Cap. 5, Sec. 127 (1)—B.C. Stats. 1925, Cap. 2, Sec. 4.*] Section 127 (1) of the Administration Act provides: "If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate." *Held,* that the words "living in adultery at the time of his death" refer to a state of affairs existing at the death of the husband and it is not sufficient to prove that the wife was living in adultery, say for two years, before the death of her husband, or to show isolated acts of adultery committed a long time prior to the husband's death. BURNS v. BURNS. - - - - - - - - **4**

DISCOVERY—Company—"Past officer." - - - - - - - - **357**
See PRACTICE. 6.

2.——*Examination for.* - **345, 298**
See COUNTY COURT. 2.
DIVORCE. 3.

3.——*Production and inspection of documents—Communications between legal adviser and client—Adjuster's and doctor's reports — Privilege — Effect of solicitor of indemnity company acting for defence in former action.*] Judgment for damages having been recovered by the present plaintiff against S. and J. in a former action for which S. and J. were held equally responsible, this action was brought on a policy of indemnity issued by the present defendant to S., and the plaintiff herein sought an order for the production for inspection of certain documents for which in its affidavit on production the defendant claimed privilege. The solicitors for the defendant acted for S. in the original action, but the present defendant had before action repudiated any liability to S. under the policy and subsequently S. had retained the services of said solicitors to conudct his defence. The documents in question may be classified generally as the various reports of the company's adjuster or claims representative, doctor's reports, confidential communications passing between the chief legal adviser of the compay for the Northwest at Seattle and the adjuster, confidential communications between the legal adviser at Seattle and the company's general legal adviser at St. Louis, and confidential communications between the company and its Vancouver solicitor. The order was granted. *Held,* on appeal, reversing the decision of MCDONALD, J., that such documents were prepared for the purpose of being laid before the legal advisers of S. and the insurance company with a view to obtaining advice relative to the defence of existing or anticipated claims which might arise out of the motor accident and the insurance policy. Proper grounds for privilege are set forth in the affidavit of documents and the plaintiff is not entitled to the production thereof. MANN V. AMERICAN AUTOMOBILE INSURANCE COMPANY. - **460**

DISORDERLY HOUSE. - - **420**
See CRIMINAL LAW. 8.

DIVORCE—In foreign Court. - **481**
See DEVOLUTION OF ESTATES. 1.

2.——*Order for security for wife's costs—Non-compliance with—Order for commitment.* - - - - - - - - **301**
See PRACTICE. 2.

3.——*Practice—Examination for discovery of intervener—Application for—Tending to show adultery—R.S.B.C. 1936, Cap. 76, Sec. 27.*] On a petition for dissolution of marriage, the petitioner applied for an order directing the district registrar to issue an appointment for examination for discovery of the intervener and for a direction that upon the said examination the intervener be not exempt from answering questions that relate to the adultery alleged between her and the husband. *Held,* that the authorities are against the making of such an order. Discovery will not be required of a party to a divorce proceeding when it is sought for no other purpose than to prove such party guilty of adultery. MATTOCK v. MATTOCK (No. 2). - **298**

DOCUMENTS—Production and inspection of. - - - - - **460**
See DISCOVERY. 3.

DOMICIL. - - - - - - - **481**
See DEVOLUTION OF ESTATES. 1.

DRUNKENNESS AS DEFENCE. - **89**
See CRIMINAL LAW. 6.

DRUNKEN PASSENGER—Assaults passenger while asleep—Duty to protect passengers from drunkards. **538**
See CARRIERS.

DYING DECLARATION—Admissibility. - - - - - **249, 264**
See CRIMINAL LAW. 1, 12.

EJUSDEM GENERIS RULE. - **509**
See STATUTES. 1.

EMPLOYER—Liability for accident—"Arising out of and in course of employment"—Interpretation. - **106**
See NEGLIGENCE. 11.

ESCROW—Mining shares in—Terms and conditions as to withdrawal of shares—Whether complied with by applicant—Interpretation. - **54**
See CONTRACT. 2.

ESTATE — *Testator's Family Maintenance Act—Petition of wife—Adultery and desertion by wife alleged—Evidence insufficient—Provision by will inadequate — R.S.B.C. 1936, Cap. 285.*] Deceased left an estate of about $11,000. By will he devised $1,000 to his widow and the balance of the estate to a nephew, two nieces and a sister-in-law. On an application by the widow for adequate provision for maintenance under the Testator's Family Maintenance Act:—*Held*, that although the evidence showed that she and her husband had not been living together for over ten years, it was not sufficient to show that she had deserted him. It was found also that the allegation of her adultery had not been sustained, and that the $1,000 left the widow by the will was not adequate provision for her. *In re* GOUGE ESTATE. - - - - - - - **544**

ESTOPPEL. - - - - **370, 500**
See INSURANCE, ACCIDENT. 2.
LANDLORD AND TENANT.

EVIDENCE. - - - - - - **528**
See NEGLIGENCE. 1.

EXCESSIVE SPEED — Collision — Automobiles. - - - - - **422**
See NEGLIGENCE. 2.

FAMILIES' COMPENSATION ACT—*Automobile accident resulting in death of person injured—Action by parents—Compensation in respect of death—Measure of damages—R.S.B.C. 1924, Cap. 85.*] In an action for damages by a father for the death of his son, who died from injuries received when run into by an automobile driven by the defendant, the defendant admitted liability and paid $2,000 into Court as compensation to all persons entitled to recover damages from him under the Families' Compensation Act. The plaintiff was awarded $3,500 and the defendant appealed, claiming that this sum was excessive. Deceased was a school-teacher, unmarried, 24 years of age and in good health. He was survived by his father, 60 years old and in good health, and his mother, 66 years old and suffering from shaking palsy. They were in poor financial circumstances, the father being on relief since 1933, but received $12 per month for operating a stall in a meat market. Deceased contributed $10 per month to the parents for two years prior to his death, and made them other irregular payments, the net contributions for the first year being about $255 and for the second year $190. Deceased earned in the first year as a teacher $800 and in the second year $1,000. He had prospects of future increases up to $1,400 a year. His estate at his death was about $200. *Held*, on appeal, affirming the decision of MCDONALD, J. (MARTIN, C.J.B.C. dissenting and would allow $2,500 in damages), that the learned judge has allowed $3,500 to be apportioned equally between the father and the mother, and upon a full consideration of the facts and the law bearing on the case, it can in no way be said that the amount fixed by the trial judge is in any way excessive, and the appeal should be dismissed. LEIGH v. LUTZ. - **83**

FOREIGN DENTIST—Advertising in British Columbia—Effective as against local assistance. - - **305**
See INJUNCTION. 3.

FRAUD—Sale of small portion of a block of land for school site—Deed not registered—Subsequent agreement for sale of whole block—Agreement registered — Knowledge of former sale. - - - - - - **99**
See REAL PROPERTY. 2.

FRAUDULENT SALE—Action to set aside —Jurisdiction. - - **345**
See COUNTY COURT. 2.

GAMING. - - - - - - **420**
See CRIMINAL LAW. 8.

HABEAS CORPUS. - **79, 140, 158**
See CHINESE IMMIGRATION ACT.
CRIMINAL LAW. 7, 9.

2.——*Certiorari in aid—Entry of a Sikh into Canada from India—Subsequent issue of "passport" and "certificate of registration" to him by proper officials—Effect of—Inquiry by Board of Inquiry—Released by Board—Arrested again for further inquiry—Legality—R.S.C. 1927, Cap. 93, Secs. 33, Subsec. 7, and 42.*] The applicant, a Sikh, was admitted into Canada from India in October, 1913. In March, 1931, he obtained from the proper authorities a passport "good for India." In September, 1931, he was permitted to go to Seattle, Washington, for a few days upon obtaining a "certificate of registration" signed by an official in the Immigration office. In March, April, and August, 1937, he was summoned and appeared at the Immigration offices in Victoria and on each occasion was examined by an immigration officer with reference to facts in connection with his entry into Canada. On August 30th, 1937, he was arrested pursuant to a warrant, brought before a Board of Inquiry and subjected to a long examination on that and the following day. The Board adjourned until September 3rd. When the Board reconvened the chairman said the inquiry was closed and the applicant was released, but after his release the chairman said it was the intention to take further proceedings against him, and applicant undertook to appear at a later date to be agreed upon, under protest. On September 16th, 1937, he was again arrested but obtained his liberty on giving bail. On October 12th, 1937, he was again arrested and taken before the Board of Inquiry. Applicant's counsel protested that he had been released and was entitled to be free, and on the Board proceeding with the inquiry the applicant, on the advice of counsel, refused to answer questions. The application for a writ of *habeas corpus* with *certiorari* in aid was then made on the grounds (1) of estoppel by *res judicata*, (2) the holding of a second Board of Inquiry was against the "essentials of justice," (3) the passport constituted a formal admission of the right of Banta Singh to be in Canada, (4) the certificate of registration given to Banta Singh to go to Seattle was also a formal admission of his right to be in Canada. *Held*, that the issuance of a passport has nothing to do with the Immigration Act or the question as to whether or not the holder had duly entered Canada and the "certificate of registration" was not intended to be a recognition of the *status* of

HABEAS CORPUS—*Continued.*

the applicant. As to estoppel, the first Board of Inquiry had a hearing only on the charge of "eluding examination by an officer at the port of entry." Section 33, subsection 7 of the Immigration Act prohibits certain different acts and creates several quite distinct offences with respect to "entry" in addition to "eluding examination." A second Board of Inquiry may proceed to have a hearing on an offence not before the first Board, and as to the "essentials of justice" there is nothing in the Act to prohibit the second Board having a hearing. The application is dismissed. *Re* BANTA SINGH AND THE IMMIGRATION ACT. - - - - **321**

HIGHWAYS—Non-repair—Hole in dirt near car rail—Injury to passenger alighting from car. - **275**
See NEGLIGENCE. 13.

HOURS OF WORK ACT, 1934—*Charge under — Dismissed — Appeal — Practice—Notice of appeal out of time—Application to extend time for service — "Avoidance of injustice"—Application refused — R.S.B.C. 1936, Caps. 42, Sec. 188, and 122, Secs. 11 and 13—Rule 967.*] The deupty police magistrate at Vancouver dismissed a charge against the defendant company "that being an employer within the meaning of the Hours of Work Act, and having notified its employees the hours at which work begins and ends, unlawfully did employ a person outside the hours so notified." An appeal to a County Court judge was dismissed on the 18th of May, 1937. The defendant company's accountant was served with a notice of appeal on the 3rd of June, 1937, and on the 12th of June following a copy of the notice of appeal was left at the office of the defendant company. On the hearing of the appeal the respondent raised the preliminary objection that the service of the notice was out of time and it was not served on the defendant as required by section 188 of the Companies Act. The appellant then moved for an extension of time for service of the notice of appeal. *Held*, that applications for extension of time depend upon the circumstances in each case. The object of the rule is to give the Court a discretion to extend time with a view to the avoidance of injustice. The charge against the respondent in this case was twice dismissed, and in the circumstances the application should be refused. *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70, applied. REX v. SAFEWAY STORES LIMITED. - - - - **396**

HUSBAND AND WIFE — *Alienating wife's affections—Loss of consortium—Damages—Wrongful harbouring—Onus on plaintiff.*] If a person persuades a wife to leave her husband or induces her to leave or incites her to leave, or procures her leaving, then he is liable, in an action for damages. Adultery is no part of the action in such a case. In an action by a husband for the enticing away of his wife he must prove that it was the defendant's enticement which caused her to cease from cohabiting and consorting with her husband. Where the only evidence is that it was she, rather than the defendant, who was the enticer, the action fails. On the claim for damages for wrongful harbouring:—*Held*, that on the facts the claim has not been made out. Brune v. Stensto. - - - **532**

2.——*Alimony—Former husband—Failure to prove his death—Action dismissed with leave to bring another action—Costs—Order LXXa, r. 6.*] The plaintiff was married to one Ledlin in 1901. In 1907 Ledlin left her and although she made enquiries through the police in Vancouver where they lived she heard nothing of him afterwards. In 1920 she married the defendant in Vancouver where they lived together until 1923 when the husband went to Stave Falls, where he obtained work. The plaintiff visited him from time to time but in 1928 the visits ceased and from that time the husband made no provision for his wife. In an action for alimony it was held that the plaintiff had failed to prove the validity of the marriage alleged to have taken place in 1920, and the action was dismissed with costs with leave to the plaintiff to bring another such action upon payment of the costs of this action, if and when she can adduce evidence of the death of Ledlin. *Held*, on appeal, varying the decision of Fisher, J., that the judgment below should not be disturbed except as to costs, namely: that pursuant to Order LXXa, r. 6, the defendant pay to the plaintiff the amount of the cash disbursements made by the plaintiff's solicitor to the suit, and that the defendant is entitled to the general costs of the appeal subject to a set-off in favour of the plaintiff of those costs of the issue on which she is successful. Hazelton v. Hazelton. - - - - - - **401**

INDECENT ASSAULT—Female—Summary trial—Jurisdiction of magistrate. - - - - - - - - **146**
See Criminal Law. 3.

INDEPENDENT CONTRACTOR. - **166**
See Negligence. 3.

INFORMATION—Sufficiency of. - **420**
See Criminal Law. 8.

INJUNCTION. - - - - - **434**
See Contract. 3.

2.——*Interim—Action—Discontinuance—Marketing Board and agency—Status to sue for injunction—Damages because of injunction—Inquiry as to—R.S.B.C. 1936, Cap. 165.*] The plaintiffs, both Board and agency, brought action and obtained an *interim* injunction restraining the defendant from marketing potatoes. The plaintiffs gave notice before expiry of the *interim* injunction to have the *interim* injunction continued, but before it came on for hearing they wholly discontinued the action as they were advised that they had no *status* to bring it. The defendant then applied for an injuiry as to the amount of damages sustained by it as a result of the *interim* injunction, claiming it had suffered damage in respect of eight cars of potatoes through loss of profit, costs of unloading, storage and reloading, and loss of market, also loss of business connections. *Held*, that in the exercise of its judicial discretion the Court should order an inquiry. *Held*, further, that the contention that the Court, before directing an inquiry, must decide whether the defendant was acting illegally in cardying on its business, must be rejected. British Columbia Interior Vegetable Marketing Board *et al.* v. Kamloops Produce Company. - - - - - - **523**

3.——*Foreign dentist—Advertising in British Columbia—Effective as against local assistance.*] The defendant, a dentist practising his profession in the City of Spokane, in the State of Washington, advertised in the Trail and Nelson newspapers and by means of radio broadcasts over the Trail and Kelowna stations of the Canadian Broadcasting Corporation in respect to his practice of dentistry in Spokane. Advertising of this nature would not be permitted by a British Columbia practitioner. In an action at the instance of the College of Dental Surgeons of British Columbia to restrain the defendant from so advertising in British Columbia in respect of his practice of dentistry in Spokane:—*Held*, that the purpose of this motion is not to restrain anything being done in Spokane but something being done in British Columbia which the Legislature has declared to be wrong. The case is aimed really at the persons within the Province who assist the defendant in doing something which is illegal. An injunction is granted. Attorney-General

INJUNCTION—*Continued.*

FOR BRITISH COLUMBIA *ex rel.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN. - - - - - - - **305**

INSURANCE, ACCIDENT — *Beneficiary—Designation of—Condition 19, Insurance Act—Designation by will—Change of beneficiary—Instructions to insurer not carried out—Letter from insurer to beneficiary—Inferences — Interpretation of statutes — B.C. Stats. 1928, Cap. 19, Sec. 7.*] In May, 1936, D. S. deciding to take out an accident-insurance policy, instructed the insurer's agent to have the defendant named as the beneficiary and the agent so instructed the insurer, but the policy was made out for the benefit of the insured himself. On receiving it he handed it to the defendant without noticing the error but the defendant noticed it and called his attention to it, when he said he would attend to the matter. Later she received a letter from the insurer advising her that she was named as the beneficiary. D. S. was killed in an accident in June, 1936. In his will (executed in August, 1926) was the following clause: "I hereby declare and designate my wife and children to be preferred beneficiaries of all and any life and accident insurance policies now or hereafter taken out by me upon my life, or payable in respect of my death," etc. Condition 19 of the statutory conditions included in all accident policies reads: "Where moneys are payable under this policy upon the death of the insured by accident, the insured may from time to time designate a beneficiary, appoint, appropriate, or apportion such moneys, and alter or revoke any prior designation, appointment, appropriation or apportionment." *Held,* that the Court must infer that the letter from the insurer notifying the defendant that she was named as the beneficiary was written as the result of the insured's pointing out that his instructions had not been carried out and that he did make a declaration constituting her the beneficiary. *Held,* further, that a designation of a beneficiary in the event of the death of the insured can be made by will or by word of mouth. The will in question did make such a designation with reference to the particular policy in question but there was a specific declaration made after the will with respect to this policy, and said later designation of the defendant altered effectively in her favour the designation made by the will. The defendant is therefore entitled to the proceeds of the policy in question. Where the provisions of two Acts

INSURANCE, ACCIDENT—*Continued.*

have to be considered in deciding an issue, that construction is to be preferred which will allow effect to be given to all the provisions of both Acts as against the construction which necessarily involves a nullification of an important provision of one of them, particularly where as in the present case, the one Act is general in its scope whereas the other deals specifically with the particular matter under consideration. THE TORONTO GENERAL TRUSTS CORPORATION *et al.* v. SHEPPARD. - **224**

2.——*Wife owner of car—Name of husband inserted in insurance policy by mistake—Effect of—Driver of car without licence — Breach of statutory condition—Insurer's knowledge — Continuation of defence in action against insured—Waiver of condition—Estoppel.*] The plaintiff held a policy of insurance to indemnify her against liability for injury to others by her car. The policy was running out in July, 1935, and her husband applied to the agents of the defendant company for a like policy to cover said car. The agents sent him an application and he signed it without noticing that his name appeared as applicant and owner of the car instead of the name of his wife, and the policy was duly issued in his name. On the 5th of November, 1935, while the car was driven by one Hanbury, a boy of seventeen years of age, it struck and injured one Hughes. The next day the plaintiff's husband notified the defendant's agents in writing of the accident, that Hanbury, a boy of seventeen years, was driving the car, and that he had no licence. On February 19th, 1936, Hughes brought action against the plaintiff and Hanbury for injuries sustained. The defendant company was immediately notified of the action and of the defence that in fact a boy named Kennedy was entrusted with the car and not Hanbury, but Hanbury was allowed to drive the car by Kennedy after they had left the plaintiff's house. The defendant company then undertook the defence of the action and carried through to judgment, but the trial judge declined to accept plaintiff's evidence and found she had entrusted the car to Hanbury and gave judgment in favour of Hughes against both Hanbury and herself. The plaintiff then brought this action that the defendant company indemnify her against the Hughes judgment under the policy. Two defences were raised, first, that the policy was not issued in her name and there was no contract between herself and the defendant company; secondly, there was

INSURANCE, ACCIDENT—*Continued.*

breach of a statutory condition in that Hanbury, who drove the car, had no driver's licence. *Held*, that from the evidence of the local manager of the defendant company it is clear that the company elected, after the accident, to treat the plaintiff as the insured and the company conducted the defence in the Hughes action which could only be done on the basis of a contract of insurance existing between it and the plaintiff. This case has to be adjudicated upon the same basis as it would be had plaintiff been the named insured in the policy and if estoppel has to be made out to support this view, the evidence establishes it. *Held*, further, that the defendant with full knowledge of the breach of said statutory condition (that Hanbury had no driver's licence) elected to proceed with the defence, and having done so, waived any right to dispute liability under the policy upon this ground. ANDERSON v. CALEDONIA INSURANCE COMPANY. - - - - - - - - **370**

INTERIM INJUNCTION. - - **523**
See INJUNCTION. 2.

INTERLOCUTORY JUDGMENT — In County Court — Writ prohibiting further proceedings—Set aside on appeal—Appeal from interlocutory judgment proper course. - **404**
See PROHIBITION. 3.

INTERPRETER. - - - - - **158**
See CRIMINAL LAW. 9.

JURISDICTION. - - **345, 476, 280**
See COUNTY COURT. 2.
CRIMINAL LAW. 16.
SUMMARY CONVICTION.

JURY—Answers to questions—Alleged inconsistency in answers—Jury sent back—Recharge—Change of answer as to ultimate negligence—Effect of. - - - - - - **66**
See NEGLIGENCE. 9.

2.——*Charge to—No objection taken.* - - - - - - **447**
See NEGLIGENCE. 17.

3.——*Directions to—Charge of murder—Accused's drunkenness as a defence—Degree of incapacity—Murder or manslaughter.* **89**
See CRIMINAL LAW. 6.

LAND—Security on—When valid—Assignment of moneys under agreement for sale of land—Chose in action—Assignment of—When absolute. **16**
See BANKS AND BANKING. 2.

LANDLORD AND TENANT—*Agreement for lease—Sufficiency of memorandum—Identity of proposed lessee—Offer by agents of both parties—Statute of Frauds—Specific performance — Estoppel.*] Real-estate agents wrote a letter addressed to the defendant in which they said, *inter alia,* "We are authorized on behalf of a client to make you the following offer. . . . The premises will be used by the lessee as a restaurant. . . . We enclose herewith our cheque for $400 as a deposit . . . to be applied on account of the first month's rent." On submission of the letter to the lessor, she signed acceptance at the bottom of the letter and was given a cheque for $100 by the agent. Two days later the agent told the defendant the name of the proposed lessee. In an action for specific performance of the agreement it was contended by the defendant that the proposed lessee was not sufficiently identified by the letter to satisfy section 4 of the Statute of Frauds. *Held,* that the proposed lessee was so described that his identity could not have been fairly disputed and therefore the statute was satisfied. *Held,* further, that after the plaintiff was informed that defendant had accepted his offer, he desisted in his efforts to obtain other premises, and the defendant was estopped from denying that the memorandum was sufficient with respect to the identity of the proposed lessee. LITRAS v. MATTERN. - - - - - - **500**

LAND REGISTRY ACT. - - **307**
See REAL PROPERTY. 1.

LAW—Mistake. - - - - **32, 42**
See CONSTITUTIONAL LAW. 3, 4.

LEASE — Agreement for — Sufficiency of memorandum—Identity of proposed lessee. - - - - - **500**
See LANDLORD AND TENANT.

LIMITATION OF ACTION. - **547**
See DAMAGES. 5.

MAGISTRATE—Jurisdiction. **146, 280**
See CRIMINAL LAW. 3.
SUMMARY CONVICTION.

MANSLAUGHTER—Abortion — Dying declaration — Admissibility — Accomplice—Corroboration—Evidence. - - - - - - - - **264**
See CRIMINAL LAW. 12.

MARKETING BOARD—Agencies appointed by Board to market milk—Equalization levy by agency against producer—Right to charge. - **61**
See NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT. 1.

MASTER AND SERVANT—Agreement between—Reasonableness — Restraint of trade. - - - - **287**
See CONTRACT. 1.

2.——*Negligent driving of servant — Course of employment.* - - - - **23**
See NEGLIGENCE. 14.

METALLIFEROUS MINES REGULATION ACT—Summary conviction under. - **280**
See SUMMARY CONVICTION.

MINERAL ACT—Notice under section 28 of —Effect of. - - - - **377**
See MINES AND MINING.

MINES AND MINING—*Deceased co-owner—Proportion of expenditure for development work—Notice under section 28 of the Mineral Act—Effect of—Interest of deceased not open to forfeiture for twelve months—R.S.B.C. 1936, Cap. 181, Secs. 28 and 126.*] The plaintiff is administrator (with the will annexed) of the estate of Walter Turner Hoover, deceased, who was a co-owner with the defendant in the Antler group of mineral claims situate in the Cariboo Mining Division of British Columbia. After Hoover's death the defendant published an advertisement under section 28 of the Mineral Act, R.S.B.C. 1936, Cap. 181, addressed to the deceased as a delinquent co-owner, calling upon him to pay the sum of $600 as the deceased's proportion of expenditure required under the provisions of the Mineral Act for assessment work on the said mineral claims for the years 1935 and 1936, and stating that in default of payment of the amount with costs of the advertisement the interest of the deceased would be forfeited and become vested in the defendant. After the notice had been advertised for a period of 90 days a copy thereof was filed in the office of the mining recorder of the said Division with an affidavit of the publisher of the newspaper in which the notice was printed stating the respective dates of insertion of the notice in his newspaper, and the defendant thereafter claimed to be the sole owner of the said mineral claims. The plaintiff brought an action for a declaration that he is entitled to an undivided one-half interest in the said mineral claims and that the notice, being addressed to a deceased person, was a nullity, and that pursuant to section 126 of the Mineral Act the interest of the deceased could not be forfeited within the period of twelve months after his death. *Held*, that a notice addressed to a deceased person is not a notice in conformity with the requirements of section 28 and is a nullity. JAMES EDWARD BECK, ADMINISTRATOR (WITH THE WILL ANNEXED) OF THE ESTATE OF WALTER TURNER HOOVER, DECEASED v. FLORENCE BIRDIE ARMSTRONG. - - - - - - - **377**

MINING SHARES—Placed in escrow—Terms and conditions as to withdrawal of shares—Whether complied with by applicant—Interpretation. - **54**
See CONTRACT. 2.

MISTAKE—Law. - - - - **32, 42**
See CONSTITUTIONAL LAW. 3, 4.

MORPHINE — Conspiring to distribute—Evidence of an accomplice — Corroboration—Charge. - - **93**
See OPIUM AND NARCOTIC DRUG ACT, 1929, THE. 1.

2.——*In possession of.* - - **326**
See CRIMINAL LAW. 10.

MORTGAGOR AND MORTGAGEE—*Security for advances—Quit-claim deed—Subsequent sale to cover advances—Whether improvident sale.*] On the 5th of August, 1938, the plaintiff company was indebted to the Bank of Montreal in the sum of $5,398.12. As collateral security the bank held a mortgage from the company on its Crescent Beach property. In July, 1935, owing to pressure by the bank and in consideration of an extension of time for payment, the plaintiff company delivered to the bank a quit-claim deed of the property, assigned to the bank all the furniture and fixtures on the premises, also $3,000 bearer bonds of the Corporation of the District of North Vancouver. It was agreed that the plaintiffs should have fifteen months from that date to pay the bank in full. On the 1st of October, 1936, the bank fixed a price of $8,500 on the property and placed same in the hands of an agent. Through the agent the property was sold for said sum on the 5th of October following. The company still owed the bank $700 on January 27th, 1937, and the said bonds were then sold for $726. The balance of $26 was credited to the company. An action for damages for alleged improvident sale of the Crescent Beach property and the said bonds was dismissed. *Held*, on appeal, affirming the decision of MURPHY, J., that on the facts there was no improvident sale and having been made in the exercise of the power of sale in the mortgage and resulting in a sum insufficient to pay the debt, it had a right to sell the bonds. On the special facts of this case it made no difference whether the bank sold under the power of sale or under the quit-

MORTGAGOR AND MORTGAGEE—*Continued.*

claim deed as owners. In either case it had a right to realize on the bonds which were hypothecated to secure both the mortgage debt and sums advanced subsequent to and apart from the mortgage debt. CAPTAIN J. A. CATES COMPANY LIMITED AND CATES v. BANK OF MONTREAL. - - - - **410**

MORTGAGORS' AND PURCHASERS' RELIEF ACT, 1934. - - - - **509**
See STATUTES. 1.

2.——*Validity.* - - - - - **81**
See STATUTES. 2.

MOTOR-VEHICLES — *Arterial highway—Collision at top of hill—Car turning to left into gas-station — Negligence going too slowly—Not amounting to contributory negligence—Too high speed on hill-top after slow sign—Damages.*] The point of impact in a collision between two automobiles was the entrance to a gas-station at the top of a hill on the north side of the Pacific Highway about nine miles south-east of New Westminster. G., driving south-east, slowed down as he approached the gas-station, and as he turned to the left across the line of traffic of north-west bound cars, to enter the gas-station, he was going at six or seven miles per hour. The defendant B., coming up the hill from the south-east in his car at about 45 miles an hour, ran into the right front corner of G.'s car when the nose of the car was over the northerly edge of the pavement. The accident took place at 4.35 p.m. on the 8th of December, 1936. It was a dull day and dusk at the time. G.'s lights were on, but in turning into the gas-station he did not give the hand signal and neither driver sounded his horn. There were "slow" signs a short distance away on both sides of the gas-station. *Held*, that G. was guilty of negligence in crossing averse traffic on the highway at too slow a speed and of minor negligence in not using his horn, and that B. coming up a hill with a turn at the brow of the hill, with which he was familiar, was travelling at an excessive rate of speed without keeping such an alert look-out as the circumstances demanded. He should have seen the warning sign below the hill and in these respects he was guilty of negligence. G.'s negligence, though reprehensible, did not contribute to the accident in the legal sense, it was the negligence of B. that really was responsible for the accident. [Varied by Court of Appeal.] J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY. - **241, 422**

MOTOR-VEHICLES—*Continued.*

2.——*Collision—Two cars travelling in same direction—One passing the other—Passing car cutting in to right side of road too sharply—Necessity of other car to apply brakes.* - - - - - - **519**
See NEGLIGENCE. 15.

3.——*One car passing another when going in the same direction—Passing car cutting in too sharply—Collision.* - - **383**
See NEGLIGENCE. 16.

MURDER—Charge of—Accused's drunkenness as a defence—Degree of incapacity—Murder or manslaughter—Directions to jury. - **89**
See CRIMINAL LAW. 6.

NATURAL PRODUCTS MARKETING ACT, 1934 (DOMINION), THE—*Ultra vires.* **32**
See CONSTITUTIONAL LAW. 3.

2.——*Validity.* - - - - - **42**
See CONSTITUTIONAL LAW. 4.

NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT — *Marketing board—Agencies appointed by board to market milk—Equalization levy by agency against producer — Right to charge — B.C. Stats. 1934, Cap. 38.*] The plaintiff, a dairyman, marketed his milk through a firm named Gibson's Dairy Produce Limited. Milk was dealt with on the basis of the butterfat it contains and when sold as fluid milk the price received was higher than when the butterfat content was sold for manufacturing purposes. Gibson's Dairy purchased the milk on the fluid basis at prevailing prices. After the plaintiff had dealt with Gibson's Dairy for about one year a scheme for controlling the marketing of milk was set up under statutory authority conferred by the Natural Products Marketing (British Columbia) Act. The Marketing Board was given authority to appoint agencies through which all producers were required to market their milk. The defendant was appointed one of such agencies and Gibson's Dairy dealt through the defendant. The plaintiff continued shipping his milk to Gibson's Dairy as formerly but instead of receiving payment from the dairy he received cheques with accompanying statements from the defendant. The statements indicated that certain deductions were charged one of which was termed an equalization levy. The idea of a general pool contemplated by the Marketing Board was abandoned and never came into operation, and the above levy arose out of the operation of an individual

NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT—*Cont'd.*

milk pool by members of the defendant association, the purpose being to distribute the burden put upon the producers whose fluid milk quota was fixed, and who then sold their surplus milk on the manufacturing market at a lower price. The defendant sought to justify the levy on the ground that the plaintiff was a member of the defendant association and was bound by its pool operation, also that he was estopped by his conduct in denying that in fact he was a member. It was held that the plaintiff never became a member of the association, that the evidence falls short of the knowledge and conduct on the part of the plaintiff necessary to create an estoppel and the plaintiff is entitled to judgment. *Held*, on appeal, affirming the decision of HARPER, Co. J., that the manner in which the defendant dealt with the plaintiffs' milk was as an association and not as an agency of the Marketing Board, the pool operation was therefore one not authorized by the marketing scheme, and the plaintiff not being a member of the defendant association, the defendant had no authority to deduct the equalization levy from the moneys received by it from Gibson's Dairy on the account of the plaintiff. BROOKE V. THE INDEPENDENT MILK PRODUCERS CO-OPERATIVE ASSOCIATION. - - - - - - - - - **61**

2.——*Validity.* - - - - - **179**
See CONSTITUTIONAL LAW. 1.

NEGLIGENCE — *Automobiles—Collision—Both drivers at fault—Contributory Negligence Act—Evidence — R.S.B.C. 1936, Cap. 52, Sec. 2.*] In the case of two persons using the highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other, a duty arises to take care. Two cars collided in the full light of day in the centre of a highway in the country where there were no intervening distracting conditions existing at the time. The driver of each car was on an equal footing, both being experienced drivers, and the cars of which they had full control were adequately equipped. They had a clear and sufficient field of vision at all material times. *Held*, that they were both in an equal degree guilty of negligence that caused the collision. FUNK V. PINKERTON: MCKINLEY, THIRD PARTY. MCKINLEY AND MCKINLEY V. PINKERTON. WILSON, WILSON AND MACKAY V. PINKERTON AND MCKINLEY. MITCHELL AND MITCHELL V. PINKERTON AND MCKINLEY. - - - - - - - - - - **528**

2.——*Collision—Automobiles — Crossing path of oncoming traffic—Degree of care to be taken — Excessive speed — Not keeping proper look-out—Contributory negligence—R.S.B.C. 1936, Cap. 52.*] At about 4.30 p.m. on the 8th of December, 1936, B., with his brother as a passenger, drove his car north-westerly up a hill on the Pacific Highway just before reaching Wander Inn, a gas-station on the north-east side of the road at the top of the hill. On reaching the brow of the hill B. saw G. driving his car south-easterly about 500 feet away. It was dusk and both cars had their lights on. On reaching the north-westerly entrance to Wander Inn G. turned to his left across the path of oncoming traffic to go into Wander Inn for gas. He did not sound his horn or put out his left hand. B., coming across the top of the hill at a high rate of speed, ran into the right front of G.'s car and drove it back eighteen feet before it came to a stop. The evidence was conflicting as to the distance B. was away from the point of impact when G. started to cross the line of adverse traffic. It was found by the trial judge that although G. was negligent in crossing a highway in face of adverse traffic at too slow a speed and not sounding his horn, his negligence was not a contributory factor and B.'s negligence alone in driving at an excessive speed and not keeping an alert look-out, was wholly responsible for the accident. *Held*, on appeal, varying the decision of MANSON, J., *per* MARTIN, C.J.B.C., MCPHILLIPS and SLOAN, JJ.A., that the Contributory Negligence Act applied and G. was responsible to the extent of 70 per cent. for the accident and B. to the extent of 30 per cent. *Per* MACDONALD, J.A.: That G. was responsible to the extent of 60 per cent. and B. 40 per cent. *Per* MCQUARRIE, J.A.: That the responsibility should be equally divided. J. W. BAILEY V. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN V. G. R. BAILEY (No. 2). - **422**

3.——*Construction of cement wall causing collapse of adjoining wall — Lack of proper care in construction — Independent contractor — Measure of damages.*] The defendant company, deciding to erect on its lot a one-storey building with cement walls, employed the third parties Sharp & Thompson as architects to make plans and supervise the construction. On completion of the plans the company entered into a contract with the third parties Kennett & Son for the construction of the building. This lot adjoined a lot of the plaintiff upon which stood a two storey brick building. The specifications called for the north wall of the

NEGLIGENCE—*Continued.*

cement building to be built against the south wall of the brick building. Builders erecting concrete walls first construct what is called "forms" made of lumber into which the liquid concrete is poured. When properly erected the inner wall of the form is made rigid by supports and the outer wall is held in place by wires running from the inner wall of the form to its outer wall. This is done to resist the lateral pressure of the liquid concrete as it is poured into the forms. The builder omitted the wires from the lumber forms used in the construction of the north wall of the concrete building, that is the wall which the specifications required to be in contact with the plaintiff's brick building. After one course of pouring concrete into the "forms" was completed and a second was in progress, the south brick wall of the plaintiff's building gave way and fell, making a hole 40 feet long and 28 feet high, and some 12 feet more of the wall was damaged. In an action for damages:—*Held*, that an adjoining owner in building a wall on his own property has no right, in the absence of agreement, to borrow support from or exercise pressure upon his neighbour's wall. To do so constitutes a legal wrong for which he would be liable if damages resulted, and if he does work on or near another's property which involves danger to that property, unless proper care is taken, he is liable to the owners for damage resulting to it from failure to take proper care, and he is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him. The plaintiff is entitled to damages. *Held*, further, that the damages recoverable is the difference between the money value to the plaintiff of the building before the accident and its money value immediately after the accident. PETER v. YORKSHIRE AND PACIFIC SECURITIES LIMITED *et al.* - - **166**

4.——*Damages — Automobile — Boy injured crossing highway—Excessive speed—Evidence of—Expert opinion—Skid marks—R.S.B.C. 1936, Cap. 195, Sec. 53.*] The plaintiff infant was being driven home from school, and the car, going northerly on the Pacific Highway, stopped on the east side of the road opposite his home that was over on the west side. When about to get out of the car the boy was warned by the driver of the approach of the defendant's car from the north, and stopped him getting out of the left-hand door, but the boy said "he could make it" and getting out of the right-hand door he ran around the back of the car and continued to cross the road, when he was struck by the defendant's car and severely injured. There was conflict of evidence as to the speed at which the defendant was going and the distance he was away when the boy emerged from behind the stationary car. The action was dismissed. *Held*, on appeal, reversing the decision of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that on the evidence there was no escape from finding that the skid marks on the road extending 108 feet were caused by the defendant's car and the circumstances herein justified the evidence of three independent expert witnesses who testified that the defendant was travelling in excess of 50 miles per hour. Had the defendant been travelling at a reasonable rate of speed he could have avoided the consequences of the negligence of the boy which negligence consisted in crossing the road without looking. Excessive speed under the circumstances was a "self created incapacity." *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23; [1916] 1 A.C. 719, applied and defendant held solely responsible for the accident. Section 35 of Motor-vehicle Act, while not abolute in terms, is helpful when considering what constitutes reasonable speed, and reasonable speed under the circumstances is that speed at which the defendant could have controlled his car so as to have avoided the risk he ought to have anticipated. REOPEL AND REOPEL v. ROSS. - - - - - - - - **333**

5.——*Damages—Automobile turns over in ditch — Defective steering-gear — Owner auto mechanic—Repairs—No inspection or enquiry as to—Liability.*] The defendant purchased a second-hand car in August, 1935. A few days after he found the steering-gear was defective and brought it back to the vendor for repairs. He got it back but a few days later the same trouble developed and he brought it back to the vendor, telling him the repairs should be done by another firm who were experts at that work. The car was sent to the experts for repairs, and when he got it back he drove it for about seven months. The defendant was an auto mechanic but had not followed his trade for three years and did not make any enquiries as to the nature and extent of the repairs. On the 25th day of April, 1936, the defendant with his wife and two children attended a wedding reception in New Westminster, and at about 2 o'clock on the following morning he volunteered to drive

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the plaintiffs home. He with his wife and son sat in the front seat and his daughter and the plaintiffs sat in the back seat. On the journey back the car struck a small stone or some obstruction which caused it to swerve, and in endeavouring to right the car it passed from the highway and overturned in a ditch at the side and the plaintiffs suffered injuries. It was found later that the steering-gear was defective, because the king-pins and bushings on the front axle were worn, causing the car to get out of control, the tendency of the car in that condition being to turn aside suddenly without warning. It was held on the trial that because the defendant was a motor mechanic himself he should have inspected the repair work before accepting the car as fit for use, and as he did not do so he was liable in damages for driving a defective machine. *Held*, on appeal, reversing the decision of McDONALD, J., that negligence should not be attributed to the defendant in driving the car when he knew it was placed with experts for correction by a reliable dealer under contract with him to return the car in good running condition. He had a right to believe that the trouble that caused him to return it for the second time was removed. The burden should not be placed upon the owner of a car to investigate the work of auto experts, and the fact that he has knowledge of mechanics or even is an expert does not alter the situation. DELANOIS AND JOHNSON V. FLESH. - **133**

6.——*Damages—Injured by falling post —Liability of city—Vancouver Incorporation Act, 1921, Amendment Act, 1936, B.C. Stats. 1936, Cap. 68, Sec. 26—Limitation of time for bringing action.*] Section 26 of the Vancouver Incorporation Act, 1921, Amendment Act, 1936, provides: "(1.) Every public street, road, . . . shall be kept in reasonable repair by the city, and in case of default the city shall, . . . , be liable for all damages sustained by any person by reason of such default. (2.) No action shall be brought against the city for the recovery of damages occasioned by such default, whether the want of repair was the result of misfeasance or non-feasance, after the expiration of three months from the time when the damages were first sustained." The city had erected a sign post about nine feet high on the boulevard just off the travelled portion near the north-east corner of Cambridge and Kootenay Streets. As the plaintiff was walking from a house to her automobile, which was standing on the travelled portion of the street, the post fell and injured her. In an action for damages:—*Held*, that the case was one of negligence to repair, but as the writ was issued more than three months after the damages were sustained, the action must be dismissed. LONG V. CITY OF VANCOUVER. - **547**

7.——*Damages—Motor-vehicle—Collision with pedestrian—Excessive speed—Ignoring stop sign at intersection—Alleged insanity of defendant—Liability.*] In the afternoon of March 30th, 1937, the defendant drove an automobile west on Twelfth Avenue in Vancouver at a rate of 40 miles an hour. He ignored the stop sign at Cambie Street intersection, struck the rear of a car driven by one Newmeyer which was travelling south on Cambie Street, mounted the curb, broke off two sign-posts and struck the plaintiff, a boy of 13 years of age, who was walking west on the sidewalk on Twelfth Avenue west of Cambie. The boy was hurled into the air, fell on the concrete sidewalk and was severely injured. In an action for damages the defence set up was that the defendant at the time of the accident was insane. *Held*, that the *onus* on the defendant to prove a state of insanity that would excuse him from liability has not been satisfied. On the contrary, the evidence proves that he was sane to the extent required to make him liable for his negligence. Discussion on the law as to whether insanity can be a defence in a negligence action. *Slattery* v. *Haley*, [1923] 3 D.L.R. 156, and *Donaghy* v. *Brennan* (1901), 19 N.Z.L.R. 289, applied. BARON V. WHALEN *et al.* - - - - - - - - **359**

8.——*Damages—Motor-vehicle—Injury to plaintiff's infant daughter — Contributory negligence — Special damages of father—Apportionment—R.S.B.C. 1936, Cap. 52, Sec. 2.*] Where a father and infant daughter are suing for damages for negligence causing injury to the daughter and the damages to the daughter are divided under the Contributory Negligence Act, the special damages awarded the father must be reduced in the same proportion. BOWES V. HAWKE. - - - - - - - - - **315**

9.——*Defendant's work-car run into by automobile—Contributory negligence—Ultimate negligence — Jury — Answers to questions—Alleged inconsistency in answers—Jury sent back — Recharge — Change of answer as to ultimate negligence—Effect of.*] In an action for damages owing to the driver of an automobile running into a

NEGLIGENCE—*Continued.*

stationary work-car of the defendant company, the driver being killed, the jury answered questions finding that the company was guilty of negligence, that the deceased was guilty of contributory negligence, and that the deceased was guilty of ultimate negligence. The jury then fixed the percentage of responsibility for the accident and fixed the amount of damages to which the plaintiffs were entitled. Upon submission of the answers, counsel for the plaintiffs objected that the finding of ultimate negligence was inconsistent with apportioning damages and with finding the amount payable in damages. The jury were sent back, subject to objection by defendant's counsel, and on their return found that the deceased was not guilty of ultimate negligence. Judgment was given for the plaintiffs for the amount found by the jury. *Held*, on appeal, reversing the decision of ROBERTSON, J., that the appeal should be allowed and that there should be a new trial. *Per* MACDONALD, C.J.B.C.: Although a judge can send a jury back for reconsideration of their verdict when it is proved that a mistake is made, care should be taken not to do so where the jury have found the facts beyond any reasonable doubt. *Per* MARTIN, J.A.: There was the particular and obvious danger, resulting largely from the lead that was given by the remarks of plaintiffs' counsel and of one of the jurors following immediately thereupon, that the jury would improperly return a new answer to bring about a verdict which would not be properly based upon the facts they ought to find, regardless of the legal consequences, but upon their conception of the legal consequences that should flow therefrom and from an intention to assist the plaintiffs in recovering damages on that conception. The presence of this unusual danger called for a corresponding redirection of unusual care, and required that they should have been warned of this unusual danger and given a clear and definite caution that their sole duty was to find the facts in answer to the questions and leave it to the Court to determine the legal consequences of their finding. A mistrial has resulted from this inadequacy and a new trial must be directed. *Per* MACDONALD, J.A.: There is no inconsistency in the answers given by the jury: no confusion evident therein nor any justification for the request by counsel for respondents to the trial judge to resubmit the case to the jury. In any event the jury were perverse in finally finding in effect on the admitted facts that the deceased could not have seen the work-truck in time to avoid hitting it. His carelessness in failing to see it was the sole and final cause of the accident. GRANT AND GRANT v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - - - - - **66**

10.——*Duty of owner of premises to licensee—Railing of balcony in state of disrepair—Gives way when leaned against—Injury to plaintiff—Trap.*] The plaintiffs occupied a suite of rooms on the second floor of an apartment-building owned by the defendant. The suite of rooms was entered through a door leading from a balcony on said floor. While the plaintiffs were using the balcony they leaned against the railing, and owing to its defective condition the railing suddenly gave way, precipitating both plaintiffs to the ground below, causing them personal injuries. In an action for damages:—*Held*, that the balcony was a trap in the sense of a concealed danger to the licensee. The defendant is responsible for the damages caused by her negligence in allowing the trap to exist which ought to have been known to her. POWER AND POWER v. HUGHES. - - - - **492**

11.——*Employee as salesman—Automobile accident — Driving home in evening—Liability of employer—"Arising out of and in course of employment"—Interpretation.*] The defendant Hinton, a salesman whose home was in New Westminster, was returning from the head office of his employers (the defendant company) in Vancouver in a motor-car at 9 o'clock in the evening of the 30th of May, 1935, after attending a meeting of salesmen. Driving south on Main Street, Vancouver, and approaching the intersection of 4th Avenue, he overtook a street-car going in the same direction. He speeded up to pass the street-car (from 25 to 30 miles an hour) and when the front of the street-car reached the intersection he was about 12 feet behind the front of the street-car. At this time the plaintiff was crossing the intersection from east to west and she had cleared the tracks just in front of the street-car when she first saw the motor-car about 12 feet away. She then ran south-westerly, trying to get across in front of the motor-car. On seeing her Hinton swerved sharply to the right, trying to avoid her, but she ran into the front left fender of the motor-car and was very severely injured. The motorman of the street-car did not intend to stop at the intersection, but he did stop either because the plaintiff was so close to him when

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passing in front or because he saw an accident was about to occur. In an action for damages the plaintiff recovered judgment against both defendants. *Held*, on appeal, affirming the decision of MANSON, J., that the accident was caused solely by the negligence of Hinton in not driving at a slower rate of speed on approaching an intersection. *Held*, further, reversing the decision of MANSON, J. (MCPHILLIPS, J.A. dissenting), that under his employment Hinton was not compelled to work after 5 o'clock except in cases of emergency, and he was not engaged in work of that character at that time. He had attended a meeting of salesmen in the evening, and when it was over at 9 o'clock started for home, when he was not performing any duty under his contract of service, therefore the accident did not arise in the course of his employment, and his employers, the Home Oil Distributors Limited, are not liable. DALLAS v. HINTON AND HOME OIL DISTRIBUTORS LIMITED. - - - - - - **106**

12.——*Going too slowly—Not amounting to contributory negligence.* - **241**
See MOTOR-VEHICLES.

13.——*Highways—Non-repair—Hole in dirt road near car rail—Injury to passenger alighting from car—B.C. Stats. 1928, Cap. 58, Sec. 38.*] The plaintiff in getting off the rear end and north side of a west-bound street-car on 41st Avenue in Vancouver, alleged that she caught the heel of her right foot in a hole between the asphalt and the track, and falling was injured. On each side of the road is an asphalt pavement which comes to a short distance from the north and south rails, and on the south side of the asphalt on the north side of the track there is laid a "wooden ribbon" three inches wide and eight inches deep. There was evidence that at the point where the plaintiff alighted the "wooden ribbon" had worn away, but there was conflict as to its extent, and the spot where the plaintiff alighted was not definitely shown. *Held*, that it was impossible to say that the street was not in a reasonable state of repair, and under the circumstances the city could not reasonably have anticipated any damage to a passenger alighting from a street-car. REYNOLDS v. CITY OF VANCOUVER. - **275**

14.——*Master and servant—Negligent driving of servant—Course of employment.*] The deceased Offerdahl, a passenger on a motor-truck loaded with boxes of apples, was sitting on one of the boxes at the back

NEGLIGENCE—*Continued.*

of the truck when the defendant Graham, driving a car of the defendant company coming in the opposite direction "sideswiped" the on-coming motor-truck. Offerdahl was thrown from the motor-truck and from injuries received he died nine days later. The defendant company had an irrigation system of which the defendant Graham was superintendent. At the instance of the defendant company Graham had been appointed water bailiff by the Government with jurisdiction over areas beyond that of the defendant company, and over which it had no control, his duties as such being under the direction of the district engineer. The defendant company had previously had trouble with other water users below their own system and an arrangement was made between the defendant company and the Winfield Irrigation District, which was below that of the defendant company, whereby the defendant company carried the Winfield water (the Winfield Irrigation District having a water licence of its own) through its flumes and delivered it into the Winfield flumes within its own district. At the time of this accident Graham had been inspecting the Winfield flume as water bailiff under the superintendence of the district engineer. In an action by the wife and children of the deceased for damages, one-quarter of the blame for the accident was attributed to deceased and three-quarters to Graham, and it was further held that Graham was at the time working in the course of his employment for the defendant company. On appeal by the defendant company:—*Held*, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the defendant company is not liable for Graham's negligence at a time when he was performing certain duties as water bailiff at a place beyond the point where the appellant company delivered water for further distribution, and in an area over which it had no control. OFFERDAHL *et al.* v. OKANAGAN CENTRE IRRIGATION AND POWER COMPANY LIMITED AND GRAHAM. - - - - **23**

15.——*Motor-vehicles — Collision — Two cars travelling in same direction—One passing the other—Passing car cutting in to right side of road too sharply—Necessity of other car to apply brakes.*] Where one car passes another going in the same direction it is the duty of the passing car to be clear of the other car before cutting in to his right side of the road. There is no obligation on the driver of the slower car to put on his brakes when the other car is passing

NEGLIGENCE—*Continued.*

or cutting in ahead of him. Putnam v. Macneill. - - - - - - **519**

16.——*Motor-vehicles—One car passing another when going in the same direction—Passing car cutting in too sharply—Collision—Confusion of driver of slower car—Resulting damages—Liability of original wrongdoer for subsequent casualties.*] At about 9 o'clock in the morning of Sunday, the 10th of November, 1935, the plaintiff, with his wife, two sons and a young girl in the car, was driving easterly on St. John's Road in Port Moody 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 him, cut in so sharply in front that his car was alleged to have struck the left front fender of the plaintiff's car. There was asphalt pavement in the centre of the road eighteen feet wide with twelve foot gravel strips on each side. The plaintiff swerved to the left on to the gravel strip, and in attempting to stop he stepped on the accelerator instead of the foot-brake. The car accelerated in speed and continued to the left over a small tree on to the sidewalk. It continued along the sidewalk, sideswiped an electric-light pole with its left fender and was thrown over against a terrace and some steps on the south side of the sidewalk, and continued on easterly until it struck another electric-light pole about 180 feet from where the collision took place. The plaintiff's wife and the three children were severely injured. The trial judge in finding the defendant solely responsible for the accident, stated: "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." *Held*, on appeal, affirming the decision of Manson, J. (McQuarrie, J.A. dissenting), that even if it could be said, and there is something to support it, that perhaps it was not as definite a finding as is usual, nevertheless in giving his judgment the learned judge ought to have found that primary fact in favour of the plaintiffs and that the expression he used "I think it did" (take place) should be regarded as a finding of fact and the judgment can be primarily sustained upon that fact of impact as well as upon the other facts upon which he relied. *Per* McPhillips, J.A.: This case falls within the responsibility of the author of initial negligence for the probable consequences of that negligence in relation to a person who causes damage as a result of his normal state of mind having been upset by circumstances brought about by the original wrong-doer. Fujiwara *et al.* v. Osawa. - - - **383**

17.——*Permanent-wave machine—Application—Injury to customer—Charge to jury—No objection taken—Onus of proof—"Res ipsa loquitur"—Costs—R.S.B.C. 1936, Cap. 56, Sec. 60.*] The female plaintiff attended the beauty parlor operated by the defendant for the purpose of having her hair permanently waved. This treatment involves the application of heat to the hair through the agency of a machine. She alleged that during this operation, through no fault of her own, she was burned by the machine. The operator admitted that if the machine is properly applied and left on for a proper length of time there is no danger of a burn. The trial judge charged the jury without objection being taken, that the *onus* of proof throughout was upon the plaintiff, and upon the jury's verdict the action was dismissed. The plaintiffs appealed, and on the opening of the appeal the appellants were allowed to amend the notice of appeal by setting up that the learned judge erred in his direction to the jury as to the *onus* of proof, and that he should have instructed the jury that the doctrine of "*res ipsa loquitur*" applied. *Held*, that the doctrine of "*res ipsa loquitur*" applies and the *onus* is upon the defendant to establish affirmatively inevitable accident or absence of negligence on his part. The learned judge below misdirected the jury on the law relative to the burden of proof, and there should be a new trial. *Held*, further, that as counsel for the appellants did not object below to the charge of the learned trial judge, the defendant is entitled to the costs of the appeal under section 60 of the Supreme Court Act, the costs of the abortive trial to follow the event of the second trial. Field and Field v. David Spencer Limited. **447**

NON-REPAIR—Hole in dirt road near car rail—Injury to passenger alighting from car. - - - **275**
See Negligence. 13.

ONUS. - - - - - - - **326**
See Criminal Law. 10.

ONUS OF PROOF. - - **532, 447**
See Husband and Wife. 1.
Negligence. 17.

OPIUM—Possession of—Conviction—*Habeas corpus*—*Certiorari* in aid—Release of accused—Appeal—Jurisdiction. - - - - - - - - **140**
See CRIMINAL LAW. 7.

OPIUM AND NARCOTIC DRUG ACT, 1929, THE—*Conspiracy to distribute morphine—Evidence of an accomplice—Corroboration—Charge—Can. Stats. 1929, Cap. 49, Sec. 4 (f).*] The accused was charged that he unlawfully did conspire, combine, confederate and agree with Shenichiro Hikida, Tadayoski Furumoto, Joe Ferraro and others, to commit an indictable offence, to wit, to distribute a drug, to wit, morphine, contrary to section 4 (*f*) of The Opium and Narcotic Drug Act, 1929. The three above-mentioned conspirators had been convicted and sentenced to imprisonment. The accused was not charged with them. The above named Furumoto turned King's evidence and stated that he sold a pound of morphine to accused in half-pound lots. The only evidence to corroborate Furumoto was that of an agent of the police, to the effect that he had seen Furumoto and the accused talking together one night, but out of earshot, in the house of the above-mentioned Ferraro, which was a boot-leggers' drinking place, resorted to by criminals and others, including operators in the opium traffic. The accused admitted he conversed with Furumoto on the night in question, but denied that the conversation with with respect to narcotics. The trial judge in his charge intimated that he was favourably impressed with the evidence of Furumoto and he told the jury that if they believed him they had the right to convict the prisoner without corroboration of Furumoto's evidence, but that it was highly dangerous in some cases to do so. The accused was convicted. *Held*, on appeal, affirming the decision of MANSON, J. (MARTIN, J.A. dissenting), that the charge was sufficiently given by the trial judge and the jury were entitled to found their verdict upon it, further that there was corroboration in the evidence of the agent of the police who saw accused talking to Furumoto in Ferraro's boot-legging premises, and if the jury decided the case on corroborative evidence they were justified in doing so. REX v. CANNING. - - - - - **93**

2.——*Construction of section 17 of.* - - - - - - - - **326**
See CRIMINAL LAW. 10.

3.——*Conviction for offence against—Sentence—Adequacy—Fine in addition—Ten*

OPIUM AND NARCOTIC DRUG ACT, 1929, THE—*Continued.*

days' imprisonment in default of payment—Adequacy. - - - - - **317**
See CRIMINAL LAW. 5.

4.——*Convictions under — Deportation—Effect of section 26 thereof.* - **151**
See ALIENS.

ORDER—Application to vary—Jurisdiction. - - - - - - **129**
See PRACTICE. 8.

OWNER—Automobile—Liability for driver. - - - - - - - **1**
See CRIMINAL LAW. 2.

PARTIES — Trade union — Unincorporated body—Representative action—Persons having same interest in cause or matter—Order authorizing one or more to defend on behalf of all. - - - - - - **161**
See PRACTICE. 9.

PASSENGER—Alighting from car—Injury to. - - - - - - **275**
See NEGLIGENCE. 13.
2.——*Drunken.* - - - **538**
See CARRIERS.

PERMANENT-WAVE MACHINE—Application—Injury to customer. - **447**
See NEGLIGENCE. 17.

PRACTICE—*Appeal to Supreme Court of Canada—Two actions consolidated for trial and appeal—Motion to approve security—Order for one judgment—R.S.C. 1927, Cap. 35, Sec. 70.*] On an application to approve security for costs to the Supreme Court of Canada, the fact that a single judgment is an adjudication upon the rights of three parties in two consolidated appeals in different causes of action arising out of the same collision of motor-cars, does not confer the right to treat the single judgment pronounced as being divisible into two or more distinct judgments for the purposes of appeal. It follows that the usual order should be made approving the security. J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY. (No. 4). - - - - - - - - **487**

2.——*Contempt of Court — Divorce — Order for security for wife's costs—Non-compliance with order—Order for commitment—Costs for maintenance—Order LXIX., rr. 1 and 2—Divorce Rules 78 and 91.*] An order was made on the 21st of July, 1937, to commit the respondent to gaol for contempt of Court by non-payment of costs taxed under Divorce Rule 91. On Septem-

PRACTICE—*Continued.*

ber 4th, 1937, the respondent was apprehended, lodged in the Provincial gaol at Oakalla Prison Farm and $7 was paid for his maintenance for one week. On September 10th, 1937, a further $7 was paid under protest for maintenance. On September 18th following, upon demand being made for the costs of maintenance, the petitioner's solicitor refused to pay. Respondent's solicitor then applied under Supreme Court Order LXIX., r. 2, for his discharge. *Held*, that the issue to decide is whether or not Order LXIX., rr. 1 and 2 are applicable. This involves the question of whether or not the order of the 21st of July, 1937, may be said to be a writ of *capias ad respondendum*, *capias ad satisfaciendum* or *ne exeat regno*, as referred to in Order LXIX., r. 1. The order made is an order "that the respondent has been guilty of a contempt of this Court and that he do stand committed to prison for his said contempt for the period there set out." It is not an order that could be properly described as one of the writs referred to in Order LXIX., r. 1, and the application is dismissed. MATTOCK v. MATTOCK (No. 3). - - - - **301**

3.——*Costs—Consolidated actions—Application of Contributory Negligence Act, R.S.B.C. 1936, Cap. 52.*] As a result of George R. Bailey, with his brother as a passenger, being in collision with Grogan, Bailey (passenger) brought action against Grogan for damages and Bailey (driver) was added as a third party. Grogan then brought action against Bailey (driver) for damages. The actions were then consolidated for trial and Bailey was held solely responsible for the accident. On appeal, the majority of the Court held that the Contributory Negligence Act applied, and Grogan was 70 per cent. responsible for the accident and Bailey (driver) was 30 per cent. responsible. On motion before the Court of Appeal to settle the minutes as to costs:—*Held*, that in the action of *Bailey* (passenger) v. *Grogan*, Bailey should get his full costs here and below. In the action of *Grogan* v. *Bailey* (driver) in the third-party proceedings, Grogan should get his costs in full of the appeal and 30 per cent. of the costs below. In the second consolidated action of *Grogan* v. *Bailey* (driver), Bailey (driver) should get his full costs of the appeal and 70 per cent. of the costs below. J. W. BAILEY v. GROGAN: G. R. BAILEY, THIRD PARTY. GROGAN v. G. R. BAILEY (No. 3). - **470**

4.——*County Court—Dismissal of charge by justice of the peace—Motion to quash*

PRACTICE—*Continued.*

appeal—Objection that it must be by way of application in Chambers and not by Court motion—Criminal Code, Secs. 749 and 750—Order VII., r. 3 (a).] Upon the respondent moving to quash an appeal by the informant from the dismissal of a complaint against him, the appellant raised the preliminary objection that under the County Court Rules the motion to dismiss should have been made by way of application to a judge in Chambers and not by Court motion. *Held*, that in all matters of practice and procedure the County Court Rules apply. Under clause (*a*) of Rule 3 of Order VII. of said Rules interlocutory applications are made according to Form 9A. Form 9A states that the application is to be made to a judge in Chambers. The respondent must strictly comply with the County Court Rules and having issued a notice of motion to the Court instead of making an application in Chambers, the motion is dismissed. REX v. CROWE. (No. 2). - - - **550**

5.——*County Court — Summons and plaint—Service of on defendant—Death of plaintiff before service—Validity—County Court Rules, Order I., r. 2D.; Order II., rr. 41 and 49.*] The summons herein was issued on the 3rd of December, 1936. The plaintiff died on the 13th of December, 1936. The defendant was served with a copy of the summons on the 18th of November, 1937, and no order of revivor was made by the Court until the 14th of December, 1937. On an application by the defendant to set aside the service of the summons:—*Held*, that the service of the summons on the 18th of November, 1937, was a nullity and the summons ceased "to be in force" after the expiration of twelve months from the date of the summons. BENING v. SINGER. **392**

6. —— *Discovery — Company — "Past officer"—Agent without authority to bind company—Not within rule 370c.*] An agent who has no authority to bind an insurance company but merely takes applications for insurance and submits them for acceptance or rejection is not an "officer" and cannot be examined as a "past officer" within rule 370c. TREWIN v. WAWANESA MUTUAL INSURANCE COMPANY. - - - - **357**

7.——*Examination for discovery of intervener—Application for.* - - - **298**
See DIVORCE. 3.

8.——*Order of Court—Failed to include a provision intended by the Court—Application to vary the order—Jurisdiction.*] If by

PRACTICE—*Continued.*

mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court has jurisdiction to correct it. THE ROYAL TRUST COMPANY v. BAINBRIDGE LUMBER COMPANY LIMITED. - - - - - - - - - **129**

9.——*Parties — Trade union — Unincorporated body — Representative action—Persons having same interest in cause or matter —Order authorizing one or more to defend on behalf of all.*] In an action for damages arising from a collision between the motorcar of the plaintiff and a car driven by the defendant, the examination of the defendant for discovery disclosed that the car driven by him at the time of the collision was the property of a trade union known as the Lumber and Sawmill Workers Union Local 2782, and that he was then engaged in the performance of his duties as an official of such union, that the union is not a registered trade union and is not incorporated, and that the trustees of such union at the time of the collision were two men named E. Anderson and Clayton Aitken. On an application to add E. Anderson and Clayton Aitken as defendants, to be sued on their own behalf and on behalf of all other members of said trade union as trustees thereof, and authorizing them to defend on behalf of all such other members and to amend the plaint in conformity thereto:—*Held*, that the evidence discloses that men sought to be added as defendants are in fact the trustees of this union though unregistered, and they can fairly be said to represent the members of the union as "people proper to be authorized to defend" and the order will be granted. HEMMINGSEN v. BERGEN. **161**

10.——*Statement of claim—Amendment —Whether new cause of action set up— Application pending second trial—Lateness —R.S.B.C. 1936, Cap. 93, Sec. 5.*] A statement of claim alleged that deceased came to his death because the defendant company by its servant or agent, the defendant Martin, so negligently and carelessly drove a street-car, the property of the defendant company, that it violently struck and collided with the deceased. After the trial on which the jury disagreed, the plaintiff applied for leave to amend the statement of claim by alleging that the injuries to the deceased were caused by the negligent operation of two of the defendant company's street-cars, or by negligence in the operation of one or other of them, or by the negligence of the drivers of the said street-cars, or one of them. Defendant company contended

PRACTICE—*Continued.*

that the proposed amendments would add a new cause of action which was barred by section 5 of the Families' Compensation Act. *Held*, that the proposed amendment fell within the ambit of the endorsement on the writ and it could not be said that the plaintiff sought a new cause of action nor was it too late to allow the amendment to be made. That a trial had taken place was not a determining factor. *Held*, further, that the Statute of Limitations is not a bar to an amendment which does no more than plead another fact or facts involving negligence arising out of the same set of circumstances and of the same character as that pleaded in the first instance. SMITH v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED AND MARTIN. - **231**

PRINCIPAL AND AGENT—*Sale of warehouse—Negotiations with purchaser—Subsequent sale through other agent on same terms — Efficient cause of sale — Right of commission.*] In May, 1917, the plaintiff took over the management and collection of rents of a warehouse property owned by the defendant and situate in close proximity to the departmental stores of David Spencer Ltd., in Vancouver. In 1926 the property was listed with the plaintiff for sale at $41,250. Upon the depression coming on in 1929, the plaintiff recommended that an offer of the Spencers of $25,000 for the property be accepted. This the defendant refused. In 1930 she lowered her selling price to $38,000. The plaintiff continued his endeavours to make a sale to the Spencers and in March, 1930, the defendant listed the property with the plaintiff at $30,000. In January, 1936, the defendant gave one Burr exclusive listing of the property for seven days at $26,000, but nothing came of it. On February 4th, 1936, the defendant gave an exclusive listing to the plaintiff at $28,000 which was never cancelled and shortly after she orally agreed to lower the price to $27,000. The plaintiff continued in his endeavours to make a sale but the Spencers would not pay more than $26,000. In the latter part of May, 1936, one *MacGill* the defendant's solicitor negotiated with Victor Spencer to bring about a sale and finally meeting him on June 1st, 1936, a sale was made at $27,000. In an action for a commission or in the alternative for a *quantum meruit* for services in connection with negotiations for a sale of the property:—*Held*, that while the Spencers were approached by others than the plaintiff none of them appears to have had a definite listing

PRINCIPAL AND AGENT—*Continued.*

(except Burr who had one for a short period) and the evidence discloses that the plaintiff did the real spade work and was most persistent of those who negotiated with the Spencers—in fact, the only really persistent negotiator. The statement of the law that "if the relation of the buyer is really brought by the act of the agent he is entitled to commission, although the actual sale has not been effected by him" is applicable here. The plaintiff is entitled to damages on a *quantum meruit* assessed at the full amount of the regular commission. MACAULAY NICOLLS & MAITLAND COMPANY LIMITED v. BURMAN. - - - - 9

PRIVILEGE. - - - - - 460
See DISCOVERY. 3.

PROHIBITION. - - - - - 516
See CRIMINAL LAW. 4.

2.——*Appeal.* - - - - - 47
See COMPANY.

3.——*Interlocutory judgment in County Court — Writ prohibiting further proceedings — Set aside on appeal — Appeal from interlocutory judgment proper course.*] Through a real-estate agent the plaintiff sold a boarding-house in Vancouver. The parties executed a preliminary contract known as an "interim receipt" which contained a term that the plaintiff would give up possession and the defendants paid $100 to bind the bargain. The plaintiff gavê up possession, and after she had moved out the defendants declined to proceed with the transaction. The plaintiff then moved back into possession and the real-estate agent demanded full commission for bringing about the sale. The agent brought action and recovered $350 as his commission. This sum was paid by the plaintiff. The plaintiff then brought action to enforce the agreement and for payment of the purchase price of the property, but the defendants could not be found and the plaintiff sold the property for $360 less than the amount the defendants agreed to pay. Subsequently the defendants were found and the plaintiff brought action for damages for breach of contract in the County Court. The defendants did not file a dispute note and interlocutory judgment was signed. On the hearing to assess damages, judgment was entered for $520. A motion by the defendants in the County Court to set aside the interlocutory judgment was dismissed. The defendants then applied for an order that a writ of prohibition do issue prohibiting the

PROHIBITION—*Continued.*

plaintiff from further proceeding with the action, which was granted. *Held*, on appeal, reversing the decision of MCDONALD, J., that the extraordinary remedy of prohibition cannot be evoked as a means of appealing from the decision of the County Court judge when the question which he decided was within his jursidiction to determine. The proper procedure to be adopted is an appeal to the Court of Appeal. *In re* PENDING ACTION: MCKEE v. HALVERSON AND HALVERSON. - - - - - - - 404

PROSTITUTION—Living on avails of. - - - - - - 476
See CRIMINAL LAW. 16.

QUALIFIED PRIVILEGE. - - - 351
See SLANDER.

QUIT-CLAIM DEED. - - - - 410
See MORTGAGOR AND MORTGAGEE.

RAILING OF BALCONY—In state of disrepair — Gives way when leaned against—Injury to plaintiff—Trap. - - - - - - - 492
See NEGLIGENCE. 10.

REAL PROPERTY—*Land Registry Act—Priority as between unregistered deed and judgment—Unregistered deed executed before registration of judgment—R.S.B.C. 1936, Cap. 105, Sec. 4; Cap. 106, Sec. 3 (1); Cap. 140, Sec. 34.*] The Commercial Securities Corporation Limited, having recovered judgment against George Kovach in the Province of Saskatchewan for $422.12, brought action in the County Court in Vancouver against Kovach upon the judgment on the 27th of January, 1937, and the plaint and summons were served on Kovach on the 1st of February, 1937. On the next day Kovach transferred a property on Napier Street in Vancouver to his wife, who registered her deed and a certificate of indefeasible title was issued in her favour on the 4th of February, 1937. On April 17th, 1937, the wife transferred the property to George Tyson, who paid her $300. Tyson did not register his deed. On the 19th of April judgment was entered in favour of the judgment creditor against the judgment debtor for $460.37, and it was registered in the Land Registry office on the 30th of April, 1937. Tyson swore he knew nothing of the judgment of the judgment creditor against Kovach until June 14th, 1937, and that his transaction with Mrs. Kovach was entirely *bona fide*. On motion for judgment in an action to set aside the transfer of said

REAL PROPERTY—*Continued.*

property to Mrs. Kovach and that the judgment debtor be restored as the registered owner thereof:—*Held*, that the transfer by the judgment debtor to his wife falls within section 3 (1) of the Fraudulent Preferences Act and is as against the judgment creditor not "utterly void" but voidable. The judgment creditor is entiled to an order setting aside the conveyance from husband to wife and directing that the certificate in favour of Mrs. Kovach be surrendered for cancellation. *Held*, further, that as the deed to Tyson was not registered, the effect of the provisions of the Land Registry Act is to deprive him of the advantage which would be his as an innocent purchaser for value without notice. *In re* FRAUDULENT PREFERENCES ACT AND *In re* COMMERCIAL SECURITIES CORPORATION LIMITED (JUDGMENT CREDITOR), GEORGE KOVACH (JUDGMENT DEBTOR) AND GEORGE TYSON. - - **307**

2.——*Sale of small portion of a block of land for school site—Deed not registered—Subsequent agreement for sale of whole block—Agreement registered—Knowledge of former sale — Fraud — R.S.B.C. 1924, Cap. 127, Secs. 36, 37 (2), 38 and 43.*] Thomas Parker, the registered owner of 203 acres of land at Rocky Point on Vancouver Island, conveyed one acre of the land to Her Majesty the Queen in the right of the Province for a school site on the 30th of June, 1888. The deed was absolute in form but was not registered in the Land Registry office. In 1928 Thomas Parker entered into a written agreement to sell the whole 203 acres to his son Alfred and his wife Lillian for $15,000, with a cash payment of $4,000, and the agreement was registered in the charge book in the Land Registry office on the 26th of July, 1928. At the time of this sale the defendants claim Thomas Parker represented to his son that the title of the Crown to the one acre would expire when the school ceased to be carried on. On February 6th, 1931, the holding of school in the school-house was discontinued on account of lack of pupils attending. Thomas Parker died on January 14th, 1934, and on the 12th of April following a certificate of indefeasible title was issued to his executors for the whole 203 acres. This action was brought by the Crown on August 2nd, 1935, to recover possession of the school site, and judgment was given for the plaintiff. *Held*, on appeal, affirming the decision of MURPHY, J. (MACDONALD, C.J.B.C. dissenting), that on the evidence the learned trial judge properly found that the appellants knew of the title of the Crown, that they were guilty of fraud, and the appeal should be dismissed. ATTORNEY-GENERAL OF BRITISH COLUMBIA v. PARKER *et al.* - - - - - **99**

REMUNERATION—For trustee. - **552**
See COMPANIES

RESTRAINT OF TRADE—Master and servant—Agreement between—Reasonableness. - - - - **287**
See CONTRACT. 1.

RULES AND ORDERS—County Court Order I., 4. 2D. - - - - **392**
See PRACTICE. 5.

2.——*County Court Order II., rr. 41 and 49.* - - - - - - - **392**
See PRACTICE. 5.

3.——*County Court Order VII., r. 3 (a).* - - - - - - - - - **550**
See PRACTICE. 4.

4.——*County Court Order VII., r. 6.* **47**
See COMPANY.

5.——*Divorce Rules 78 and 91.* - **301**
See PRACTICE. 2.

6.——*Order LXV., r. 32.* - - **294**
See COSTS. 2.

7.——*Order LXIX., rr. 1 and 2.* - **301**
See PRACTICE. 2.

8.——*Order LXXA, r. 6.* - - **401**
See HUSBAND AND WIFE. 2.

9.——*Supreme Court Rule 370c.* **357**
See PRACTICE. 6.

10.——*Supreme Court Rule 370r.* **345**
See COUNTY COURT. 2.

11.——*Supreme Court Rule 967.* - **396**
See HOURS OF WORK ACT, 1934.

SALE OF GOODS—Property to remain in vendor—Agreements not registered—Bankruptcy of purchaser—Trustee—Creditors. - **488**
See CONDITIONAL SALE AGREEMENTS.

SECURED CREDITORS. - - **488**
See CONDITIONAL SALE AGREEMENTS.

SECURITY FOR COSTS—Motion to approve—Supreme Court of Canada. - - - - - - - **487**
See PRACTICE. 1.

SENTENCE—Adequacy—Fine in addition—Ten days' imprisonment in default of payment—Adequacy. - **317**
See CRIMINAL LAW. 5.

2.——*Leave to appeal from — Adequate reasons.* - - - - - **240**
See CRIMINAL LAW. 14.

SERVANT—Negligent driving by—Course of employment. - - **23**
See NEGLIGENCE. 14.

SLANDER — *Meeting of Pharmaceutical Association—Presidential address—Qualified privilege — R.S.B.C. 1936, Cap. 215.*] The defendant was the president of the Pharmaceutical Association of British Columbia, created under the Pharmacy Act. The plaintiff conducted at a profit a school of pharmacy in Vancouver which was attended by pharmacy students. The school was in no way connected with the association. At the annual meeting of the association the low average of successful candidates in the subjects of *materia medica* and botany was commented upon, and the president in his address to the meeting said "I fear *materia medica* and botany are not being properly taught in Vancouver in either of the schools." In an action for slander:—*Held*, that the statutory direction that a meeting of members of the association be held annually was made so that members could be informed of the business of the association and of any matter in which they as such members are interested. The annual meeting was a privileged occasion upon which defendant was entitled to use the language above quoted without incurring legal liability for so doing. *Held*, further, that the defence of qualified privilege is not destroyed by the fact that the editor of a trade journal, whose presence was required by the by-laws, was present at the meeting and defendant knew that his remarks would be published in that journal. MCINTOSH v. SCOTT. - - - - - - **351**

SOLICITOR AND CLIENT — Communications between. - - **460**
See DISCOVERY. 3.

SPECIFIC PERFORMANCE. - **500**
See LANDLORD AND TENANT.

SPEEDY TRIAL. - - - - - **476**
See CRIMINAL LAW. 16.

STATEMENT OF CLAIM — Amendment—Whether new cause of action set up—Application pending second trial—Lateness. - - **231**
See PRACTICE. 10.

STATUTE—*Interpretation.* - **224**
See INSURANCE, ACCIDENT. 1.

STATUTE, CONSTRUCTION OF. - **237**
See DAMAGES. 3.

STATUTE OF FRAUDS. - - **500**
See LANDLORD AND TENANT.

STATUTES—*Interpretation—Ejusdem generis rule — Mortgagors' and Purchasers' Relief Act, 1934—Leave to take proceedings —For personal judgment on covenant—Must be specifically applied for—B.C. Stats. 1934, Cap. 49, Sec. 4.*] An appointment under section 5 of the Mortgagors' and Purchasers' Relief Act recited that the purpose of an inquiry was to determine whether the intended plaintiff should be granted leave "to foreclose a certain agreement for sale of lands." The registrar's report on the inquiry recommended that leave be granted the intended plaintiff "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of principal moneys, interest, etc., payable under said agreement and the indenture of assignment of said lands of the 6th of September, 1928. The order then made gave the intended plaintiff leave "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of the principal moneys, interest, etc., payable under said agreement and said assignment. The plaintiff claims in his statement of claim (a) to have an account taken of all moneys due for principal and interest, etc., payable under an agreement in writing of the 1st of May, 1926, for the sale by the plaintiff to the defendants Lee Foo, Lee Lip and Lee Wing of certain lands; (b) for personal judgment against the defendants Fiorenza and Fagundies for the amount found due by virtue of the covenants of said defendants contained in the assignment of said lands of the 6th of September, 1928, made by the abovementioned purchasers to the said defendants. *Held*, that effect must be given to all the subsections of section 4 (1) of said Act. The expressed intention of the section is that the leave required before taking proceedings for personal judgment upon any such covenant should be specifically applied for and specifically granted by the order before such proceedings can be taken. In the present case, while leave to take proceedings for foreclosure and other remedies supplementary or incidental to foreclosure with respect to the said lands was applied for and granted, leave was not specifically applied for or granted to take proceedings for personal judgment, therefore the said order did not grant the leave required for

STATUTES—*Continued.*

taking proceedings for personal judgment on said covenants. YORKSHIRE AND PACIFIC SECURITIES LIMITED v. FIORENZA *et al.* **509**

2.——*Revised Statutes of 1936 — Mortgagors' and Purchasers' Relief Act, 1934—Not printed in extenso in Revised Statutes —Listed in table of private and local Acts in revision—Validity—B.C. Stats. 1934, Cap. 49—B.C. Stats. 1936, Cap. 52, Sec. 6.*] The Mortgagors' and Purchasers' Relief Act, 1934, was not printed *in extenso* in the Revised Statutes of British Columbia, 1936, but was listed in a table of private and local Acts in the fourth volume of the revision. *Held*, that the Act is still in force as it cannot be said to come within section 6 of the Revised Statutes Act, 1936, as being repugnant to the Supreme Court Act or the Rules, and the fact that it has been included among the statutes listed in volume 4 of the Revised Statutes, 1936, negatives the view that it has been repealed. *In re* INTENDED ACTION. KNOX v. VENNING. - **81**

56 Geo. III., Cap. 100, Sec. 3 (Imp.). - **79**
See CHINESE IMMIGRATION ACT.

B.C. Stats. 1925, Cap. 2, Sec. 4. - **4**
See DEVOLUTION OF ESTATES. 2.

B.C. Stats. 1928, Cap. 19, Sec. 7. - **224**
See INSURANCE, ACCIDENT. 1.

B.C. Stats. 1928, Cap. 58, Sec. 38. - **275**
See NEGLIGENCE. 13.

B.C. Stats. 1929, Cap. 13, Sec. 2. - **488**
See CONDITIONAL SALE AGREEMENTS.

B.C. Stats. 1934, Cap. 38. - **179, 61**
See CONSTITUTIONAL LAW. 1.
NATURAL PRODUCTS MARKETING (BRITISH COLUMBIA) ACT. 1.

B.C. Stats. 1934, Cap. 49. - - **81**
See STATUTES. 2.

B.C. Stats. 1934, Cap. 49, Sec. 4. - **509**
See STATUTES. 1.

B.C. Stats. 1935, Cap. 46, Secs. 7 (1), 45 and 46. - - - - **280**
See SUMMARY CONVICTION.

B.C. Stats. 1936, Cap. 34. - - **179**
See CONSTITUTIONAL LAW. 1.

B.C. Stats. 1936, Cap. 52, Sec. 6. - **81**
See STATUTES. 2.

B.C. Stats. 1936, Cap. 68, Sec. 26. - **547**
See DAMAGES. 5.

STATUTES—*Continued.*

B.C. Stats. 1936 (Second Session), Cap. 30. - - - - - - **179**
See CONSTITUTIONAL LAW. 1.

B.C. Stats. 1936 (Second Session), Cap. 30, Sec. 5. - - - **42**
See CONSTITUTIONAL LAW. 4.

Can. Stats. 1929, Cap. 49, Sec. 4, subsec. (1) (*d*) and (*i*) and subsec. (2). - - - - - - **317**
See CRIMINAL LAW. 5.

Can. Stats. 1929, Cap. 49, Secs. 4 (1) (*d*) and 17. - - - - **326**
See CRIMINAL LAW. 10.

Can. Stats. 1929, Cap. 49, Sec. 4 (1) (*f*). - - - - - - - **93**
See OPIUM AND NARCOTIC DRUG ACT, 1929, THE. 1.

Can. Stats. 1929, Cap. 49, Secs. 4 and 26. - - - - - - **151**
See ALIENS.

Can. Stats. 1934, Cap. 24, Sec. 75 (2) (*c*). - - - - - - **16**
See BANKS AND BANKING. 2.

Can. Stats. 1934, Cap. 57. - **32, 42**
See CONSTITUTIONAL LAW. 3, 4.

Can. Stats. 1935, Cap. 64. - **32, 42**
See CONSTITUTIONAL LAW. 3, 4.

Criminal Code, Sec. 216, Subsecs. 2 and (*l*). - - - - - **472, 476**
See CRIMINAL LAW. 11, 16.

Criminal Code, Secs. 226, 227 and 229. **420**
See CRIMINAL LAW. 8.

Criminal Code, Sec. 236 (*b*). - **467**
See CRIMINAL LAW. 15.

Criminal Code, Secs. 292, 583, 773, 774, 777, 779 and 781. - - **146**
See CRIMINAL LAW. 3.

Criminal Code, Sec. 641 (3). - **478**
See CRIMINAL LAW. 13.

Criminal Code, Sec. 749. - - **516**
See CRIMINAL LAW. 4.

Criminal Code, Secs. 749 and 750. - **550**
See PRACTICE. 4.

Criminal Code, Secs. 1013 (2) and 1022. - - - - - - **240**
See CRIMINAL LAW. 4.

Criminal Code, Sec. 1013, Subsec. 4. - **476**
See CRIMINAL LAW. 16.

R.S.B.C. 1924, Cap. 1, Sec. 23, Subsec. 13 (*a*). - - - - - **47**
See COMPANY.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 5, Sec. 127 (1). - **4**
See DEVOLUTION OF ESTATES. 2.

R.S.B.C. 1924, Cap. 44, Sec. 3. - **488**
See CONDITIONAL SALE AGREEMENTS.

R.S.B.C. 1924, Cap. 46, Sec. 3. - **179**
See CONSTITUTIONAL LAW. 1.

R.S.B.C. 1924, Cap. 53, Sec. 25. - **47**
See COMPANY.

R.S.B.C. 1924, Cap. 85. - - **83**
See FAMILIES' COMPENSATION ACT.

R.S.B.C. 1924, Cap. 127, Secs. 36, 37 (2), 38 and 43. - - - **99**
See REAL PROPERTY. 2.

R.S.B.C. 1924, Cap. 135, Sec. 2 (25). - **16**
See BANKS AND BANKING. 2.

R.S.B.C. 1924, Cap. 177. Sec. 34 (1). - **1**
See CRIMINAL LAW. 2.

R.S.B.C. 1924, Cap. 245, Sec. 101. - **280**
See SUMMARY CONVICTION.

R.S.B.C. 1936, Cap. 42, Sec. 188. - **396**
See HOURS OF WORK ACT, 1934.

R.S.B.C. 1936, Cap. 52. - - **422**
See NEGLIGENCE. 2.

R.S.B.C. 1936, Cap. 52, Sec. 2. **528, 315**
See NEGLIGENCE. 1, 6.

R.S.B.C. 1936, Cap. 52. - - **470**
See PRACTICE. 3.

R.S.B.C. 1936, Cap. 56, Sec. 60. - **447**
See NEGLIGENCE. 17.

R.S.B.C. 1936, Cap. 58, Sec. 40 (1). - **345**
See COUNTY COURT. 2.

R.S.B.C. 1936, Cap. 76, Sec. 27. - **298**
See DIVORCE. 3.

R.S.B.C. 1936, Cap. 93, Sec. 5. - **231**
See PRACTICE. 10.

R.S.B.C. 1936, Cap. 105, Sec. 4. - **307**
See REAL PROPERTY. 1.

R.S.B.C. 1936, Cap. 106, Sec. 3 (1). - **307**
See REAL PROPERTY. 1.

R.S.B.C. 1936, Cap. 122, Secs. 11 and 13. - - - - - - - **396**
See HOURS OF WORK ACT, 1934.

R.S.B.C. 1936, Cap. 133, Secs. 101 to 105. - - - - - - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

R.S.B.C. 1936, Cap. 140, Sec. 34. - **307**
See REAL PROPERTY. 1.

STATUTES—*Continued.*

R.S.B.C. 1936, Cap. 148. - - **438**
See BANKS AND BANKING. 1.

R.S.B.C. 1936, Cap. 165. - **179, 523**
See CONSTITUTIONAL LAW. 1.
INJUNCTION. 2.

R.S.B.C. 1936, Cap. 181, Secs. 28 and 126. - - - - - - **377**
See MINES AND MINING.

R.S.B.C. 1936, Cap. 195, Sec. 53. - **333**
See NEGLIGENCE. 4.

R.S.B.C. 1936, Cap. 215. - - **351**
See SLANDER.

R.S.B.C. 1936, Cap. 285. - - **544**
See ESTATE.

R.S.B.C. 1936, Cap. 285, Sec. 3. - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

R.S.B.C. 1936, Cap. 310. - - **416**
See WOODMEN'S LIENS.

R.S.C. 1927, Cap. 12, Secs. 75 and 79. **438**
See BANKS AND BANKING. 1.

R.S.C. 1927, Cap. 22, Secs. 2 (*c*) and 8. - - - - - - **151**
See PRACTICE. 1.

R.S.C. 1927, Cap. 35, Sec. 70. - **487**
See PRACTICE. 1.

R.S.C. 1927, Cap. 93, Secs. 33, Subsec. 7, and 42. - - - **321**
See HABEAS CORPUS. 2.

R.S.C. 1927, Cap. 93, Secs. 42 and 43. **151**
See ALIENS.

R.S.C. 1927, Cap. 95, Sec. 37. - **79**
See CHINESE IMMIGRATION ACT.

STEAMSHIP—Drunken passenger—Duty to protect passengers from drunkards. - - - - - - - **538**
See CARRIERS.

STOP SIGN—Effect of. - - **359**
See NEGLIGENCE. 7.

SUMMARY CONVICTION—*Under Metalliferous Mines Regulation Act—Certiorari—Magistrate—Jurisdiction—Evidence as to—Whether two offences—Amendment of conviction—R.S.B.C. 1924, Cap. 245, Sec. 101—B.C. Stats. 1935, Cap. 46, Secs. 7 (1), 45 and 46.*] The accused was convicted under the Summary Convictions Act for refusing to comply with an order given under section 7 (1) of the Metalliferous Mines Regulation Act. The conviction imposed a penalty of $300 under section 45 of the Act and a fur-

SUMMARY CONVICTION—*Continued.*
ther penalty under section 46 of $5 per day from September 11th, 1936, to January 7th, 1937 (the date of the conviction), save and except Sundays and statutory holidays, and also required the accused to pay $4.25 costs to the magistrate. On an application by way of *certiorari* to quash the conviction:—*Held,* that the conviction was for one offence only; that the magistrate had jurisdiction territorially and otherwise to try a case of the kind described in the information and conviction; that apart from section 101 of the Summary Convictions Act the Court had no right to consider whether there was sufficient or proper evidence on which to convict; that the further penalty was one which the magistrate did not have the power under such an information and conviction to impose and that part of the conviction awarding costs in the sum of $4.25 to the magistrate is bad on its face. *Held,* further, that as the Court was satisfied that an offence of the nature described in the conviction over which the magistrate had jurisdiction had been committed, the conviction should be upheld under the curative provisions of section 101 of the Summary Convictions Act, but it should be amended by striking out the words imposing the further penalty and costs. REX v. COLPE. - - - - **280**

STYLE OF CAUSE. - - - - **47**
See COMPANY.

TESTATOR'S FAMILY MAINTENANCE ACT. - - - - - - - - **544**
See ESTATE.

2.——*Nothing in estate of deceased—Two insurance policies — Children of deceased designated as beneficiaries—Will—Preferred beneficiaries—Petition by wife for adequate provision—Insurance so designated not part of "estate"—R.S.B.C. 1936, Cap. 133, Secs. 101 to 105; Cap. 285, Sec. 3.*] The estate of Donald A. Macdonald at the time of his death was insolvent. There were two insurance policies on his life. One was for $14,494 which originally was made payable to his wife but was subsequently changed and made payable to his children; a second policy for the same amount was made payable to his children. After payment of certain charges the balance, which was paid into Court, was $26,400. By his will deceased left five-fifteenths of said amount to his daughter and two-fifteenths each to his wife and four sons. Upon the petition of the wife under the Testator's Family Maintenance Act for adequate provision for her maintenance, it was ordered that $10,000 be paid to the wife and that the balance be divided equally amongst his children. *Held,* on appeal, reversing the decision of McDONALD, J., that the insurance money under the circumstances in this case does not form part of "the estate of the testator" and the Testator's Family Maintenance Act does not apply. *In re* TESTATOR'S FAMILY MAINTENANCE ACT AND THE ESTATE OF DONALD ALEXANDER MACDONALD, DECEASED. DALTON *et al.* v. MARY GERTRUDE MACDONALD. **473**

TRADE UNION—Unincorporated body. - - - - - - **161**
See PRACTICE. 9.

TRAP—Railing of balcony in state of disrepair—Gives way when leaned against—Injury to plaintiff. - **492**
See NEGLIGENCE. 10.

TRIAL—Putting in other parties' examination—Effect of. - - - **345**
See COUNTY COURT. 2.

TRUSTEE—For bondholders—Trustee's conduct—Remuneration of trustee—Duties and responsibilities of trustee. - - - - **552**
See COMPANIES.

ULTIMATE NEGLIGENCE—Jury—Answers to questions—Alleged inconsistency in answers—Jury sent back—Recharge—Change of answer as to ultimate negligence. - **66**
See NEGLIGENCE. 9.

WIDOW—Inheritance by—Administration Act—Adultery as a bar to wife sharing in husband's estate. - **4**
See DEVOLUTION OF ESTATES. 2.

WIFE—Adequate provision for. - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

2.——*Petition by—Adequacy of provision in will.* - - - - - - **544**
See ESTATE.

WILL—Adequacy of provision for wife. - - - - - - **544**
See ESTATE.

2.——*Construction—Absolute gift—Subsequent restrictions—Effect of.*] By his will a testator gave to his wife "all my real estate of every kind and all my personal estate and effects whatsoever to her sole use and benefit, subject to the following restrictions: one-half of the whole of my said estate both real and personal which shall

WILL—*Continued.*

remain at the time of the death or remarriage of my said wife shall go to my said wife or such person or persons as she shall appoint, and the remainder of my said estate shall be divided in the following manner, that is to say . . . ." *Held*, that there is an absolute gift here in the first instance and the subsequent words do not cut it down. *In re* SCOTT ESTATE. - **278**

3.——*Preferred beneficiaries—Petition by wife for adequate provision.* - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

WOODMEN'S LIENS—*Work on two separate limits—Liens on logs cut on one for work done on both—Contract with logging company—Ownership after trees are felled —Status—R.S.B.C. 1936, Cap. 310.*] The G. H. Moore Timber Company Limited carried on logging operations at Forward Harbour, B.C., the operations being completed on the 1st of June, 1937. The Gulf Logging Company Limited had purchased timber licence 5259 at Wellbore Channel (about six miles away) and under agreement with the Gulf Logging Company Limited the G. H. Moore Timber Company Limited agreed to log the timber on timber licence 5259. After completion of its work at Forward Harbour the Moore Company moved to Wellbore Channel and commenced logging operations. The Gulf Logging Company assisted in the way of hauling logs and in the construction of roads. The claimants issued a writ for liens under the Woodmen's Lien for Wages Act on the 13th of July, 1937, on the logs from Wellbore Channel for the work done at both Forward Harbour and Wellbore Channel. The Gulf Logging Company ad-

WOODMEN'S LIENS—*Continued.*

mitted the right of the claimants to a lien on said logs for the work done on the Wellbore Channel licence but not for the work done at Forward Harbour. It was *held* by the trial judge that as soon as the trees were felled on timber licence 5259 the logs became the absolute property of the Moore Company, and the Gulf Logging Company had no legal *status* to question the validity of said liens. *Held*, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the learned judge took a wrong ground in holding that the Gulf Logging Company had no *status* to contest the claims of the plaintiffs, that the appeal should be allowed and a new trial ordered. LUCAS *et al.* v. GULF LOGGING COMPANY LIMITED *et al.* - - - - - **416**

WORDS AND PHRASES—"Arising out of and in course of employment"—Interpretation. - - **106**
See NEGLIGENCE. 11.

2.——*"Colore officii"—Meaning of.* - **42**
See CONSTITUTIONAL LAW. 4.

3.——*"Disposing of property" — Interpretation.* - - - - - **467**
See CRIMINAL LAW. 15.

4.——*"Estate"—Interpretation.* - **473**
See TESTATOR'S FAMILY MAINTENANCE ACT. 2.

5.——*"Mens rea"—Interpretation.* - **326**
See CRIMINAL LAW. 10.

6.——*"Res ipsa loquitur"—Application.* - - - - - - - - **447**
See NEGLIGENCE. 17.