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 LIV.

VICTORIA, B. C.
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1940

JUDGES

OF THE

Court of Appeal, Supreme and County Courts of British Columbia, and in Admiralty

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. ARCHER MARTIN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. ARCHER MARTIN.

JUSTICES:

THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. WILLIAM GARLAND ERNEST McQUARRIE.
THE HON. GORDON McGREGOR SLOAN.
THE HON. CORNELIUS HAWKINS O'HALLORAN.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. AULAY MORRISON.

PUISNE JUDGES:

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

DISTRICT JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. FREDERICK CALDER, - - - - - - - Cariboo
HIS HON. CHARLES HOWARD BARKER, - - - - - Nanaimo
HIS HON. JOHN DONALD SWANSON, - - - - - - Yale
HIS HON. GEORGE HERBERT THOMPSON, - - - East Kootenay
HIS HON. HERBERT EWEN ARDEN ROBERTSON, - - Cariboo
HIS HON. JOHN CHARLES McINTOSH, - - - Victoria, Nanaimo
HIS HON. WALTER ALEXANDER NISBET, - - - West Kootenay
HIS HON. JOSEPH NEALON ELLIS, - - - - - Vancouver
HIS HON. WILLIAM EDWARD FISHER, - - - - - - Atlin
HIS HON. ANDREW MILLER HARPER, - - - - Vancouver
HIS HON. CHARLES JAMES LENNOX, - - - - - Vancouver
HIS HON. HERBERT HOWARD SHANDLEY, - - - - Victoria
HIS HON. WELLINGTON CLIFTON KELLEY, - - - - Yale
HIS HON. DAVID WHITESIDE, - - - - - - - Westminster
HIS HON. JOHN OWEN WILSON, - - - - - - - Cariboo
HIS HON. PAUL PHILLIPPS HARRISON, - - - - - Nanaimo

ATTORNEY-GENERAL:

THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDA.

On the 20th of December, 1939, the Honourable James Alexander Macdonald, K.C., retired Chief Justice of British Columbia, died at the City of Victoria.

On the 23rd of February, 1940, His Honour John Charles McIntosh, Judge of the County Courts of Victoria and Nanaimo, died at the City of Port Alberni.

On the 25th of April, 1940, His Honour Paul Phillipps Harrison, Junior Judge of the County Court for the County of Nanaimo, was appointed Judge of the said Court and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour John Charles McIntosh, deceased.

On the 25th of April, 1940, Laurence Arnold Hanna, Barrister-at-Law, was appointed Junior Judge of the County Court for the County of Nanaimo and a Local Judge of the Supreme Court of British Columbia.

On the 15th of May, 1940, the Honourable Malcolm Archibald Macdonald, a Justice of Appeal, was appointed Chief Justice of British Columbia, in the room and stead of the Honourable Archer Martin, resigned.

On the 16th of May, 1940, the Honourable Malcolm Archibald Macdonald, was appointed District Judge in Admiralty in the room and stead of the Honourable Archer Martin, resigned.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

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"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under authority of the "Court Rules of Practice Act," R.S.B.C. 1936, chap. 249, and all other powers thereunto enabling, the following rules are made:—

1. During the war no probate of a will or letters of administration of the estate of any national of the German Reich, wherever resident, shall be granted in respect of any assets in this country without the express licence of the Crown acting through the Minister of Finance.

2. In all cases where probate or letters of administration are granted during the war to any person entitled thereto the grant shall be made upon the condition that no portion of the assets shall be distributed or paid during the war to any beneficiary or creditor who is a national of the German Reich, wherever resident, or to any one on his behalf, or to or on behalf of any person resident in the German Reich of whatever nationality without the express sanction of the Crown acting through the Minister of Finance; and if any distribution or payment is made contrary to this condition the grant of probate or letters of administration will be forthwith revoked.

3. Any applicant for letters of administration or probate during the war shall furnish evidence, to the satisfaction of the Judge to whom the application is made, that the person in respect to whose estate such probate or letters of administration are applied for was not a national of the German Reich; or failing such evidence shall produce the licence of the Crown that such probate or letters of administration may be granted. Such applicant shall also give such information as the Registrars of the Courts may require in order to ascertain whether any of the assets would in time of peace be distributable or payable to any such nationals, and if required shall make a statutory declaration as to the assets and their disposition in the event of probate or letters of administration being granted.

4. In cases deemed by him proper the Minister of Finance may sanction the payment of moderate sums out of assets to beneficiaries or creditors who are nationals of the German Reich resident in Canada at the commencement of the war and during the war.

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., September 18th, 1939.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under authority of the "Court Rules of Practice Act," chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers thereunto enabling, the rules relating to nationals of the German Reich with reference to probate and letters of administration, made by Order in Council No. 1264, approved September 18th, 1939, be amended by adding thereto the following as Rule 5:—

"5. The above rules shall apply as well to subjects of Italy as to nationals of the German Reich."

T. D. PATTULLO,
Acting Attorney-General.

Attorney-General's Department,
Victoria, B.C., June 25th, 1940.

"COURT RULES OF PRACTICE ACT."

Amendments to the Supreme Court Rules

PURSUANT to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers them thereunto enabling, their Lordships the Chief Justice and Judges of the Supreme Court of British Columbia have been pleased to order and do hereby order that Appendix N of the Appendices to the "Supreme Court Rules, 1925," as approved by their Lordships on the 11th day of October, 1938, be amended as follows:—

1. That the words in the heading of the Tariff be amended by deleting the words within brackets—namely, "except proceedings under the 'Winding-up Act' or under the 'Bankruptcy Act' "—and substituting therefor, within brackets, the words "except where a special tariff is prescribed under any Statute."

2. That Item 9 be amended by striking out the words and figures:—

"(*a.*) If opposed	20.00	35.00	50.00	75.00
(*b.*) If unopposed	15.00	15.00	20.00	25.00"

and substituting therefor the words and figures

"in the discretion of the Registrar:—				
(*a.*) Maximum	20.00	35.00	50.00	75.00
(*b.*) Minimum	15.00	15.00	20.00	25.00"

3. That Item 38 be amended by striking out the words "whether printed or typewritten, for each copy, per folio" and the figures " .05, .06, .08, .10," and by inserting in lieu thereof the following:—

"(*a.*) Where typewritten, per folio in one copy thereof	.40	.50	.60	.60
(*b.*) Where Appeal Books or Factums are printed there shall be allowed:—				
(1.) For examining the proof print, per folio	.05	.06	.08	.10
(2.) The actual amount paid for printing, but not to exceed per folio in one copy thereof.....	.40	.50	.60	.60"

4. That Item 44 be struck out and the following substituted therefor:—

"44. Attendance of out-of-town counsel (for one counsel only) on first day of sitting and also while case is on peremptory list, not exceeding three days, exclusive of the day the hearing commences, per diem	15.00	15.00	15.00	15.00"

5. That the clause relating to maximum taxable costs immediately following Item 48 of said Tariff be amended by inserting after the word "disbursements," wherever it appears therein, the words "and fees and allowances under Item 38."

6. That the said amendments shall take effect on the first day of February, 1940, and shall apply to all taxations of costs taking place on and after that date.

Dated the 10th day of January, 1940.

AULAY MORRISON, *C.J.S.C.*
DENIS MURPHY, *J.*
D. A. MCDONALD, *J.*
A. I. FISHER, *J.*
HAROLD B. ROBERTSON, *J.*
A. M. MANSON, *J.*

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

MAYO LUMBER COMPANY LIMITED v. KAPOOR LUMBER COMPANY LIMITED.

S. C.
In Chambers
1939
Jan. 18.

Practice—Writ issued by plaintiff company—Garnishee order—Only two directors in defendant company—One refuses to act—Application for leave to enter conditional appearance.

The plaintiff company, on issuing a writ, obtained a garnishee order attaching moneys to the credit of the defendant company in the Canadian Bank of Commerce. The action was commenced on instructions of the president alone and there were four directors. The president of the plaintiff company was also a director and secretary of the defendant company, of which there were only two directors. The president of the defendant company was vice-president of the plaintiff company and one of its largest shareholders. He knew nothing of the issue of the writ and disapproved of it. He then called a meeting of the directors of the defendant company but as the only other director was the president of the plaintiff company, he refused to attend, and the president of the defendant company could not then have a resolution passed authorizing the filing of a conditional appearance. The president of the defendant company then applied *ex parte* for an order that the defendant might enter a conditional appearance without prejudice to bringing an application within ten days to set aside the writ and garnishee order.

The application was granted.

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In Chambers
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MAYO LUMBER CO. LTD. v. KAPOOR LUMBER CO. LTD.

THE action was commenced by *C. F. Davie,* the plaintiff's solicitor, and a garnishee order was obtained attaching the sum of $67,275.40 on deposit to the credit of the defendant company with the Canadian Bank of Commerce. The action was launched on instructions of only one director, the president of the company. There were four directors. No meeting of directors to authorize the action had been convened. The said president of the plaintiff company was also a director and secretary of the defendant company, of which there were only two directors. The president of the defendant company was vice-president of the plaintiff company and one of the largest shareholders thereof. He had no knowledge of any intention to issue the writ and definitely disapproved thereof. The president of the defendant company, on learning that the action had been started and the company's moneys attached, consulted counsel and was advised that an application should be made to have the writ and garnishee order set aside as issued without authority of the plaintiff company, and to be paid its costs by the solicitor who issued the writs. Thereupon the president of the defendant company called a meeting of its directors. His co-director, the president of the plaintiff company, failed to attend the meeting, and there being but the two directors, a stalemate resulted, so no resolution could be passed authorizing the filing of a conditional appearance. Counsel for the defendant now applied *ex parte* in Chambers for an order authorizing the defendant company's solicitors to act as though directly retained by the company with instructions and authority to take all necessary and proper steps to represent and defend the company as its solicitors and counsel in the action, and that the defendant might enter a conditional appearance to the writ without prejudice to the bringing of an application within ten days to set aside the writ and garnishee order. The application was heard by ROBERTSON, J. at Victoria on the 18th of January, 1939.

Jackson, K.C., for the application.

ROBERTSON, J. made the following order:

UPON HEARING read the affidavits of Kapoor Singh sworn the 17th day of January, 1939, and of Joseph Birchell sworn

the 18th day of January, 1939, and of Tara Singh Siddoo sworn the 18th day of January, 1939, and of *Gwilym Wilmot Baugh Allen* sworn the 18th day of January, 1939, and UPON HEARING Mr. *M. B. Jackson, K.C.*, IT IS ORDERED that Messrs. *Jackson & Baugh Allen*, solicitors for the above named defendants be and are authorized to act as solicitors for the said defendants the Kapoor Lumber Company Limited in this action as though directly retained by the said company with instructions and authority to take all necessary and proper steps to represent and defend the said company as its solicitors and counsel in this action.

AND IT IS FURTHER ORDERED that the defendant may enter a conditional appearance to the writ of summons in this action without prejudice to the bringing of an application within ten days from the date hereof to set aside or discharge as the case may be the writ of summons and garnishee order herein, and in the event of no such application within the time limited, the appearance to stand as unconditional.

BRIEN v. ASTORIA HOTELS LIMITED.

Assault—Plaintiff enters men's portion of beer parlour—Trespasser—On refusal to leave ejected by proprietor—Use of force.

The plaintiff entered the men's portion of a beer parlour endeavouring to sell wares to the customers. The man in charge asked her to leave. She refused to go and the man then took hold of her showing that necessary force would be used unless she went to the exit with him. She left reluctantly. In an action for damages for assault:—

Held, that the plaintiff was a trespasser, and as she had been requested to leave and was given a reasonable opportunity of doing so peaceably, and the degree of force used being reasonable, she had no cause of action.

ACTION for damages for assault. The plaintiff, a woman, entered the men's portion of the defendant's beer parlour for the purpose of selling socks to the customers. The man in charge asked her to leave. She refused, and he then took hold of her in

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a manner indicating that the necessary force would be used unless she went with him to the exit. She then left. Tried by MORRISON, C.J.S.C. at Vancouver on the 3rd of April, 1939.

William Savage, for plaintiff.
Harper, and *Anderson,* for defendant.

Cur. adv. vult.

5th April, 1939.

MORRISON, C.J.S.C.: The plaintiff, Edith Brien, was at the material times herein a trespasser. It is lawful for the occupier and for any other person with the authority of the occupier to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry. A trespasser in the circumstances of this case cannot be ejected until requested to leave the premises and a reasonable opportunity of doing so peaceably has been afforded.

The amount of force that may be used must amount to nothing more than forcible removal, and must not include beating, wounding or other physical injury—Salmond on Torts, 8th Ed., 45.

I find that the plaintiff, against the wishes of the defendant, entered the men's portion of the defendant's beer parlour and appeared to be soliciting for some purpose. The defendant McMahon, in charge of that part of the Astoria Hotel Ltd. premises, requested her to desist and to leave. She did not comply with his request and after being again definitely told to leave, she not responding to the request, he took hold of her in a manner indicating that the necessary force would be used unless she came along with him to the exit, where he left her. She left reluctantly. She made a gesture to return. What happened when McMahon left her is a matter of conjecture. She apparently stepped or fell from the steps into the sidewalk where a witness —Collins—attended to her. This witness's evidence is, at least in my opinion, exaggerated. Whether she left in a fit of temper and brought about her own discomfiture is again a matter of surmise. It appears that the plaintiff and another woman, Mrs. Ferguson, whose name was mentioned by plaintiff's counsel in opening, and who was not called, were in the habit of peddling

socks around beer parlours with a view of disposing of them to loggers who might be found congregated at these resorts. This the beer parlour people object to and notices to that effect are placed in conspicuous places throughout the premises.

I place little or no credence on the plaintiff's evidence. Several people were in the place at the time and were called as witnesses. None of them supported her evidence as to the alleged language used by McMahon or as to the alleged violence used by him. I am quite satisfied that none of them would have permitted the plaintiff either to be talked to or handled the way she says without their either intervening or protesting or reporting the occurrence. I agree with Mr. *Anderson* and Mr. *Harper's* submission and dismiss the action.

Action dismissed.

MANUFACTURERS LIFE INSURANCE COMPANY v. INDEPENDENT INVESTMENT COMPANY LTD. *ET AL.*

Costs—Foreclosure action—Solicitor and client—Taxation—Special circumstances—Discretion—Order LXV., r. 8 (a).

On the settlement of the order *nisi* in a foreclosure action, the plaintiff applied to have his costs taxed on a solicitor and client basis.

Held, that there is a discretion in the Court under Order LXV., r. 8 (*a*) enabling it to award costs on a solicitor and client basis. The plaintiff is entitled *ex contractu* to tax his costs on a solicitor and client basis and to add the amount thereof to his claim as against the mortgaged property.

APPLICATION by plaintiff as mortgagee, on the settlement of the order *nisi*, to have the costs of a mortgage action taxed as between solicitor and client. The facts are set out in the reasons for judgment. Heard by MANSON, J. at Vancouver on the 29th of December, 1938.

T. E. H. Ellis, for plaintiff.
O'Brian, K.C., for defendant.

Cur. adv. vult.

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MANUFACTURERS LIFE INS. CO. v. INDEPENDENT INVESTMENT CO. LTD.

1st February, 1939.

MANSON, J.: Question arises on the settlement of the order *nisi* as to the costs to be allowed plaintiff. The plaintiff claims: (1) That the mortgagee is entitled to all costs, charges, and expenses to which he has been put in order to realize on his security. (2) That the position of a mortgagee with respect to costs is similar to that of a trustee and not to that of an ordinary litigant and that he is entitled to his costs on a solicitor and client basis. (3) That the mortgagee's rights in this respect rest upon contract and not upon the ordinary rules relating to costs, and particularly in this case as there is specific agreement covering the matter.

The defendant company contends: (1) That the plaintiff is not entitled to his costs on a solicitor and client basis *ex contractu*. (2) That the authorities support the award of party and party costs only and that the form in Seton's Judgments and Orders, 7th Ed., p. 1891, should be followed. (3) That the mortgagee's costs are not in the discretion of the Court. (4) That the Supreme Court Rules, having the force of statute, preclude other than party and party costs. (5) That, although the Court has discretion under the Mortgagors' and Purchasers' Relief Act in the matter of costs, the discretion ought to be exercised benevolently in so far as the mortgagor is concerned. (6) That in any event the Court is *functus* under orders already made, in so far as costs are concerned.

Order LXV., r. 8, Supreme Court Rules, reads as follows:

8. In all causes and matters where costs are payable and are subject to taxation such costs shall be taxed as follows:—

(*a.*) Where costs are payable between party and party they shall be taxed in accordance with the provisions of Appendix N: Provided that in any cause or matter the Court or a Judge may direct that the costs payable to any party shall be taxed either under appendix M or as between solicitor and client:

(*b.*) In all other cases where costs are payable, including costs as between solicitor and client, such costs shall be taxed in accordance with the provisions of Appendix M, with such further allowances as the taxing officer or, in the case of a review of taxation, the Judge or the Court shall consider proper.

In Seton's Judgments and Orders, *supra*, at p. 1876 it is laid down:

Both in foreclosure and redemption actions, the mortgagee is entitled to the costs of action (as between party and party, *In re Queen's Hotel Company, Cardiff, Limited*, [1900] 1 Ch. 792), and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security for principal and interest.

The form given in Seton at p. 1891 is consistent with the observations made by the learned editors as quoted. In *Cotterell* v. *Stratton* (1872), 8 Chy. App. 295, at p. 302, Lord Selborne, L.C. observes:

The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust.

These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of trustees. In fact, such a departure, instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions, and would deprive the latter class of the assistance of all who cannot afford, or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time.

In *Rees* v. *Metropolitan Board of Works* (1880), 14 Ch. D. 372, Fry, J. at p. 374, commenting on the form in Seton, after stating that he was not disposed to depart from the ordinary form of inquiry observed:

Under that inquiry the plaintiff [the mortgagee] is entitled to all just allowances. The costs in question are either just allowances or they are not; if they are, the plaintiff will get them under the ordinary inquiry; if they are not, he ought not to get them at all.

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MANUFACTURERS LIFE INS. CO. v. INDEPENDENT INVESTMENT CO. LTD.

Manson, J.

In *Re Griffith Jones & Co.* (1883), 50 L.T. 434, in which a Court of Appeal consisting of Cotton, Lindley, and Fry, LL.J., reversed Kay, J., Cotton, L.J. said in the course of argument:

> The mortgagee's costs would include the costs of the action as between solicitor and client, and a mortgagee may add to his security any costs which he properly pays to his own solicitor.

and in the course of his judgment he observed further:

> Now undoubtedly a mortgagor must pay all the costs of the mortgagee including those payable by the latter to his solicitor.

In *In re Queen's Hotel Company, Cardiff, Limited,* [1900] 1 Ch. 792, at p. 793, Cozens-Hardy, J. observes:

> The question really is, What are the rights of a mortgagee plaintiff in dealing with the mortgaged property in a suit? It is quite clear that a mortgagee plaintiff is only entitled to party and party costs of action; there is no vestige of authority to the contrary; nor does it make any difference, so far as I am aware, that he asks for sale and not foreclosure.

This was a debenture-holder's action but the judgment of the learned judge cannot be reconciled with that of the Court of Appeal in the *Griffith Jones & Co.* case. In Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 406, speaking of mortgagee's actions, it is said:

> Costs are taxed as between party and party . . . the mortgagee adds them to his security.

In the notes in Halsbury mention of the fact is made that *Re Griffith Jones & Co., supra,* does not support the proposition laid down and this observation is made:

> Formerly the mortgagee was allowed solicitor and client costs (*Lomax* v. *Hide* (1690), 2 Vern. 185).

The decision in *In re Queen's Hotel Company, Cardiff, Limited, supra,* was discussed in *In re New Zealand Midland Railway Company. Smith* v. *Lubbock,* [1901] 2 Ch. 357; at p. 370 Sterling, J. says:

> Cozens-Hardy, J. appears to me to have reasoned in a way which is quite irresistible. The plaintiffs were simply mortgagees, enforcing their security against the mortgagors and their incumbrancers. Suppose there were no subsequent incumbrancers, and the mortgagors stood alone, the plaintiffs would have been entitled simply to their costs as between party and party. The general rule of the Court is to that effect.

The *Griffith Jones* case does not seem to have been cited in the Court below or in the Court of Appeal.

In *Mayhew* v. *Adams,* [1930] 3 W.W.R. 539 the question of mortgagee's costs was under review—the defendant ought to

deprive the mortgagee of costs on the ground of misconduct. Martin, J.A., in the course of his judgment, at p. 541, observed:

> The general rule in foreclosure and redemption actions is that the mortgagee is entitled to all his costs; he is to get the money secured by the mortgage free of all costs and expenses, and that although he has not succeeded in establishing the full amount of the claim he has contended for. With respect may I say that in my view the learned judge stated the rule as it is and as it ought to be. It is a statement in accord with what was said by Lord Selborne in *Cotterell* v. *Stratton*.

The matter has been before our own Courts prior to the recent amendment to Order LXV. I am informed by the district registrar that mortgagee's costs have been allowed on more than one occasion in our Courts on a solicitor and client basis. Counsel for the plaintiff brought to my attention *Manufacturers Life Insurance Company* v. *David Spencer Ltd. et al.* That action is numbered in the Vancouver registry, 126/33. There an order was made by McDONALD, J., ordering costs to the mortgagee on a solicitor and client basis.

Since the recent amendment to our Rules I think there is no doubt that there is a discretion in the Court under Order LXV., r. 8 (*a*) enabling it to award costs on a solicitor and client basis, and as I have already indicated, in my opinion they should be awarded upon that basis.

The mortgage indenture in the case at Bar, bearing date October 31st, 1927, contains, *inter alia,* the following clause:

> G. And it is hereby agreed that the mortgagee may pay . . . any liens . . . and the amount so paid together with all costs, charges and expenses, solicitors' or otherwise, which may be incurred in the taking, recovering and keeping possession of the said lands or inspecting the same and generally in any other proceedings taken to realize the moneys hereby secured or to perfect the title of the said lands; and . . . shall be a charge on the lands in favour of the mortgagee and shall be payable forthwith by the mortgagors to the mortgagee with interest at the mortgage rate until paid. . . .

The plaintiff is entitled *ex contractu* to tax his costs on a solicitor and client basis and to add the amount thereof to his claim as against the mortgaged property. That does not mean that the plaintiff will be entitled to charge as against his security costs unnecessarily incurred as between solicitor and client. The

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taxing officer will only allow such items as the plaintiff establishes to be, in the words of Mr. Justice Fry, "just allowances."

The costs in the orders already made are to be taxed (nothing having been said to the contrary therein) on the basis now awarded.

Order accordingly.

C. A.
1939
March 7, 9.

CANADA RICE MILLS LIMITED v. THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED. (No. 2).

Costs—Scale of—New Appendix N (1938)—Increasing scale—Jurisdiction of Court of Appeal—Over costs of Court below—Whether cause for increase—Proper practice—R.S.B.C. 1936, Cap. 249.

Powers of disposition with respect to costs, whether derived from statute or rule or otherwise, that the Court has hitherto exercised over costs here and below have not been curtailed in any relevant respect by the New Appendix N promulgated under the Court Rules of Practice Act, becoming effective on the 1st of November, 1938.

Held, that in this case no good ground has been shown for ordering taxation of these costs on a higher scale either here or below.

MOTION for an order that the costs of the appellant in this case (see 53 B.C. 440) be taxed both in the Court below and in the Court of Appeal on a higher scale than that which would otherwise be applicable. Under Appendix N to the Supreme Court Rules, 1925, the costs of the successful appellant were taxable both in the Court below and in the Court of Appeal under Column 2. The existing tariff under Appendix N which came into force on November 1st, 1938, contains the following provision:

Provided, however, that in all actions, causes, proceedings, and appeals the Court or a Judge may at any time before taxation order the costs or any part thereof to be taxed on a higher scale than that which would be otherwise applicable, in the following cases:

(*a.*) Where some difficult point of law or construction is involved:

(*b.*) Where the question litigated is of importance to some class or body of persons:

(*c.*) Where the question litigated is of general or public interest:
(*d.*) Where the result of the action or counterclaim is in effect determinative of rights between the parties beyond the relief actually recovered or denied in the action or counterclaim;
or in any other case for special reason.

The preliminary objection was taken that the Court of Appeal did not have power to entertain the application in so far as it related to the costs in the Court below.

Heard by MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A. at Vancouver on the 7th of March, 1939.

Des Brisay, for the motion.
Bull, K.C., contra.

Cur. adv. vult.

On the 9th of March, 1939, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: With respect to the costs, we are of opinion that the various powers of disposition, whether derived from statute or rules or otherwise, that we have hitherto exercised over costs here and below have not been curtailed in any relevant respect by the new Appendix N promulgated under the Court Rules of Practice Act, R.S.B.C. 1936, Cap. 249, becoming effective on November 1st last.

Then, having jurisdiction as aforesaid and in the exercise of it, we are of opinion that no good ground has been shown for ordering taxation of these costs on a higher scale either here or below.

We wish to add with respect to the practice, as we have already pointed out but are repeating in view of one or two departures from it which have occurred of late, that it is always open to counsel to speak to costs at the time of delivery of the judgment, or at any reasonable time thereafter before it has been finally entered. The course adopted in this appeal of launching a substantive formal motion respecting costs is without precedent and contrary to established practice, which is that all that is necessary is to give informal notice to the other side of the intention to speak to costs, and arrange with the registrar to have the case put on the list for a convenient time for that purpose, as heretofore.

Motion refused.

C. A.
In Chambers
1939
March 11.

REX v. GUINNESS.

Bail—Application for until determination of appeal to Supreme Court of Canada—Motion for leave to appeal to Supreme Court not yet heard—Jurisdiction—Application refused as appeal not then "pending"—Criminal Code, Secs. 1019 and 1025.

An application for bail under section 1019 of the Criminal Code made when a motion for leave to appeal to the Supreme Court of Canada under section 1025 of said Code has not been granted cannot be entertained because until said leave to appeal is granted, no appeal is "pending" under said section 1019 and therefore there is no jurisdiction to admit to bail.

APPLICATION for bail by prisoner pending the hearing of his motion for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal of the 7th of March, 1939, dismissing defendant's appeal from his conviction by MURPHY, J. and a jury on the 15th of November, 1938, and if such leave be granted pending the determination of his said appeal. Heard by MARTIN, C.J.B.C. in Chambers at Vancouver on the 11th of March, 1939.

Marsden, for the application: This application is under section 1019 of the Criminal Code. The prisoner has launched an application for leave to appeal to the Supreme Court of Canada under section 1025 of the Criminal Code. That bail may be granted "pending the determination of the appeal" see *Steele* v. *Regem* (1923), 42 Can. C.C. 47. The judgment in this case conflicts with the judgment of the Court of Appeal of Alberta in *Rex* v. *Pettibone* (1918), 30 Can. C.C. 164.

Richmond, for the Crown, *contra*: Under section 1025 of the Criminal Code notice of motion to a judge of the Supreme Court of Canada has been served returnable on the 24th instant for leave to appeal from the judgment of the Court of Appeal of British Columbia. My submission is that there is no appeal "pending" until leave has been granted by the Supreme Court judge, and therefore there is no jurisdiction now to grant bail. Leave must be given by a judge of the Supreme Court of Canada

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within twenty-one days after the judgment appealed from is pronounced.

Marsden, in reply: There is no direct case on the point but the *Steele* case seems to contemplate a continuance from the judgment of the Court of Appeal.

MARTIN, C.J.B.C.: The application must be refused. No jurisdiction is conferred upon me to "admit to bail" in a case of this kind within section 1025 until after leave to appeal has been granted by a judge of the Supreme Court of Canada, because until that has been obtained no appeal exists, and therefore none can be "pending," as section 1019 requires, before my power to "admit to bail" can be exercised.

Application refused.

Application refused.

REX v. RYAN.

S. C.
In Chambers
1939
Feb. 15.

Certiorari—Conviction—Sole witness for Crown not sworn—Jurisdiction of justice of the peace—Can. Stats. 1932, Cap. 42, Sec. 18.

An accused was charged before a justice of the peace with an offence under section 18 of The Fisheries Act, 1932, and convicted. The only witness called to prove the charge was not sworn at any time during the proceedings. On an application for a writ of *certiorari*:—

Held, that once there is jurisdiction a conviction regular on its face cannot be quashed on *certiorari* on the ground that there is no evidence to support it.

APPLICATION for a writ of *certiorari.* Heard by ROBERTSON, J. in Chambers at Victoria on the 15th of February, 1939.

P. R. Leighton, for the application.
Macfarlane, K.C., for the Crown.

ROBERTSON, J.: The accused was charged before a justice of the peace on January 28th, 1939, with an offence under section 18 of The Fisheries Act, 1932, Can. Stats. 1932, Cap. 42. He

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pleaded not guilty. He was convicted and ordered to pay a fine and costs. He now applies for a writ of *certiorari* on the ground that the only witness called to prove the charge was not sworn at any time during the proceedings. This is not denied. Jurisdiction in the justice of the peace to try the case is conceded; but it is said he exceeded his jurisdiction, or, afterwards became without jurisdiction, because the sole witness for the Crown was not sworn.

The cases show jurisdiction is "determinable on the commencement, not at the conclusion of the inquiry": *Rex* v. *Nat Bell Liquors, Ld.*, [1922] 2 A.C. 128, at 153; 91 L.J.P.C. 146; 37 Can. C.C. 129; [1922] 2 W.W.R. 30. Once there is jurisdiction, a conviction regular on its face cannot be quashed on *certiorari* on the ground there was no evidence to support the conviction: *Rex* v. *Nat Bell Liquors, Ld., supra,* at pp. 151-153; *Rex* v. *Cox,* 41 B.C. 9, at 10-11; 51 Can. C.C. 203; [1929] 1 W.W.R. 542, at 543; *Rex* v. *Gustafson,* 42 B.C. 58; 52 Can. C.C. 151; [1929] 3 W.W.R. 209.

The application is refused.

Application refused.

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1939
March 20, 22.

REX v. HAMLIN.

Criminal law—Contributing to child's delinquency—Can. Stats. 1929, Cap. 46, Secs. 33 (1) (b) and 37; 1935, Cap. 41, Sec. 3.

The purpose of The Juvenile Delinquents Act, 1929, is to prevent the morals of a child becoming endangered. Prior to the addition of subsection (4) to section 33 it was necessary that there be evidence that the child's morals were in fact endangered, but it was not necessary that it be shown upon the evidence that the child participated in an immoral act. The purpose of the addition of subsection (4) by the 1935 amendment was to relieve the Court of the necessity of speculating as to whether or not the child's morals were in fact undermined.

APPEAL by the Crown from the dismissal of a charge by the judge of the Juvenile Court, leave to appeal having been granted under section 37 of The Juvenile Delinquents Act, 1929. The

facts are set out in the reasons for judgment. Argued before MANSON, J. at Vancouver on the 20th of March, 1939.

Orr, for the Crown.
P. A. White, for accused.

Cur. adv. vult.

22nd March, 1939.

MANSON, J.: This is an appeal pursuant to leave granted under section 37 of The Juvenile Delinquents Act, 1929, Can. Stats. 1929, Cap. 46. The learned judge of the Juvenile Court had the witnesses before him and was able to observe their demeanour and form an opinion as to their credibility. In a borderline case such as the one at Bar that was an advantage of very considerable importance. The learned judge referred to the conduct of the respondent as an "impropriety." He obviously did not accept the uncorroborated testimony of the little girl. I gather from his observations, however, that even apart from that evidence he was not entirely satisfied with the innocence of the accused, but that he was of the opinion that there was sufficient doubt about the matter to warrant giving the benefit of that doubt to the accused.

The statute is for the protection of children. Section 33 (*b*) is the relevant section. It is quoted hereunder:

33. Any person, whether the parent or guardian of the child or not, who, knowingly or wilfully, . . .

(*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent; shall be liable on summary conviction before a Juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

The corresponding section of the original Act was section 29 of the statutes of 1908, Cap. 40. The original section has been redrafted and conspicuously the words "or likely to make any child a juvenile delinquent" have been added. These words were not in the statute at the time of the decision in *Rex* v. *Limoges and Stackhouse,* [1920] 1 W.W.R 293; 32 Can. C.C. 200. In *In re Strom,* [1930] 1 W.W.R. 878; 53 Can. C.C. 224, Macdonald, C.J.K.B. observes at p. 881:

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I cannot see very much difference between sec. 29 of the then Juvenile Delinquents Act [1908 (Can.), Cap. 40] and sec. 33 of the present Act.

With that view, with respect, I am not in accord. I think the added words were inserted by Parliament with the deliberate purpose of strengthening the section. Parliament doubtless intended that, where possible, the door should be closed before the horse had gone. The purpose of the statute is to prevent the morals of a child becoming endangered. Prior to the addition of subsection (4) to section 33 it was necessary that there be evidence that the child's morals were in fact endangered, but it was not necessary that it be shown upon the evidence that the child participated in an immoral act, and under the statute as it now stands that is clearly unnecessary. In *Rex* v. *Vahey* (1931), 57 Can. C.C. 378, at 380; [1932] O.R. 211, at 213, Orde, J.A. observes:

> There must be . . . , some evidence . . . that the child's morals are in fact (not in theory) endangered . . . , to justify a conviction.

That was a prosecution under the Criminal Code, R.S.C. 1927, Cap. 36, Sec. 215, Subsec. 2. As it seems to me, no fault can be found with the observation quoted, but there is no suggestion that the evidence must establish that the morals of the child were actually undermined—the learned judge is speaking of "endangering." In 1935, Cap. 41, the following subsection (4) was added to section 33:

> (4) It shall not be a valid defence to a prosecution under this section either that the child is of too tender years to understand or appreciate the nature or effect of the conduct of the accused, *or that notwithstanding the conduct of the accused the child did not in fact become a juvenile delinquent.*

(The italics are mine.)

The subsection quoted was not in the Act at the time of the decision in *In re Strom.* The Supreme Court of Nova Scotia sitting *en banc,* Hall, J. dissenting, in *Re McDonald* (1936), 11 M.P.R. 91; 66 Can. C.C. 230, read subsection (4) strictly, perhaps too strictly. In my view Parliament intended to make it clear that conduct likely to undermine the morals of a child should constitute an offence. The purpose of the added subsection doubtless was to relieve the Court of the necessity of speculating as to whether or not the morals were in fact undermined.

Returning to the facts of the case at Bar—clearly the respondent was guilty of an act of grave indiscretion. It is possible that he had no evil intent, sufficiently possible, in spite of the evidence pointing in the other direction, to warrant the Court in giving him the benefit of the doubt. That was the view taken by the learned judge below, and I feel that I ought not to disturb the order made.

Appeal dismissed.

HIATT v. ZIEN AND ACME TOWEL AND LINEN SUPPLY LIMITED.

Negligence—Automobiles—Plaintiff driver trespasser on defendant's land—Run into by defendant's driver—Failure of defendant's driver to look out—Duty to trespasser.

The plaintiff, a "junk" merchant, and others carrying on a similar business, were accustomed for some time to going with their trucks to the back door of the premises known as 1146 Granville Street. They reached the door from a lane that ran north and south at the back of the lots on their east side. Immediately north of said premises is house No. 1142 occupied by the defendant company. At the rear of the building the lot is vacant for 57½ feet to the lane. The plaintiff and others, in order to back their motor-trucks before returning on to the lane, had been accustomed to make use of the vacant land aforesaid owned by the defendant company. The defendant company, through its employees, was aware of this practice and made no objection. While the plaintiff was making use of this vacant plot on the occasion in question, an employee of the defendant company drove its truck along the lane and backed up on to the said vacant plot and struck the side of the plaintiff's truck. On seeing the defendant's truck coming towards him, the plaintiff shouted loudly and in fear of a collision instinctively thrust his left arm out of his left window with the result that he was severely injured. The defendant's employee did not hear the plaintiff's shouts nor did he look to see if anyone was behind him.

Held, that the defendant company was liable even if the plaintiff was a trespasser, and even if the defendant's employee did not actually know the plaintiff was there, as he knew that the plaintiff might be there, he should have looked and if he had he would have seen that the plaintiff was there.

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ACTION for damages resulting from the alleged negligent driving of a car by a servant of the defendant company. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 16th of February, 1939.

Lucas, and *Hill,* for plaintiff.
Maitland, K.C., and *J. G. A. Hutcheson,* for defendants.

Cur. adv. vult.

20th February, 1939.

McDONALD, J.: The plaintiff carries on business as a "junk" merchant, gathering second-hand machinery and furniture and disposing of same to merchants who deal in such commodities. For several years prior to January, 1938, the plaintiff and others, carrying on a similar business, were accustomed to go with their trucks to the back door of the premises known as 1146 Granville Street in this city. Immediately to the north of said premises is house No. 1142 occupied by the defendant company under a lease. At the rear of the defendant company's premises, and forming a part of same, is a plot of vacant land extending easterly from the rear of the building, a distance of 57½ feet, to a lane. The defendant company's premises extend easterly a distance of some 16 feet further than do the premises at No. 1146. It was the custom of the plaintiff and others coming in from the lane, which runs north and south, to use the vacant plot for the purpose of turning their trucks about after they had finished with their business. This custom is sworn to by three witnesses and there is no evidence to the contrary and I think the only fair inference that can be drawn is that the defendant company, through its employees, was aware of it and made no objection.

On January 21st, 1938, the plaintiff, having called at the rear of No. 1146, backed his truck on to the vacant plot with the purpose of turning about in order to return to the lane from which he had come. As he backed up, so that the rear of his truck was some five or six feet from the wall at the northerly boundary of the vacant plot, and as he stood there, about to

change his gear in order to go forward, the defendant Zien, an employee of the defendant company, proceeded along the lane in a southerly direction to the southerly boundary of the vacant lot, then reversed his gear and backed up on to the plot and against the easterly side of the plaintiff's truck. He did not actually injure the truck but unfortunately the plaintiff, seeing the defendant's truck coming towards him, shouted loudly and "in the agony of collision" instinctively thrust his left hand and arm through his left window with the result that his arm was severely crushed and permanently injured. The defendant Zien did not hear the plaintiff's shouts of warning nor did he see the plaintiff or his truck although the shouts were heard and both trucks were seen by a witness on the premises to the south of No. 1146 at a time when Zien's truck was some 15 or 20 feet from the plaintiff. The reason for Zien's failure to hear or see was that he neither listened nor looked to ascertain whether any one was behind him. Under these circumstances are the defendants liable for the injuries suffered by the plaintiff?

Keeping in mind the principle referred to by Mr. Justice SLOAN in *Power* v. *Hughes*, 53 B.C. 64 at 67; [1938] 2 W.W.R. 359, [quoting Greer, L.J. in *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, at 476; 101 L.J.K.B. 46]

> . . . before you can establish liability for negligence you must first show that the law recognizes some duty towards the person who puts forward the claim,"

the inquiry must be whether or not the defendant Zien owed any duty to the plaintiff under the circumstances. It is strongly contended that he did not—that the plaintiff was in fact a trespasser and that the defendant Zien owed him no duty whatever except that he must not be guilty of negligence so reckless as to be equivalent to a malicious act. In my opinion the plaintiff was not a trespasser but was where he was by the leave and licence of the defendant company, but, assuming that he was a trespasser, I venture to hold that the defendants are still liable under the circumstances of this case. The most useful judgment on the subject, of which I am aware, is that of Scrutton, L.J. in *Mourton* v. *Poulter*, [1930] 2 K.B. 183; 99 L.J.K.B. 289. There the learned Lord Justice, using the word "negligence" in

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its precise meaning as involving a duty, found that under the circumstances of that case the defendant was liable even to a trespasser. There are several statements in the judgment which support the plaintiff's position in the present case which, put briefly, is that the defendant Zien knew or ought to have known that the plaintiff or some other person might be in the path of his car.

It is contended by the defendants that if the plaintiff was a trespasser there is no liability unless Zien actually knew the defendant was where he was. I think the judgment in *Mourton* v. *Poulter, supra,* holds otherwise. In that case the learned Lord Justice, in considering the previous decisions in *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; 98 L.J.P.C. 119; and *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404; 99 L.J.K.B. 380, points out at p. 189 ([1930] 2 K.B.) that in the last-mentioned case, where the Court was dealing with the question of the liability to a trespassing child, the Court

> took the view that persons who started the rope when they knew that there might be children in its neighbourhood, and who were themselves in a position from which if they had looked they could have seen the children beside it, were guilty of negligence.

The decision of the Court of Appeal in the *Excelsior Wire Rope Co.* case was upheld by the House of Lords. I think on the authorities that, even looking at the plaintiff's case in its weakest aspect, he is entitled to recover. His special damages are $1,263.50 and I assess his general damages at $2,500.

Judgment for plaintiff.

GREGSON v. CITY OF VANCOUVER.

S. C.
1938
Nov. 28.
1939
Feb. 15.

Negligence—Damages—Defect in sidewalk—Injury to pedestrian—Reasonable repair—High-heeled shoes—Loss of daughter's payments for board during illness—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.

The sidewalk in question consists of concrete slabs. One of the slabs had sunk (or the one south of it had risen) with the result that there was a rise as between it and the southerly slab next to it. The defect came to the knowledge of the defendant through its overseer and some champering was done with a view to remedying the defect, but a ridge remained after the champering, somewhat less in height than before. The plaintiff, who wore high-heeled shoes, stumbled on the ridge and fell, suffering injuries.

Held, that the sidewalk was not in reasonable repair within section 320 of the Vancouver Incorporation Act, 1921, and the city was liable in damages.

Held, further, that as the plaintiff, a widow, had to keep at home one of her daughters who had been working and had been paying her mother for room and board, the loss was an element of special damages to the plaintiff.

ACTION for damages for injuries sustained by the plaintiff by her stumbling and falling on a ridge of a concrete slab that had sunk on one side in its place in a sidewalk. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 28th of November, 1938.

W. H. Campbell, for plaintiff.
Lord, and *R. K. Baker*, for defendant.

Cur. adv. vult.

15th February, 1939.

MANSON, J.: This action arises out of an accident sustained by plaintiff on June 1st, 1938, as she was walking in a southerly direction on the sidewalk along the west side of Alma Road, between 8th and 9th Avenues, in the city of Vancouver. The sidewalk consists of concrete slabs. One of the slabs had sunk (or the one south of it had risen) with the result that there was a rise as between it and the southerly slab next to it. At the kerb edge of the sidewalk the depression amounted to approximately 12/16 inch, at the centre 13/16 inch and at the west side

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of the walk 14/16 inch. The defect came to the knowledge of the defendant through its overseer, and some champering was done with a view to remedying the defect. Champering does not level the slabs but tends to convert the abrupt rise into a sloping one. In the very nature of things, chipping of the concrete does not leave a smooth rise. A ridge remained after the champering somewhat less in height than theretofore. Mr. Tooker of the engineering staff of the defendant, at question 27 *et seq.* of his examination for discovery referred to the rise as an abrupt ridge.

Section 320 of the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55 (as amended by 1936, Cap. 68, Sec. 26) reads in part as follows:

> 320. (1.) Every public street, road, lane, bridge, and highway of which the Council has the custody, care, and management shall be kept in reasonable repair by the city, and in case of default the city shall, subject to the provisions of the Contributory Negligence Act, be liable for all damages sustained by any person by reason of such default.

The word "reasonable" was put in the section by amendment passed in the year 1928 (B.C. Stats. 1928, Cap. 58, Sec. 38).

Plaintiff, a rather tall woman, 58 years of age, in walking along, stumbled upon the ridge and fell, and as a result of her fall she sustained injuries. The whole question involved is whether the defendant made default in maintaining the sidewalk at the point mentioned in reasonable repair. The municipality is not an insurer that its sidewalks are in a perfect state of repair. The Courts have never so held. Even before the amendment of 1928 the municipality was not held liable where the state of repair was, in the view of the Court, reasonable, and one doubts if the insertion of the word "reasonable" has really changed the law. In my view the amendment has done no more than to emphasize the state of the law as it was before.

It is not an easy matter to determine just where the line is to be drawn in determining what constitutes reasonable repair. That there was a defect in the sidewalk at the point mentioned on Alma Road is beyond argument, and it cannot be disputed that one might walk over these two slabs of sidewalk a very great number of times without stumbling as a result of the defect. On the other hand, it is equally true that one might

catch one's heel or toe on the edge of the southerly slab on the very first occasion when one traversed this portion of the sidewalk. Women now-a-days wear high-heeled shoes. It is their privilege to do so. One takes judicial notice of the fact that they do so, and a defect of this character, when being traversed by a woman with a high-heeled shoe, may easily result in her stumbling. Of course, she may stumble and sustain no injury, but then she may, and she has a right to expect the sidewalk to be in a reasonable state of repair so that she can walk in her normal way without catching her heel and being thrown. It well might be that a pedestrian with a low-heeled shoe would stumble over this ridge. Mr. Maxwell, a business man of the locality in question, testified that he did stumble over this very ridge, but fortunately he sustained no injury. He said that the champering was done some years ago, before he established his business in the locality. He spoke of the champering as a "poor job of levelling off." Incidentally he saw the plaintiff stumble and fall, and went to her assistance.

This is perhaps a borderline case. Not only is there an obligation on the municipality to keep its sidewalks in reasonable repair, but there is an obligation upon the pedestrian to take reasonable care in walking upon them. In my view, a pedestrian is not called upon to keep as strict a look-out in walking upon a concrete sidewalk as, for instance, upon a wooden sidewalk in some outlying part of the municipality. The trend of the Ontario decisions has been to put a somewhat greater obligation upon the pedestrian than is put upon him in this Province, and a somewhat lesser obligation upon the municipality. (*Vide Burgess* v. *The Town of Southampton,* [1933] O.R. 279, and the cases therein reviewed by Fisher, J., at p. 282.) In the case at Bar the defendant itself certainly regarded the original depression as a defect which it ought to correct, and it did make an endeavour to correct it, but not a satisfactory endeavour. While the statute has been changed by the addition of the word "reasonable" since *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457; 2 W.W.R. 66, was decided, the reasoning of the majority members of the Court in that case is, in my opinion, still apposite, particularly that appearing at pp. 458-9 and at

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pp. 461-2. The *Cummings* case is still an authority in Alberta where the word "reasonable" has long been in the corresponding statute. See also *Woodcock* v. *City of Vancouver,* 39 B.C. 288; [1927] 3 W.W.R. 759, where MCDONALD, J. gives a useful review of the authorities. See also *Moran* v. *City of Vancouver,* 40 B.C. 450; [1928] 3 W.W.R. 660, a decision by my brother MURPHY, after the insertion of the word "reasonable" in section 320 of the statute. On the whole I am inclined to the opinion that I ought to find as a fact that there was a want of reasonable repair on the part of the defendant, and I do so find.

Damages: The plaintiff sustained a broken arm, some injury to her left wrist and some minor injury to both knees. The fracture of the radius was at the wrist and one of the fragments was cracked longitudinally and thus the wrist joint was involved. A small piece of bone was broken off the ulna. The plaintiff was disabled completely for one month and partially disabled for some time after that. There was at the time of the trial still a slight deformity in the wrist and some weakness. The plaintiff is a widow, keeping house for her two daughters, her son and herself. It was nearly eight weeks before she could use her wrist. As a result of her injury she had to keep at home one of her daughters who had been working. The daughter had been paying her mother for room and board $5 a week. The daughter lost eight weeks from her employment.

Special damages are allowed in the sum of $152.50. General damages are assessed at $700.

Costs to the plaintiff.

Judgment for plaintiff.

REX AND CITY OF VANCOUVER v. WOODS.

S. C.
1939
Jan. 27;
Feb. 15.

Municipal law—Freight vehicle owned by outsider—City by-law requiring licence—Validity—Possession of licence from Province—Effect of—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (130)—R.S.B.C. 1936, Cap. 116.

The respondent operates freight trucks between Hope and the city of Vancouver, including the freight truck in question, for which he holds a licence under the Highway Act covering a public-freight vehicle. On the 18th of August, 1938, the respondent sent said truck into the city of Vancouver and loaded said truck with goods in the city and took the loaded truck to Hope. On a charge that being a person using a vehicle for the purposes of his business within the city of Vancouver, he unlawfully did fail to procure a licence in respect thereof from said city and pay the specified fee:—

Held, that section 163 (130) of the Vancouver Incorporation Act, 1921, does not express clearly and unequivocally an intention to give power to the city to prevent an outsider who has paid for a Provincial licence to transport freight on his truck between Hope and Vancouver, from picking up or delivering the freight in the city until he has paid the city for an additional licence allowing him to do so.

APPEAL by way of case stated from police magistrate Wood, Vancouver, dismissing a charge against the defendant H. L. Woods, that at the city of Vancouver on the 18th of August, 1938, being a person using a vehicle for the purposes of his business within the city of Vancouver, he unlawfully did fail to procure a licence in respect thereof from the city of Vancouver and pay therefor the specified fee. The defendant resides at Hope, B.C. He is in the freighting business and operates a freight truck between Hope and Vancouver. He holds a licence under the Highway Act covering a public-freight vehicle. This licence permits the operation of a vehicle from Hope to Vancouver over the transprovincial highway and from Hope to Spuzzum through Chilliwack, New Westminster, Choate, Emory Lodge and Yale. The city contends that in addition to this licence the defendant must take out a licence under City By-law No. 2296 and its amendments. The appeal was argued at Vancouver before FISHER, J. on the 27th of January, 1939.

McTaggart, for City of Vancouver.

The defendant, in person.

Cur. adv. vult.

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15th February, 1939.

FISHER, J.: This is a case stated by H. S. Wood, Esq., K.C., police magistrate in and for the city of Vancouver, pursuant to the Summary Convictions Act, R.S.B.C. 1936, Cap. 271.

On October 24th, 1938, the learned magistrate dismissed the charge against the respondent wherein he was charged as follows:

H. L. Woods, you are charged that at the city of Vancouver on the 18th day of August, 1938, being a person using a vehicle for the purposes of your business within the said City of Vancouver, unlawfully you did fail to procure a licence in respect thereof from the city of Vancouver and pay therefor the specified fee.

The appellant, city of Vancouver, appeals from such dismissal and in the case stated the magistrate says that it was proved before him:

(*a*) That the respondent resides at Hope in the Province of British Columbia, and operates freight trucks, including a freight truck number C.Z. 327, between Hope aforesaid and the city of Vancouver, in the Province of British Columbia aforesaid;

(*b*) That for the above truck, C.Z. 327, the respondent holds a licence, registration number 175456, under the Highway Act, being Cap. 116, R.S.B.C. 1936, covering a public-freight vehicle a copy of which licence is attached hereto and made part of this case;

(*c*) That the city of Vancouver duly passed the following by-laws, number 2296 and number 2453, both of which are attached hereto and made part of this case;

(*d*) That on the 18th day of August, 1938, the respondent sent the said truck, C.Z. 327, into the city of Vancouver aforesaid, and loaded up the said truck with goods in the city of Vancouver aforesaid, and did on said date take the said goods out to Hope aforesaid, in the truck aforesaid, through a portion of the city of Vancouver aforesaid, to wit, Kingsway;

(*e*) That the respondent is in the trucking business, that is to say, the business of transporting goods, for delivery to persons other than himself, and was engaged in such business within the city of Vancouver by means of the operation of said truck therein, in the manner aforesaid, on the said 18th day of August, 1938, which operation was the subject of the charge aforesaid;

(*f*) That respondent's truck aforesaid was on the 18th day of August, 1938, aforesaid, so operated within the said city of Vancouver, as a "public-freight vehicle" within the meaning of the Highway Act aforesaid;

(*g*) That the respondent did not hold any licence from the city of Vancouver under By-law 2296 as amended by By-law 2453, aforesaid, in the premises.

The questions submitted are as follow:

First: Was I right in deciding that By-law 2296, as amended by By-law 2453, aforesaid, does not cover this case and therefore does not warrant a conviction on the aforesaid charge?

Second: Does the licence 175456 under the Highway Act aforesaid, operate in any way to prevent the city of Vancouver aforesaid from imposing a licence on the respondent or to prevent his being charged as aforesaid and convicted thereunder in the premises?

With respect to the facts I am confined to those set out in the case stated and I deal with the matter on such basis. In his oral reasons for judgment the magistrate said, in part, as follows:

The licence held by the defendant under the Highway Act permits the operation of the vehicle between the following termini and on the following routes only: from Hope to Vancouver over the transprovincial highway, and from Hope to Spuzzum through the following intermediate points: Chilliwack, New Westminster, Choate, Emory Lodge and Yale.

It is contended by the city that in addition to this licence the defendant must take out a licence under By-law 2296, which by-law was put in as an exhibit with its amendments.

The material portions of this by-law are as follow:

"Section 4: Every person carrying on, maintaining, owning or operating within the city any of the several trades, occupations, callings, businesses, undertakings or things which are hereby defined and classified as set forth in section 5 hereof, or in Schedule 'A' of this by-law or who operates any of the vehicles for hire or other conveyances hereinafter designated and described, shall procure a licence therefor, and shall pay the amounts in respect thereof set forth in Schedule 'A' hereto.

"Section 5: The following persons shall take out and procure from the city a licence in respect of any of the several trades, occupations, callings, businesses, undertakings or things following:

. . . . .

"(2) Every person owning or using any cart, wagon, truck or automobile for the purpose of his business."

The prosecution relies on the case of *The King* v. *F. R. Stewart & Co.*, [(1928)] 39 B.C. 401; also found in [1928] 1 W.W.R. 586; that is the report I have before me. There it was held that the Stewart Company must take out a licence in the city of North Vancouver, where they were delivering goods, under a by-law, which reads:

"35. From every owner of every truck plying for hire or used for the delivery of wood, coal, merchandise, or other commodity, twenty dollars for every six months for each truck. Where the owner of such truck is paying to the municipality a licence fee as a merchant, the licence fee for each truck or delivery conveyance shall be reduced to five dollars for every six months."

The wording of that by-law is explicit, but it is not clear to me that in the present legislation the city intended to cover a case such as the one before me.

Counsel on behalf of the city of Vancouver submits that the section of the by-law under which the licence fee mentioned in the case stated was imposed is in exact compliance with the

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power given by the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (130), and that this is sufficient under the *Stewart* case, *supra*. Said section 163 (130) reads as follows:

> 163. The Council may from time to time pass, alter, and repeal by-laws for the following purposes:—
>
> . . . . .
>
> (130.) For licensing all persons or corporations using any carts, wagons, trucks, or automobiles, or other conveyances, for the purpose of their business, and for classifying such carts, wagons, trucks, or automobiles; for controlling and restricting the weight and width of all loads, and for differentiating in the fees to be imposed on such classes of carts, wagons, trucks, or automobiles.

The question therefore arises as to the power given by the Vancouver Incorporation Act, 1921, as aforesaid and, as it must be admitted that the by-law cannot go and was not intended to go beyond the statutory power conferred by the Legislature, the real issue is as to the construction of the words of the statute as aforesaid. In construing such words the object undoubtedly is to see what is the intention expressed by the words used. See *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at 763; 47 L.J.Q.B. 193, *per* Lord Blackburn. In the present case therefore one must consider whether the intention of the Legislature, as expressed by the words used, was to cover such a case as this and to give power to the city of Vancouver to prevent an outsider, who has paid for and obtained a licence from the Provincial Department of Public Works to transport freight on the said truck between Hope and Vancouver, from picking up or delivering the freight in the city of Vancouver until he has paid another licence fee to the city of Vancouver. It must be admitted that the Legislature might have so intended but the question is whether such was the intention of the Legislature as expressed by the words used and I think the words of such a statute as well as the by-law must be strictly construed. It is quite apparent that section 290 (34) of the Municipal Act, R.S.B.C. 1924, Cap. 179, as enacted in 1925 by Cap. 35, Sec. 28, as well as the by-law, dealt with in the *Stewart* case, *supra*, contained the words "truck . . . used for the delivery of wood, coal, merchandise" and in the *Stewart* case, 39 B.C. at p. 403, MCPHILLIPS, J.A. said:

. . . The statutory provision plainly indicates the intention of the Legislature to give protection to the municipalities against outside trucks, that is, trucks not covered by municipal licence used for the delivery of merchandise within the municipality.

On the other hand it is apparent that neither the section of the Vancouver Incorporation Act, 1921, as aforesaid nor the by-law in question herein contains the words "using any trucks for the delivery of merchandise." It may be argued that the words "using . . . any trucks for the purpose of their business" mean the same thing or at least are sufficiently explicit to cover such a case as the present one, but this argument cannot prevail unless the words strictly construed express the same or such intention. My view is that a reasonable inference from the use of different words would be that the intention expressed was different but in any event I think the statutory provision as aforesaid does not clearly and unequivocally express an intention to give power to the city of Vancouver to prevent an outsider, who has paid for a Provincial licence as aforesaid to transport freight on the said truck between Hope and Vancouver, from picking up or delivering the freight in the city of Vancouver until he has paid for an additional licence in respect thereof from the city of Vancouver allowing him to do so. I would say, therefore, as the learned magistrate says, that "it is not clear to me that in the present legislation the city intended to cover a case such as the one before me" and I would answer the questions as follows:

First: Yes.

Second: The city of Vancouver has not at present the statutory power to impose a licence upon the respondent in the premises.

Appeal dismissed.

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Jan. 12, 13; *March* 14.

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Municipal Act—By-law providing for building permit—Erection of building without permit — Conviction — Certiorari—By-law—Validity—Conviction quashed—Appeal—R.S.B.C. 1924, Cap. 179, Sec. 54, Subsec. (56) (ii); 1936, Cap. 199, Sec. 59 (52)—B.C. Stats. 1933, Cap. 46, Sec. 4.

On October 7th, 1938, the defendant applied to the city building inspector for a permit to build upon a lot owned by him in the city of Kelowna. The inspector refused to grant a permit on the ground that it would depreciate the value of surrounding property. On proceeding to build the defendant was convicted for unlawfully erecting part of a building without a permit having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law of said city. Upon *certiorari* proceedings, it was *held* that subsection (56) (ii) of section 54 of the Municipal Act, R.S.B.C. 1924, Cap. 179, authorized the council to pass a by-law "For regulating the erection and construction of buildings," that this does not give the power to prohibit. The by-law in question purports to require a permit for the "Construction, erection . . . of any building or part thereof within the city limits." The Legislature did not give so broad a power, and section 2 (a) of the by-law is invalid.

Held, on appeal, reversing the decision of MANSON, J. (O'HALLORAN, J.A. dissenting), that the penalty section 2 (i) of the by-law has not been challenged, and the inquiry narrows down to a consideration of section 2 (a). This section was made pursuant to section 59 (52) of the Municipal Act, R.S.B.C. 1936, Cap. 199, which is as follows: "In every municipality the Council may . . . make, . . . by-laws . . . for any of the following purposes, that is to say: (52) For requiring . . . , owners, . . . to obtain and hold a valid permit . . . , before commencing and at all times during any erection, . . . [of] buildings and structures of the kind, description, or value specified in the by-law." Section 2 (a) of the by-law is a valid exercise of the power conferred by said section 59 (52).

The respondent constructed a building without a permit. Section 2 (a) requires him to have a permit before doing so and as section 2 (a) is a valid exercise of the authority conferred by section 59 (52) of the Municipal Act, R.S.B.C. 1936, the magistrate had jurisdiction to try and convict him for breach of section 2 (a).

APPEAL by the Crown from the order of MANSON, J. of the 9th of December, 1938 (reported, 53 B.C. 272), whereby a conviction of the respondent for that he unlawfully did on Friday, the 21st of October, 1938, at the city of Kelowna, in the county of Yale, erect part of a building without a permit

for such erection having first been obtained from the inspector, as provided in section 2 of the Fire Limits and Building Regulation By-law being By-law No. 668 of The Corporation of the City of Kelowna, as amended by By-law No. 736 of the said corporation, contrary to the provisions of such by-laws, was declared invalid and quashed.

The appeal was argued at Victoria on the 12th and 13th of January, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Maitland, K.C. (*Weddell*, with him), for appellant: The respondent erected a building without a licence and was convicted. On *certiorari* the learned judge quashed the conviction and declared the by-law *ultra vires*. He held the statute did not authorize it: see *Rex* v. *Brandilini* (1926), 38 B.C. 87; *Rex* v. *Nat Bell Liquors, Ld.*, [1922] 2 A.C. 128. On the question of the validity of the by-law see *Carrick* v. *Corporation of Point Grey* (1927), 38 B.C. 481 at p. 485; *Kruse* v. *Johnson*, [1898] 2 Q.B. 91. He says "regulation" does not give the power to "prohibit." Subsection (52) of section 59 of the Municipal Act, R.S.B.C. 1936, Cap. 199, gives us the power: see *Municipal Corporation of City of Toronto* v. *Virgo*, [1896] A.C. 88; *Rex* v. *Mould* (1920), 28 B.C. 221; *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393, at pp. 400 and 404. See also sections 15 and 24 of the Town Planning Act. The refusal of a permit is a question for *mandamus* and not *certiorari*: see *Ashton* v. *Wainwright*, [1936] 1 All E.R. 805. He did not have his permit and is liable.

Galbraith, for respondent: We say this is prohibition and the by-law goes beyond the powers given the municipality: see *Municipal Corporation of City of Toronto* v. *Virgo*, [1896] A.C. 88; *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91; 90 L.J.P.C. 102; 58 D.L.R. 1; *John Deere Plow Company, Limited* v. *Wharton* (1914), 18 D.L.R. 353; [1915] A.C. 330. This is not a regulation it is a prohibition: see *Falls* v. *Shamrock Fuel Co.*, [1924] 4 D.L.R. 863; *City of Toronto* v. *Foss* (1913), 10 D.L.R. 627; *Rex* v. *Sung Chong* (1909), 14 B.C. 275; *Rex* v. *Cope and Frey* (1906), 4 W.L.R. 253; *Re By-Law 92, Town of Winnipeg Beach* (1919), 50 D.L.R. 712;

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Regina v. *On Hing* (1884), 1 B.C. (Pt. 2) 148; *City of Toronto* v. *Elias Rogers Co.* (1914), 19 D.L.R. 75, at pp. 85 to 91.

Maitland, replied.

Cur. adv. vult.

14th March, 1939.

MARTIN, C.J.B.C.: The Court is of opinion, our brother O'HALLORAN dissenting, that this appeal should be allowed. We will hand down our reasons, and our brother MCQUARRIE authorizes us to say he is in accord with the majority of the Court.

Meanwhile I shall content myself by saying, briefly, that in my opinion the writ of *certiorari* was improvidently issued and has resulted in confusion from the failure below to distinguish between the jurisdiction of the magistrate and the wrongful exercise, assuming it to be so, of the powers of the building inspector, the appropriate remedy for which was, under the circumstances, *mandamus*—*Rex* v. *Farnborough Urban Council,* [1920] 1 K.B. 234, and *cf. Rex* v. *Minister of Transport,* [1927] W.N. 128.

I agree with the reasons about to be handed down by my brother SLOAN.

MACDONALD, J.A.: The respondent was convicted for breach of a building regulation by-law of the city of Kelowna under sections 2 (a) and 2 (i) set out in the reasons for judgment of my brother SLOAN. If authority was conferred upon the municipality to pass this section of the by-law and it is not rendered nugatory by other sections that might be held to be *ultra vires* and respondent—as he did—erected a building without a permit, then clearly he was properly convicted. The authority to enact sections 2 (a) and 2 (i) is conferred by section 59 (52) of the Municipal Act also referred to by my brother SLOAN. An examination of the proceedings brought before us on *certiorari* show that the magistrate did not act without jurisdiction. To go further afield is to enter upon a discussion of irrelevant matters.

A would allow the appeal.

McQUARRIE, J.A.: The learned judge below in his reasons for judgment holds that section 2 (a) of the by-law is invalid and that the conviction is invalid and must be quashed.

The respondent was convicted

for that he, the said William Nychuk . . . at the city of Kelowna, in the county of Yale aforesaid unlawfully did erect part of a building without a permit for such erection having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law, being By-law No. 668 of The Corporation of the City of Kelowna, as amended by By-law No. 736 of the said corporation, contrary to the provisions of such by-laws and contrary to the form of the statute in such case made and provided. . . .

He was fined $10 and costs with the usual alternative in case of default of payment. The relevant provision of the by-law, section 2 (a), as amended, reads as follows:

The construction, erection, alteration, rebuilding, repair, or removal of any building or structure within the city limits, shall not be commenced or carried on by any person until a permit for such work shall first have been obtained from the inspector.

It appears to be common ground that legislative authority for that provision is contained in subsection (61*d*) of section 54 of the Municipal Act, R.S.B.C. 1924, Cap. 179, as re-enacted by section 10 of Cap. 32, B.C. Stats. 1928, which, in part, reads as follows:

(61*d*.) For requiring contractors, owners, or other persons to obtain and hold a valid permit from the Council, or from the proper officials authorized from time to time by resolution or by-law of the Council for such purpose, before commencing and at all times during any erection, installation, addition, repair, or alteration of gas pipes and fittings, plumbing, electrical wiring, sewers, drains, tents, signs, gasoline tanks and pumps, and all similar works and things and buildings and structures of the kind, description, or value specified in the by-law; . . .

The learned judge in his said reasons for judgment further states that the respondent made four submissions ((1938), 53 B.C. 272, at 273):

(a) That the by-law in question was *ultra vires* of the municipality in that it authorized a prohibition and not merely a regulation; (b) that the information did not disclose an offence under the by-law; (c) that there was no evidence before the justice that the applicant's land and building was within the city of Kelowna; (d) that there was no evidence before the justice of any act on the part of the applicant in violation of the by-law.

Submissions (b), (c) and (d) are not sustained and the sole question to be determined is that raised by submission (a).

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I quote further from his reasons for judgment as follows (pp. 273-4):

> The by-law, it is contended, was a valid by-law under the Municipal Act. By 1933 Cap. 46, Sec. 4, section 54 (56) of the Municipal Act was repealed and the following clause substituted:
>
> "(56.) (i.) For the appointing of a building inspector and defining his duties:
>
> "(ii.) For regulating the erection and construction of buildings, and for prohibiting the erection of wooden buildings, or any addition to or alteration of wooden buildings, within the fire limits of the municipality, except with the authority in writing of the building inspector; and for prohibiting the rebuilding or repairing of a wooden building within the fire limits which has deteriorated by decay or been damaged by fire to the extent of forty per cent. of its value."

It is common ground also that the respondent had no permit and that he erected a part of the building.

On the hearing before us counsel for the respondent adopted the reasons for judgment of the learned judge below and I take it the respondent is limited to ground (a) above stated.

It is to be noted that the learned judge finds and based his judgment on section 2 (a) of the by-law being invalid and therefore holds that the conviction is invalid and must be quashed. The formal order of the Court does not quash or declare any part of it to be invalid.

It is true that the respondent complains that he was illegally refused a building permit and in his reasons for judgment the learned trial judge expresses the opinion that (p. 275)

> . . . there is nothing in the Municipal Act empowering the council to pass a by-law authorizing its building inspector to refuse a permit upon the grounds on which the refusal here was based.

But this appeal, as I see it, is confined to the order made and entered herein and in fact the notice of motion, dated the 3rd of November, 1938, on which these proceedings were initiated is expressly restricted to an application for a writ of *certiorari* to remove into the Court the record of the said conviction and to set aside the conviction. If the respondent's purpose was to force the building inspector to issue a permit to him, in my opinion, he has misconceived his remedy. He clearly submitted himself voluntarily to the jurisdiction of the council and the building inspector in his application for a permit, which is part of the record herein, and if refusal to grant a permit to him

was illegal there may have been proper proceedings which he could have taken to enforce his right to one but, in view of the conclusion I have arrived at, I do not feel it incumbent upon me to go into that phase of the matter in detail. In any event the respondent should not have taken the law into his own hands. But even if the Court should hold that the proper procedure was followed here by the respondent I think that the learned judge below was in error in his opinion that section 2 (a) of the by-law is invalid and in that respect I think reference should be made to *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393 cited by counsel for the appellant. This is clearly regulation and not prohibition. I would adopt the reasoning of Anglin, J., in *The City of Montreal* v. *Morgan, supra,* as follows (p. 400):

> Power to regulate does not imply [generally] power to prohibit [*City of Toronto* v. *Virgo,* [1896] A.C. 88, at p. 93]. . . . But [it] necessarily implies power to restrain the doing of that which is contrary to the regulation authorized, and in that sense and to that extent involves the power to prohibit. . . .

In the case at Bar also there is clear legislative authority for section 2 (a) of the by-law as hereinbefore set out in subsection (61*d*) of the Municipal Act as re-enacted by section 10 of Cap. 32, B.C. Stats. 1928. At first blush it might be thought that the said provision in the by-law was defective inasmuch as it does not specify the kind, description or value of the buildings affected but reference should be made to section 43 of the by-law which contains a description of the buildings aimed at in the following words:

> "Building" means a combination of materials to form a construction that is safe and stable, and adapted to permanent or continuous occupancy for residence, business, assembly, or storage purposes; the term "building" shall be construed as if followed by the words "or part thereof."

"Structure" is also defined in the same section of the by-law as follows:

> "Structure" means a combination of materials, other than a building, to form a construction that is safe and stable; including among others, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, sheds, coal bins, fences, and display signs; the term "structure" shall be construed as if followed by the words "or part thereof."

Those definitions read in conjunction with said section 2 (a) of the by-law make the latter complete. I, therefore, am of

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opinion that the appeal should be allowed and the conviction of the magistrate restored.

SLOAN, J.A.: This is an appeal by the Attorney-General from an order of Mr. Justice MANSON quashing, on *certiorari* proceedings, a conviction against the respondent for a breach of the Fire Limits and Building Regulation By-law of The Corporation of the City of Kelowna upon the ground that the section 2 (a) and a part of section 2 (e) of the said by-law are *ultra vires*. Now, on *certiorari*, as Lord Sumner said when delivering the judgment of the Board in *Rex* v. *Nat Bell Liquors Ld.*, [1922] 2 A.C. 128, at pp. 154-5:

> The object is to examine the proceedings in the inferior Court, to see whether its order had been made within its jurisdiction

and I propose to limit my consideration of this matter to the one question: Was there jurisdiction in the magistrate to convict? The answer to that question involves the determination of the validity or invalidity of the said by-law.

It is perhaps convenient at this point to set out the conviction. In part, it is as follows: [already set out in the judgment of MCQUARRIE, J.A.]

Section 2 of the said by-law contains a number of provisions numbered and lettered from 2 (a) to 2 (k) but it is necessary to consider only sections 2 (a) and 2 (i) because if these two sections are *intra vires* the jurisdiction of the magistrate is beyond question. Sections 2 (a) (as amended) and 2 (i) read as follows:

> 2 (a): [already set out in the judgment of MCQUARRIE, J.A.].
>
> 2 (i) If any building, or part of a building of any description, shall be constructed, erected, altered, or repaired within the city limits without a permit for such construction, erection, alteration, or repair having been first obtained as in this section provided, the owner of the land on which such building is constructed, erected, altered, or repaired shall be guilty of an infraction of this by-law, and such building shall be removed by or at the expense of the owner.

The penalty section 2 (i) has not been challenged; thus the inquiry narrows to a consideration of 2 (a).

Section 2 (a) was made pursuant to section 59 (52) of the Municipal Act, Cap. 199, R.S.B.C. 1936 (I give the revised statute reference for convenience) which, so far as relevant, is as follows:

> In every municipality the Council may . . . make, . . . by-laws . . . for any of the following purposes, that is to say:
> (52) For requiring owners, . . . to obtain and hold a valid permit . . . , before commencing and at all times during any erection, . . . [of] buildings and structures of the kind, description, or value specified in the by-law.

In my view section 2 (a) of the by-law is a valid exercise of the power conferred by said section 59 (52).

I cannot, with deference, attach much weight to the submission that whereas the Act delegates power to require a permit before commencing the erection of a building the by-law exceeds that power by prohibiting the commencement without a permit. The language of the Act authorizes the municipality to require the permit as a condition precedent to the commencement of a building operation. In truth the Act gives power to require an owner to hold a valid permit not only before but "at all times" during the construction of his building.

I view the word "requiring" in the sense that it is used in the statute in question as synonymous with "demanding." I know of few better ways of enforcing that demand than by the making of a by-law which compels the prospective builder to procure his permit before he shall be allowed to commence his construction. The power to require or demand the procuration of permit would be nugatory unless it involves a power to prohibit the builder from proceeding in defiance of that requirement. *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, at pp. 449, 450.

In my opinion the validity or invalidity of section 2 (a) of the by-law does not depend upon whether it is a regulation or prohibition and in consequence *Municipal Corporation of City of Toronto* v. *Virgo,* [1896] A.C. 88, and like cases are of no application. The statute uses the word "requiring"—not "regulating."

The word "requiring" must be considered in its primary meaning and not as connotatively meaning "regulating" for it is clear that when the Municipal Act confers authority to regulate it does so by the use of express language. In this connection it is significant that under section 59 by-laws may be made: (43) (*b*) for regulating the erection and construction of buildings; (43)

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(*b*) for prohibiting the erection of wooden buildings within the fire limits of a municipality; (44) for authorizing the pulling-down or removal of buildings; (47) for prevention of alterations of plans; (53) for compelling the providing of emergency exits. It will be seen from the few examples I have given that the Legislature used a wide range of expression in its delegation of authority to municipalities and there is no reason why the word "requiring" should be given any strained or artificial meaning which clearly was never intended.

Counsel for the respondent made a determined attack upon the validity of section 2 (e) of the by-law which reads as follows:

> 2 (e) If, however, he [*i.e.*, the building inspector] considers that such proposed work is not in accordance with this by-law and the statutes of the Province of British Columbia and the Dominion of Canada relating thereto, or any of them, or with any rules, regulations, or ordinances made thereunder, or that sufficient provisions have not been made in regard to public safety, fire, sanitation, ventilation, or that such work, if carried out, will be a deformity or incongruity or that it is likely to depreciate the assessable value of adjacent property, he shall refuse a permit, and if the proposed work is to rebuild or repair a wooden building within the fire limits of the city which has deteriorated by decay or been damaged by fire to the extent of forty (40) per cent. of its value, he may refuse a permit. In any such a case he shall retain the plans and specifications in the city offices.

Respondent's counsel submitted that the Act gave no power to refuse to issue a permit or alternatively no power to refuse upon the grounds specified in section 2 (e).

In the view I take I consider it unnecessary to deal with this submission and I expressly refrain from expressing any opinion as to the validity or invalidity of this section. Assuming, however, his argument to be well founded and that 2 (e) is either wholly or in part *ultra vires* that has no relation to the jurisdiction of the magistrate to determine whether the respondent violated the provisions of section 2 (a). It is the authority of the building inspector to refuse to issue a permit that is involved in the validity or invalidity of section 2 (e)—not the jurisdiction of the magistrate to try an accused person for constructing a building without the permit required under 2 (a). There is no element in 2 (e) which is an essential ingredient in the proof of the charge. The question as to the validity or invalidity of 2 (e) and whatever reasons (however fantastic) the building inspector

may advance in explanation of his refusal to issue a permit are of no concern in a proceeding of this kind no matter what considerations may apply thereto in a *mandamus* proceeding. *Ashton* v. *Wainwright,* [1936] 1 All E.R. 805, at pp. 810-11.

It is common ground that the respondent constructed a building without a permit. Section 2 (a) requires him to have a permit before doing so and as section 2 (a) is a valid exercise of the authority conferred by section 59 (52) of the Municipal Act the magistrate had jurisdiction to try and convict him for a breach of section 2 (a). Whatever reasons (whether good or bad) the respondent had for not having a permit cannot deprive the magistrate of jurisdiction and we are not reviewing his findings of fact.

There is only one other point that requires consideration. Counsel for the respondent submitted that section 2 (a) was defective in that, as required by section 59 (52) of the Act, it does not specify the "kind, description or value" of the "buildings or structures" concerning which a permit is required. The "kind [and] description" of such "buildings and structures" is to be found in the definitive sections of the by-law already quoted in the reasons for judgment of my brother McQUARRIE and therefore this submission is without foundation.

With respect, I would allow the appeal.

O'HALLORAN, J.A.: William Nychuk made written application in the required form to the building inspector of the city of Kelowna on October 8th, 1938, for a permit to build a one-storey building on a lot owned by him on Bernard Avenue, for the stated purpose of carrying on an auto-supply business and residing therein with his family. According to the accompanying plan, it was to cost $2,000 and to contain five rooms and a bath-room; the front room was adapted to carry on his business of auto supplies. The building inspector forwarded this application to the chairman of the building committee of the city council for advice, stating in his letter:

> As this location is perhaps out of the business zone I think it best for the council to express their opinion first.

The city council considered the application and on the 12th

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of October, pursuant to instructions, the city clerk wrote the applicant:

> Your application for a permit to build a business and residential structure on lot 1, map 2604, was considered by the city council at the regular meeting held last night when it was unanimously decided by the council they would not issue the necessary trade licence to you authorizing you to carry on the sale of auto supplies in the proposed building as this property is in a residential area.

On the 14th of October five ratepayers "residing or holding" property in the neighbourhood of Nychuk's property filed a petition with the city council in support of his application, stating they considered "it will not depreciate the value of the property in that neighbourhood."

This was considered by the city council and the city clerk, pursuant to instructions, wrote the applicant again on the 20th of October:

> I was instructed to inform you it is still the opinion of the council it is in the best interests of the city that stores should not be erected in the area in which map 2604 is situate. However, there will shortly be submitted to the taxpayers at a public meeting a zoning by-law defining the area of the business section and after a decision has been reached this matter will then receive consideration on the basis of the zoning by-law.

No zoning by-law was then passed but on the 24th of October the building inspector wrote the applicant refusing his application to build a "combined business and residence building";

> on the ground that in my opinion it will depreciate the value of surrounding property.

Previously, but on the same day, he had notified the applicant to cease work immediately until he was in possession of a building permit. Nychuk proceeded to build and on the 1st of November he was convicted in that he:

> Unlawfully [did] erect part of a building without a permit for such erection having been first obtained from the inspector as provided in section 2 of the Fire Limits and Building Regulation By-law being By-law No. 668 of the City of Kelowna as amended by By-law No. 736 of the said corporation, contrary to the provisions of such by-laws. . . .

Section 2(a) and (e) of that by-law read: [Section 2 (a) is already set out in the judgment of MCQUARRIE, J.A., and 2 (e) in the judgment of SLOAN, J.A.]

On the 21st of November the conviction was quashed on *certiorari* proceedings by Mr. Justice MANSON on the grounds (1) that the refusal to issue a permit was in fact a prohibition of

building and therefore *ultra vires* as the power to regulate alone is given by section 59 (43) (*b*) of the Municipal Act, Cap. 199, R.S.B.C. 1936, which gives power to pass by-laws, "For regulating the erection and construction of buildings." Although in the same subsection power is given to prohibit the erection of wooden buildings (which this is not); and (2) that while section 59 (52) of the Municipal Act, *supra,* enables the passing of by-laws:

> requiring . . . owners . . . to obtain and hold a valid permit . . . , before commencing and at all times during any erection, excavation, installation, addition, repair, or alteration of gas pipes and fittings, plumbing, electrical wiring, sewers, drains, tents, signs, oil-burners and pressure-tanks, gasoline tanks and pumps, and all similar works and things and buildings and structures of the kind, description, or value specified in the by-laws;

yet it does not contain the power to refuse the granting of a permit.

This matter arose out of Nychuk's determination to utilize his lot on Bernard Avenue to carry on his auto-supply business and the city council's determination to prevent him doing so because it wished to maintain that part of Bernard Avenue as a residential area. It is clear from the evidence that the objection was not to the building as such but to the purpose for which the building was to be used. If Nychuk had stated in his application that the building as designed was to be used solely for residential purposes and that the front room exactly as designed would be used as a children's play-room, music-room, library or studio, instead of a store, there is not the slightest suggestion that the building permit would have been refused. I cannot find anywhere in the appeal book any suggestion even of a reason why the permit was refused except the city council's desire to maintain Bernard Avenue as a residential street. The evidence is conclusive that the refusal of the permit was not *bona fide*; it was a "colourable" refusal; it was not an exercise of the power given by the parent statute for "regulating the erection and construction of buildings" but a device to do indirectly that which could not then be done directly, *viz.,* prevention of the carrying on of a lawful business on Bernard Avenue and thus maintain it as a residential area until a by-law could be passed

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(if it could be) defining the residential and business areas of the city of Kelowna.

After the application had been before the city council and the building inspector for some two weeks the building inspector refused the permit on the ground it would "depreciate the value of surrounding property." In the light of what had transpired this could only mean that it was anticipated it would depreciate the value of surrounding property as residential property, if as and when a by-law was passed restricting the area in question to residential purposes. This is admitted by the building inspector in his evidence cited *post*. Now if the city of Kelowna had passed a by-law under statutory authority restricting Bernard Avenue to residential purposes (as was done for example in *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393), Nychuk could have had no grounds for complaint on that score; but it is admitted in the city clerk's letter to Nychuk of the 20th of October, *supra,* and also in his evidence that this had not been done; it is there stated that a zoning by-law was shortly to be submitted to the taxpayers defining the area of the business section. The evidence can lead to no other reasonable conclusion than that the refusal to grant the permit was not an untrammelled exercise of his duty by the building inspector in the course of regulation of building and construction but was dictated by the efforts of the city council unlawfully to prevent a lawful business being carried on, on Bernard Avenue before the zoning by-law was submitted to the ratepayers.

The building inspector under cross-examination, corroborated by the city clerk, stated that he arrived at the opinion the building would depreciate the value of adjoining property, by reason of information given him by the council that the business area should not be extended beyond certain limits; and that his refusal of the permit was prompted by his intention to carry out the wishes of the city council in this respect:

Mr. Gore (building inspector): The opinion of the council apparently is that business premises should not be extended beyond there.

It is the opinion of the council it is in a residential area? Yes.

When did you arrive at the opinion that it would depreciate the adjoining property? It was upon information given to me, that business should not extend beyond certain limits.

By whom? The council.

. . . . .

That has been your understanding from the council and you have endeavoured to carry that out? Yes.

And so as a result of this understanding you tell Mr. Nychuk that you cannot give him this building permit, because it is going to depreciate the surrounding property, meaning residential property? Yes.

This is confirmed by the city clerk in his evidence now cited:

And the building permit was refused on the ground that certain property was considered to be in the residential area? Yes.

And the city council is endeavouring to prevent a further extension of business places in the residential area? Yes.

And having that in mind they have taken the position that this permit should not be granted and they have informed the building inspector accordingly I take it. Yes.

The city council had not taken the legal steps required to segregate business and residential areas; as the evidence of the city clerk shows:

. . . and the council's views were that this proposed building would be a business building erected in a residential area.

. . . That has never been defined by the council at any time? Not as a business area. But as a fire zone.

It was defined as a fire zone only. And that is the only definition that the city have shown,—that the council have shown? Yes.

It was not contended that the definition of an area as a fire zone carried with it zoning provisions enabling the segregation of business and residential areas. That of course was the purpose of the proposed zoning by-law. The building inspector having refused the permit in order to carry out the city council's unlawful attempts to prevent the applicant carrying on a lawful business on his property then laid an information against the applicant on instructions from the municipal authorities.

Before the learned magistrate it was not contended Nychuk had a permit, but cross-examination brought out the uncontroverted evidence that the refusal of the permit was in fact a method adopted to prevent unlawfully the carrying on of a lawful business on Bernard Avenue. This the city council had no right to do, and of course if it could not do so directly it could not do so indirectly under the guise of refusing a building permit.

The learned magistrate however refused to direct his mind thereto. Counsel for the city of Kelowna contended the issue was "permit or no permit" and objected to all evidence showing

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Nychuk was refused the permit illegally. The learned magistrate accordingly, while admitting the evidence, concerned himself only with the fact that Nychuk did not hold a permit. He refused to "impartially and effectually inquire, examine, deliberate and decide" whether the refusal was "colourable" and not *bona fide*. He stated his position clearly:

> In my opinion what I have to consider is this, whether or not this permit was granted . . . whether it is right, or whether it is wrong, or whether it is unjust, I am not here to decide. . . . What I am here to decide, to my mind, is that this man is charged with breaking one of the by-laws of the city, and this is where it begins and ends, unless it is taken to a higher Court.

From his own statement it is apparent he refused to take into consideration the uncontroverted evidence before him that the refusal of the permit was a mere sham and part of an unauthorized plan to maintain Bernard Avenue as a residential area. In so doing he refused to consider whether Nychuk was illegally deprived of the permit. It is true he did not decide that Nychuk was guilty notwithstanding that he had been deprived of the permit legally or illegally. He did not get that far; but he refused to consider the evidence thereof which he had admitted and which would have enabled him to adjudicate thereon. He did not adjudicate thereon; to his mind, Nychuk was guilty if he did not have a permit, and to his mind the fact that Nychuk did not have a permit because he was deprived of it illegally was not for him to consider but for a higher Court. The magistrate's finding is clear that possession of a permit, was in his mind "where it begins and ends." This was a denial of a fair trial; as such it was a violation of the "essentials of justice" and the conviction was properly quashed by Mr. Justice MANSON on *certiorari* proceedings. *Vide* among many cases *The King (Martin)* v. *Mahony,* [1910] 2 I.R. 695, and *In re Low Hong Hing* (1926), 37 B.C. 295, MARTIN, J.A. (as he then was) at p. 302. To quote the apt language of a distinguished judge in another connection "the arm of the law would have grown very short and the power of the Court very feeble if that were not the case."

In *Sharpe* v. *Wakefield* (1891), 60 L.J.M.C. 73 Lord Halsbury, L.C. said at p. 76:

An extensive power is confided to the Justices in their capacities as Justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not to private opinion—*Rooke's Case*, [(1598)] 5 Rep. 100*a*; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular.

Vide also *The King* v. *The Archbishop of Canterbury* (1812), 15 East 117; 104 E.R. 789 at p. 799. In *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, Lord Esher, M.R., said at pp. 375-6:

They [the vestry] must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

And also at p. 377:

Even if the interpretation put on the Act . . . had been the right one, which I think it was not, the vestry did not bring their minds to the question which they had to decide, and took into account circumstances which they ought not to have taken into account, and so did not properly exercise their discretion.

applied in *Sadler* v. *Sheffield Corporation* (1924), 93 L.J. Ch. 209, at 224. Refer also *Rex* v. *Board of Education*, [1910] 2 K.B. 165, affirmed in the House of Lords, [1911] A.C. 179. *Vide* also *The Queen* v. *Bishop of London* (1889), 24 Q.B.D. 213; Lindley, L.J., p. 240, and Lopez, L.J. p. 243. *Vide* also *The Queen* v. *London County Council* (1891), 61 L.J.M.C. 75, at pp. 76-8; *Rex* v. *Brighton Corporation* (1916), 85 L.J.K.B. 1552, Lord Reading, C.J., at pp. 1554-5, and *Rex* v. *Farnborough Urban Council*, [1920] 1 K.B. 234. In the light of the uncontroverted evidence these authorities should convince that Nychuk was refused the permit illegally. In refusing to consider this uncontroverted evidence and the legal consequences flowing therefrom, the learned magistrate refused to adjudicate. In thus refusing to adjudicate and exercise his jurisdiction he denied Nychuk a fair trial. I may mention incidentally that section 42 of the Summary Convictions Act, Cap. 271, R.S.B.C. 1936, compels the magistrate, in order to adjudicate, to consider the whole matter before him; it reads in part:

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The Justice, having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, . . .

A municipal corporation is the creature of statute and possesses only the powers given it by statute. Its powers are scrutinized closely when it tends to interfere with the common-law rights of individuals, such as for example the use of a person's own land. In *Rex* v. *Sung Chong* (1909), 14 B.C. 275, a decision of the Full Court of this Province (HUNTER, C.J., IRVING and MORRISON, JJ., HUNTER, C.J. dissenting in the result) the late Mr. Justice IRVING said at pp. 277-8:

. . . but in such a case as the present, which restrains or limits a man's right to carry on his trade in the ordinary way, we ought to be satisfied that the right has been taken away from him before we uphold any by-law to that effect.

Among the normal rights which are available to every British subject against all the world are (1) personal safety and freedom; (2) one's good name; (3) the enjoyment of the advantages ordinarily open to all the inhabitants of the country, *e.g.*, the unmolested pursuit of one's trade or occupation and free use of the highways; (4) freedom from malicious vexation by legal process; and (5) to one's own property.

Where a restraint is sought to be put upon any person in respect of the exercise of any of these natural rights, I think it is the duty of the Court to assume that the Legislature did not intend to interfere with them unless clear and unequivocal words have been used.

As Mr. Justice Riddell said in *City of Toronto* v. *King*, [1924] 1 D.L.R. 1101, at 1106:

The common law right of every man is to build upon his own land whatever kind of building he sees fit, so long as it is not a nuisance, public or private. It requires an express statute to take away that right of property.

Prohibition cannot be attained in the guise of regulation, for what cannot be done directly cannot be done indirectly. The Earl of Halsbury, L.C., observed in *Rossi* v. *Edinburgh Corporation*, [1905] A.C. 21, at 26:

. . . if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature had contemplated.

The uncontroverted evidence is that this case sprang from the attempt of the city council to prevent the carrying on of a lawful business on Bernard Avenue, although it had no right to do so; that was the object and effect of the refusal of the permit; it was therefore a "colourable" attempt to prohibit the carrying

on of a lawful business in a certain area joined with a "colourable" attempt to prohibit the "erection and construction of buildings" in that area. No such power to prohibit building is given in the Municipal Act nor did appellant's counsel claim there was. The power to regulate implies the existence of that which is regulated, for as stated by Lord Davey, who delivered the judgment of their Lordships of the Judicial Committee in the leading case of *Municipal Corporation of City of Toronto* v. *Virgo,* [1896] A.C. 88 at p. 93:

> No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

It should be said that no question of nuisance or maintenance of order was urged in the case at Bar. It is an inescapable conclusion that the refusal of the building permit was a "colourable" attempt to prevent the construction of business premises in a certain area, in order to prevent entirely the carrying on of business in that area. To my mind this is an effort to attain more effective prohibition even than the refusal to permit certain kinds of business to be transacted in certain areas at certain times as exemplified in *Municipal Corporation of City of Toronto* v. *Virgo* and *Rex* v. *Sung Chong, supra.*

In addition, as pointed out by Mr. Justice MANSON, while section 59 (52) of the Municipal Act, *supra,* required a person to hold a permit to build yet it gives no power to refuse a permit. In my view this requirement is in the nature of a licence to build; it is not incidental to the power to prohibit or regulate building construction as given in section 59 (43) (*b*); for if it is to be interpreted as "regulation" of building, then it is so much surplusage as wide powers of regulation are already given in section 59 (43) (*b*); on the other hand, if it is to be interpreted as a power to prohibit it is *ultra vires* as that power is confined to wooden buildings, which is not the case here.

For these reasons, I cannot escape the conclusion that when the learned magistrate declined to apply his mind to the essen-

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tial considerations I have mentioned, and in the "teeth" thereof so to speak, held that possession of the permit was the "beginning and end" of the case, he did not adjudicate upon the charge before him and did not exercise jurisdiction, as he refused to "impartially and effectually inquire, examine, deliberate and decide"; he thereby denied Nychuk a fair trial, and the resulting conviction was properly quashed on *certiorari*. I would dismiss the appeal.

Appeal allowed, O'Halloran, J.A. dissenting.

Solicitor for appellant: *E. C. Weddell.*
Solicitors for respondent: *Galbraith & Kidston.*

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April 17, 18, 19, 20, 21, 24, 25, 26; *June* 9.

HOME OIL DISTRIBUTORS, LIMITED *ET AL.* v. ATTORNEY-GENERAL OF BRITISH COLUMBIA *ET AL.*

Constitutional law—Property and civil rights—Trade—Provincial jurisdiction—Coal and Petroleum Products Control Board Act—Price-fixing powers of Board—Validity—Report of Commission—Admissibility in evidence—B.C. Stats. 1937, Cap. 8, Secs. 14 and 15—B.N.A. Act, 1867 (30 & 31 Vict.), Cap. 3, Secs. 91 (13) and 92 (2).

Section 14 of the Coal and Petroleum Products Control Board Act, which purports to give the Board, with the approval of the Lieutenant-Governor in Council, price-fixing powers with respect to the sale of coal and petroleum products for use in the Province, was *held* on the trial to be *ultra vires*, since the direct result and the intended result of the exercise of the said powers would be an interference with external trade in petroleum products, and therefore the section, under the guise of accomplishing a local purpose, encroaches on the Dominion's jurisdiction over "the regulation of trade and commerce," and section 15 of said Act, which provides that where the Board has fixed a price for coal or petroleum or any petroleum product, it may with the approval of the Lieutenant-Governor in Council, declare that any covenant in any existing agreement for the purchase or sale within the Province of coal or petroleum or a petroleum product for use in the Province shall be varied so that the price shall conform to the price fixed by the Board, was *held* to be *ultra vires*.

Held, on appeal, reversing the decision of MANSON, J., that the Act is *intra vires*, since its pith and substance is an Act to regulate particular businesses entirely within the Province, with control over products within its territorial jurisdiction and power to fix prices, not only of locally produced products, but also those imported from a foreign jurisdiction.

On the submission that the Act is *ultra vires* as its purpose and intent was to protect the coal industry of the Province from competition from fuel-oil which is derived from the crude oil imported from California, and that the intent and effect of fixing the retail price of gasoline at a lower figure than now obtains is to force the petroleum industry to make an increase in the price of fuel-oil, thus affording coal a preferred position in the local market:—

Held, that the Province may divest a local company of part of its profits for the dual purpose of protecting the consuming public from the excessive cost of gasoline and of, at the same time, affording the coal industry protection from unfair and ruinous competition from fuel-oil sold below cost. This class of legislation is within the power exclusively assigned to the Province to make laws in relation to property and civil rights.

Held, further (MCQUARRIE, J.A. dissenting), that the report of the Royal Commission on the petroleum industry should be admitted in evidence in so far only as it finds facts which are relevant to the ascertainment of the said alleged purpose and the effect of the enactment.

APPEAL by defendants from the decision of MANSON, J. of the 9th of March, 1939, in an action for a declaration that the Coal and Petroleum Products Control Board Act, enacted by the Legislature in 1937, and the amendments thereto in 1938, were in whole or in part *ultra vires* of the Legislature, and for an injunction restraining Dr. W. A. Carrothers, sole member of the Board appointed under the Act, from proceeding thereunder. It was held on the trial that the sections of the Act relating to price fixing were *ultra vires*, and an injunction was granted prohibiting the Board from making any order fixing the price of gasoline under the provisions of the Act. The price-fixing provisions were found *ultra vires* on the grounds, first, that the power to reduce the retail of gasoline if exercised (or as in fact exercised by the Board) would produce the result that the companies would be compelled to import a different type of crude oil with a higher gasoline and a lower fuel-oil content. This would in fact, and was intended by the Legislature to, afford protection or assistance to the coal industry of the Prov-

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ince. The purpose of the legislation was to compel the importation of a commodity different in type from that which is now imported. Secondly, the action of the Board indicated a deliberate intention to disregard the losses on the part of the plaintiffs, as the result of its orders, in the belief that the losses would be absorbed by the parent companies in the foreign jurisdiction. This action of the Board almost immediately prior to the amending enactment of 1938, is indicative of the intention of the Legislature, which acted not to destroy the Board's order, but to frustrate the Court proceedings designed to enjoin the Board's action. Thirdly, the price-fixing order of the Board or any order of the Board lowering the wholesale price of gasoline in accordance with the powers conferred by the Act, could not by any action of the Board be prevented from directly interfering with external or interprovincial trade. Fourthly, both in its intention and direct result, the exercise of the price-fixing power conferred is an interference with external and interprovincial trade in petroleum products.

The appeal was argued at Vancouver on the 17th to the 26th of April, 1939, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Wismer, K.C., A.-G. (*J. P. Hogg,* with him), for appellants: The Coal and Petroleum Products Control Board Act, as amended, is an Act establishing a Board to regulate and control within the Province the coal and petroleum industries. The power of regulation and control is so restricted by the Act that it can be exercised in respect only of products and things situated within the Province and of transactions that take place wholly within the Province. The words of Lord Atkin in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, at 720, apply, namely:

> The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the Province, and it is therefore *intra vires* of the Province.

The Act confers no power of regulation in respect of the importation of crude oil from California, nor the import or export of refined petroleum products. The manufacture and distribution constitute a wholly Provincial business: see *Citizens Insurance*

Company of Canada v. *Parsons* (1881), 7 App. Cas. 96; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *City of Montreal* v. *Montreal Street Railway*, [1912] A.C. 333; *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] 1 A.C. 588; *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Chung Chuck and Mah Lai* v. *Gilmore* (1936), 51 B.C. 189; *In re Constitutional Questions Determination Act* and *In re Natural Products Marketing (British Columbia) Act* (1937), 52 B.C. 179; *Gallagher* v. *Lynn*, [1937] A.C. 863; *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708. Regulation under the Act includes by virtue of sections 14 and 15 a price-fixing power. The plaintiffs argue these two sections, and they were held to be *ultra vires*. They say first that the pith and substance of the Act is protection of coal. Section 42 of the Act provides that

> the Board . . . shall not fix the price of any product or commodity for the purpose of affording protection or assistance to any other product, commodity or industry.

We say the Province has the right to fix a just price for any commodity in the Province, regardless of the fact that competing commodities may thereby benefit. Secondly, they say the business is interprovincial and international, in that the companies engaged are controlled by outside companies, some of which produce crude oil and the crude oil is imported. Extraprovincial ownership cannot affect the constitutionality of the Act: see *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91, at p. 100. Importation of crude oil is not affected by the Act. Thirdly, they say the business of producing gasoline is interrelated to that of producing fuel-oil, so that the price of one depends on the price of the other. The answer is that it is one of the inescapable consequences of price-fixing, regardless of the nature of the commodity of which the price is fixed. Fourthly, they say the purpose and effect is so to regulate that the regulation is the regulation of trade and commerce. The learned judge said the direct result of the exercising of price-fixing power, and the intended result is an interference with external trade in petro-

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leum products. If the companies voluntarily change the type of crude oil imported, that is merely incidental to the exercise by the Province of its undoubted legislative jurisdiction to regulate the coal and petroleum businesses within the Province: see *Gallagher* v. *Lynn*, [1937] A.C. 863, at p. 868. The Board has jurisdiction in respect of the following: (1) Operations in refineries in British Columbia; (2) wholesaling in British Columbia; (3) storage in British Columbia; (4) transportation in British Columbia; (5) retailing in British Columbia. Volumes one and two of the Macdonald Report should not be admitted in evidence: see *Assam Railways and Trading Co.* v. *Commissioners of Inland Revenue*, [1935] A.C. 445, at p. 457; *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A.C. 117, at pp. 130-31; *Rex* v. *Nat Bell Liquors, Ld.*, [1922] 2 A.C. 128. It is submitted that the purpose of the Legislature is to legislate regarding the petroleum industry as a particular business in the Province, and also that the effect is adequately circumscribed within the Province, and any extra-provincial effect is merely incidental: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*, [1897] A.C. 231; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73; *Canadian Pacific Wine Co.* v. *Tuley*, [1921] 2 A.C. 417; *In re Grain Marketing Act, 1931*, [1931] 2 W.W.R. 146, at p. 181.

J. W. deB. Farris, K.C. (*Symes*, and *T. E. H. Ellis*, with him), for respondents: Price-fixing regulations operate externally. The regulations are intended to force the industry to reduce its cost of operation by conducting its business more economically. The regulations are directed at abuses which are local, particularly a reduction of the number of service stations. The regulations are *ultra vires* for two reasons: First, the regulation is not a direct method of regulation. It does not strike directly at the evil to be remedied. The tendency of the regulation is to effect conditions and practices outside the Province at least equally with those within. It is the general tendencies of the price reduction which determine its validity and not the

results in particular instances: see *Rex* v. *Caledonian Collieries,* [1928] A.C. 358; *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.,* [1927] A.C. 934, at 938. Second, assuming the price-fixing regulations are operative as claimed on the so-called abuses, namely, excessive number of stations and costly form of advertising, they are in fact the regulation of trade which is not confined to the Province. The regulations may be looked at in two ways: one, as regulations of the operating company; two, as regulations of the trade or industry. As to the first, the price-fixing regulation regulates the parent company outside the Province and not merely the local subsidiary. The operation of a price-reducing regulation is the same as the operation of a tax: see *Attorney-General of Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.,* [1930] A.C. 357. In considering the substance of the regulations to determine on whom the burden of reduction falls see *Palmolive Manufacturing Co. (Ontario) Ltd.* v. *The King,* [1933] S.C.R. 133, at p. 140. A Province cannot impose a direct tax for a purpose outside its powers: see *In re Insurance Act of Canada,* [1932] A.C. 41. As to the second, in reality it is the trade that is regulated, and section 91 (2) of the B.N.A. Act refers to not the regulation of trading companies but the regulation of trade and commerce: see *In re The Regulation and Control of Radio Communication in Canada,* [1932] A.C. 304. These regulations in their purpose strike at the business not merely locally, but in its whole international structure. The price-fixing powers of regulation are not within property and civil rights in the Province, because they relate to property and civil rights outside the Province, to the regulation of trade which is external, trade local and external indiscriminately, and because the effect on external trade is not ancillary or incidental, but direct and in the same aspect. The price-fixing regulations are in relation to trade which is not purely local. There has been no case which extends the powers of the Province to the extent claimed in this legislation: see *Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R.

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357. Secondly, the regulations are not matters of property and civil rights in the Province but are regulations of trade, as trade in their external aspects. The cases dealing with the words "in relation" are *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348; *City of Montreal* v. *Montreal Street Railway*, [1912] A.C. 333; *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1916] 1 A.C. 598; *Attorney-General of British Columbia* v. *Attorney-General of Canada*, [1924] A.C. 222; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73 at p. 78; *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700; *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935*, [1936] S.C.R. 398; *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202. Thirdly, as to how far regulations may be considered purely local and within property and civil rights within the Province, subjects that in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91: see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Larkin* v. *Long*, [1915] A.C. 814; *Forbes* v. *Attorney-General for Manitoba*, [1937] A.C. 260. The basis of the rule as to ancillary or incidental legislation is that the main subject of the legislation is in purpose and effect within Parliament's jurisdiction, and that there are matters which are necessarily ancillary or incidental which might otherwise be *ultra vires* but can be supported for this reason. In this case it is submitted that the present legislation is a regulation of a trade as a trade, and if it operates in this form externally it assumes the character of the regulation of trade and commerce. The liquor cases do not come under property and civil rights, but under the regulation of trade and commerce. A matter coming within the class of subject property and civil rights may be the regulation of trade as trade and therefore is Provincial if and only if operating entirely within the Province: see *Gallagher* v. *Lynn*, [1937] A.C. 863, at 869; *Attorney-General*

for British Columbia v. *Kingcome Navigation Co.*, [1934] A.C. 45. The price-fixing regulation will directly affect the importation of gasoline from the United States. The regulations are in direct conflict with the Dominion's policy indicated in the Customs Act and the dumping duties, which is to keep up the price of gasoline to protect the local refineries. The regulations are a method of regulating the importation of crude petroleum with a view to the protection of the local coal industry.

Wismer, replied.

Cur. adv. vult.

9th June, 1939.

MARTIN, C.J.B.C.: In this appeal, which raises questions of exceptional importance and difficulty, necessitating prolonged consideration, we have reached the unanimous conclusion (not, we may say, without hesitation caused by the admirable argument presented by Senator *Farris* that the appeal should be allowed, for reasons to be handed down as soon as possible supporting our opinion that, in brief, the impugned legislation is in

> pith and substance . . . an Act to regulate particular businesses entirely within the Province, and it is therefore *intra vires* of the Province:

Shannon v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, at p. 720.

For the present we think it desirable only to add that, in arriving at said opinion, we have not given effect to the amending statute, *i.e.,* the Coal and Petroleum Products Control Board Act Amendment Act, 1938, passed on the 9th of December last, after our judgment on the *interim* injunction was pronounced on the 5th of that month (53 B.C. 355), because we regard that interlocutory enactment as ineffective to curtail the unassailable jurisdiction of the Courts of Canada to adjudicate upon constitutional questions under the British North America Act, and, under the circumstances before us, we regard it as not of weight in other respects.

16th June, 1939.

MARTIN, C.J.B.C.: When judgment was pronounced herein on the 9th instant it was my intention to hand down reasons in addition to those then briefly given (to which I refer), but after

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having had the benefit of considering those since prepared by my brother SLOAN I find myself in such substantial agreement therewith that I do not think it would be profitable to take further time to add to them. I am the more moved to this course because if it is intended to take the opinion of a higher Court upon our judgment, the questions of public interest involved are of such weight and urgency that delay in obtaining a final adjudication should in every possible way be avoided.

MCQUARRIE, J.A.: Further argument confirms my opinion expressed when the question was dealt with by this Court on an appeal by the Attorney-General from an injunction order reported in (1938), 53 B.C. 355, at 363; [1939] 1 W.W.R. 49, at 54; and [1939] 1 D.L.R. 573, at 577 that the Act is *intra vires* of the Provincial Legislature, all of which I now reaffirm and embody in this judgment, in so far as the same may be applicable to the issues before us on this appeal. I shall, therefore, confine my remarks to (a) new points raised by counsel for the respondents on this appeal; (b) matters to which my former dissenting judgment may not apply and an elaboration of my reasons for judgment reported as aforesaid; and (c) a brief statement regarding the oral judgment of the Court delivered by the learned Chief Justice of British Columbia. As to (c), in order to clear up any question which may possibly be raised, I would say that when the learned Chief Justice made use of the following words: "(not, we may say, without hesitation caused by the admirable argument presented by Senator *Farris*)" we had no intention that the word "hesitation" should convey that there was any doubt in our minds. We only intended, as I understood it, to intimate that we had given full consideration to Mr. *Farris's* argument. (a) and (b) appear to be corelated to such an extent as to render it advisable for me to consider them together as I have decided to do.

My notes of the argument on the hearing of the interlocutory appeal, in which my former judgment was delivered, show that counsel for the respondents then contended that the result of lowering the price at which gasoline could be sold in British Columbia might have a disastrous effect on the company plaintiffs

and might even force them into bankruptcy. I immediately expressed my astonishment and doubt that decreasing the sale price in British Columbia could have any such effect on the large, powerful and wealthy corporations the plaintiff companies were known to be. Even if it had the effect, losses in dealing in any commodities subject to Provincial control would not prevent the Legislature from fixing prices and even adding to the loss. Mr. *Farris* thereupon reminded the Court that the said companies were separate and distinct legal entities incorporated in British Columbia and were all required by their parent corporations to pay their own way or otherwise go out of business. On the hearing of this appeal he reversed his position as to that branch of his argument, abandoned the "bankruptcy" idea and said "There is a Santa Claus on whom they can fall back, their parent companies," which might be called upon to bear the consequential loss, thereby having an effect outside or beyond the Province of British Columbia. He enlarged on the question of "integrated" companies and contended that we would have to go back to the oil wells where the crude oil was produced and the incidental services connected therewith, all having an international effect and entering into the field of trade and commerce which is within the exclusive jurisdiction of the Dominion. That is, of course, an entirely different proposition. It seems to me, however, that even if Mr. *Farris* is correct in his present position, it could have no effect here because the Act deals only with the sale price in British Columbia of a product manufactured in this Province.

Counsel for the respondents now frankly admits that "price-fixing" is the only real issue in this case and contends that as the Dominion has made provision under the Customs Act and Customs Tariff and amending Acts for fixing the value of certain classes of articles exported to Canada for the imposition of additional special or dumping duties, it has directly or indirectly launched into the field of "price-fixing" and has therefore revoked the jurisdiction of the Province to fix the price at which gasoline may be sold in British Columbia. As pointed out to counsel on the hearing, I do not see that there is anything in that contention for the reason more particularly that, in my

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opinion, fixing of values for duty purposes and fixing of sale prices in the Province are entirely different matters. I might add that marketing legislation held valid and in operation in this Province affects fruit for example in respect of which dumping duties apply. As a matter of fact, if Mr. *Farris* is relying on the report, it finds that dumping duties do not apply to gasoline.

Dealing with the general aspects of this important case, at the risk of some repetition, and, after careful consideration of the reasons for judgment of the learned trial judge, the able arguments of the Attorney-General and Mr. *Farris* and the authorities cited by them, I would, with all deference, express my further reasons why this appeal should be allowed and the judgment of the learned trial judge reversed with the incidental dissolution of the injunction.

If, instead of being refined or manufactured in this Province, all gasoline used in British Columbia was imported from the United States (it would have to be imported if we had no refineries here) under the decision in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, it would not be treated in any different way from vegetables grown in the United States and imported into this Province. When both products, gasoline or vegetables, reach this Province an Act regulating their sale would be legislation in respect to property and civil rights. It would also be a matter of purely local concern. In the *Shannon* case it was pointed out that their Lordships did not accept the view that natural products, as defined by the Act, were confined to natural products in British Columbia. It is settled, therefore, that no matter where the products come from, once they reach this Province they are subject to marketing control.

It was there decided that imported vegetables and fruit, or any other commodities, may be controlled by the local Legislature including fixing prices. There is no difference between imported gasoline and imported fruit so far as this case is concerned. A certain amount of gasoline is in fact imported or can be imported subject to a duty as in the case of vegetables, fruit or other foreign products. Will it be said that this Act applies to gasoline imported from California but not to gasoline wholly

refined in British Columbia from crude imported from California into British Columbia? If that is so, a part of the local consumption of gasoline (imported) would be subject to the Act while the balance would not. If there is any difficulty, and I consider that there is none, since the *Shannon* decision, it might be in respect to foreign gasoline imported; not of the locally manufactured product.

Let us test it by an illustration: suppose crude oil imported from California or any other country, instead of being refined in British Columbia and manufactured into different products, including gasoline, was used by the industry in its raw state for fuel purposes. Certain types of crude no doubt could be used in heavy industry as a fuel. At all events let us assume that this was done to test the value of submissions made that the Act under consideration is *ultra vires* of the Provincial Legislature. Clearly, if foreign fruit or vegetables are subject to Provincial control after reaching British Columbia, so also would crude imported and used as aforesaid. This must be so unless the Court reaches the conclusion that Provincial control of commodities depends on the nature of the product. Will it be said that if crude so imported would be subject to Provincial control, its manufactured products, *viz.*, gasoline, fuel-oil, lubricants, etc., all manufactured from it in this Province after the crude or raw material is imported into this Province would not also be subject to Provincial control?

It was said that in the judgment of the Judicial Committee in the *Shannon* case no reference was made to price-fixing. The Act then under review provided for the control and regulation in any and all respects of the marketing of natural products within the Province. Price-fixing is a form of regulating and it was not necessary to mention that phrase in their Lordships' reasons. Any doubt on this point is set at rest by reference to section 5 (*g*) of R.S.B.C. 1936, Cap. 165. That provision gave the Board power

> to fix the price or prices, maximum price or prices, minimum price or prices, or both maximum and minimum prices at which the regulated product, or any grade or class thereof, may be bought or sold in the Province; and may fix different prices for different parts of the Province.

Then it was submitted that if a Provincial Government Board

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regulates the price of gasoline to cure a local evil, as the appellant contends, *viz.*, excessive prices for gasoline in British Columbia, not elsewhere, such consequences will follow in the whole petroleum industry, changing its character; compelling the companies to change their book-keeping methods, import a different kind of crude and in some way affecting not only interprovincial trade but trade and commerce generally. How increasing the price at which gasoline may be sold in British Columbia can have all these effects is hard to understand. The fact is it is not so and in any event it would not in law make any difference.

Further, if the Macdonald Report may be looked at, these alleged results, if of any importance, may be avoided by the oil industry through adding a fraction of a cent per gallon to their heavy fuel-oil sales in British Columbia. The Commissioner found that the heavy fuel-oil was sold below cost. As they sell four or five times as much heavy fuel-oil as gasoline, a slight adjustment in heavy fuel-oil prices will avoid these alleged results without changing in any way their business methods. I may say in passing that after that adjustment in heavy fuel-oil prices is made, to answer the argument that this is an Act to protect the coal industry and therefore beyond Provincial powers, according to the report of the Commissioner, heavy fuel-oil would still be sold below cost. It would be strange if a powerful industry with two products to sell sold one product (gasoline) at excessive prices, giving rise to a local grievance, and, to suit its own purpose, sold the other product (heavy fuel-oil) below cost, could by such methods resist control by way of price-fixing. If that is so the farmers growing different products may find a way to evade marketing legislation. Proper adjustments can be made if, as stated, it is a matter of any importance, without any disturbance beyond the confines of the Province.

So far as protection to coal is concerned the Macdonald Report points out, if it should be referred to contrary to my view, that Dominion aid, through a tariff, is necessary before that industry can be protected: regulating the price of gasoline does not even indirectly do so. It is sought to lower the price of gasoline because that commodity, standing alone, is sold at excessive prices. Nowhere is it stated or implied that any reduction in

gasoline must be viewed in its relation to any other product. If there was no inquiry into the coal industry the same finding would have been made in respect to gasoline; it stands by itself. If, however, it did follow, not as a primary purpose or object of the Act, but only incidentally that the coal industry was assisted the Act would not be bad. The fuel-oil tax imposed by the Provincial Legislature of this Province doubtless helped the coal industry. It was held to be *intra vires*.

The answer to all these far-fetched suggestions, even if true, that certain effects of a national or international character will follow this legislation in respect to a local matter, is that this is not legislation in relation to these extraneous matters. As Lord Atkin said in the *Shannon* case at p. 720, quoting from the judgment in *Gallagher* v. *Lynn*, [1937] A.C. 863, at 869:

"It is not passed 'in respect of' trade, and is therefore not subject to attack on that ground."

In the same way the Act under review is not passed in respect to or in relation to international trade or trade and commerce generally, much less interprovincial trade. The latter is not even touched because the gasoline refined here is all sold in this Province. If any of it went outside, the Act will not apply to it. It is the simple proposition of manufacturing wholly in this Province for the local use of people in this Province products for sale in the Province, all manufactured from raw material (crude) imported into the Province. It surely makes no difference that the raw material to start the industry in this Province is imported. Indeed it was conceded that as crude is produced in the neighbouring Province of Alberta this legislation would be *intra vires* in that Province. Will it be suggested that if they ran out of crude in Alberta and had to import it until more was discovered, the Act would be suspended in the meantime? Refineries in Alberta would in any event probably import some crude. Would that make the whole Act invalid or invalid in part?

It may of course be true to some extent that in modern business products everywhere may be affected by world conditions and world prices and that fixing prices of any product may affect to some degree the sale by the owner of other commodities or make readjustments of his business methods advisable or even neces-

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sary. The sale of certain kinds of vegetables coming into this Province from California, and sold at fixed prices, might affect the prices to be obtained by the owner for the same or other vegetables, for example, sold by him in the State of Texas. If the price of a California grower's vegetable products is fixed in British Columbia he may find it necessary, or advisable, in other parts of the American continent, or in fact all over the world, to adjust prices elsewhere. It may lead him also as a business man to grow more of one product and less of another. All this is incidental. It is not the object or intent of the legislation directly or indirectly to compel him to do so. Certain effects, as I said, follow every legislation affecting commodities widely used. When a Provincial Legislature attempts to legislate, not merely in respect to the sale of the local product but also in respect to consequential effects outside or beyond its control it will be time enough to question such legislation.

I referred to vegetables imported into this Province from California. One could imagine a case where a fruit or a vegetable industry might be carried on in the same way as the oil industry. Will the size of the business or its world-wide activities decide whether or not that part of it carried on in this Province is within or without Provincial control? Could it be said that if large fruit or vegetable growers in California owned not only extensive farms as the oil companies, if the report be considered, own large oil fields but also owned the trucks to carry their products to the Coast (as oil companies own the pipe lines to carry crude) also the ships to carry their products to this Province (as the oil companies own tankers); let us suppose too that these fruit or vegetable growers, as great integrated companies, owned all the facilities for distribution in this Province (as do the oil companies) will it then be said for a moment that the products of these large growers, the owners of all these facilities, when placed on the market stalls in this Province side by side with other products are not subject to Provincial control although imported fruit or vegetables from a small California grower, without all these facilities, are subject to control? Surely it is not necessary to say more than that. If that is not so what sort of inquiries will the Courts have to make to see who are within

the Act and who are not? Does the application of the Act depend upon who is the owner of the products and on the way he conducts his business financially or otherwise? Clearly since the *Shannon* decision the fruit or vegetable products of a large or small company shipped in this Province are subject to control. Suppose the time comes when a California fruit or vegetable might prove to be the raw material as crude is the imported raw material for gasoline from which other products might be manufactured in this Province. If the fruit or vegetable itself when imported can be regulated so also any products manufactured from it in this Province and sold in this Province could be regulated by the Government. These products would be exactly in the same position as gasoline marketed in British Columbia from imported crude.

Based on the decision of the Judicial Committee in *Attorney-General for Alberta* v. *Attorney-General for Canada,* [1939] A.C. 117, it is submitted that in a case of difficulty the "effect" of legislation might be examined; that we might look at the effect of the legislation under review and judge it accordingly. That is true provided one looks at the real effect lying plainly on the surface and not at fanciful effects. The real effect is to regulate the price of a local commodity manufactured in this Province, not, as in the Alberta case, under the guise of imposing taxation on banks, preventing them from carrying on business. There too they looked at the legislative history of Alberta "including the attempt to create a new economic era in the Province" (132). It can hardly be said that the intention is to create a new economic era in this Province. If one wants to look at the history of other legislation in British Columbia it will be found in other marketing control Acts held to be valid by the Judicial Committee, not, as in Alberta, in other legislation, intending to bring about "a new economic era" with banks standing in the way and therefore requiring removal. Lord Maugham, L.C. pointed out that it was clear that banks and savings banks operating in Alberta might greatly interfere with these proposed economic changes sought and that being so it was deemed advisable if not to prevent their operation in the Province, to at least so cripple them that it would be impossible to carry on the

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business of banking. What is said apparently is that the real effect of the legislation we are considering is to control trade and commerce. That is not so. Certainly not to any greater extent than other marketing Acts held to be valid. In the Alberta case, it could properly be looked upon as legislation in relation to banking. This enactment cannot be looked upon as in relation to trade and commerce.

In respect to these alleged questions of trade and commerce said to be affected by this legislation we should not overlook the evidence. Respondents' witnesses do not make this claim. The general manager of Home Oil Distributors gave the following evidence regarding the business of his company:

> Is there anything international in that business? No.
> Is there anything interprovincial in that business? No.

A. D. Grant, superintendent of the Ioco Refinery of Imperial Oil, gave, in effect, similar evidence. Further, Mr. Kenmuir, division manager of the Union Oil Company of Canada, gave this evidence:

> Do you know of any international aspect of your B.C. operation? No. I cannot answer.

I call attention in conclusion to the judgment already reported in (1938), 53 B.C. 355, where the Chief Justice of British Columbia, at p. 359, said:

> . . . It is conceded by respondents' counsel that, if the report cannot be resorted to, then there are no facts before us to support an attack upon the validity of the Act.

That is still true. No facts were adduced at the later trial to change that position. Any evidence of Dr. Carrothers, as to the use of the report in fixing prices long after the legislation was passed, cannot be material on this point. We have therefore the position that we are dealing with an Act conceded in itself to be perfectly valid.

I held that the Macdonald Report was not admissible. We now have before us three volumes making the complete report; all held by a majority to be admissible. Now the Legislature would have had at the most only two volumes before it when the Act was passed. We now have the strange position that the Court has decided that it may find out the intention of the Legislature by looking at the three volumes and yet one of them was not in

existence when the Act was passed. This is another reason in support of my view, with respect for other views, that we could only look at the statute itself. I would allow the appeal.

SLOAN, J.A.: There falls to be determined in this appeal an issue respecting the constitutional validity of the Coal and Petroleum Products Control Board Act, a statute enacted by the Legislature of British Columbia in 1937 (B.C. Stats. 1937, Cap. 8). Mr. Justice MANSON found sections 14 and 15 of the Act *ultra vires* and from that decision the Attorney-General appeals to us.

Under the Act there is constituted a Coal and Petroleum Control Board and said sections 14 and 15 empower the Board to fix the prices at which coal and petroleum products may be sold in the Province, either wholesale or retail, for use in the Province. The validity of the Act is brought into question by the respondent companies which, generally speaking, operate crude-oil refineries within the Province and sell the petroleum products derived from such operation to consumers within the Province. While, by the refining process, a great many commercial products are extracted from the crude oil we are concerned only with gasoline and fuel-oil. The power of the Board to fix the retail price of gasoline lies at the heart of the present problem.

The Attorney-General submitted and counsel for the respondents conceded that the Act, in form, falls within section 92 (13) of the B.N.A. Act. That is, as far as I remember, the only juncture at which the submissions of counsel touched at a common point.

The Attorney-General contended that the Act, not only in form, but in pith and substance and in its true nature and effect was, to give an exclusive description of the character of it, an Act in relation to the domestic and local control of a product which has its beginning and end within the Province.

It was, he submitted, the regulation of an individual form of trade and commerce, confined to the Province, and the legislation not being within but without any one of the enumerated classes of subjects in section 91, in that it is in substance local and Provincial, it falls within "Property and Civil Rights" a subject-

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matter exclusively assigned to the Province under said section 92 (13).

Senator *Farris,* on the other hand, in an able and informative argument submitted that the price-fixing sections were, in the known circumstances, legislation in relation to trade and commerce in the sense in which that phrase is used in section 91 (2) of the B.N.A. Act. He advanced other reasons why the statute should be held *ultra vires* but at the moment I propose to confine myself to this first question: Is the legislation, in its true character, in relation to the regulation of trade and commerce in its domestic and local aspect or is it the regulation of trade and commerce in the sense which has been ascribed to those words in the interpretation of section 91 (2)? Before examining the facts for the purpose of determining under which set of powers this legislation falls it is perhaps proper to more closely define our terms, and, in this connection, I see very little use in once more marshalling the relevant authorities. They are all well known. It is settled that the expression in section 91 "to make laws . . . in relation to . . . the regulation of trade and commerce" must be given a restricted meaning in order to afford scope for powers which are given exclusively to the Provincial Legislatures and to prevent a serious encroachment upon local autonomy. There has thus been "carved out" of the power given to Parliament to regulate trade and commerce that power which it is essential the Provinces should possess to regulate trade and commerce in its local aspect. It is settled that legislation dealing with the contracts of a particular Provincial trade or business, or regulating trade in particular commodities or classes of commodities in so far as it is local in the Provincial sense, is within the exclusive powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce.

Turning then to the relevant facts I deem it unnecessary to repeat the history of this legislation which is extended in the reasons of Mr. Justice MANSON, but, to ascertain its purpose and effect, I wish to make a short reference to what was put before us.

Crude oil is not produced in British Columbia. It is imported

by the refineries mainly from California and processed here. The producing and refining companies are part of an integrated system which operates as a unit and the distribution of gasoline through service stations and other outlets is part of the same system. Without the Province then, is the oil well, the pipe-lines and transportation services—within the Province, the refineries and marketing systems. Counsel for the respondents contends that because of this integrated system price-fixing of gasoline affects the industry as a whole, not only within but without the Province, and in consequence the impugned legislation is not the regulation of a trade in its purely local aspect but the regulation of trade as trade in its external aspect. With deference I cannot give effect to this submission. Gasoline is a product which, through a highly technical process of refining the imported crude oil, first comes into existence in this Province. It is sold and consumed here. It therefore has its beginning and end within the Province. The legislation in question, in my opinion, is the exercise of the power to regulate for legitimate Provincial purposes a particular trade which is confined to the Province. It is not legislation which has either the purpose or effect of regulating, as such, the companies which carry on the trade. True that the exercise of the price-fixing power may have an indirect and incidental effect upon the foreign end of the integrated system in that the amount of money realized from the British Columbia operation may be less. (I say "may" because of the possibility of making up the anticipated loss in income by reducing the costs of local distribution.)

Can it be said because a foreign company as the consequential effect of a Provincial statute may receive a lesser revenue from the operation of a local subsidiary than formerly that, for that reason, legislation directed primarily and in substance to the regulation of a local trade loses that character and is to be considered as legislation in relation to foreign and external trade? I think not, neither can I subscribe to the theory that an Act *ex facie intra vires*, as the regulation of a local trade, is to be destroyed because the internal system of company management in the conduct of that regulated trade has a self-imposed international integration. To hold otherwise must inevitably lead to

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an unwarranted limitation of the powers of a Province over the regulation of what is, in truth, a local and domestic matter. In *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708 (a judgment I consider decisive of this appeal), the Board held valid the Natural Products Marketing (British Columbia) Act which empowered a Board *(inter alia)* to fix prices of natural products. We find in the judgment of Lord Atkin these observations (pp. 718-9):

> Their Lordships do not accept the view that natural products as defined in the Act are confined to natural products produced in British Columbia. . . . But the Act is clearly confined to dealings with such products as are situate within the Province.

It follows from this decision that the Province has power, generally speaking, to fix prices not only of locally produced products but also those imported from a foreign jurisdiction. Let us now assume, however, that foreign farm produce is imported into and sold in this Province by a local company which happens to be the subsidiary of a large foreign organization carrying on the business of growing and marketing vegetables with the aid of an integrated international system of company operation. If, because of that self-designed manner of conducting a trade in this Province, and elsewhere, the Province is to be deprived of its control over the product within its territorial jurisdiction then the concept of Federal and Provincial legislative powers, which has been formulated throughout the years by judicial decisions must be recast to a degree beyond that point to which I feel a Court, not of final resort, is warranted in travelling. To give effect to the submission of respondents' counsel would mean that, while the trade as trade in the regulated product continued to be carried on without any outward manifestation of change in the conduct of such trade, the companies engaged therein could by the simple expedient of changing the internal structure of their organizations escape Provincial regulation of their product. Legislative jurisdiction over such local product would then depend upon the character of the owner of it—a character which might change from day to day. It is my view that a chaotic condition would immediately flow from such a determination of this issue.

Senator *Farris,* attacking upon another front, submitted the

Act *ultra vires* as its purpose and intent was to protect the coal industry of the Province from competition from fuel-oil which is derived from the crude oil imported from California. The basis of this contention lies in the facts found in the Report of the Commissioner relating to the petroleum industry to the effect that gasoline carries more than its fair share of its cost of production and distribution in the Province and therefore is sold for too high a price while fuel-oil does not carry a fair share of its cost of production and is sold at too low a price in order to unfairly compete with coal. Counsel suggests that the intent and effect of fixing the retail price of gasoline at a lower figure than now obtains is to force the petroleum industry to make an increase in the price of fuel-oil, thus affording coal a preferred position in the local market. In my opinion the intent and purpose of the Act is to fix the price of gasoline. It may well be that the Legislature had, as an indirect motive, the assistance of the Provincial coal industry but I can see nothing illegitimate in that object. Neither, for that matter, am I able to comprehend, on the assumption that counsel's submission is the right one and that the purpose and effect of this Act is the protection of coal from unfair competition within the Province, why an Act of that character is not within Provincial competence. Both industries are within the territorial jurisdiction of the Province and if the Legislature considers it in the public welfare and for the common good to save a local industry from virtual extinction because of uneconomic competition I consider the effectuation of such a purpose by the statutory regulation of that other local and competitive trade to fall within section 92 (13). In the exercise of the plenary power conferred by a specifically enumerated head of section 92 the Legislature may discriminate between the benefits or burdens to be enjoyed or suffered by competitive local trades. If, as in *McGregor* v. *Esquimalt and Nanaimo Railway*, [1907] A.C. 462 (affirming (1906), 12 B.C. 257), the Legislature of the Province could by "a remedial Act" (p. 467) divest a railway company of mines (primarily coal) and mineral rights and vest those mines and rights in settlers in the Railway Belt holding title to the surface can it be said with any logic, that the Province is powerless to divest a local company of part of its

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profits for the dual purpose of protecting the consuming public from the excessive cost of gasoline and of, at the same time, affording the coal industry protection from unfair and ruinous competition from fuel oil sold below cost? To my mind this class of legislation is within the power exclusively assigned to the Province to make laws in relation to property and civil rights.

Senator *Farris* further submitted that one kind of trade regulation contemplated by the questioned Act, *i.e.*, price-fixing, is in direct conflict with the policy of the Federal Government, as indicated in the Customs Act, to maintain the price of gasoline for the purpose of protecting the oil refineries. In my view the facts do not support this contention but, assuming it to be so, I can see no conflict of jurisdiction. To my mind the "double aspect" rule, so clearly enunciated in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, is in point in this branch of the appeal. Dominion customs duties, even if used as a means of regulating trade and commerce, are imposed for a purpose and in an aspect entirely distinct from the aspect and purpose of the statute in question here. The Dominion purpose may extend, at large, to the protection of industries from unfair competition from the importation of a foreign product. The Provincial purpose may be to assist, within the Province, a local industry from unfair competition, not of a foreign product, but of another local product. I can see no discordance between these different purposes. Both can exist without constitutional conflict: the one in relation to a subject within Dominion competence; the other in relation to a subject within Provincial competence.

It is of interest to note that in *Attorney-General for British Columbia* v. *Kingcombe Navigation Co.*, [1934] A.C. 45, at 46, counsel contended that the tax imposed by this Province on fuel-oil was invalid because it infringed upon the power of the Dominion to regulate trade and commerce and that the tax, being imposed for the protection of the coal industry was in conflict with the policy of the Dominion as indicated in the Customs Act. The Board did not give effect to either contention.

It is also not without reason to mention the situation which would arise, with respect to Provincial marketing legislation held *intra vires* in *Shannon's* case, *supra*, should effect be given

to this suggested conflict between Provincial enactment and Dominion policy, as indicated in the Customs Act. Natural products imported into the Province are subject to the exercise of the Federal power to impose custom duties thereupon for the protection of the Canadian farmers and if the right of the Dominion to impose a duty is destructive of the Provincial power to fix, for legitimate Provincial purposes, the local price of another dutiable commodity—gasoline—it follows that the power to regulate natural products by price-fixing within the Province, lies not with the Province but must be within the Dominion sphere of legislative jurisdiction—a result wholly at variance with the principles enunciated by the Board in *Shannon's* case.

In leaving this appeal I would make short reference to the admissibility in evidence of the report of the Commissioner on the petroleum industry. It comprises three volumes, two of which we held on an interlocutory appeal in this case to be admissible in evidence

> in so far only as it [the Report] finds facts which are relevant to the ascertainment of the . . . purpose and the effect of the enactment:

(1938), 53 B.C. 355, at p. 360. I see no reason to depart from the conclusion therein reached and include Vol. III. within that ruling. In so far as the effect of the 1938 amendments to the questioned Act is concerned I can add nothing to what was said by the Chief Justice in delivering the *per curiam* oral judgment herein.

In the result I would allow this appeal and for the reasons hereinbefore set forth declare the impugned legislation *intra vires* the Provincial Legislature.

Appeal allowed.

Solicitor for appellants: *H. Alan Maclean.*
Solicitor for respondents: *T. E. H. Ellis.*

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SHERWOOD v. LEWIS.

Landlord and tenant—Monthly tenancy—Rent payable in advance—Two months' rent in arrears—Landlord cuts off light and gas for ten days—Landlord applies for order for possession—R.S.B.C. 1936, Cap. 143, Secs. 29 and 30.

A furnished flat was let to a tenant at $12 per month payable in advance on the 4th of each month. The landlord supplied the heat, light, gas for cooking, and water. The tenant was two months in arrears for January and February, 1939, and on the 8th of February the landlord cut off the tenant's light and gas for ten days. On an application by the landlord for delivery up of possession of the premises under sections 29 and 30 of the Landlord and Tenant Act:—

Held, that the tenant had suffered damage through the breach of covenant of the landlord to the extent of $10, that the rent owing the landlord was $24 for the months of January and February, 1939, that the landlord should have possession, and an order was so made. It was then declared that the sum which the tenant may pay in order to obviate the execution of the order is $14, along with the costs fixed at $15.

APPLICATION by the plaintiff, a landlord, that his tenant do deliver up possession of the premises to the landlord under sections 29 and 30 of the Landlord and Tenant Act. The facts are set out in the reasons for judgment. Heard by LENNOX, Co. J. at Vancouver on the 1st of March, 1939.

J. D. Forin, for the application.
Jeremy, for the tenant.

Cur. adv. vult.

20th March, 1939.

LENNOX, Co. J.: This is an application made by a landlord against his tenant under and by virtue of sections 29 and 30 of the Landlord and Tenant Act, being chapter 143, R.S.B.C. 1936, and the tenant replies that the application should fail because the affidavit upon which the show cause summons was issued by the registrar had therein that the tenant had no right to set off.

The facts shortly are these: The tenant was in arrears for two months' rent of $12 per month, payable in advance on the 4th of the month, for the months of January and February,

1939. The demise was of a furnished flat and the landlord was to supply with the flat, heat, light, gas for cooking purposes, and water.

On or about the 8th of February the landlord, not being able to collect his rent, cut off the tenant's light and cooking-gas for about ten days (re-establishing those services on or about the 18th).

Counsel for the tenant submitted that the cutting off of these services amounted to an eviction or partial eviction and that therefore (1) the rent was not payable or (2) that the damage sustained by such action on the part of the landlord could be set off against the rent; and that in either event as the landlord's affidavit set forth that there was no set-off, the affidavit was wrong and that the summons proceeding thereon should not have been issued, in other words, the proceedings were bad from the beginning.

Both counsel submitted written argument, that submitted by Mr. *Forin* for the landlord being full and convincing on many points.

All the authorities submitted have reference to actions or distress proceedings and refer to the questions as to (a) whether certain services having been cut off, this amounts to a partial eviction; (b) whether such a claim by the tenant is one for damages for breach of covenant only; (c) whether the tenant should set off such damages as against a claim for rent by way of set-off or by way of counterclaim, depending on whether the proceedings by the landlord are by way of an action for rent or by way of distress.

In my opinion none of these authorities is applicable to the questions in this matter. All these authorities deal with common-law principles as between landlord and tenant, but in this case we are dealing with a special Act of this Province, specially providing means to assist a landlord in certain circumstances in obtaining possession of his premises from defaulting tenants (under sections 29 and 30). There do not seem to be any cases affecting the points raised under the provisions of this statute and we must therefore look to the wording of the statute itself and endeavour to dispose of the subject-matter within the

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orbit of the Act, interpreting in such disposal the intent of the Legislature where these intentions are not specifically set out.

It is true that this Act ought to and must be strictly construed according to the specific wording thereof, and counsel for the tenant, urging that strict construction, submits that if the landlord swears that the tenant has no right to set off and if it is found that he has a right to set off that the proceedings following the affidavit are null and void.

I do not agree with this contention. All that is required under section 29 with regard to the affidavit is that, *inter alia,* he must swear that the tenant has no right to set off and if he does so, and the remainder of his affidavit is according to the requirements of the section, then the registrar shall cause to be issued from the County Court a summons calling upon the defendant to show cause why an order should not be made for delivering up possession of the premises to the landlord.

It will be noted here first of all that this is a procedure for getting delivery up of possession of the premises to the landlord and not primarily for payment of rent.

Now when the summons has been issued, under section 30 on the return of the summons it is laid down that

> the judge . . . shall hear the parties on the evidence they may adduce upon oath, and make such order, either to confirm the tenant in possession or to deliver up possession to the landlord, as the facts of the case shall warrant.

Further, if delivery up is ordered, then the tenant shall be dispossessed unless

> (*a.*) [the] tenant, in case the default be simply for non-payment of rent, before the execution of the order, pay the rent in arrear and all costs,

when the said proceedings shall be stayed and the said tenant may continue in possession of his former tenancy. It will be noted then that the gravamen of the Act is to obtain possession, and after the order for possession is given it can only be stayed by the tenant paying the rent due and costs. So it is not an action for rent nor is it procedure by way of distress.

It seems to me, therefore, that in proceedings under sections 29 and 30 of this Act, provided the summons is issued and the affidavit sets forth what is required, that then the whole matters between landlord and tenant are gone into and summarily settled by the judge.

Referring again to the affidavit upon which the summons is issued, it will be seen that the landlord must swear, *inter alia,* as to the amount of rent in arrear and the time for which it is so in arrear. Here again, if an oath is taken as to these matters, even if the facts are not correct, the registrar can issue the summons, and if the tenant has defences to give as to the amount of rent, if any, in arrear, etc., he can appear, and his evidence will be taken by the judge upon oath as set forth under section 30 and the whole matter summarily disposed of.

I might here remark that proceedings have been quashed upon the return of the summons when the affidavit upon which the summons proceeded did not in fact contain all the matters provided for under section 29, but this is a different matter from saying that the summons should be quashed because the matters provided to be sworn to under section 29 were in fact wrong.

In this conception then it seems to me that in order to carry through the intention of the Legislature, the judge summarily disposes of all matters raised as between the landlord and tenant and then has to decide as to whether possession should be given to the landlord or not. But as the Act provides that the tenant can free himself from the consequences of that order by payment of a certain sum, it follows that that sum should be definitely settled by the judge in the order which he gives for possession and it seems to me that in these proceedings, if the question is raised by the tenant that there is a liability on the landlord for payment of a sum of money to the tenant, whether by way of damages or otherwise, the question should be settled by the judge under these proceedings. It will be noted again that the wording of the Act is "the judge . . . shall hear the parties on the evidence they may adduce upon oath, and make such order," etc.

Having come to this conclusion and having heard the parties and having already intimated that my judgment is that the tenant has suffered damage through the breach of covenant of the landlord to the extent of $10 and, further, that the rent owing to the landlord is $24 for the months of January and February and that the landlord ought to get possession of his

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premises forthwith, I now make such an order and declare that the sum which the tenant may pay in order to obviate the execution of the order is $14 along with costs which I fix at $15 but less the costs of the application by the tenant heard before His Honour Judge ELLIS as to which I have consulted with him, and which he fixes at $10. The amounts therefore which the tenant must pay to remain in possession are the above $14 plus $15 less $10 plus any other costs properly incurred in carrying out the above order for possession.

Incidentally, it appearing that while these proceedings were undisposed of, the landlord had given notice to the tenant under section 19 of the Act to leave the premises at the end of the next month under the demise (namely, 4th April, 1939), counsel for the tenant took the stand that these present proceedings are now waived on account of the subsequent proceedings. I find that I cannot agree with that submission, but do agree with counsel for the landlord that there is nothing to prevent a landlord applying, as he has done, especially as the remedies under section 19 *et seq.* show that a judge is not given jurisdiction therein until after the termination of the notice to quit and such a demand has been made for possession and refused. As an addendum to the above (though in my opinion the situation as between the landlord and the tenant in these proceedings is not affected by it) the question having been raised by counsel for the landlord that the rent having fallen due on 4th February and the tenant's claim of eviction not having arisen till after that date, the whole of the month's rent for the month from 4th February is payable and only a claim for damages remains: None of the cases submitted in support of this submission seems to have been decided where the rent is payable in advance. In *Whitehall Court, Limited* v. *Ettlinger,* [1920] 1 K.B. 680, at p. 686, the Earl of Reading C.J. states that

> the tenant shall pay the rent that became due before the recovery: because the enjoyment of the land being the consideration for which the tenant was obliged to pay the rent, so long as the consideration continued, the obligation must be in force.

This would be clear when the rent is payable at the end of the period but not when payable in advance. In this case (if there

had been an eviction in February) the tenant could not dispute on that account the payment of the January rent, but though the February rent is due on 4th February (in advance) could it be said that he could not dispute the February rent? I think not.

Order accordingly.

HAVENS v. HODGSON.

Contract—Rescission—Fraudulent misrepresentation—Damages.

In an action for rescission based on fraud, damages can be given to cover any loss which plaintiff incurred in partially carrying out the contract.

ACTION for rescission of an agreement between the plaintiff and defendant made on the 18th of August, 1938, whereby the plaintiff was to purchase one-half the shares in the Coach and Horses Hotel Company Limited, previously held by the defendant. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Victoria on the 26th of April, 1939.

R. D. Harvey, for plaintiff: We are entitled to damages in addition to return of purchase-money where there is fraud: see *Lempriere* v. *Lange* (1879), 12 Ch. D. 675; *Stocks* v. *Wilson,* [1913] 2 K.B. 235; *R. Leslie, Lim.* v. *Shiell* (1914), 83 L.J.K.B. 1145; *Clarke* v. *Dickson* (1858), El. Bl. & El. 148; *Newbigging* v. *Adam* (1886), 34 Ch. D. 582; *Whittington* v. *Seale-Hayne* (1900), 82 L.T. 49; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; *Nocton* v. *Ashburton (Lord),* [1914] A.C. 932; *Hill* v. *Stephen Motor & Aero Co. Ltd.,* [1929] 2 W.W.R. 97; *Gardiner* v. *Beckley and Bennett* (1905), 2 W.L.R. 146; *Goldrei, Foucard & Son* v. *Sinclair* (1917), 87 L.J.K.B. 261 at p. 264; *Barron* v. *Kelly,* 56 S.C.R. 455; [1918] 2 W.W.R. 131; *Pagnuelo* v. *Choquette* (1903), 34 S.C.R. 102.

E. L. Tait, for defendant: The remedy for rescission originated as an implement of the Courts of Equity, but the plaintiff is not entitled to damages: see *Erlanger* v. *New Sombrero*

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Phosphate Company (1878), 3 App. Cas. 1218 at p. 1278; Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 737 and 744. The case of *Newbigging* v. *Adam* (1886), 34 Ch. D. 582, at pp. 591 and 595, is in our favour. The defendant having paid the moneys into Court there is no further right of action.

Harvey, replied.

Cur. adv. vult.

11th May, 1939.

MURPHY, J.: The Coach and Horses Hotel Company Limited carried on the business of a beer parlour in the municipality of Esquimalt. Up to August, 1938, defendant held all the issued shares with the exception of one which was issued to his nominee as a qualifying share. On August 10th, 1938, plaintiff and defendant entered into a written agreement whereby all the shares in the company's treasury were to be issued and the plaintiff was to purchase one-half of such shares for $20,000. He paid $9,000 in cash, the balance to be paid as in the said agreement set out. The first of said postponed payments was to be made on November 10th, 1938. On that day plaintiff paid $400 principal and $166.35 interest to defendant as called for by said agreement. This money was obtained by plaintiff as a dividend on the shares to be purchased by him in the said company. In February, 1939, plaintiff brought this action for rescission of said agreement, alleging fraudulent misrepresentations by defendant. The alleged fraudulent misrepresentations are set out in the amended statement of claim and are of a serious character. The defendant in his statement of defence accepted the plaintiff's demand for rescission. He did not deny the allegations of fraud set out in the statement of claim and they must consequently be taken as admitted. Under the agreemeant referred to, plaintiff, in addition to the $9,000 cash paid on account, was to contribute $500 as working capital for the company and defendant was to contribute a like amount. Plaintiff furnished his $500 to the company. Defendant paid into Court the said sum of $9,500 with interest thereon at 5 per cent. up to the date of the filing of the statement of defence. He also paid in further sums to cover plaintiff's costs and moneys which he admitted should be repaid to plaintiff on rescis-

sion being granted. The total amount so paid in was $10,011.30. At the trial the plaintiff applied to be allowed to amend his statement of claim by setting up a claim of at least $200 a month for plaintiff's services in pursuance of the agreement made between plaintiff and defendant on August 10th, 1938. Plaintiff on the same date entered into an agreement with the Coach and Horses Company Limited, to act as manager of the company's beer parlour business at a salary of $30 a week. This salary was duly paid. The additional $20 a week claimed by the amended statement of claim was based on the contention that the salary of a manager of a beer parlour was ordinarily $50 a week. I find that this was proven as a fact. Defendant filed an amended statement of defence and paid into Court a sum more than sufficient to pay this extra $20 a week to plaintiff for the time that he had acted as manager of the company's beer parlour. The excess moneys were to satisfy costs and an item of $10 expense which the plaintiff incurred in moving his personal belongings to the company's premises. Defendant claims that the moneys so paid into Court satisfy any claim that the plaintiff can have in an action for rescission, even if such action is based upon fraud, because damages cannot be given in such an action. Plaintiff argues that where a contract is rescinded on the ground of fraudulent misrepresentation, damages for any loss incurred by him owing to his partial execution of the contract may be awarded, and cites the case of *Hill* v. *Stephen Motor & Aero Co. Ltd.*, 23 Sask. L.R. 552; [1929] 2 W.W.R. 97. The statement of claim alleges that the company lost money in the year 1937. The evidence shows that it made considerable money after the plaintiff took over the management in August, 1938, because, as stated, a dividend of some $1,100 was declared in November. It would seem strange if a defendant, having induced a plaintiff by fraud to contribute working capital to a business and devote his whole time and attention thereto, with the result that the business is changed from a losing concern to a fairly profitable one, could escape all further liability by returning plaintiff's contribution of working capital with interest at 5 per cent. and by paying him the salary ordinarily earned by the manager of a beer parlour. An action for deceit on the facts of this case

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would, in my opinion, not meet the just claims of the plaintiff. The case referred to is, I think, authority for the proposition that damages can be given in an action for rescission based on fraud to cover any loss which plaintiff incurred in partially carrying out the contract. Here I think plaintiff has incurred such loss. He was possessed of quite an amount of capital. For several years past he has been buying up beer-parlour businesses which were not prosperous, assuming the managing of same and succeeding in so improving such businesses that he has been enabled to sell at a considerable profit. He has not been an ordinary beer-parlour manager. In partially carrying out this contract he devoted the whole of his time to the management of this particular beer parlour. As stated, he succeeded in greatly improving the business. In my opinion, the justice of this case requires that plaintiff be awarded a sum in excess of the wages of an ordinary beer-parlour manager for this service. I fix this sum at $600, after taking into consideration defendant's claim for use of the two rooms occupied by plaintiff during his management of the beer parlour.

Plaintiff in his amended statement of claim demanded the return of $566.36 paid by him to defendant on November 10th, 1938. I hold that he cannot recover such sum. He received this money as a dividend on the shares which he agreed to purchase under the agreement of August 10th, 1938, and such payment was made in pursuance of the terms of said agreement. To award him this sum would be incompatible with repudiation of the said contract whereas his present action is based on such repudiation.

There will be judgment for the plaintiff for rescission and for the amount paid into Court, plus $600, less the sum of $42.50, being the excess paid in with the amended statement of defence on the claim for $490 additional wages. Plaintiff is entitled to the costs of the action but such amount of costs as was paid in with the statement of defence is to be credited on the costs when taxed. Defendant is entitled to the costs of drawing and of filing the amended statement of defence.

Judgment for plaintiff.

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April 13, 14; *May* 3.

Engineering Profession Act—Practitioner under—Plans and supervises erection of theatre—Not holding certificate of registration under Architects Act—Conviction—Appeal—R.S.B.C. 1936, Caps. 14 and 87.

The defendant was convicted for planning and supervising the erection of a theatre in the city of Vancouver, not holding a certificate of registration under the Architects Act to practise within the Province as an architect. On appeal the defendant claimed, *inter alia*, that being a mechanical and structural engineer under the Engineering Profession Act, whereby he became registered as a professional engineer, he is entitled to plan and supervise the erection of such building, as he comes within the two exceptions contained in the Architects Act allowing professional engineers to so plan and supervise.

Held, that the defendant does not come within the exceptions contained in the Architects Act, and the appeal was dismissed.

APPEAL by Charles Bentall from his conviction by deputy police magistrate McQueen of Vancouver, for unlawfully practising as an architect without holding a certificate of registration under the Architects Act. Argued before LENNOX, Co. J. at Vancouver on the 13th and 14th of April, 1939.

Hossie, K.C., and *Ghent Davis*, for appellant.
Maitland, K.C., and *Remnant*, for respondent.

Cur. adv. vult.

3rd May, 1939.

LENNOX, Co. J.: This is an appeal by the defendant Charles Bentall against a conviction made against him by George R. McQueen, deputy police magistrate for the city of Vancouver, whereby he the said Charles Bentall not holding a certificate of registration under the provisions of the Architects Act, R.S.B.C. 1936, Cap. 14, to practise within the Province as an architect unlawfully did at the said city of Vancouver between the 20th day of June, 1938, and the 14th of September, 1938, practise within the Province of British Columbia as an architect in that he, the said Charles Bentall, did between the dates last aforesaid for gain, plan and supervise for others the erection of buildings for persons other than himself to wit: the Bay Theatre at Denman and Barclay Streets in the city of Vancouver, Province of British Columbia, contrary to the form of the statute in such case made and provided.

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There are two pertinent Acts to be looked at in this matter: The Architects Act *(supra)* and the Engineering Profession Act, R.S.B.C. 1936, Cap. 87.

The defendant appeals on several grounds as follow:

(1) That, as he is a registered practitioner (being a mechanical and structural engineer) under the Engineering Profession Act whereby he became registered as a professional engineer, he is entitled to plan and supervise for others for gain the erection of such building as the said Bay Theatre; and that he is so allowed because of two exceptions contained in the Architects Act allowing professional engineers to so plan and supervise, these exceptions being: (a) Under section 32 (1) of the Architects Act the wording there being

but where a person is registered as a professional engineer under the Engineering [Profession] Act nothing in this subsection shall apply to him in respect of the practice by him of professional engineering,

and (b) under subsection 32 (1) of said Act, by the following words:

or in respect of the doing by him of anything mentioned in subsection (7) of section 33.

The wording of said section 33, subsection (7) is as follows:

Nothing in this Act shall be construed so as to prevent any civil, mining, mechanical, electrical, metallurgical, chemical, geological, or structural engineer from carrying on the work of designing or supervising the building, remodelling, or repairing of any structure usually designed or supervised as to its construction, alteration, or repair by such engineer.

(2) That in any event he did not plan or supervise the building of the Bay Theatre but merely acted as the managing director of his company, The Dominion Construction Company, who had the contract to build the theatre. (3) That even if he did plan and supervise the building he did not do so for gain, and (4) That even if he did plan or supervise the building for gain, this was a single or isolated act of practising as an architect and that he is so charged.

This appeal, so well and ably argued by counsel on both sides, has given me much thought, but it seems to me that the words of Rivard, J. in *Association des Architectes de la Province de Quebec* v. *Ruddick* (1934), 59 Que. K.B. 72, at 78, are much in point when he says:

By the comparison of the Act ruling the architects and the one ruling

the civil engineers, at first it clearly appears that the Legislature intended the practice of the art of architecture and that of the science of civil engineering to be two distinct professions. But the scope of the activities reserved to each one of these professions is perhaps not well precised. The words "furnish plans or specifications to construct buildings" are rather extensive and somewhat imprecise.

Architecture and engineering are *per se* not the same profession and cannot come under the same category.

Under section 32 (1) of the Architects Act the first exception quoted above applies in my opinion to engineering work and not architectural work.

Under section 33 (7) of the Architects Act the second exception (also quoted above) and containing these special words "of any structure usually designed or supervised . . . by such engineer," taken in conjunction with the interpretation of "Practice of professional engineering," being section 2, subsection (1) of the Engineering Profession Act which, in part, has these words:

> All buildings necessary to the proper housing, installation, and operation of the engineering-works embraced in this clause;

means in my opinion such buildings and no others. Further the words in such interpretation clause, "designing, . . . of any [such] works" (in the 5th line) must be held to be *ejusdem generis* with the samples of such works designated in the clause. In my opinion cathedrals, theatres and dwellings and such like buildings do not come under this interpretation. If it were otherwise (and exemplifying my other reasons) I fail to see the necessity of section 3, subsection (2) of the Architects Act which reads:

> It shall be lawful for one or more registered architects to enter into a partnership with one or more professional engineers, registered under the laws of this Province, for the practice of their professions.

Counsel for the defendant submitted that the Architects Act is a private Act and should be most strictly construed when it affects the rights of others and that therefore the word "usually" in section 33 (7) *(supra)* should be held to mean that any practice which had been carried on in the way of planning or supervising buildings by professional engineers prior to the coming into effect of the Architects Act would be the usual work of a professional engineer. In other words, it was contended for the

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defendant that the Architects Act was passed to protect the public against unskilled persons planning and supervising buildings (from $10,000 in value) thereby providing for public safety but that professional engineers, being quite capable of erecting all sorts of buildings with safety to the public and having as a fact in some cases erected such buildings as theatres, that they were especially exempted. I do not agree with this submission as I am satisfied that taking the wording of the above statutes together, the word "usually" applied to structures in connection with engineering work as distinct from architectural work in their well-known sense. This is not a private Act but a public Act—not an Act to a private corporation brought into being or in being for profit, and it seems to me that the many authorities cited to me by counsel for the defendant on the strict interpretation of private Acts do not apply.

However, even if they did—in this case defendant seeks to come in as one of a special class said to be exempted from the penalties imposed against the public as a whole, if, not being registered architects, they practise as such, and he must prove that he comes under the exceptions provided. I find that he has not done so. On the other hand, it has been shown that in this case he does not come within the exception.

Much evidence was brought to endeavour to show that professional engineers before the passing of the Architects Act were accustomed to designing, etc., all classes of buildings and that the word "usual" under section 33 (7) applied to such former practice. I find, as above, against that contention.

I find that Bentall did plan in whole or in part the Bay Theatre and did supervise the building thereof, such supervision not being merely as an officer of the construction company but mostly, if not wholly, as an architect.

As to the question of payment: I find that Bentall did so act for gain. Gain does not necessarily mean direct payment in specie.

As to the submission that the charge and the evidence adduced amounted to a single or isolated act of "practising as an architect," I find the contrary. Indeed almost the whole defence was

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based on the pleas that he had built several theatres and was entitled to do so.

I further find that Bentall can not shield himself under the fact that some of the work in drawing theatre plans was done by a firm of architects in Toronto not registered under the British Columbia Act.

I dismiss the appeal, find the defendant guilty and impose a fine of $25 or in default imprisonment for five days.

Appeal dismissed.

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Mines and minerals—Option to purchase group of claims by individuals—Syndicate formed—Transfer of option to syndicate—Company formed—Transfer of option by syndicate to company—First option holders agents for syndicate—Non-disclosure of interest—Action against agent by member of syndicate.

The plaintiff, a member of a syndicate, alleged, *inter alia*, that the trustee for and agent of the syndicate failed to disclose to its members that he was buying for its members property in which he had an interest, and therefore he should account for the profits made by him. Rescission could not be granted because the property had been transferred by the syndicate to a company.

Held, that even assuming the plaintiff did not know the facts, relief could not be given her or the syndicate in the circumstances; the Court would not fix a new price; the right of the syndicate was to be paid its loss on the whole transaction, and no proof of damages on the whole transaction was given. The principle applicable is that if the agent's duty is to advise the principal as to the purchase of stocks or shares having a market value, and he sells to his principal stocks and shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter, if the property sold by the agent to the principal is a specific property having no market value, for the Court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction: if he has suffered no such loss there can be no damages.

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ACTION against the three Carrs in their individual capacities, P. D. Carr as trustee of the Founders Syndicate and the Zeballos Gold Peak Mines Ltd., for (1) A declaration that the 450,000 shares of the Zeballos Company were issued in trust for the Founders Syndicate, and for an accounting; (2) for an order that the 450,000 shares be delivered up and transferred in the proper ratio to the plaintiff and the other members of the syndicate; (3) an injunction. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 26th to the 28th of January, 1939, argument being heard at Victoria on the 6th of February, 1939.

W. B. Farris, K.C., for plaintiff.
Donaghy, K.C., for defendants Carr.
Sheppard, for defendant Zeballos Company.

Cur. adv. vult.

13th February, 1939.

ROBERTSON, J.: On June 1st, 1937, the defendant T. L. Carr, on payment of $100, obtained an option until June 21st, 1937, to purchase the "Gold Peak group" of mines. If Carr wished to exercise the option, he had to pay an additional $22,500, by instalments, as follows: $2,500 on or before June 21st, 1937, $1,500 on or before September 21st, 1937, $2,500 on or before December 21st, 1937, $5,000 on or before June 21st, 1938, and $11,000 on or before December 21st, 1938. Carr held the option in trust for himself and his brothers, the defendants Patrick B. Carr and Peter D. Carr. The Carrs did not have the money to make the purchase payments or to work the property. In view of this they determined to form a syndicate. As a matter of fact they had towards the end of May or beginning of June, 1937, given instructions for the preparation of a syndicate agreement. This was done. The agreement is dated June 8th, 1937, and is between Peter D. Carr, "called herein the trustee," and "the several persons whose signatures are hereafter affixed as signatories to this agreement." It provided, in part: (1) That "the parties hereto form a syndicate" to be comprised "of them and such other persons as might from time to time be entitled to

membership in the syndicate"; (2) its business to be carried on under the name "Founders Syndicate"; (3) the membership to be limited to 1,000, each membership to be of the par value of $100 and called a "unit"; (4) its objects (*a*) to acquire mines by option; (*b*) to acquire by purchase "stock in any other company"; (*c*) to purchase any contract; (*d*) to cause to be incorporated any corporation to acquire its assets; (*e*) to borrow money. It further provided Peter D. Carr was to be manager; it gave him power to issue unit certificates in consideration of cash or in payment of the purchase price of properties conveyed to the syndicate; and the entire control of its affairs, with liberty to conduct them as he saw fit and, in particular, to float a company to acquire any of its assets, to fix the sale price and the number of shares to be allotted for such sale. It further gave him power to obtain a charter "incorporating the syndicate for the acquisition of all its assets" in consideration of such shares as to him "might appear advisable." The agreement made no direct reference to the option or the Golden Peak group. Peter D. Carr, T. L. Carr, the option holder, and all the unit holders who paid cash (63 in number) signed this agreement; the two Carrs on or about June 19th, 1937 (as is shown by the date at its end) and the cash unit holders probably about the time they paid for their units. In the meantime the Carrs had made, out of their own moneys, the payment of $2,500 due on June 21st, 1937. The first units were sold about July 27th, 1937. By August 1st, 6 units had been sold. As will hereafter appear the Carrs turned over the option to the syndicate in August, 1937, for 937 units of the syndicate. By September 8th, 21 additional units had been sold. The plaintiff bought three units through P. B. Carr on August 11th, 1937. He says he told her a company was to be incorporated, to take over the option, with a capitalization of 500,000 shares of which 200,000 shares were to be sold to the public and 100,000 shares were to remain in the treasury and that her 400 shares would come out of the Carrs' 200,000. She admits that he told her she would receive 400 shares for each unit held by her but says she never knew at any time what shares the Carrs were to receive.

The Carrs about this time were busy forming a company.

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They proposed at first to form a company, with 500,000 shares, to purchase the option for 200,000 fully-paid shares, to sell 200,000 shares to the public and keep 100,000 shares in the treasury. They saw the superintendent of brokers about this. He was told the expenditure on the property was approximately $15,000. He would not agree to the proposed incorporation and plan. Finally he agreed to approve of the incorporation of a company with 1,500,000 shares of which 450,000 shares should be paid for the option, such shares to be deposited in escrow. This was shortly before September 8th. A meeting of the syndicate was held on September 8th. The plaintiff and her husband John Cameron, who was not a unit holder, were there. The Carrs say the whole position was explained to the meeting and that everyone understood. The plaintiff and her husband and other unit holders signed a document as follows:

September 8th, 1937.

To P. D. Carr, Esq.,
Trustee "Founders Syndicate,"
955 Thurlow Street,
Vancouver, B.C.

We, the undersigned members of the "Founders Syndicate" having had explained to us fully the alteration in the capitalization of the company to be formed, into which our units are to be exchanged for shares, hereby agree to such change in lieu of the original understanding and undertaking. We understand that the company will be named:

"Zeballos Gold Peak Mines Ltd."

and capitalized at $1,500,000 of $1.00 par value N.P.L., and further, for each unit held by us, we shall receive 800 shares.

The Zeballos Gold Peak Mines Limited (N.P.L.) was incorporated on September 21st, 1937. On the same day it entered into an agreement with T. L. Carr whereunder it purchased all his interest in the option and tools, equipment, buildings, trails, roads, surveys, tunnels, cuttings, etc., for 450,000 fully paid shares, to be put in escrow in accordance with the requirements of the superintendent of brokers. The agreement recited the payments of $2,600 made by Carr. The company assumed the balance of the payments. The shares were issued to T. L. Carr. Between Christmas and New Year, 1937, the plaintiff obtained from P. D. Carr a document (Exhibit 20) dated August 11th, 1937, certifying she held three units of the Founders Syndicate transferable only on the books of the syndicate and that she was

entitled to share in 1/1000 (should be 3/1000) of the assets or net profits of the syndicate. On January 19th, 1938, the plaintiff received from the defendant Peter D. Carr a declaration, and gave a receipt as follows:

September 8th, 1937.

To P. D. Carr, Esq.,
Trustee Founders Syndicate,
955 Thurlow Street,
Vancouver, B.C.

We, the undersigned members of the Founders Syndicate, having had explained to us fully the alteration in the capitalization of the company to be formed, into which our units are to be exchanged for shares, hereby agree to such change in lieu of the original understanding and undertaking. We understand that the company will be named Zeballos Gold Peak Mines Ltd. and capitalized at $1,500,000 of $1.00 par value N.P.L. and further for each unit held by us we shall receive 800 shares.

Declaration of Trust.

I, Thomas L. Carr, of Vancouver, British Columbia, hereby declare that I hold in trust for Kathea Cameron of Suite 306, 1144 Harrow Street, Vancouver, B.C., twenty-four hundred (2400) shares of the capital stock of Zeballos Gold Peak Mines Limited (Non-personal liability) subject to terms of escrow imposed by the Superintendent of Brokers for British Columbia, and that certificates covering the said shares have been deposited with the Bank of Toronto, Seymour and Hastings Streets, Vancouver, B.C., as escrow agents.

Dated at Vancouver, British Columbia, this 19th day of January, 1938.

[Sgd.] T. L. Carr.

I hereby acknowledge receipt of declaration of trust of Thomas L. Carr covering 2400 shares of escrow stock in Zeballos Gold Peak Mines Ltd. (N.P.L.) which I acknowledge to be in entire satisfaction and discharge of my rights as unit holder in the Founders Syndicate.

[Sgd.] Kathleen Cameron.

The action is brought against the three Carrs "in their individual capacities," P. D. Carr as trustee of the Founders Syndicate and the said Founders Syndicate and the company. No relief was asked against the Founders Syndicate. It was not represented at the trial. As an unincorporated association it could not be sued under its own name; so that it is not necessary to consider it further. The relief asked against the other defendants is as follows: (1) A declaration that the 450,000 shares were issued in trust for the Founders Syndicate; and for an accounting; (2) in the alternative for a declaration that the Carrs fraudulently conspired to obtain, and did obtain, these shares from the Zeballos Company, and fraudulently conspired

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to obtain control of this company; (3) and that the Carrs fraudulently obtained the consent of the superintendent of brokers to the issuance of the 450,000 shares; (4) for an order that the 450,000 shares be delivered up and transferred in the proper ratio to the plaintiff and the other members of the syndicate; (5) in the alternative, that all shares not the property of the Founders Syndicate be surrendered to the company for cancellation and that the company do cancel the same; (6) an injunction.

In my opinion there is no evidence to support the relief claimed under heads 2 and 5, *supra*. Further as the plaintiff is not a shareholder in the company, I fail to see how she can maintain an action for this relief. See *Burland* v. *Earle*, [1902] A.C. 83; 71 L.J.P.C. 1. I cannot see the relevancy of the claim for relief under head 3; and so, in my view, it is not necessary to deal with it. It remains then to consider whether the plaintiff is entitled to the relief claimed under heads 1, 4, and 6. The position taken by the defendant is that the syndicate agreement was never acted upon; that, in its place, after July 22nd, 1937, a verbal agreement was entered into with the plaintiff whereby the Carrs agreed to sell to her 400 of the 200,000 shares it was proposed they should get in a company to be incorporated with 500,000 shares, for each $100 she had put up. In my opinion the evidence is overwhelmingly against this submission. The syndicate agreement is signed, not only by all the subscribers, but by P. D. Carr, the trustee, and T. L. Carr, the option holder. The books which the Carrs kept with reference to the syndicate were made up by Colson who says he made the entries from documents and statements given to him by one of the Carrs. The Carrs were really partners in this transaction. Pursuant to paragraph 10 of the syndicate agreement the trustee could purchase the option for units. In the journal, Exhibit 8, is the following entry:

Mining claims	93700.-	
To Carr Brothers 948 units		93700.-

Purchase of claims for 948 fully paid units from Carr Brothers.

The date is either August 30th or August 1st. It would appear that August 30th was written in first of all and later it

was altered to August 1st. There also appears to be an alteration in the value of the units; 948 at $100 would be $94,800, and this appears to have been changed to $93,700. The total number of units taken by persons other than the Carrs was 63, and this added to 937 units, which $93,700 represents, makes 1,000 units, the total number of units provided for by the syndicate agreement.

I think that this shows that the beneficial interest in the option thereafter belonged to the syndicate. Then the document above referred to, Exhibit 20, shows that at that time, P. D. Carr recognized that there was a syndicate. Further the document, given on January 19th, 1938, set out, *supra,* shows the existence of the syndicate. In addition to this there is the declaration, Exhibit 19, made by P. D. Carr on August 26th, 1937, showing that he was a partner in the Founders Syndicate. I refer also to Exhibits 7, 8, 14 and 21. I find the Carrs held 937 units and the other unit holders 63 units.

The syndicate agreement says nothing about each unit holder being entitled to shares. The agreement was not one which was required by law to be in writing. It might, therefore, be partly verbal. The plaintiff and the Carrs both agree that there was a verbal term added to the written agreement, *viz.*, that the plaintiff was to get 400 shares for each unit which was varied on September 8th in the manner already referred to. The plaintiff complains, however, that she was not told on September 8th, how many shares the Carrs were to get, nor that part of the syndicate money was being used by the Carrs for their own purpose. In fact so far as she was concerned she does not appear to have thought the Carrs were getting anything. It is impossible for me to believe that she thought they were giving everything to the syndicate for nothing. She knew the syndicate had been formed to take over their option. She and P. D. Carr were the only persons present when she made her contract. I have already stated what he says he told her then. T. L. Carr says that he met the Camerons many times and that, at the time her cheque was handed over in payment, she was told that the Carrs were getting 200,000 shares in a company with 500,000 shares and that her shares were coming out of the Carrs' 200,000. Then

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the plaintiff says she heard nothing at the meeting of September 8th of the amount of shares which the Carrs were to get. Dr. Thomas, who is an independent witness, says they were told, then, that each of the syndicate holders who had been entitled to 400 shares out of the shares of a company with 500,000 shares would get 800 shares for each unit in a company, proposed to be formed, with 1,500,000 shares, these shares to come out of 450,000 shares which the Carrs were to get. Goode and Dr. Maclean, another independent witness, who were at the meeting say the same thing. In addition to this her husband John Cameron, who, although in Court, was not called as a witness signed Exhibit 21. He was one of the incorporators of the Zeballos Company. He was present when the application to the superintendent of brokers was being prepared; and he was present at the meeting when Exhibit 17 was authorized to be executed; and at all the preliminary meetings of the company. I find it hard to believe that, under the circumstances, Cameron did not know about the shares the Carrs were to get and did not tell his wife. The probabilities are he did. In any case I find she did know.

The Carrs by September 8th had spent approximately $2,120 of the syndicate moneys on the property (Exhibit 25). Up to this time as I have mentioned they had received payment for 26 units, *i.e.*, $2,600. While the Carrs did not tell the members of the syndicate on this date that they had, or should have had, this amount in hand, they made no misrepresentation on this point. Further there is nothing in the evidence to show they did not on this date have this money on hand.

The 450,000 shares would, on their issue, belong to the syndicate subject to any agreement which the plaintiff and members of the syndicate made. The question is: Did the plaintiff retain her interest in the syndicate? The plaintiff admits she was to get 400 shares for each unit she held. If the Carrs had received 200,000 shares for the option these shares would then belong to the syndicate and under the terms of the agreement upon a division she would be entitled to 1/1000 or 200 shares. If the Carrs received 450,000 shares, her 1/1000 would have amounted to 450 shares. So that in either case she was getting by the

arrangement she made with the Carrs more than she would have been entitled to had all the shares been handed over to the syndicate and then divided amongst its members under the written terms of the agreement. Under the arrangement which was finally arrived at the Carrs were giving to each one of the unit holders 350 shares more in respect of each unit than the holders would have been entitled to. There was therefore consideration for the arrangement that the plaintiff accepted the declaration of trust in entire satisfaction and discharge of her rights as a unit holder in the syndicate. All other unit holders except the Carrs signed the same form of release. The shares have now been put in escrow and are now held in trust under these declarations of trust for the various unit holders. Consequently all the unit holders have received all they are entitled to out of the assets of the syndicate. All the remaining assets of the syndicate belong to the Carrs, as they own all the remaining units in the syndicate. The plaintiff has no further interest in the syndicate and is not entitled to an accounting. The plaintiff is not entitled therefore to the declaration she asks.

The plaintiff says she did not know P. B. Carr and Peter D. Carr had an interest in the option; that P. D. Carr was the trustee for and agent of the syndicate and failed to disclose to its members that he was buying for the syndicate property in which he had an interest and therefore he should account for any profits made by him. I think the plaintiff did know. Assuming, however, she did not, is she or the syndicate entitled to any relief under the circumstances of this case? Rescission is not asked for and could not be granted in any event as the mines now belong to the company. The Court will not fix a new price between the parties. The right of the syndicate is to be paid its loss on the whole transaction. No proof of damages on the whole transaction was given. Lord Parker in delivering the judgment of the Judicial Committee in *Jacobus Marler Estates, Lim.* v. *Marler* (1913), 85 L.J.P.C. 167*n*, 114 L.T. 640*n*, said:

> Equity treats all transactions between an agent and his principal, in matters in which it is the agent's duty to advise his principal, as voidable unless and until the principal, with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, ratify and confirm the same. In such cases the interest of the agent is in

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conflict with his duty, and there can be no real bargain at all. It must be remembered, however, that if the transaction be one of sale by the agent to the principal the latter must, in order to avoid it, be able to restore the agent to his original position. If he has resold the property, or cannot restore it to the agent in its original condition, the right to avoid the transaction will, as a general rule, have been lost. But, even so, it does not follow that the principal is without remedy. He may be able to recover damages from the agent for negligence in the performance of his duties. Thus, if the agent's duty is to advise the principal as to the purchases of stocks or shares having a market value, and he sells to his principal stocks or shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter, if the property sold by the agent to the principal is a specific property having no market value, for the Court will now fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction. If he has suffered no such loss there can be no damages.

The action is dismissed with costs.

Action dismissed.

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REX v. EVELEIGH.

Master and servant—Violation of Semi-monthly Payment of Wages Act—Suspended sentence—Recognizance—Improper form—Violation of conditions of—Wrong procedure—Prohibition—R.S.B.C. 1936, Cap. 271, Secs. 72 (2) and (7); Cap. 303.

Upon the accused pleading guilty to a charge of violating the Semi-monthly Payment of Wages Act, he was released by the magistrate on suspended sentence of one year on entering into a so-called recognizance (quoted *infra*). Before the expiration of the year a summons was issued and served on the accused containing a charge in the same words as those in the former summons, the object being to have the accused sentenced for a breach, if one were proved, of the so-called recognizance. On accused's application for prohibition:—

Held, that the recognizance was not in the form proper and usual in the case of suspended sentences and did not comply with section 72 (2) of the Summary Convictions Act, and was therefore not a recognizance at all, and therefore the magistrate had no power to sentence the accused now and the order for prohibition should issue.

Held, further, that the wrong procedure was adopted and the present proceedings were beyond the jurisdiction of the magistrate.

APPLICATION for prohibition. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 16th of February, 1939.

R. D. Harvey, for the application.
Carew Martin, for the Crown.

Cur. adv. vult.

18th February, 1939.

ROBERTSON, J.: The accused appeared before a stipendiary magistrate on July 4th, 1938, and pleaded guilty to a charge in a summons dated June 21st, 1938, that "during the two months last past," he did unlawfully fail

to pay as often as semi-monthly to Joseph P. Haddock his employee, who was engaged in or about the Industry of Lumbering, all wages earned by him from time to time to a day not more than eight days prior to the date of payment as required by the Semi-monthly Payment of Wages Act, being chapter 303, R.S.B.C. 1936.

The magistrate decided as follows:

Penalty sentence suspended for one (1) year, no costs, to keep the peace and is of good behaviour towards His Majesty's liege people and especially in the matter of semi-monthly payment of wages to his employees and in the matter of payment of the arrears of wages now in existence for the term of twelve (12) months next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

A so-called recognizance was taken as follows:

Form of Recognizance to Keep the Peace.

Canada
Province of B.C.
County of Nanaimo.

Be it remembered that on Monday the 4th day of July in the year one thousand nine hundred and thirty-eight A.D., at Lake Cowichan in the County of Nanaimo, Russell Eveleigh is convicted before the undersigned, Col. J. H. Boyd, a stipendiary magistrate, in and for the County of Nanaimo, for that he, the said Russell Eveleigh [here is set out charge as above].

And upon the said Russell Eveleigh pleading guilty to the charge as aforesaid I adjudge that the said Russell Eveleigh for his said offence should be on suspended sentence for the term of twelve months next ensuing, upon the said Russell Eveleigh fulfilling the conditions hereunder written.

Taken and sworn before me, the day and year and at the place above mentioned.

[Sgd.] J. H. Boyd.
A stipendiary magistrate in and
for the County of Nanaimo,
Province of British Columbia.

[Sgd.] Russell Eveleigh.

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The condition of the above recognizance is such that if the above bound Russell Eveleigh keeps the peace and is of good behaviour towards His Majesty's liege people and especially in the matter of the semi-monthly payment of wages to his employees and in the matter of the payment of the arrears of wages now in existence for the term of twelve months next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

The accused was released. Suspended sentence and release of the accused on his entering into a recognizance are authorized by section 72 of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271. On January 11th, 1939, a summons was issued and, later, served on the accused, containing a charge in exactly the same words as the summons issued in June. The summons came on for hearing before the same stipendiary magistrate. He stated to counsel who appeared for the accused that the summons did not constitute a second charge but related to the previous proceedings taken in June. Obviously the idea was to sentence the accused for a breach, if one were proved, of the so-called recognizance. The accused now applies for prohibition. It is objected that nothing which, properly, could be called a recognizance was entered into and that therefore no further proceedings could be taken against the accused; further, that, in any event, the stipendiary magistrate should be prohibited from proceeding on the second summons as the proper procedure, *viz.*, information and warrant provided by section 72, had not been adopted. Dealing with the first point, a form of recognizance which is usual in cases of suspended sentence is set out in an article by Mr. Eric Armour, K.C. (afterwards Mr. Justice Armour) in 46 Can. C.C. 98, at p. 111. There, it will be seen, that, in a proper recognizance the accused and his sureties, if any, appear before the stipendiary magistrate and acknowledge themselves to owe to His Majesty whatever sum may be fixed by the magistrate, if the accused fails in the conditions set out in the recognizance. It will be noticed that in this case the accused did not appear before the magistrate. There was no acknowledgment of an amount owing to His Majesty. Again section 72 (2) which gives power to the magistrate to release on suspended sentence says that he

may, instead of sentencing him at once to any punishment, direct that he

be released on his entering into a recognizance, . . . during such period as the Justice or Court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

The so-called recognizance did not fix any time within which the accused was to appear and receive judgment. In my opinion the recognizance is not a recognizance at all, because of the defects which I have mentioned. It has been held in the Province of Quebec that, under these circumstances, what has taken place is equivalent to an acquittal; that the Court is then *functus officio;* and its jurisdiction being exhausted, prohibition will lie. See *Laplante* v. *Court of Sessions of the Peace* (1937), 69 Can. C.C. 291. The magistrate's only power to suspend sentence was given him by section 72. He had not the power to postpone sentence which superior Courts of Record have at common law—see *Rex* v. *Spratling* (1910), 80 L.J.K.B. 176; [1911] 1 K.B. 77.

Unless then a proper recognizance had been taken the magistrate has no power to sentence the accused at a later date. The order will issue. It is clear also that in any event the wrong procedure was adopted. Section 72 (7) of the Summary Convictions Act states that where

Any Justice . . . is satisfied by information on oath that an offender whose release has been directed by a Justice or Court under this section has failed to observe any of the conditions of his recognizance [he] may issue a warrant for the apprehension of the offender;

and the offender, when apprehended on the warrant, shall be brought before the justice and may be sentenced to any punishment to which he might have been sentenced by the justice or Court before whom he was convicted.

The present proceedings are not warranted in any way and are beyond the jurisdiction of the magistrate—see *Rex* v. *Siteman* (1902), 6 Can. C.C. 224; *Rex* v. *Glasgow* (1936), 11 M.P.R. 142; 67 Can. C.C. 392.

Application granted.

C. C.
1939
March 7.

IN RE VERNON MUNICIPAL SCHOOL DISTRICT AND THE CANADIAN PACIFIC RAILWAY COMPANY.

Assessment appeal—Construction of statutes—Headings—R.S.B.C. 1936, Cap. 199, Secs. 216 (1) (a) and 223 (4)—R.S.B.C. 1936, Cap. 253, Secs. 70 and 114.

Section 114 of the Public Schools Act provides that "Lands claimed by a railway company as its right of way . . . shall be valued for the purposes of this Act at three thousand dollars per mile," and section 223 (4) of the Municipal Act provides that "The miles of single track of any railway company as mentioned in section 216 (1) (*a*) shall for the purpose of assessment and taxation be deemed to be land, and the amount of the assessment thereon shall be at the rate of five thousand, two hundred and eighty dollars per mile."

In relation to that portion of the right of way of the Canadian Pacific Railway beyond the corporate limits of the city of Vernon, but included pursuant to the Public Schools Act in the Vernon Municipal School District, the present assessment of $4,000 per mile was in force for each year from 1921 to the present, pursuant to friendly arrangement between the city and the railway company. The railway company claims the assessment of $4,000 per mile is excessive and in contravention of section 114 of the Public Schools Act. The city contends that the present assessment having been in force since 1921 is not excessive, is both legal and reasonable pursuant to section 223 (4) of the Municipal Act, and section 114 of the Public Schools Act has no application.

Held, that the Public Schools Act is divided into a number of important headings and section 114 is included in the sections coming under the heading of "Rural School Districts." The headings govern and may generally be read before each of the sections which are ranged under them. Said section 114 only applies to rural school districts and has no application to this case. The city has acted within its legal rights in making the assessment in question and the appeal is dismissed.

APPEAL by the Canadian Pacific Railway from the Court of Revision of the City of Vernon, confirming the assessment of a portion of the right of way of the railway situate beyond the corporate limits of the city of Vernon, but included in the Vernon Municipal School District for school purposes pursuant to the Public Schools Act. Argued before SWANSON, Co. J. at Vernon on the 7th of March, 1939.

Greaves, for appellant.
Morrow, for respondent.

Cur. adv. vult.

7th March, 1939. C. C. 1939

IN RE VERNON MUNICIPAL SCHOOL DISTRICT AND CANADIAN PACIFIC RY. CO.

SWANSON, Co. J.: This is an appeal by the Canadian Pacific Railway Company against the assessment for school purposes confirmed by the Court of Revision of the city of Vernon, held on February 8th, 1939, at Vernon, B.C., upon that portion of the right of way of the Canadian Pacific Railway Company situate and being beyond the corporate limits of the city of Vernon, but included pursuant to the Public Schools Act in the Vernon Municipal School District for school purposes by the city of Vernon.

It is submitted on behalf of the railway company by Mr. *Greaves* that the present assessment of $4,000 per mile is excessive and in contravention of section 114 of the Public Schools Act under which it is submitted the proper assessment should be $3,000 per mile. It is submitted by Mr. *Morrow* on behalf of the city of Vernon that the assessment of $4,000 per mile is both legal and quite reasonable, and that it is within the power of the city to assess these lands at the rate of $5,280 per mile, being the rate now in force pursuant to section 223 (4) of the Municipal Act on all lands of the railway company situate and being within the corporate limits of the city. Mr. *Morrow* submits that the present assessment of $4,000 per mile now complained of on the lands in question has been in force for each year from 1921 to the present, pursuant to a friendly arrangement between the city and the railway company. This is the first time this assessment has been challenged by the railway company. Nevertheless the company is within its statutory rights in now lodging an appeal to this Court.

Mr. *Morrow* fortifies the city's position by invoking section 70 of the Public Schools Act.

This section 70 in effect states that where the boundaries of the municipal school district (to which class the city of Vernon belongs) have been extended so as to embrace territory not included in the municipality (city of Vernon in the present case) comprised in the district, all property situate in that territory shall be liable to assessment and taxation for school purposes in the same manner and to the same extent as if it were within the limits of the municipality. Mr. *Greaves* stresses the concluding five lines of section 70.

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IN RE VERNON MUNICIPAL SCHOOL DISTRICT AND CANADIAN PACIFIC RY. CO.

Swanson, Co. J.

Mr. *Morrow* submits that section 114 of the Public Schools Act has no application whatever to the case in question, that section being applicable solely to rural school districts. I am quite of the opinion that Mr. *Morrow's* argument is correct, that section 114 has no application to the matter under consideration.

It is very significant that the Public Schools Act is divided into a number of very important headings.

"Classification of School Districts" is especially provided for in the Act by section 14 and succeeding section 15; "Provincial Aid to Schools" is provided for by section 18 and following sections; "Municipal School Districts" are dealt with under that heading beginning at section 31 up to section 76; "Rural School Districts" are dealt with under that "heading" by section 76, and from that on to section 130 of the Act; "Community School Districts" under section 130 and "General Provisions" under section 131 to section 170.

The headings [in a statute] . . . govern, and may generally be read before, each of the sections which are ranged under them. They are to be regarded as parts of the statute itself, and may be read not only as explaining the sections which immediately follow, but as affording an even better key to the general construction than a mere preamble. Further, as being found and sometimes referred to in the enacting parts, they are deserving of greater consideration than marginal notes. The clear meaning and natural operation of words found in the various sections under headings must, however, according to general rule, not be restrained or confined by them:

see Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 464; see also 26 A. & E. Encycl. of Law, 2nd Ed., article "Statutes," pp. 629-30.

In *Eastern Counties, &c. Companies* v. *Marriage* (1860), 9 H.L. Cas. 32, Bramwell, B. at p. 46:

This general heading is not only in good sense, but as matter of verbal accuracy to be considered as governing, and to be read before, each section which ranges under it, as though they had been numbered 1, 2, and so on.

Mr. Baron Channell in the same case at p. 41 said:

These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the construction of the sections which follow than might be afforded by a mere preamble.

Mr. Baron Bramwell said in the House of Lords, in the case of *Hammersmith, &c. Railway Co.* v. *Brand* (1869), L.R. 4 H.L. 171, at pp. 180-90; 38 L.J.Q.B. 265, at p. 270:

> Your Lordships will find that they begin with a general heading. . . . All that follows this heading is to be construed with reference to it: see *Eastern Counties, &c. Companies* v. *Marriage*, [*supra*].

See also *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 53 L.J.P.C. 59; Proudfoot, V.C. in *Wood* v. *Hurl* (1880), 28 Gr. 146, quoting above judgment of Baron Channell and Baron Bramwell. See also the ruling of FISHER, J. in *Yorkshire and Pacific Securities Ltd.* v. *Fiorenza* (1937), 52 B.C. 509 at p. 514.

For these reasons I think I must rule that the city has acted within its legal rights in making the assessment in question. The appeal is accordingly dismissed. The costs of the appeal are allowed to the city, fixed at $25.

Appeal dismissed.

McDONALD v. UNITED AIR TRANSPORT, LIMITED.

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1939
March 7, 14.

Practice — Discovery — Examination of officer of company — Aeroplane operated by defendant company—Pilot of aeroplane—Whether an officer under rule 370u.

One Tweet was a pilot of an aeroplane owned and operated by the defendant company. An application by the plaintiff under rule 370u for an order for the examination for discovery of Tweet as an officer of the defendant company was dismissed.

Held, on appeal, reversing the decision of FISHER, J., that "having regard to all the circumstances of the case" the Court is of opinion that this man is an "officer" within said rule, and the governing circumstances briefly are that he was a pilot in sole charge of the aeroplane of the defendant corporation, the alleged mismanagement whereof is the basis of this action.

APPEAL by plaintiff from an order of FISHER, J. of the 20th of January, 1939 (reported, 53 B.C. 377), dismissing the plaintiff's application for leave to examine one Charles Tweet for discovery as an officer of the defendant company. The action

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was for damages owing to injuries sustained by the plaintiff when an aeroplane of the defendant company plunged into Wolverine Lake in British Columbia. The said Charles Tweet was the pilot of the aeroplane at the time of the accident.

The appeal was argued at Vancouver on the 7th of March, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

L. P. Macdonald, for appellant: The application is under rule 370u. A pilot of an aeroplane is the same as the conductor of a train: see *Leach* v. *Grand Trunk R.W. Co.* (1890), 13 Pr. 369; *Elliott* v. *Holmwood & Holmwood* (1915), 22 B.C. 335. The case of *Speakman* v. *City of Calgary* (1908), 9 W.L.R. 264 was relied on, but my submission is that it is not an authority: see *The Canada Atlantic Ry. Co.* v. *Moxley* (1888), 15 S.C.R. 145 at p. 159. The pilot has sole control of the aeroplane. Under the law he makes entries in the log book and unless we can examine him there is no one to examine: *Leach* v. *Grand Trunk R.W. Co.* (1890), 13 Pr. 467; *Giddings* v. *Canadian Northern Ry. Co.* (1919), 12 Sask. L.R. 381; *Morrison* v. *Grand Trunk R.W. Co.* (1902), 5 O.L.R. 38; *Powell* v. *Edmonton, Yukon and Pacific R.W. Co.* (1909), 11 W.L.R. 613; *Dawson* v. *London Street R.W. Co.* (1898), 18 Pr. 223; *Harvie* v. *C.P.R.,* [1928] 1 D.L.R. 696.

Tysoe, for respondent: The rule 370u refers to officers outside of British Columbia, and the question is whether he was in authority at the time of the accident: see *Nichols & Shephard* v. *Skedanuk* (1912), 5 Alta. L.R. 110, at pp. 112-3. A bus-driver is in the same position: see *Odell* v. *City of Ottawa* (1888), 12 Pr. 446.

Cur. adv. vult.

On the 14th of March, 1939, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of opinion that this appeal should be allowed and that the person in question is an "officer of the corporation" who should be examined under rule 370u.

In coming to this conclusion we observe with some surprise that the leading cases in this Court were not referred to below

nor cited to us by counsel, though by them the principle of the matter has been settled for many years, twenty-seven, in fact, by this Court, in the case of *King Lumber Mills* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 26, wherein my late brother IRVING laid down the rule which we have always followed since then, *viz.*, that "whether a person is an officer or not depends upon the circumstances of each particular case." We reaffirmed that principle in 1931 in the case of *Johnson* v. *Solloway, Mills & Co. Ltd.*, 45 B.C. 35 at p. 38, where, in delivering the judgment of the majority of the Court, I said:

> The first question is as to whether or no the person sought to be examined under rule 370c (1) is one who has been an officer of this corporation, and that, as this Court has laid down in consonance with the decisions of other Courts of Canada, means with regard to all the circumstances of the case.

And in the same volume the same principle appears at p. 213 in the case of *Kapoor Lumber Co. Ltd.* v. *Canadian Northern Pacific Ry. Co.* [(1932)].

It is also to be observed that in the Court below in 1915—in *Elliott* v. *Holmwood & Holmwood*, 22 B.C. 335—Mr. Justice MACDONALD expressed views as to the meaning of "officer" of a company, which is in accord with the said previous decision of this Court in the *King Lumber Mills* case though, strangely enough, he did not refer to it.

Applying said principle to the facts before us all we think is necessary to say is that "having regard to all the circumstances of the case" we are of opinion that this man is an "officer" within said rule, and the governing circumstances briefly are—we go no further—that he was the pilot in sole charge of the aeroplane of the defendant corporation the alleged mismanagement whereof is the basis of this action.

Other circumstances may arise in future affecting other occupants or servants of the company in aeroplanes, but we, wisely, we venture to think, refrained from saying anything about such situations and confine ourselves to that which now presents itself.

Appeal allowed.

Solicitor for appellant: *L. P. Macdonald.*
Solicitor for respondent: *C. W. Tysoe.*

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June 8, 14.

REX v. LEAHY.

Criminal law—Driving a motor-car while intoxicated—Evidence of intoxication—Upon indictment or upon summary conviction—Distinction as to punishment—Criminal Code, Sec. 285 (4).

On a charge of driving a motor-car while intoxicated, under section 285 (4) of the Criminal Code it is incumbent upon the prosecution to show that accused was so intoxicated that "if permitted to drive a motor-car it would be a danger to the public."

McRae v. *McLaughlin Motorcar Co.*, [1926] 1 D.L.R. 372, followed.

It will be noted that when a charge is laid upon an indictment under subsection 4 (*a*) of section 285 of the Criminal Code, the punishment is much greater than when an accused is found guilty upon a summary conviction under subsection 4 (*b*) of said section. It is obvious therefore, that Parliament, when enacting the legislation, drew a distinction as to the classes of cases which might arise under the section, and put a responsibility on the Crown to decide which subsection should be invoked when proceedings are started.

CHARGE of driving a motor-car while intoxicated, under subsection 4 (*a*) of section 285 of the Criminal Code. Tried by ELLIS, Co. J. at Vancouver on the 8th of June, 1939.

W. S. Owen, for the Crown.
H. I. Bird, for defendant.

Cur. adv. vult.

14th June, 1939.

ELLIS, Co. J.: The accused is charged under section 285, subsection 4 of the Criminal Code, which reads as follows:

4. Every one who, while intoxicated or under the influence of any narcotic, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty of an offence, and shall be liable,

(*a*) upon indictment, for a first offence to imprisonment for a term not exceeding three months and not less than thirty days, and for each subsequent offence to any term not exceeding one year and not less than three months; or

(*b*) upon summary conviction, for a first offence to a term of imprisonment not exceeding thirty days and not less than seven days, for a second offence to a term of imprisonment not exceeding three months and not less than one month, and for each subsequent offence to a term of imprisonment not exceeding one year and not less than three months.

It will be noted that when the charge is laid upon an indictment the punishment for the first and second offence is much greater than when an accused is found guilty upon a summary conviction for the first and second offence. It is obvious, therefore, that Parliament, when enacting the legislation, drew a distinction in its mind as to the classes of cases which might arise under the section, and put a responsibility on the Crown to decide which subsection would be invoked when proceedings were started. It would appear that the intention is that the Crown, seized with the nature of each particular case, would in the exercise of its duty, interpret or construe the subsections reasonably bearing in mind the intent of Parliament as expressed in the legislation. In other words serious charges would be proceeded with by way of indictment, less serious ones by the other method, the latter of which cases would on conviction carry a less minimum term of imprisonment. As far as I can gather, the law officer of the Crown, who prefers the charges, does not adopt this principle and there is a growing practice in some quarters to disregard the implication of Parliament, or the reasonable intent of the statute and to lay charges by way of indictment.

Everyone is aware that modern conditions resulting in a vast and rapidly growing increase in the numbers of motor-vehicles, capable of great and terrible danger to human safety and destruction to property, have imposed on our legislators the necessity and duty of passing drastic legislation to stop and curb this danger and destruction. In carrying out this duty, however, Parliament has recognized some distinction and passed the two subsections quoted above. The result is that judges in this Court, where the trial is by way of indictment, often find themselves in a difficult position. This arises in the classes of cases, where no injury to the person occurs nor damage to property ensues and where the evidence does not disclose the slightest negligence in driving. The Crown, however, does prove intoxication, and a conviction must follow, and the minimum punishment of 30 days in gaol must follow, even if the judge trying the case is satisfied a lesser punishment, under all the circumstances, is more just and would like to impose the seven-day minimum as provided under the other subsection. This is the

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class of case Parliament must have contemplated when it passed the two subsections and differentiated in the punishments judges are obligated to impose. Under the illustration I have given the trial judge has no power to temper justice with that mercy that is an underlying or fundamental principle of judicial conduct.

The facts of the case at Bar do not disclose any undue, reckless or negligent driving, with the possible exception of some fast driving on Georgia Viaduct. The accused was driving his car alone. A witness, one Hildebrand, called by the accused, was driving his car on the viaduct at the same time and going in the same direction. There was not much difference in the speed of the two cars, and each used care in crossing Main Street. Each was stopped by the police after crossing Main Street. No suggestion of any kind was made that Hildebrand was intoxicated. The two police officers think the accused was, yet Hildebrand and the accused showed about the same ability in driving their respective cars. It may be that both were driving too fast on the viaduct and may be guilty of driving to the common danger but that is not the charge before me. If the accused was intoxicated I cannot find that it impaired his ability to drive.

Now on the question of intoxication, which is the charge against the accused, police constable McWilliams said the accused's breath smelt very strongly of liquor. Police constable Lamont said "I would say he was in a state of intoxication." Inspector Parsons was in the police station when the accused was brought in. He was told by either McWilliams or Lamont to go upstairs where the accused was and see him. This he did, and in his opinion, the accused was in a state of intoxication, his breath smelt of liquor and his speech was thick. Parsons was vague in his evidence as to the accused's speech, and in fact gave no particulars as to what he said, and did not make the positive statement that he talked to him. On cross-examination Parsons made this remarkable statement: "I went up with the preconceived notion I would find a drunk." It seems difficult to understand this method of picking out drunks. Parsons warned beforehand and fortified with knowledge previously given, goes upstairs to find a drunk, and finds him to his satis-

faction at least. Inspector Parsons holds a responsible position on the police force and is an officer frequently before this Court as a witness. I am satisfied as to his honesty of purpose but I cannot help but deplore the method adopted as in this case.

The accused took the stand in his own behalf and denied he was intoxicated. He is a druggist, had worked until midnight, when he went to the home of his boss in West Vancouver to attend a dance. He frankly admitted drinking four bottles of beer in the course of an hour and a half. He was sober when he arrived and when he left—facts which were corroborated by three other witnesses. I cannot conclude as a fact he was intoxicated.

There is only one other point for me to consider. Three policemen think the accused was intoxicated. The accused and three other reputable witnesses think he was not. It is regrettable that in cases of this kind and seriousness some other evidence beyond opinions is not available. No examination of the condition of the accused the night in question was made, no tests were applied as to his ability to react or as to the condition of his blood, no medical evidence or evidence of any experts was available to the Court to help in arriving at a conclusion and on the simple question of *onus* the Crown failed. With no intention whatever of reflecting on the honesty of the police evidence it is not quite clear what they mean when they say the accused was intoxicated. They were not asked nor did they volunteer what they meant by their direct statements, other than I have pointed out before.

The words of the statute are not ambiguous and they have a meaning.

If Parliament means that every person is guilty of the offence set out in the Code who has a drink of intoxicating liquor in him or whose breath smells of alcohol, or who, in the opinion of a police officer, is intoxicated the duty of a judge sitting as a jury is easy. I think, however, the Courts must put some interpretation on the language of the Code and the liberty of the subject not taken from him lightly.

I am inclined to agree with the language of Hayward, Co. Ct. J. in *Rex* v. *Oeullette* (1931), 55 Can. C.C. 389 who follows the

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judgment of Boyle, J. in *McRae* v. *McLaughlin Motor Car Co., Ltd.*, [1926] 1 D.L.R. 372 and says:

> . . . it was still incumbent upon the prosecution to show that he was so intoxicated that, "if permitted to drive a motor car, it would be a danger to the public," according to the case of *McRae* v. *McLaughlin Motor Car Co.*, [*supra*] where the trial judge dissents from the proposition that, "some people believe that a man who takes any alcohol thereby becomes intoxicated."

In my opinion the degree of intoxication contemplated by Parliament in enacting section 285 of the Criminal Code is a state of intoxication during which "if permitted to drive a motor-car it would be a danger to the public."

I have no hesitation in holding therefore that the accused was not intoxicated within the meaning of the statute, nor in fact at all, and find him not guilty.

Charge dismissed.

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June 2, 15.

STAPLES v. ISAACS AND HARRIS.

Contempt of Court—Publication tending to prejudice the fair trial of an action—Newspaper comments—Application to commit.

Publication in a newspaper, pending the trial of an action, of any observations which in any way prejudice the parties in the action, is technically a contempt of Court. The Court will not exercise its extraordinary power of committal if the offence complained of is of a slight or trifling nature, but only if it is likely to cause substantial prejudice to the parties to the action.

MOTION to commit the defendant Harris, publisher of a newspaper, for contempt of Court, or in the alternative that a writ of attachment do issue against the publisher for contempt. Heard by ROBERTSON, J. at Vancouver on the 2nd of June, 1939.

Bull, K.C., for the motion.
Norris, K.C., contra.

Cur. adv. vult.

15th June, 1939.

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ROBERTSON, J.: This is a motion to commit the defendant Harris, the publisher of The Vernon News, for contempt of Court in publishing or causing to be published, as Editorials, in that paper, on the 27th of April, 1939, and 11th of May, 1939, words obstructing or tending to obstruct the administration of justice or calculated to prejudice the plaintiff in the fair trial of this action.

The plaintiff commenced this action on the 20th of April, 1939, in the Kelowna registry in the County of Yale, complaining of an alleged libel by the defendants in the month of August, 1938. A statement of claim was served with the writ in which the plaintiff set forth the words complained of, which I need not repeat here. The innuendo alleged is as follows:

(6) The said words set forth in paragraphs 3, 4 and 5 above meant and were understood to mean that the plaintiff in the conduct of his business as a shipper of fruit and therein as an agent for fruit growers, for his own advantage and profit, or for the advantage or profit of the company or companies of which he is an officer, had acted in a grossly corrupt manner and had failed in his duty to fruit growers for whom he or his company or companies was or were acting as agent, in that he had permitted and connived at dishonest and improper practices whereby the said growers were forced to accept a price for their fruit below that which they would have obtained and thereby was guilty of a criminal offence.

The statement of claim fixes the place of trial at Kamloops in the County of Yale. The defendants' application to set aside the service of the writ was dismissed. The defendants then served notice of appeal. By arrangement the appeals were abandoned and were dismissed on the 8th of May. It was a term of the dismissal of the appeals that the trial of the action should not take place until after vacation. The Assizes in Kamloops are usually held about October or November so the trial cannot come on for some three or four months.

I do not think the Editorial in the issue of the 11th of May, 1939, shows contempt. The Editorial of the 27th of April stated that The Vernon News and other papers had published the article complained of, eight months ago; that, subsequently, after a preliminary investigation, a commissioner was appointed under the Combines Act and it was expected his report would be made shortly; and that now the plaintiff takes action. It then refers to the paragraphs in the statement of claim (which

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it is stated could be read in another column of that issue) in which the libel complained of is set forth, and then proceeded:

It is a fair comment to make that it is not until eight months after the charges were first sounded and then echoed and re-echoed across Canada, Roy Baird Staples should discover that he was being brought into hatred and contempt thereby.

Why then are the charges being brought at this time? Opportunities aplenty were afforded Mr. Staples to publicly deny them from the start. He replied by supporting the application for the Combines investigation. Why does he not wait the results of that investigation and why does he wait all this time before entering a libel action? Has he been asleep and did not know what was afoot?

Why is the publisher of this newspaper singled out and an action entered against him personally? Was he not discharging his duty as a publisher to give publicity to charges of conduct which affect the welfare of the whole of the fruit growing area? Could he do less and hold his head up among his fellows? Publication of the charges meant loss of friendship, loss of business, and was justifiable only on the grounds that the report was a fair one and was published in the interests of the public good.

Is the action taken against publisher Harris rather than against The Vernon News because it is hoped to distinguish on the matter of privilege between the publisher and the reporter? Is the latter to be penalized for serving his newspaper, and through it the great mass of the people?

Is it not logical to ask at this time why it is that the British Columbia Fruit Growers' Association, which circulated these charges amongst its membership and the British Columbia newspapers, are not among the co-defendants?

It is significant that while some seven persons and companies were charged as being members of an illegal combine, neither the jobbing interests nor any company or person other than Mr. Staples has seen fit to take action in the Courts.

If the writ is issued as a matter of intimidation it will fail of its purpose.

The implications of this action are far-reaching. They are the business of every man and woman who directly or indirectly makes his or her living through the operations of the fruit industry and is interested in our much-prized freedom.

I desire to refer to several cases which lay down the principles which should govern the Court in an application of this sort. In *The Queen* v. *Payne*, [1896] 1 Q.B. 577, Lord Russell of Killowen, C.J., said at p. 580:

. . . but I wish to express the view which I entertain, that applications of this nature have in many cases gone too far. No doubt the power which the Court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of Court; but the applicant must shew that

something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending.

And at 581 he quotes with approval what Cotton, L.J. said in *Hunt* v. *Clarke* (1889), 58 L.J.Q.B. 490, a case in which an application to commit for contempt was made, as follows:

Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider, and in my opinion, although, as I say, there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference, or any such fear of any such interference, with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the Court in interfering by this summary and arbitrary process.

Wright, J., agreed with Lord Russell and said (pp. 581-2):

I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the Court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. That is the rule which I wish to adopt with regard to applications of this nature.

See also *Ex parte Gaskell & Chambers Ld.*, [1936] 2 K.B. 595, where the above quotations from *The Queen* v. *Payne* were approved.

Applying these principles I am of the opinion that under the circumstances of this case the article complained of is not "calculated really to interfere with a fair trial of the action." I must consider the position as of the 27th of April, 1939, when the Editorial was published. At that time it was not known when the trial would take place. The earliest date would be at the Assizes at Kamloops commencing June 5th—that is about six weeks after the publication. In view, however, of the matter in dispute it is quite unlikely that the trial would have taken place so soon, in which case it would not have come on until the Autumn Assizes, which were fixed in January of this year to commence on the 6th of November, 1939. Under these circum-

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stances I think the language of Boyd, C., in *Guest* v. *Knowles* (1908), 17 O.L.R. 416, at 424, is most appropriate. After referring to what Lord Morris, speaking for the Judicial Committee, in *McLeod* v. *St. Aubyn,* [1899] A.C. 549, said, at p. 561, *viz.*:

> Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice.

and that

> It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity,

he said as follows:

> These two articles published touching an election controversy, long before the civil action can be ready for trial, are at best ephemeral products, serviceable, it may be, for the occasion, but once read on the day of issue are quickly forgotten. Giving jurymen, of whatever stripe of politics, credit for ordinary intelligence and average honesty, it cannot be supposed that any one would cherish these comments in his mind for months afterwards, or that any such permanent impression would be made upon the mind as would cause one to disregard the instructions of the judge, undervalue the sworn testimony of the witnesses, and swerve from his sworn duty to decide according to the evidence, upon the merits of the case. . . .
>
> This motion invokes the strong arm of the Court to put forth its extreme power of imprisonment. It is an application of serious moment, and it should rest upon clear and sufficient evidence, manifest in or fairly to be inferred from the impeached articles, that the offence has been committed, as to an interference or attempted interference with the ordinary course of justice in the matter of a fair trial.

The application must be dismissed with costs.

Motion dismissed.

USEICH v. FISHER *ET AL.*

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Animals—Cruelty to dogs by owner—Recommendation by veterinary surgeon and two reputable citizens that dogs be destroyed—Agent of Society for Prevention of Cruelty to Animals shoots dogs—Action by owner for damages—R.S.B.C. 1936, Cap. 266, Sec. 7.

The plaintiff was convicted for ill treatment of his 40 dogs by reason of filthy premises and not providing sufficient food. Owing to complaints the defendant Fisher, an agent of the Vancouver branch of the Society for the Prevention of Cruelty to Animals, examined the premises and at his instance a veterinary surgeon and two reputable citizens examined the premises and the dogs. The veterinary surgeon and the two citizens recommended that the animals be destroyed. Upon this recommendation the defendant Fisher shot 24 of the 40 dogs. In an action for damages:—

Held, dismissing the action, that the defendant Fisher acted lawfully under authority conferred upon him by section 7 of the Society for the Prevention of Cruelty to Animals Act, the provisions of which were fully observed.

Held, further, that assuming the defendant Fisher had acted unlawfully, the defendant the Vancouver Branch of the Society for the Prevention of Cruelty to Animals would not be liable for his illegal acts.

Stanbury v. *Exeter Corporation*, [1905] 2 K.B. 838, and *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364, applied.

ACTION against the defendants for $700, damages for shooting and killing 24 dogs belonging to the plaintiff. The plaintiff had been convicted on February 9th, 1939, under section 542 (*a*) of the Criminal Code before two justices of the peace, for ill treatment of his 40 dogs by neglecting to supply sufficient food, bedding, care and shelter, and was fined $5 and costs. Owing to complaints as to the inadequacy of the penalty and the plaintiff's treatment of his dogs, the defendant Fisher, an inspector appointed by the Vancouver Branch of the Society for the Prevention of Cruelty to Animals, also a special constable of the Vancouver City Police and the British Columbia Police, reported to the president of the Vancouver Branch of said Society, and requested that she and her husband view the dogs with him at the plaintiff's home. Constable Jones, who laid the aforesaid complaint against the plaintiff, directed the above three persons to the plaintiff's home, and the kennels were found

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to be in a filthy condition, lacking adequate bedding and proper facilities, and the dogs were diseased and showed results of malnutrition. The defendant Fisher then brought Doctor Sleeth, a veterinary, and one David Keith, to examine the dogs. Doctor Sleeth recommended their destruction, whereupon the defendant Fisher shot four dogs and the next day he returned to the kennels with Mr. Keith and shot 20 more dogs. The defendant pleaded section 7 of the Society for the Prevention of Cruelty to Animals Act. Tried by LENNOX, Co. J. at Vancouver on the 19th and 22nd of May, 1939.

Swencisky, for plaintiff.
Eades, and *Schultz,* for defendants.

Cur. adv. vult.

16th June, 1939.

LENNOX, Co. J.: This is an action to recover damages for the shooting and killing of some 24 dogs, the property of the plaintiff, by the defendant, Walter Fisher, who was an inspector appointed by the Vancouver Branch of the British Columbia Society for the Prevention of Cruelty to Animals. The defence is that the dogs were destroyed by the defendant Fisher, but at that time he was acting as an agent of the branch and was lawfully entitled to so destroy the dogs in the circumstances under which he found them, and under the authority of section 7 of the Society for the Prevention of Cruelty to Animals Act, R.S.B.C. 1936, Cap. 266. It was admitted (1) that the Vancouver Branch of the Society for the Prevention of Cruelty to Animals is a duly constituted branch of the British Columbia Society for the Prevention of Cruelty to Animals and (2) that the defendant Fisher was an agent of the Vancouver Branch aforesaid.

Counsel for the plaintiff submitted the following arguments:

1. That the evidence of constable B. W. Jones, who was present as a citizen, did not show that in his judgment the animals destroyed came under any of the categories set forth in section 7 and that, therefore, Fisher had not the requisite authority to slay the dogs. 2. That if the killing were unlawful the defendant, the Vancouver Branch of the Society were liable

in damages as well as Fisher. 3. That by the killing the plaintiff suffered damage even though said damage might be nominal.

Said section 7 of the Act is as follows:

7. Any agent or officer of the Society, or of any branch thereof, may lawfully examine, seize, and destroy or cause to be destroyed any animal found to be at large, abandoned, or in the possession of any person who is not properly caring for said animal, and appearing in the judgment of two reputable citizens, and of a veterinary surgeon, called by such agent or officer to view the said animal in his presence, to be so severely injured that the said animal cannot, without cruelty, be led away, or to be disabled, diseased past recovery, or unfit for any useful purpose.

Fisher being (as admitted) an agent of the branch, is entitled under that section to destroy animals, provided he proceeds in the way set out in the section, and provided further that in the judgment of the persons therein set forth the animals come under any of the categories detailed therein as sufficient justification for their being destroyed.

These animals were not at large or abandoned, but it was amply shown that they were in the possession of a person (namely the plaintiff) who was not properly caring for said animals. A veterinary surgeon (Dr. T. E. Sleeth) and two reputable citizens (David A. Keith and Barry W. Jones), were with Fisher on the 15th of February, 1939, for the purpose of carrying out the provisions of said section 7.

I find it abundantly proved that in the judgment of Dr. Sleeth, D. A. Keith and B. W. Jones, who were called by Fisher as such agent to view the animals in his presence, the animals destroyed were unfit for any useful purpose.

It is true that in his evidence Jones did not state directly that the dogs shot were unfit for any useful purpose, but I am of opinion that that was not necessary and that the Court is entitled to find from the evidence given that that was the judgment of the witness.

In endeavouring to dispute the question as to non-usefulness of purpose counsel for the plaintiff seemed to rely on the idea that if a dog barked it would be useful as a watch-dog. I know of no definition as to the attributes necessary in a dog to make it a useful watch-dog. It is absurd to say, in my opinion, that a dog that barks is on that account a useful watch-dog, because a dog might bark and run away, or a dog might bark at the moon,

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or because it is lonely or even when there is nothing to bark at, and become a nuisance; nor can I find (as suggested) that a dog because it is vicious is a useful watch-dog—its very viciousness itself defeats its purpose as a useful watch-dog. The section uses the words "useful purpose." I can quite understand, however, that there are such animals as useful watch-dogs and realize that their function is to protect whatever is required to be protected and know how to act about providing such protection without either falling short of or going beyond what is necessary in the circumstances. None of the dogs which were destroyed, in my opinion, comes under the category of useful watch-dogs or even watch-dogs. It was the opinion of the witnesses that the dogs were not in such a state as to be fit for any useful purpose at the time of their destruction, and of course that is the time and the only time that is of moment. Nor is it a question of what other people may think (from evidence in Court or otherwise) as to the rightness of having the dogs destroyed—section 7 *(supra)* sets forth the persons whose judgment is to prevail. While that is so I must say that from all I heard I quite concur in the judgment of the agent, the veterinary surgeon and the two citizens.

Finding, therefore, as I do, that Fisher acted within his authority in destroying these 24 dogs, it is unnecessary for me to deal with the question as to whether the branch of the Society would be liable for damages (if any), if he had not acted lawfully.

As it may be, however, that I may be found to be wrong in my above finding and in order, in that event, to endeavour to save, if possible, the action coming back for further adjudication, I find that Fisher's actions did not involve the branch of the Society in any liability, and in so finding adopt the language of Lord Alverstone, C.J., in *Stanbury* v. *Exeter Corporation,* [1905] 2 K.B. 838, at p. 841, wherein he says:

> This case, . . . , is, I think, very analogous to that of police and other officers, appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts.

This question of authority and liability is carefully canvassed in the case of *Fisher* v. *Oldham Corporation,* [1930] 2 K.B. 364.

Under the Society for the Prevention of Cruelty to Animals Act *(supra)* the agent is given direct statutory authority to deal (under said section 7) with the examination, seizure and destruction of animals in certain circumstances, and I doubt if even the Society or branch which appointed an agent would have the authority to order him to desist in such circumstances as he thought necessitated his acting as empowered under the Act.

If I am wrong in my judgment as to the lawfulness of the slaying, then on the question of damages I find (as I stated *viva voce* on the last day of the trial) that the plaintiff has suffered no damage; not even nominal damages. The evidence, in my opinion, clearly shows that the cost of keeping the animals (if the plaintiff's evidence as to same is to be believed) was far greater than what he received or was likely to receive from the sale of the dogs at the price at which he was offering them, if indeed they could be sold at all. Further, there was no damage from their loss on account of any love for the animals or for the animals as pets, because it was amply demonstrated that he could have no love for the dogs, keeping them as he did (than which I could imagine no worse case) and that all the enjoyment which he could possibly get out of keeping them would be the delight he might have in seeing them suffer; and of course the deprivation of that right does not in all human conscience justify the payment of any money in damages.

The plaintiff's action is dismissed with costs.

Action dismissed.

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KATSUMI HANADA AND YOSHIO HANADA v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence — Street-car runs over child's leg — Assessment of damages— Damages excessive—Jurisdiction of appellate Court.

About 4 o'clock in the afternoon on a clear day, a street-car of the defendant company, going east on Powell Street in Vancouver, stopped at the corner of Dunlevy Avenue and then proceeded on at about fifteen miles an hour, when the motorman saw some children playing at the north kerb in about the middle of the next block, when he slowed down to about twelve miles an hour and commenced to sound his gong. When about twenty feet west of the building in front of which the children were playing, a girl eight years of age suddenly dashed out to cross the street and was followed by the infant plaintiff, a Japanese boy of three years of age. The motorman claimed he immediately put on the emergency brake and the girl succeeded in crossing the track in front of the car, but the infant boy ran into the car just as it was stopping, about six feet behind the front of the car, and the front wheel ran over one of the boy's legs, necessitating amputation about six inches above the knee. The learned trial judge accepted the evidence of two of the plaintiff's witnesses and found that the motorman was not keeping a proper look-out and was guilty of negligence, and he assessed the damages of the infant plaintiff at $15,000.

Held, on appeal, affirming the decision of MCDONALD, J. as to the negligence of the motorman, but reducing the *quantum* of damages (MACDONALD, J.A. dissenting) to $10,000.

APPEAL by defendant from the decision of MCDONALD, J. of the 5th of December, 1938, in an action for damages arising out of an accident on Powell Street between Dunlevy Avenue and Jackson Avenue on the 2nd of September, 1937, shortly after 4 o'clock in the afternoon. A one man street-car was proceeding eastwards on Powell Street on the south rails. The car stopped at Dunlevy Avenue and then proceeded on at about fifteen miles an hour, when the motorman saw several children playing on the north sidewalk at about the middle of the block. He then slowed down to twelve miles an hour and sounded his gong. When about twenty feet from the building in front of which the children were playing, a little girl eight years of age suddenly ran out and across the street from the kerb. This little girl was

followed by the infant plaintiff, a Japanese boy three years of age. Immediately the little girl started across, the motorman applied his emergency brakes and the little girl managed to cross the tracks in front of the street-car just as it stopped, but the Japanese boy ran into the side of the street-car about six feet from the front, and one of his legs slid under the front wheel and was almost completely severed. The leg was subsequently amputated six inches above the knee. The infant plaintiff was awarded $15,000 damages.

The appeal was argued at Victoria on the 1st and 2nd of May, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

McAlpine, K.C. (*Riddell*, with him), for appellant: The child ran into the street-car and the motorman did all he could: see *The North British & Mercantile Insurance Company* v. *Tourville* (1895), 25 S.C.R. 177; *Jones* v. *Hough* (1897), 5 Ex. D. 122. The learned judge accepted the evidence of two witnesses in the grandstand of the Powell Street grounds. They were some distance away and they disagreed, one saying that one little girl ran in front of the street-car and the other saying that two little girls ran across. Their evidence also differed in other particulars. When the little girl started across the motorman put on the brakes and stopped in 25 feet. Two women in the car gave evidence and were close enough to see distinctly what happened. There was error in saying the motorman did not keep a proper look-out. The injured child's father is a cook working up north. The damages of $15,000 are excessive: see Charlesworth's Law of Negligence, 1938, pp. 505-6; *Taylor* v. *B.C. Electric Ry. Co.* (1922), 16 B.C. 420 at p. 422. This Court has jurisdiction to review the *quantum*: see *Bateman* v. *County of Middlesex* (1912), 6 D.L.R. 533; *Middleton* v. *McMillan*, [1929] 1 D.L.R. 977. That it is excessive see *Armsworth* v. *The South-Eastern Railway Co.* (1847), 11 Jur. 758; *Rowley* v. *London and North Western Railway Co.* (1873), L.R. 8 Ex. 221; *Phillips* v. *South Western Railway Co.* (1879), 4 Q.B.D. 406; *Schwartz* v. *Winnipeg Electric R. Co.* (1913), 12 D.L.R. 56, at p. 59; *Veniot* v. *Black*, [1933] 2 W.W.R. 198, at p. 210.

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Nicholson (*Yule,* with him), for respondents: The learned judge accepted the evidence of Williams and Barlow. The motorman was not keeping a proper look-out: see *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 634. He failed to take immediate steps to slow down: see *Winnipeg Electric Co.* v. *Symons,* [1928] S.C.R. 627; *Canadian Pacific Rway. Co.* v. *Hinrich* (1913), 48 S.C.R. 557; *Long* v. *Toronto Rway. Co.* (1914), 50 S.C.R. 224; *Banbury* v. *City of Regina* (1917), 35 D.L.R. 502. To an infant there must be a high degree of care: see *Sydney and Glace Bay Ry. Co.* v. *Lott* (1907), 42 S.C.R. 220; *Rickard* v. *Ramsay,* [1936] S.C.R. 302. That the appellate Court should not disturb the findings see *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37; *Huntting Merritt Lumber Co.* v. *Coyle* (1922), 67 D.L.R. 655; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, at p. 306; *Ogawa* v. *Fujiwara,* [1938] S.C.R. 170; *Ross* v. *Reopel, ib.* 171. It cannot be said the learned trial judge was clearly wrong: see *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241. On the amount of damages allowed see *Watts* v. *Corporation of District of Burnaby* (1929), 41 B.C. 282; *Cossette* v. *Dun* (1890), 18 S.C.R. 222; *Praed* v. *Graham* (1889), 59 L.J.Q.B. 230; *McHugh* v. *Union Bank of Canada,* [1913] A.C. 299; *Flint* v. *Lovell* (1934), 104 L.J.K.B. 199; *Owen* v. *Sykes* (1935), 105 L.J.K.B. 32 at pp. 35-6; *Gillespie Grain Co.* v. *Kuproski,* [1935] S.C.R. 13; *Battagin* v. *Bird,* [1937] 1 W.W.R. 719; [1938] S.C.R. 70.

McAlpine, replied.

Cur. adv. vult.

16th May, 1939.

MARTIN, C.J.B.C.: The appeal is allowed in part as to damages, our brother MACDONALD dissenting. The Court, that is to say, my brother O'HALLORAN and myself, are of the opinion that the damages should be reduced to $10,000. We base our view upon the principle that the assessment of $15,000 is beyond reason, to use the expression that we adopted in the recent case of *Funk* v. *Pinkerton* on the 8th of November last, based upon the language used by the Supreme Court of Canada *per* Davis,

J. in *Warren* v. *Gray Goose Stage Ltd.*, [1938] S.C.R. 52, at p. 56; [1938] 1 D.L.R. 104, 108, *viz.*:

> It is quite impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount.

This Court adopted that principle in *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280, at 284 and 288. We also adopt a most lucid exposition of the principle by that truly distinguished judge, Lord Chief Baron Palles, in the case of *M'Grath* v. *Bourne* (1876), Ir. R. 10 C.L. 160, *in banco* at pp. 164 and 165. I shall not read the whole passage because it is too long for the moment, but therein that great judge expounded the question with his customary lucidity and, briefly, adopted the definition of Fitzgerald, J. that

> the amount should be such that no reasonable proportion existed between it and the circumstances of the case—

in other words "beyond reason" before an appellate Court will interfere with the assessment.

MACDONALD, J.A.: I would not overrule the findings of fact by the learned trial judge. He found that the motorman's failure to maintain a proper look-out caused the accident. While part of the evidence of two witnesses, believed by the trial judge, in respect to the movements of two girls suggest deductions unfavourable to the respondents' case, still viewing all their evidence and that of other witnesses there is enough to fully support his findings. The indisputable physical facts also, having regard to the relative speed of the car and that of the injured three-year-old Japanese child toddling across the street, show that when the latter left the kerb to cross the street towards the track thereby giving notice of danger to an alert motorman, the latter was necessarily at such a distance from the point of impact that, had he been keeping a proper look-out, he could have stopped in time to avoid the accident. His action in not stopping was due to failure to observe the child when it commenced its journey from the kerb to the tracks.

We were asked to find that the damages awarded, *viz.*, $15,000 were excessive. The child's father (a cook) earns his living by manual labour. The only other material facts are disclosed by

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the accident itself. The child's leg had to be amputated so close to the thigh that it may not be possible to use mechanical aids: except of course a crutch. We are concerned therefore with a child of parents in moderate circumstances permanently crippled by the loss of a limb.

The grounds upon which appellate Courts reduce damages as excessive are well known. The difficulty arises in application. In my opinion, with respect, the learned trial judge could not reasonably award that sum. I do not think it wise to award damages so excessive that if a defendant should be a man of moderate means the result might be ruinous. I do not state this as a principle, except to the extent that regard should be paid to industrial and living conditions in the Province in so far as it bears on the question of earning-power. Damages, for example, awarded by Courts in the United States in a more highly industrialized and thickly populated country would appear to be—and might well be—higher than awards in comparable cases in this Province. However, apart from this aspect, applying the principles laid down in the cases, I am convinced, having regard to the injuries received, the child's station in life and probable diminution of earning power, which, of course, is only partial, damages in the sum of $10,000 would afford ample recompense.

While the foregoing expresses my own opinion, guided, as I must be, by the decision of this Court in other cases, I do not feel free to give effect to it. In *Funk* v. *Pinkerton* (not yet reported) decided recently the plaintiff Funk, 62 years of age with a life expectancy of only 8 to 10 years (compared to 42 in this case) was awarded $19,310, as general damages by the trial judge for permanent injuries, received in a motor accident. I thought the award excessive and dissented but that judgment was not disturbed.

True the plaintiff in the case at Bar will not be permanently disabled but as against that aspect the plaintiff Funk had been partially paralyzed since 1918. He could not, because of his condition perform manual labour. He had employment as a clerk in a warehouse earning $70 a month and that intermittently: he could sit down while performing these duties. Because

of that decision I would not reduce the damages in the case at Bar.

If nearly $20,000 should be awarded to an elderly man, partially disabled before the accident capable only of earning a small monthly sum for the remaining 8 or 10 years of his life, it cannot consistently be said that $15,000 is excessive in this case.

I may venture to express the view that more moderate amounts should be awarded.

I would dismiss the appeal.

O'HALLORAN, J.A.: I would reduce the damages from $15,000 to $10,000; the latter sum is, in my view, more appropriate to the circumstances disclosed in the evidence.

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

Solicitor for appellant: *V. Laursen.*
Solicitors for respondents: *Locke, Lane & Nicholson.*

DON INGRAM LIMITED v. GENERAL SECURITIES LIMITED.

Contract between automobile dealer and finance company—Loan of money—Damages for breach—Measure of damages.

Where a company engaged in the selling of automobiles brings action for damages for breach of contract, the defendant having agreed to finance the plaintiff's purchases of automobiles and carrying charges thereon, it was:—

Held, that the contract alleged had been proven, that the defendant had broken it and the plaintiff was entitled to substantial damages, and when it is found that the defendant company had full knowledge of the circumstances under which the contract was made, the loss by the plaintiff of its franchise granted it by the car manufacturer, and the consequent destruction of its business and its loss on the sale of its assets were natural and probable results which must have been within the contemplation of the defendant, the damages should be assessed accordingly.

Held, further, that there is a clear distinction between the breach of a contract to pay money due and the breach of a contract to lend money, and in the latter case the plaintiff is entitled to recover for the loss

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he has sustained through those consequences of the breach which the parties contemplated or ought to have contemplated would probably result therefrom.

Hadley v. *Baxendale* (1854), 9 Ex. 341, applied.

ACTION for damages for breach of contract made in the month of October, 1937, between the plaintiff and the defendant for financing the purchase of 26 automobiles and the carrying charges thereon from Windsor, Ontario, to the city of Vancouver. Tried by FISHER, J. at Vancouver on the 12th, 13th and 14th of April, 1939.

Locke, K.C., and *T. E. H. Ellis*, for plaintiff.
Bull, K.C., and *R. H. Tupper*, for defendant.

Cur. adv. vult.

19th April, 1939.

FISHER, J.: The plaintiff's claim against the defendant is for damages for breach of a contract alleged to have been made in or about the month of October, 1937, between the plaintiff and the defendant for financing the purchase of 26 automobiles and the carrying charges thereon from Windsor, Ont., to Vancouver, B.C.

It is or must be common ground that in or about the month of October, 1937, and for some four years prior thereto, the plaintiff was the retail distributor, and for part of that time had been also the wholesale distributor, for the Studebaker Corporation of Canada Limited, selling and distributing in the Province of British Columbia or in certain designated portions thereof automobiles manufactured by the said company, under what may be called franchise agreements with such company effective upon November 29th, 1933, and amended from time to time thereafter (see Exhibits 15 and 16). By an agreement made in or about the month of February, 1934, the defendant agreed with the plaintiff to furnish the necessary credit and to advance such money as should be required from time to time to finance exclusively the plaintiff's purchases of automobiles and to supply working capital for the plaintiff's business (see Exhibits 1 to 6) and pursuant to such agreement the defendant did during

the years 1934, 1935, 1936 and during part of the year 1937 furnish the plaintiff with credit and advanced such moneys as were necessary for the purposes aforesaid.

It is submitted by counsel on behalf of the defendant that there is no direct evidence of any contract such as is alleged by the plaintiff to have been made with the defendant to finance the purchase of the said 26 automobiles but at most only a conditional approval of their purchase. In this connection, however, reference might be made to the evidence of the witness Don Ingram, president of the plaintiff company, being in part as follows:

Well, now, then did you later on have a discussion with Mr. McDougall about purchasing some further cars? Yes.

When was that? That would be two days following Thanksgiving Day, whatever date that would be.

Don't you know the date? It would be the 14th or 15th. I am sure it was the second day.

The second day following Thanksgiving Day 1937? Yes.

Now, what was the discussion at that time? Give it in detail, please—the substance of it? I visited Mr. McDougall at his office and told him that I would like to bring in some cars by water, and showed him a list of the cars we had on hand and those on order already at the factory; and also at the bottom of the list it showed the cars I would like to order from the factory, and asked him what he thought of it and asked him if he would finance the cars for us. With that, we sat down and had a discussion on it, and he took his pencil and paper. . . . Well, when he figured that out and saw the saving I was going to make, he agreed to finance the cars for me, and he said, "Go ahead and bring them in," and he didn't stop there. He was most anxious that I should get busy in a hurry and get the cars ordered by boat, because I might miss the boat and these boats leaving on a certain date, they wouldn't wait on my order. And he asked me certain questions on that which I couldn't answer. Anyway, he instructed me to order the cars and I had to explain the arrangement that I had made with the Studebaker factory man the day before—— . . .

Who was Mr. Gaskin? The Studebaker man.

And was he the man to whom you had given the order on this condition? Yes. And Mr. McDougall said that was perfectly all right as long as I got the order in, and Mr. McDougall then told me I had better get busy as quick as I could and make absolutely sure of myself, as I could not afford to miss a saving of $1,600, and he said he was going back to the Studebaker factory and would be there in a few days' time, and would do all he could to make sure the shipment would get away, and was going to see Mr. Brooks and asked me if I had anything to tell him.

Who is Mr. Brooks? He is the president of the Studebaker Corporation in Walkerville, and he said he would visit Walkerville on his first stop going east. It would be his first stop. And with that we left—well, I left his office.

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Well, now, you say, Mr. Ingram, you had a list which you and Mr. McDougall discussed of the number of cars you had on order and the number of further cars at the bottom. Have you that document now? No. What did you do with it? I left it in Mr. McDougall's office.

. . . . .

Now Mr. Ingram you had just finished telling us what the arrangement was or what had occurred between yourself and Mr. McDougall two days after Thanksgiving in his office. You said you asked him to finance the shipment and he agreed to do so. Did he attach any conditions to the agreement? No conditions. We never had any conditions any time in financing cars.

Even in regard to this shipment you say he did not impose any conditions? No there was no conditions at all.

I accept this evidence of the witness Don Ingram and upon the whole of the evidence I am satisfied and find that the defendant agreed with the plaintiff unconditionally to finance the purchase of the 26 automobiles and that in the month of October, 1937, the plaintiff, relying upon the said agreement, entered into an agreement with the said Studebaker Corporation of Canada Limited to purchase the said automobiles and a further agreement with the Vancouver-St. Lawrence line to transport the same to Vancouver by water. In December, 1937, the said automobiles arrived at Vancouver and documents of title to the said automobiles with drafts attached were presented to the plaintiff for acceptance and payment. The defendant upon being requested thereupon to carry out the agreement as aforesaid and furnish the moneys required for such purpose and for the payment of the carrying charges refused to do so and as a matter of fact never did so. The plaintiff endeavoured unsuccessfully to arrange elsewhere for the necessary moneys whereupon the said Studebaker Corporation of Canada Limited terminated the said franchise agreements by letter dated January 10th, 1938 (Exhibit 21) and sold most of the said automobiles to third persons then appointed by the said corporation as agents for British Columbia in the place of the plaintiff and, as I find, the then existing business of the plaintiff was consequently destroyed and its assets had to be sold at a loss.

Upon the facts found by me as above set out I have no hesitation in holding that the defendant was guilty of a breach of contract and is liable to the plaintiff in damages. It is contended

however by counsel on behalf of the defendant that in any event the plaintiff can only recover nominal damages.

Reference is made to Mayne on Damages, 10th Ed., p. 10, reading as follows:

In contract the measure of damages is much more strictly confined than in tort. As a general rule, the primary and immediate result of the breach of contract can alone be regarded. Hence, in the case of non-payment of money, no matter what inconvenience the plaintiff has sustained by the plaintiff, the measure of damages is the money and interest thereon only (*per* Willes, J., *Fletcher* v. *Tayleur* (1855), 17 C.B. 29; 25 L.J.C.P. p. 66; *per* Bovill, C.J., *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. at p. 506; 37 L.J.C.P. at p. 240. See also *Duckworth* v. *Ewart* (1863), 2 H. & C. 129; 33 L.J. Ex. 24; *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Ex. 92; 39 L.J. Ex. 41; *In re English Bank of the River Plate. Ex parte Bank of Brazil,* [1893] 2 Ch. at p. 446; 62 L.J. Ch. 578, *per* Chitty, J.; and *Wallis* v. *Smith* (1882), 21 Ch. D. at p. 257; 52 L.J. Ch. 145, where Jessel, M.R., described the English law as not quite consistent with reason).

In *Wallis* v. *Smith, supra,* Jessel, M.R. said at p. 257:

It has always appeared to me that the doctrine of the English law as to non-payment of money—the general rule being that you cannot recover damages because it is not paid by a certain day, is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However that is our law. If however, it were not our law the absurdity would be apparent. I see no reason apart from our law why a man may not stipulate "You shall pay me £500 on a given day." It may be of almost vital importance to him. He may have to deposit it as security for the granting of concessions of enormous value, and the other party may know it. He may have to make a payment on a stamp for a most valuable patent, and the other party may know that he relies upon it. It is not unreasonable, as it appears to me, in those cases to say, "If you do not pay the £500, or it may be £50, on that date, you shall pay £5000 for the damage I shall sustain." There may be such cases, and many more cases besides those I have given as illustrations. However the decisions do go to that length. Many of them are old decisions, and one of them at least is the decision of the Court of Appeal; I think we are bound by them, and to that extent, therefore, they govern any case of the same kind.

It is submitted by counsel on behalf of the defendant relying on the cases noted in Mayne on Damages and other cases cited that the law is that upon breach of contract to lend money the same general rule or principle applies as upon breach of a contract to pay money due and that the measure of damages is such that only nominal damages can be recovered unless the case can be brought into the category of special cases such as *The Manchester and Oldham Bank Limited* v. *W. A. Cook and Co.*

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(1884), 49 L.T. 674, and *Larios* v. *Bonany y Gurety* (1873), L.R. 5 P.C. 346, in which cases substantial damages were given. I cannot agree with this submission. I think the authorities referred to by counsel on behalf of the plaintiff, especially those hereinafter mentioned, establish that there is a clear distinction drawn by the cases between breach of a contract to pay money due and breach of a contract to lend money and that the general rule or principle applicable in the latter case is that the loss sustained by reason of the breach may be recovered as damages which may be in some cases merely nominal and in other cases substantial. Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 121, sec. 153, reads as follows:

> Upon breach of a contract to pay money due, the amount recoverable is limited to the amount of the debt together with interest from the time when it became due, if interest is agreed to be paid or is otherwise recoverable by law. But upon breach of a contract to lend money, the additional expense incurred in obtaining the loan elsewhere is a natural result of the breach and may be recovered or such other substantial damage as was within the contemplation of the parties.

In *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Ex. 92; 39 L.J. Ex. 41, which was an action for damages on an agreement to accept and pay bills, Kelly, C.B. said at pp. 44-5 as follows:

> Undoubtedly the case is one which involves a question of great importance, because no authority has been produced bearing at all upon the question, unless indeed, we consider the cases of *Rolin* v. *Steward* [(1854)], 14 C.B. 595; 23 L.J.C.P. 148, and *Marzetti* v. *Williams* [(1830)], 1 B. & Ad. 415 to have proceeded upon an analogous principle. Under these circumstances we must decide the case according to the true principles of the law; and it can hardly be disputed that where an action is brought upon a special contract which the defendant has broken, the defendant is liable to pay, and the plaintiff is entitled to recover, whatever damages naturally and legally result from the breach of contract of which complaint is made. In determining what the damages resulting from the breach of contract are, I think we may adopt the principle of the case of *Hadley* v. *Baxendale* (1853), 9 Ex. 341; 23 L.J. Ex. 179, and consider what, at the time of making the contract, must have been, or probably was, within the contemplation of the parties. . . . Is it to be doubted that the defendants must have known, when they originally entered into the contract, what the necessary inevitable consequences must be to the plaintiff, if, after having accepted the bills, after being supplied with the funds by the plaintiff, they were unable to meet the acceptances. I think, therefore, upon the principle of *Hadley* v. *Baxendale*, [*supra*] this is a damage which is the necessarily resulting consequence of the state of things existing between the parties,

and therefore that the damages claimed naturally flow from the breach of contract.

In *South African Territories* v. *Wallington*, [1897] 1 Q.B. 692, at 695; 66 L.J.Q.B. 551, Lopes, L.J. said:

If the contract is to make a loan, that specific performance will not lie is too clear for argument. We must look at the agreement as a whole. Surely in its very nature it is a contract to lend money for a certain fixed period to the company, the payment to be made in the way specified.

On a contract to lend money, no action will lie for the money; an action will only lie for breach of the contract. The borrower may go into the market the next day after the breach, and get the money without incurring any loss, or he may not be able to get it without suffering a loss, in which case the measure of the damages is the loss he suffers. My brother Chitty puts the matter very clearly in *Western Wagon and Property Company* v. *West*, [1892] 1 Ch. 271, at p. 277: "It was contended for the plaintiffs that on a contract to make a loan the measure of damages for breach was the sum agreed to be lent, and that the damages were thus liquidated and ascertained. . . . On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. For instance, if A. agrees to lend B. £100 at interest for a week, and makes default, and B. within a few minutes after the time at which the £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest and for the same period of time, the damages would be merely nominal. Damages recovered are not recovered by way of loan; the plaintiff puts them in his pocket and keeps them."

I cannot understand how the learned judge in the Court below decided that the plaintiffs were entitled to judgment for 520*l.*, the amount of the instalments up to the time of action brought, that is, in reality, to specific performance. In my judgment the contract is a contract for a loan, and on the breach damages only are recoverable.

At pp. 696-7 Chitty, L.J. said:

The plaintiffs are entitled to recover damages for breach of the agreement to make the loan. The damages in such a case may be large or small, or merely nominal, according to the circumstances. The measure of the damages is the loss sustained by the borrower through the breach, the rule in *Hadley* v. *Baxendale* [*supra*] being applied when the circumstances justify its application. If the intended borrower, being a man of good credit, can readily obtain the loan from another person on the same terms, the damages would be nominal. If he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater and might be very substantial. The burden of proving the amount of the loss sustained rests on the plaintiff. In this case no such evidence was adduced. . . .

As there was no evidence of any special loss sustained by the plaintiffs, the damages must be reduced to a nominal sum.

The decision of the Court of Appeal in the *South African Territories* case, *supra*, was appealed to the House of Lords

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([1898] A.C. 309; 67 L.J.Q.B. 470) and the head-note in the case, as reported in [1898] A.C. 309, reads as follows:

The rule that specific performance cannot be granted in respect of a contract to lend money applies to a contract to lend to a company money, payable by instalments, upon the security of debentures to be issued by the company.

Where the lender makes default in payment, the moneys due for unpaid instalments do not constitute a debt to the company, and the company are only entitled to damages for the actual loss caused by the breach of contract.

The decision of the Court of Appeal, [1897] 1 Q.B. 692, affirmed.

As I have already intimated, I think that in a case of a contract to advance money, which the case now before me is, the rule in *Hadley* v. *Baxendale, supra,* applies and with respect to the effect of that rule I have to say that I adopt what was said by Haultain, C.J.S. in *Rivers* v. *George White & Sons Co. Ltd.,* 12 Sask. L.R. 366; [1919] 2 W.W.R. 189, at 191-2:

In several cases in addition to the case of *British Columbia Saw-Mill Co.* v. *Nettleship, supra,* of which *Horne* v. *Midland Railway Co.* [(1872)], L.R. 7 C.P. 583; 41 L.J.C.P. 264; [(1873)] L.R. 8 C.P. 131; 42 L.J.C.P. 59, may be mentioned, the decisions tended to hold that there must be something amounting to an express or implied undertaking on the part of the defendant to be liable for special consequences of his breach of contract. That theory is fully developed in the decision cited by the learned trial judge.

This theory has been rejected by later decisions, which established the principle that the defendant's liability is not created by agreement, or *quasi*-agreement, but is imposed by law.

"A person contemplates the performance and not the breach of his contract; he does not enter into a kind of second contract to pay damages, but he is liable to make good those injuries which he is aware that his default may occasion to the contractee. [*Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670; 27 W.R. 221, *per* Bramwell, L.J., at p. 674.]

See also judgments of Brett, L.J. and Cotton, L.J., in the same case.

It may be observed that this theory "of a kind of second contract to pay damages" has been mainly developed in actions against carriers, on the ground that a common carrier has no discretion to decline a contract.

In my opinion the rule in *Hadley* v. *Baxendale* [*supra*] applies to the present case. The effect of that rule and the law on the question involved is very clearly summed up by Mr. (now Sir) F. E. Smith [later the Earl of Birkenhead] in an article in Vol. 16 of the Law Quarterly Review, 275, at p. 286, as follows:

"The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. If they contemplated or ought to have contemplated, the consequences which have proximately followed, they are liable to pay damages accordingly.

"In determining what consequences the parties may be reasonably supposed to have contemplated, the knowledge of the circumstances under which

the contract was made must be, not merely an important, but the decisive consideration."

In the present case I find that at the time the contract was made as aforesaid in or about the month of October, 1937, the defendant had full knowledge of the circumstances under which the contract was made. The evidence conclusively proves that. The defendant kept in close touch with the plaintiff's business (see especially Exhibits 7, 8 and 9) and had actual knowledge of the probable consequences of the breach. In my opinion loss of profits on the automobiles and loss of the plaintiff's franchise with the consequent loss of its business and loss on realization of its assets were under the circumstances natural and probable results which must have been and were within the contemplation of the defendant. The defendant is therefore liable to pay damages to the plaintiff accordingly.

I come now therefore to assess the damages and before doing so I pause here to say that I have noted paragraph 25 of the said franchise agreements providing for termination without cause on ten days' notice and I have tried to keep in mind the many contingencies that might have affected the matter. I am satisfied however that substantial damages have been caused to the plaintiff by the defendant's breach of contract as aforesaid and that they can and should be assessed under the headings as hereinafter set out after making allowances, as I have tried to do, for contingencies to an extent reasonable in all the circumstances. After careful consideration of the evidence and the arguments of counsel I think a fair assessment of the damages is as follows: I estimate the damages arising from the loss of profits on the 26 automobiles as $2,000, the damages arising from the loss of the franchise and the consequent loss of the business at $5,000 and the damages arising from the loss on realization of the assets at $1,000. Judgment accordingly in favour of the plaintiff against the defendant for the total damages of $8,000 and costs.

Judgment for plaintiff.

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April 25, 27.

NORTHWEST TERMINALS *ET AL.* v. WESTMINSTER TRUST COMPANY *ET AL.* (No. 2).

Practice—Costs—Costs to both parties—Proportionate reduction—Application to costs under Column 4—Charge under Item 38 of Appendix N for appeal books—Whether disbursement.

An order as to costs provided that each of the parties shall be allowed a certain proportion of its costs.

Held, not to affect the application of the paragraph of Appendix N as to maximum costs.

Held, further, that the proviso in said paragraph applies to costs taxable under Column 4 of Appendix N.

The charge for appeal books provided for by Item 38 of Appendix N is a solicitor's charge and not a disbursement, and said item is distinguishable from Item 27 of Appendix N.

Worth v. *Weber* (1938), 53 B.C. 170, distinguished.

REVIEW of the taxation by the district registrar of the costs of the trial and appeal. Heard by ROBERTSON, J. in Chambers at Vancouver on the 25th of April, 1939.

McAlpine, K.C., for plaintiffs.
Griffin, K.C., for defendants.

Cur. adv. vult.

27th April, 1939.

ROBERTSON, J.: The plaintiffs' costs of the trial and appeal ((1938), 53 B.C. 463) are taxable under Column 1, the defendants' costs under Column 4 of Appendix N. Appendix N contains the following paragraph:

> In all actions, causes, proceedings, and appeals in which the items in Columns 1, 2 and 3 of the above Tariff apply, the maximum amount of costs taxable by any party against any other party, exclusive of disbursements, shall not exceed the sums hereinafter set out. Provided that where the costs, exclusive of disbursements, of any party have been reduced by reason of the application of the maximum allowances hereinafter set forth, any costs, exclusive of disbursements, which are to be deducted from or set off against the costs which have been so reduced shall be reduced in the same proportion.

The plaintiffs' costs of the trial and appeal exceeded in each case the maximum amounts and were reduced to the maximum amounts. The district registrar was asked to reduce the defend-

ants' taxed costs of the trial and appeal in accordance with the proviso above. He refused to do so. The plaintiffs now ask for a direction to him to allow the proportionate reduction.

Counsel for the defendants first of all relies upon the adjudication with regard to costs contained in the order of the Court of Appeal which provides that each of the parties shall be allowed a certain proportion of its costs. In my opinion this does not affect the paragraph, *supra*.

Next, it is submitted that the proviso does not apply to costs which are taxable under Column 4 but only to costs taxable under one of the first three columns. I cannot agree with this. The paragraph provides for a maximum amount of costs taxable by any party under one of the first three columns. If the defendants' contention were correct there would be no necessity for the proviso. There is nothing in the proviso to indicate that it shall not apply where the defendants' costs are being taxed under Column 4. I think the plaintiff is entitled to the order asked for with costs.

The defendants apply for a review of the decision of the registrar that the charge for the appeal books is a disbursement. Item 38 reads as follows:

> Preparation of Appeal-books (and copies) and factums (and copies) whether printed or typewritten, for each copy, per folio . . .

I have been referred to two cases. The first is *Stirling & Pitcairn Ltd.* v. *Kidston*, [1920] 2 W.W.R. 862. I think this case has no bearing as the tariff items which the learned Chief Justice of British Columbia (then MARTIN, J.A.) was considering were entirely different to item 38, *supra*. The other case is *Worth* v. *Weber* (1938), 53 B.C. 170, a decision of SLOAN, J.A. The tariff item considered by him read:

> 27. Cost of preparation of appeal books and factums and copies, whether printed or typewritten, not to exceed, per folio . . .

The learned judge based his opinion on the word "cost" which he held was used in the sense of an out-of-pocket expenditure. Appendix N, with which I am concerned, came into force on the 1st of November, 1938. The item bearing upon the question is as follows: [already set out above].

It will be at once seen there is a marked difference between Item 38 and Item 27 under consideration in *Worth* v. *Weber*,

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supra. In the first place the words "cost of" are left out in Item 38. Then under Item 27 the cost of preparation "not to exceed per folio" is taxable whereas under Item 38 a flat amount of five cents per folio is given for an appeal book whether printed or typewritten. In other words, under Item 27 the registrar might decide to allow only three cents per folio whether the appeal books had been printed or typewritten, while under Item 38 whether the appeal books are printed or typewritten and whether the books cost more or less than five cents per folio the solicitor is entitled to tax that amount. Under these circumstances it seems to me to be a solicitor's charge. Appendix N commences as follows:

> Tariff of costs between Party and Party in any Action, . . . and in any Appeal . . . , exclusive of Disbursements but inclusive of all Allowances to Counsel and Solicitors, . . .

It will be seen from this that the items set out in Appendix N are inclusive of allowances to counsel and solicitors and exclusive of disbursements. In my opinion this indicates that Item 38 is a solicitor's charge which he is entitled to whether the appeal books are printed or typewritten. I therefore think that the registrar was wrong in holding that the charge for appeal books is a disbursement and there will be an order accordingly with costs.

Order accordingly.

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May 5, 8, 16.

REX v. DALE.

Criminal law—Procuring an abortion—Charge—Misdirection—New trial—Criminal Code, Secs. 303 and 1014.

The accused was convicted upon an indictment under section 303 of the Criminal Code, charging that "with intent thereby to procure miscarriage, the accused did unlawfully use upon the person of Ann Tannassee a certain instrument, to wit, a syringe." The jury, while being instructed by the learned trial judge that the case had, upon the facts proved, turned out admittedly not to be one of using an instrument with intent to procure miscarriage, as charged, were then directed to decide it as one for unlawfully using "other means whatsoever with the like intent," though that offence was not charged.

Held, on appeal, that the jury did not return a verdict upon the charge as laid, and therefore there has been a trial upon a false issue and there must be a new trial.

APPEAL from the conviction by MORRISON, C.J.S.C. and the verdict of a jury at the Spring Assize at Vancouver on the 23rd of March, 1939, on the charge that at the city of Vancouver, between the 16th and 22nd of September, 1938, Hazel Dale, with intent thereby to procure the miscarriage of one Ann Tannassee, did unlawfully use upon the person of the said Ann Tannassee a certain instrument, to wit, a syringe. Ann Tannassee visited accused's home on three occasions and was treated on each occasion. On the third visit she fainted and she was then taken to the General Hospital. She was pregnant and on the following day she passed the fœtus and the afterbirth. Her convalescence was normal and she recovered.

The appeal was argued at Victoria on the 5th and 8th of May, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Ian Cameron, for appellant: The charge was that a syringe was used on the person of Ann Tannassee. There was no evidence whatever that a syringe was used at all. The learned judge said there was no evidence of an instrument being used, and then went off into the question as to whether she administered drugs to her, and it was on this that the jury evidently brought in their verdict, in face of the fact that there was no charge as to drugs. On the question of reasonable doubt see *Rex* v. *Schurman* (1914), 23 Can. C.C. 365, at p. 367; *Rex* v. *Slee*, [1926] 1 D.L.R. 729, at p. 730.

A. B. Macdonald, K.C., for the Crown: This was a charge under section 303 of the Criminal Code, and the learned judge in his charge dealt with the whole section as he is entitled to do. There was evidence upon which the jury would find her guilty in any case.

Cameron, in reply: Section 1014 of the Code does not apply to this case at all: see *Brooks* v. *Regem*, [1927] S.C.R. 633; [1928] 1 D.L.R. 268, at pp. 270-1.

Cur. adv. vult.

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On the 16th of May, 1939, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are all of the opinion that a new trial must be granted because there was grave misdirection, with all respect, to the jury upon this indictment under section 303 of the Code charging that

> with intent thereby to procure miscarriage the [appellant] did unlawfully use upon the person of Ann Tannassee a certain instrument, to wit, a syringe.

That was the indictment, with that one count only, but in some unfortunate way the jury while being instructed by the learned trial judge that the case had, upon the facts as proved, turned out admittedly not to be one of using an instrument with intent to procure a miscarriage, as charged, yet were directed to decide it as one for unlawfully using "other means whatsoever with the like intent," though that offence was not charged, and therefore was not before them to pass upon.

It seems to have escaped the attention of all concerned that there are three at least distinct prohibited means of "intent to procure miscarriage" under said section 303, and yet though the case was taken away from the jury on the specific intent alleged in the indictment, it was allowed to proceed at large upon the foreign issue as to whether or no either one or the other of the remaining means of committing that crime had been resorted to, though neither of them was charged in the indictment, and therefore it is quite as impossible, as it is irrelevant, for us to attempt to ascertain upon what "intent" the jury irrelevently acted. The only thing that is clear is that the jury did not return a verdict upon the charge as laid, and therefore there has been a trial upon a false issue and so there must be a new one. It is impossible moreover, under such circumstances, to apply the remedy otherwise afforded by section 1014, subsection 2.

New trial granted.

CORNISH v. REID AND CLUNES.

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April 24, 25, 27.

Negligence—Collision at intersection—Driver on right—Duty to keep proper look-out—Evidence at inquest—Administration Act, R.S.B.C. 1936, Cap. 5—Damages.

Although a motorist who is on the right of another car when approaching an intersection has the right of way, the obligation is nevertheless on him to use due care under the circumstances.

Held, that the driver on the right had not looked properly to his left before entering the intersection and that had he done so he must have seen the other car in time to have avoided the collision, and was therefore guilty of contributory negligence.

ACTION by the administratrix of the estate of John Moxin, deceased, who sues on behalf of the widow and children and also for damages under the Administration Act. John Moxin, deceased, was a gratuitous passenger on a motor-truck driven by one Kemp in an easterly direction on Thirteenth Avenue at about 7 o'clock in the evening of April 10th, 1938, and at the same time the defendant Clunes was driving an Oldsmobile sedan owned by the defendant Reid, and with the consent of Reid, in a northerly direction on McDonald Street toward the intersection of the two streets. The cars collided at the intersection and John Moxin was killed. Tried by McDONALD, J. at Vancouver on the 24th and 25th of April, 1939.

Nicholson, and *Yule,* for plaintiff.
Bull, K.C., and *Ray,* for defendants.

Cur. adv. vult.

27th April, 1939.

McDONALD, J.: On April 16th, 1938, just before 7 o'clock in the evening, one Kemp was driving a Ford truck in an easterly direction on Thirteenth Avenue while the defendant Clunes was driving an Oldsmobile sedan motor-car, owned by the defendant Reid, and with the consent of said Reid, in a northerly direction on McDonald Street toward the intersection of said two streets. At the intersection a collision took place, resulting in the death of one John Moxin, a gratuitous passenger in the

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truck. Moxin left him surviving, a widow, now 19 years of age, a son born March 2nd, 1935, and a posthumous son born July 1st, 1938. The plaintiff is administratrix of the estate of John Moxin, deceased, and sues on behalf of the widow and children and also for damages under the Administration Act, R.S.B.C. 1936, Cap. 5, which statute gives rise to a cause of action for damages for shortening Moxin's expectation of life.

At the time of the accident it was raining heavily, the streets were wet and though dusk was approaching the lights were not yet necessary. The visibility was bad and admittedly under all the circumstances unusual care and prudence were required from both drivers. Both drivers gave evidence at the trial, which evidence I do not accept. I am satisfied that each is reconstructing in his mind what he thinks must have happened rather than stating exactly what did happen. It is sufficient in this regard to say that an analysis of the evidence of each of them results in the conclusion that what they said is absurd and unbelievable. The defence also called the defendant Reid and the sister of the defendant Clunes who were riding in the rear seat of the Oldsmobile. I have had very little assistance from either of these witnesses in reaching a conclusion upon the vital issues in the case. Miss Clunes did not impress me as having a very clear recollection of what happened. So far as she is concerned I am satisfied she saw nothing until the accident was imminent and unavoidable and, inasmuch as she was knocked unconscious in the accident, her memory is not to be greatly relied upon.

I think the real facts may more safely be collected from the evidence given by the defendant Clunes himself (not at the trial after he had plenty of time to consider the effect of his evidence) but at the coroner's inquest a few days after the accident, after he had viewed the scene and had time to collect his thoughts, which evidence, in its main aspects at least, was fully verified by him in his examination for discovery several months later. If I am right in accepting this evidence then the fact is that as Clunes drove northerly on McDonald Street he was proceeding at a maximum speed of 25 miles per hour and had slowed down as he crossed Fifteenth and Fourteenth Avenues and as he was

about to cross Thirteenth Avenue. The first time he looked to his left was when he was about 30 feet from the southerly kerb of Thirteenth Avenue, at which time he was in the act of speeding up to cross the street. Even at that moment he failed to see the truck though it was clearly within his view. He then looked to his right when suddenly on his left he saw the truck in the intersection and only a few feet from him. It was too late then to avoid an accident. There is a house on the south-west corner of the intersection but this would not interfere, from a distance of some 60 feet south of Thirteenth Avenue, with a view of any object on Thirteenth Avenue for at least one-half block (*i.e.*, some 200 feet) west of McDonald Street. I am firmly convinced that Clunes never looked to his left until it was too late to avoid an accident. If he did look, he gave but a careless, casual and purposeless glance.

Under such circumstances was Clunes guilty of negligence which contributed to the accident? This is the only question with which we are concerned. In my opinion he was. Had he kept a proper look-out he must have seen the approaching truck in time to bring his car under control and so to avoid the accident. The fact that he was in charge of the vehicle approaching from the right and therefore had the right of way does not relieve him from the responsibility of using due care under the circumstances. In reaching this conclusion I am, I think, following the decisions of the Courts of Appeal in Ontario and Saskatchewan—*Carter et al.* v. *Wilson,* [1937] O.R. 499; *Heard* v. *John Erzinger Ltd.,* [1938] 1 W.W.R. 725—and a decision of my brother ROBERTSON in *Mann* v. *Strugnell and Johnston,* [1937] 1 W.W.R. 730, which authorities, I am satisfied, do not in any way trench upon the decision in the much discussed case of *Swartz* v. *Wills,* [1935] S.C.R. 628.

There will be judgment for the plaintiff against both defendants.

The question of damages gives one great concern. The special damages amount only to $22.50 and are not in dispute. After considering the matter from the various points of view which one would bring to the attention of a jury in such a case, I assess

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damages to each of the children at $2,250 and to the widow at $5,000 and to the administratrix, under the Administration Act, $3,000.

Judgment for plaintiff.

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May 2, 3, 4.

PATTERSON v. KEARNEY & COMPANY LIMITED.

Highways—Steps on city property giving access to building—Snow and ice on steps—Plaintiff falls on steps and is injured—Defendant monthly tenant in building—Liability.

The defendant was a monthly tenant of a building which was entered from steps that were constructed wholly on city property. The plaintiff, when leaving the building, fell and was injured when walking down the steps. There were snow and ice on the steps at the time of the accident. In an action against the tenant of the building for damages:—

Held, that as the defendant was not, in law, in occupation of the steps in question, there was no duty owing by the defendant to the plaintiff in respect thereof, and the action fails.

ACTION for damages for injuries sustained by the plaintiff resulting from a fall on steps giving access to a building in which the defendants are monthly tenants. Tried by MCDONALD, J. at Vancouver on the 2nd and 3rd of May, 1939.

Coady, for plaintiff.
H. I. Bird, for defendants.

Cur. adv. vult.

4th May, 1939.

MCDONALD, J.: In January, 1937, defendant company was a tenant from month to month of a building at the corner of Broadway and Willow Street in this city. On the easterly side of the building are two sets of steps giving access to the building and located entirely upon the property of the city of Vancouver. On January 23rd, 1937, plaintiff entered the premises by the more northerly set of steps and went out by the southerly steps. By reason of the dangerous condition of the steps, owing to snow and ice having been allowed to remain thereon, plaintiff fell and

injured the lower part of her spine. In case the matter should go farther and the plaintiff should be held entitled to succeed perhaps I should assess her damages. Her special damages are $175.50 and I think a fair assessment of her general damages would be $1,000.

On the evidence I think the plaintiff should succeed if the defendants owed any duty to the plaintiff in the premises. As intimated at the close of the hearing, however, I am bound to hold on the evidence that the plaintiff cannot succeed for the reason that the defendants were not, in law, in occupation of the steps in question and hence there was no duty owing by the defendant to the plaintiffs in respect thereof. The case falls fairly within the decision of the Court of Appeal for Ontario in *Reid* v. *Mimico,* [1927] 1 D.L.R. 235.

Action dismissed.

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Practice—Service out of jurisdiction—Contract—Ought to be performed within the jurisdiction—Order XI., r. 1 (e).

By Order XI., r. 1, service out of the jurisdiction of a writ of summons or notice of such writ may be allowed whenever:—"(*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction."

The plaintiff is a company incorporated and carrying on business in British Columbia. The defendant is an American citizen who resides in Seaside, State of Oregon, U.S.A., and is the registered holder of 125 shares in the Hollenbeck Dollar Logging Company Ltd., a company incorporated in British Columbia with head office in Vancouver, its issued capital being 200 shares.

On the 13th of July, 1938, the plaintiff obtained a 30-day option from the defendant to purchase all the shares of the Hollenbeck Dollar Logging Company Ltd. for $28,000, payable without interest at the rate of $1 per thousand feet on all logs sold from the operation of the company at Harrison Lake, B.C., subsequent to the execution of the option. All liabilities of the Hollenbeck Dollar Logging Company Ltd. with certain exceptions to be paid by the present shareholders and all logs in the water, cash on hand and accounts receivable to be taken by

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the present shareholders and Smith & Osberg Ltd. to pay for all felled and bucked and cold decked logs on the ground at inventory cost. On the 12th of August following the plaintiff telegraphed the defendant "We hereby accept the offer contained in your option letter to us of July thirteenth, letter following." Upon the defendant refusing to transfer the shares, the plaintiff obtained an *ex parte* order whereby liberty was given to issue a writ of summons for service out of the jurisdiction, and to serve notice thereof on the defendant. An application by the defendant to set aside the said order was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (MCQUARRIE, J.A. dissenting), that such contract was not one which "according to the terms thereof" ought to be performed within the jurisdiction, within the meaning of Order XI., r. 1 (*e*), and therefore leave to serve notice of the writ out of the jurisdiction in an action upon such contract against the defendant, who is an American citizen, could not be given.

APPEAL by defendant from the order of FISHER, J. of the 20th of January, 1939, dismissing an application of the defendant for an order that the order of the Chief Justice, of the 28th of December, 1938, herein, whereby liberty was given to the plaintiff to issue a writ of summons for service out of the jurisdiction and to serve a notice thereof on the defendant at Seaside or elsewhere in the State of Oregon, might be discharged and that the said writ and service of the notice thereof and all subsequent proceedings in the action might be set aside on the grounds that the action is not founded on any breach within the jurisdiction of a contract which according to the terms thereof ought to be performed within the jurisdiction, and that there is no jurisdiction for the making of said order, that the cause of action in respect of which the said action is brought is not one within the jurisdiction of this Honourable Court, and upon the ground that the material filed in support of the application for said order does not disclose a cause of action.

The appeal was argued at Vancouver on the 14th and 15th of March, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Maitland, K.C. (*Des Brisay*, with him), for appellant: The action was for specific performance of an agreement. The agreement was an option given by the defendant to the plaintiff for the purchase of all the shares of the Hollenbeck Dollar Logging Company Ltd. The option was for 30 days from the

13th of July, 1938, and the defendant's address, given by the defendant to the plaintiff, was Seaside, Oregon. That this order for service of the writ and notice thereof should not have been made see *The Hagen,* [1908] P. 189; *Comber* v. *Leyland,* [1898] A.C. 524, at p. 528; *Oppenheimer* v. *Sperling* (1899), 7 B.C. 96, at p. 97. The defendant is in the State of Oregon and is not a British subject. There must be a presentation of the document to the defendant: see *Orr* v. *Brown* (1932), 45 B.C. 323; *Tate* v. *Hennessey* (1900), 7 B.C. 262; *Castleman* v. *Waghorn, Gwynn & Co.* (1908), 41 S.C.R. 88, at p. 96; Palmer's Company Law, 16th Ed., 118; *Tangney* v. *Clarence Hotels Co.,* [1933] I.R. 51, at p. 59; *Stephens* v. *Medina* (1843), 4 Q.B. 422; Wegenast's Company Law, 1931, 546; *Boulton* v. *Hugel et al.* (1874), 35 U.C.Q.B. 402, at p. 407; *Cobbold* v. *Peto* (1872), 27 L.T. 130; *Bowlby* v. *Bell* (1846), 3 C.B. 284; *Birkett* v. *Cowper-Coles* (1919), 35 T.L.R. 298; *Johnson* v. *Taylor Bros. and Company, Ld.,* [1920] A.C. 144; *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, at p. 468.

McAlpine, K.C., for respondent: The shares were to be delivered in British Columbia. We do not need to tender a conveyance. To transfer shares in England the vendor must tender a transfer. *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453 is overruled and *Comber* v. *Leyland,* [1898] A.C. 524 is distinguished; and see *Rein* v. *Stein* (1892), 61 L.J.Q.B. 401; *Duval & Co.* v. *Gans & Pick* (1904), 73 L.J.K.B. 907; *Bell & Co.* v. *Antwerp, London, and Brazil Line* (1890), 60 L.J.Q.B. 270; *The Eider* (1893), 62 L.J. P. 65; *Thompson* v. *Palmer,* [1893] 2 Q.B. 80; *Van Hemelryck* v. *William Lyall Shipbuilding Co.* (1921), 90 L.J.P.C. 96.

Maitland, in reply, referred to *Royal Bank of Canada* v. *Skeans* (1916), 24 B.C. 190; *Slater* v. *Velie Motors Corporation* (1928), 40 B.C. 184; *Orr* v. *Brown* (1932), 45 B.C. 323; *Corporation of District of Coldstream* v. *Macdonald-Buchanan* (1934), 48 B.C. 409; *Martin* v. *Stout,* [1925] A.C. 359; *Skinner* v. *City of London Marine Insurance Corporation* (1885), 14 Q.B.D. 882.

Cur. adv. vult.

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MARTIN, C.J.B.C.: We are of opinion, our brother MCQUARRIE dissenting, that the appeal should be allowed. Speaking for myself, I am free to confess that at the end of the argument I was much impressed by the able presentation of the case by counsel on behalf of the respondent, but, on further consideration of the matter, and having had the advantage of the perusal of the judgment of my brother SLOAN (which, if I may say so, is a valuable contribution to the subject) I feel constrained to change my mind and agree with that judgment.

The other members of the Court are, I understand, handing down judgments.

MACDONALD, J.A.: We had the benefit of full argument on a question not free from difficulty, *viz.*, whether or not on the facts disclosed in the material service of a writ on an intended defendant in the State of Oregon ought to be permitted. The material facts together with the two documents forming the contract, in respect to which a breach is alleged, are stated in the reasons of my brother SLOAN. It will be observed that the contract is not for the transfer of shares *solus;* the intended defendant and present appellant had to perform other covenants.

While we were referred to many helpful cases the judgment of the House of Lords, particularly the reasons of Lord Birkenhead, L.C., in *Johnson* v. *Taylor Bros. and Company Ld.*, [1920] A.C. 144, gives a complete statement of the principles applicable. There Taylor Bros., intended plaintiffs, iron founders doing business in England, entered into an agreement with A. Johnson & Co., intended defendants, carrying on business in Stockholm, Sweden, the latter agreeing to supply the intended plaintiffs with Swedish pig-iron from the year 1908 to 1920 on a basis of 97*s.* 6*d.* per ton, to be delivered in England. If the cost of production and delivery showed a profit to the Stockholm Company exceeding a certain amount a rebate would be given to the intended plaintiffs adjusted in a manner not necessary to recite. The pig-iron was to be at the risk and for the account of the intended plaintiff from the time of its shipment. It was further provided that the pig-iron should be invoiced to the plaintiffs at 97*s.* 6*d.* a ton, c.i.f. Leeds, and 93*s.* 9*d.* c.i.f. Manchester Docks

and paid for on the basis of such invoices; acceptances at 90 days against shipping documents, etc. It will be observed that under this contract for "the sale of goods upon cost, insurance, freight, or more shortly c.i.f. terms" the intended defendants undertook (1) to ship goods according to contract delivering them in England; and (2) tendering

> to the purchaser within a reasonable time after shipment the shipping documents, *e.g.*, the bill or bills of lading and a policy of insurance reasonably covering the value of the goods.

As stated too certain adjustment had to be made in case profits to the intended defendants exceeded certain amounts.

As stated by Lord Birkenhead, L.C., at p. 149:

> . . . the tendering of the shipping documents ought in such a case to be made in this country.

It follows too that if the ore had been shipped failure to tender the shipping documents would constitute a breach of contract. The basic obligation of the shipper however was to ship goods from Stockholm of a certain description. That was "at least first in order chronologically" (p. 150). Clearly, if no other element entered into the question this would not be a contract which according to its terms ought to be performed in England.

It was submitted, however, that the non-delivery of the pig-iron in England constituted a breach of the contract and that occurred in England. It would appear to follow, that the intended plaintiffs could establish jurisdiction in England against the Stockholm firm by starting an action, not for breach of the obligation to ship but for breach of the undertaking to deliver, or to deliver the shipping documents. But as indicated at p. 150:

> . . . proceedings in respect, not of the fundamental breach, namely, of the undertaking to ship, but of the consequential breach of the undertaking, namely, to tender shipping documents within the jurisdiction

cannot be taken.

While the point was abandoned, *viz.*, that the contract to ship pig-iron was a contract which according to its terms ought to be performed in England, it was contended that the other obligation of the intended defendants

> of tendering shipping documents in the jurisdiction, [had] been broken, and that this contract at any rate is plainly one which according to its terms ought to be performed within the jurisdiction. . . .:

p. 151. This was submitted on the basis that it is enough if

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Macdonald, J.A.

some part of the contract had to be performed within the jurisdiction and a breach within the jurisdiction of that part occurred. The view stated by Lindley, L.J., in *Rein v. Stein,* [1892] 1 Q.B. 757, is cited by Lord Birkenhead; he said, however, that:

> I understand the Lord Justice, in making that observation, to have in mind a case where a contract involves distinguishable and independent obligations, some of which under its terms require implement without, and others within, the jurisdiction. In such a case that general policy of the law upon which I have already insisted would be abundantly satisfied by giving effect to the view indicated by Lindley, L.J.

The contract to ship and to tender documents are interdependent. And he goes on (p. 152):

> It is ludicrous to suppose that their substantial complaint lies in the withholding of paper symbols which could have no meaning, and which indeed could have no existence, when once the original breach had been committed.

And again on the same page:

> But "the part of the contract" which is to be performed within the jurisdiction must be a part which according to the tenour of its terms is susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract. The observation in my view does not apply and was not intended to apply to a case where that which was to be performed without the jurisdiction was of such a nature that its breach so destroyed the substratum of the whole contract that no performance was or could conceivably be possible of "the part of the contract" which, if matters had pursued a normal course, would have been performed in this country. It is, in other words, not permissible in such a case to found proceedings within the jurisdiction upon part of a contract which is ancillary to another part in this sense at least, that the breach of that other part necessarily involves its own destruction.

Service *ex juris* of a writ therefore should not be allowed if it is issued in respect to an action, based upon a contract with several terms some to be performed within and others without the jurisdiction unless "individual performance" of the former terms can be exacted independent of the fundamental term or terms to be performed outside the jurisdiction.

Lord Dunedin referred at p. 155 to a further statement by Lord Lindley in *Rein* v. *Stein,* [1892] 1 Q.B. at 753, *viz.,* that

> you must look at the whole circumstances to determine whether the contract was one that ought, according to the terms thereof, to be performed within the jurisdiction.

The same principle is stated in *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453. That is true, but it does not affect the principles laid down by Lord Birkenhead; it may be that, looking at all the

circumstances, a conclusion might be reached that certain covenants in the contract were

> susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract.

We must look for the substantial complaint. When the ore was not shipped the gist of the contract was broken. The failure to tender shipping documents would be a breach if the ore had been shipped but when it was not no shipping documents came into being at all and

> the breach of non-tender was, so to speak, swallowed up by the prior breach of non-shipment:

Lord Dunedin, p. 155. If the pig-iron had been shipped and the shipping documents were not tendered in England an action might be founded on that breach but that point was never reached. The important point as Lord Buckmaster said at p. 160, is to find "the real matter of dispute."

Turning to the case at Bar undoubtedly the real point in dispute—without it, or independently of it, all other terms have no significance—is alleged failure on the part of the intended defendant to transfer to the intended plaintiff all the shares in the Hollenbeck Dollar Logging Company Ltd. Any provisions whether found in an Act or in the contract requiring registration of shares in the books of the company do not, any more than failure to deliver documents, alter the fact that the fundamental breach is failure to make the transfer; subsequent steps are incidental and ancillary. The breach is the alleged refusal to transfer shares just as in *Johnson* v. *Taylor Bros. and Company, Ld., supra,* the breach was failure to ship the ore. It is true that the intended defendant only owned 125 shares. He contracted, however, to transfer all of them. It is his obligation to obtain title to the others in order to fulfil his contract and if he fails to do so a breach is committed. It is not material that the other shareholders reside in British Columbia. He undertook as a resident of the State of Oregon, to transfer all the shares in the company including those which, as an independent act of his own, he must procure. There is no doubt, therefore, that if we were concerned simply with the transfer of these shares *solus* he could satisfy his obligation by executing the transfer in the

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State of Washington. (*Oppenheimer* v. *Sperling* (1899), 7 B.C. 96, at 99).

The contract, however, outlined in the exchange of a letter and telegram already referred to has other terms. He agrees to transfer the shares for $28,000: this amount to be paid at the rate of $1 per thousand feet of all logs sold from logging operations carried on in this Province. He also agrees to discharge nearly all the liabilities of the Hollenbeck Dollar Logging Company Ltd. As the company was operating in this Province doubtless its liabilities were incurred here. A further covenant was that:

> Logs in the water, cash on hand, accounts receivable, etc., shall be taken by the present shareholders or paid for by Smith & Osberg Ltd. Smith & Osberg Ltd. also shall pay for all felled and bucked and cold decked logs on the ground at inventory cost.

It is not necessary or advisable to attempt a detailed interpretation of this contract; that will be a subject of discussion at the trial. It may be said, however, that the first clause, *viz.*, payment of $28,000 from logs sold presents no difficulty on the point under consideration. If he agreed to transfer the shares for cash the contract would be made in the State of Washington; it is immaterial that he is to be paid in other ways.

The second term was relied on by counsel for the respondent. As mentioned by my brother SLOAN during the argument the intended defendant contracted to transfer—for want of a better phrase—unencumbered shares. He can therefore, as Mr. *McAlpine* submitted, only discharge that obligation by coming into this Province to pay debts of the Hollenbeck Dollar Logging Company Ltd. carrying on business here. Similar considerations apply to the final covenants. The fact remains, however, that apart from the transfer of the shares (putting aside for the moment the feature that they were to be unencumbered) none of these covenants is

> susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract.

If the shares were transferred and it was later found that liabilities undertaken were not discharged, an action in respect thereto might be maintained in this Province. It would be impossible, however, to launch an action for failure to pay debts

without reference to the transfer of shares. All these covenants are incidental to and consequential upon the performance of the basic term of the contract, *viz.*, to transfer all the shares of the Hollenbeck Dollar Logging Company Ltd. It would be idle to say "we insist upon performance of these terms whether or not you transfer the shares."

On the remaining point that it is not a transfer of shares *solus* but of unencumbered shares, it is enough to say that this relates solely to the character so to speak of the shares to be transferred.

It follows that I would allow the appeal.

McQUARRIE, J.A.: I would dismiss the appeal for the reasons for judgment of FISHER, J., the learned judge who made the order appealed from.

SLOAN, J.A.: This is an appeal from the refusal of FISHER, J., to set aside an *ex parte* order of MORRISON, C.J.S.C., granting the plaintiff leave to issue a writ of summons for service out of the jurisdiction and to serve notice thereof on the defendant at the town of Seaside or elsewhere in the State of Oregon.

The plaintiff's action is for specific performance of a contract for the delivery by the defendant to the plaintiff of all the issued shares of the share capital of the Hollenbeck Dollar Logging Company Ltd.

The plaintiff is a company incorporated and carrying on business in this Province. The defendant is an American citizen who resides and has a business office in the town of Seaside in the State of Oregon. The Hollenbeck Dollar Logging Company Ltd. is a company incorporated in this Province, with its head office at the city of Vancouver, and carries on its business within British Columbia. Its issued share capital is 200 shares. The defendant is the registered holder of 125 thereof. The remaining issued shares are registered in the names of two other shareholders both resident in this Province.

This action is based upon the contract created by the plaintiff's acceptance of the following option:

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Sloan, J.A.

Smith & Osberg Limited
Bank of Nova Scotia Building
Vancouver, B.C.

July 13, 1938.

Smith & Osberg Ltd.,
602 W. Hastings St.,
Vancouver, B.C.

Dear Sirs:

I hereby give you an option for a period of thirty days from date to purchase all the shares of the Hollenbeck Dollar Logging Co. Ltd. for the sum of $28,000 payable without interest at the rate of $1.00 per thousand ft. on all logs sold from the operation of the company at Harrison Lake subsequent to the execution of this option. All liabilities of the Hollenbeck Dollar Logging Co. Ltd., except A. R. Williams account and the Lawrence Mfg. Co. account (amounting in all to approximately $15,000) at the date of execution of this option will be paid in full by the present shareholders. All logs in the water, cash on hand, accounts receivable, etc., shall be taken by the present shareholders or paid for by Smith & Osberg Ltd. Smith & Osberg Ltd. also shall pay for all felled and bucked and cold decked logs on the ground at inventory cost. This option is given in consideration of your examining the property.

Yours truly,
W. B. Hollenbeck.

This option was accepted (according to the plaintiff) by a telegram addressed to the defendant at Seaside in Oregon and reading as follows:

To W. B. Hollenbeck,
Seaside, Oregon.

We hereby accept the offer contained in your option letter to us of July thirteenth stop letter following.

Smith & Osberg Ltd.
Per C. C. Smith.

The plaintiff alleges that the defendant after receipt of this acceptance, although requested so to do, has refused to transfer the shares in question to the plaintiff.

The relevant rule for consideration is Order XI., r. 1 (*e*) (M.R. 64) and reads as follows:

1. Service of out the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever:—

(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract whenever made, which, according to the terms thereof, ought to be performed within the jurisdiction.

The narrow question is whether the contract sued upon is one which "ought to be performed within the jurisdiction." In the absence of authority "ought" might import considerations of

the widest kind but this rule is of a considerable age and happily this word "ought" in it has not escaped comment.

The Earl of Halsbury, L.C. in *Comber* v. *Leyland,* [1898] A.C. 524, at 528-9, said:

> In order to justify the exercise of this limited and exceptional power of issuing process to be served in a foreign country, you must show that the performance of the contract must (although the word "ought" is used in the rule, that is what I understand it to mean) under the obligation of the contract itself be in this country.

In *Mutzenbecher* v. *La Aseguradora Espanola,* [1906] 1 K.B. 254, at 260, Collins, M.R. said:

> It is said . . . that it must be shewn that the contract on the part of the person who issued must be one to be performed within the jurisdiction. Applying that test to this case, is this a contract that so far as the defendants are concerned can be described as one that ought to be performed in England?

I see no reason why I should not adopt, as proper, the test suggested to Collins, M.R., by the language of the Earl of Halsbury.

Applying then that test to this case I am satisfied that in so far as the sale of the shares is concerned, the defendant's only contractual obligation is to execute and deliver proper forms of transfer together with the requisite share certificates. He is not obligated to effect registration—*Castleman* v. *Waghorn Gwynn & Co.* (1908), 41 S.C.R. 88; *Skinner* v. *City of London Marine Insurance Corporation* (1885), 14 Q.B.D. 882; *Oppenheimer* v. *Sperling* (1899), 7 B.C. 96, at 99; *Tangney* v. *Clarence Hotels Co.*, [1933] I.R. 51, at 59—nor for that matter to prepare the transfer forms. It is the duty of the transferee to prepare the necessary forms and to present them to the transferor for signature. *Birkett* v. *Cowper-Coles* (1919), 35 T.L.R. 298.

It is clear to me that the said obligation of the defendant is not one which must be performed within the jurisdiction. The transfer forms could be executed and delivered (together with the share certificates) in the United States with as equal efficacy as in this Province and it is settled that where the contract may be fulfilled either within or without the jurisdiction the rule in question has no application—*Bell & Co.* v. *Antwerp, London and Brazil Line,* [1891] 1 Q.B. 103; *The Eider,* [1893] P. 119.

Counsel for the appellant sought to maintain the said order of

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MORRISON, C.J.S.C., by submitting that in any event part of the contract had to be performed within the jurisdiction. He contended that as the articles of association of the Hollenbeck Dollar Logging Company Ltd. contained a right of pre-emption it was necessary for the defendant to fulfil, within the Province, the conditions imposed upon him by such restrictive articles. The plaintiff's material, however, sets out that the defendant "warranted" to plaintiff "that he had the right and power to deliver . . . all the issued shares of the Hollenbeck Dollar Logging Company Ltd."

In my opinion it is implicit in this statement of the defendant that he had complied with the restrictive articles of the said company and had fulfilled all conditions precedent to his right to complete the transfer of the shares before granting the option to the plaintiff. The plaintiff does not dispute the right of the defendant to make an effective transfer of the shares in question and it seems to me that whatever the defendant was called upon to do in order to make such transfer is of no moment in the determination of the issue before us.

Counsel for the appellant also submitted that the defendant by agreeing, in the contract, to pay the company's debts had, of necessity, to seek out the company's creditors in this Province and in consequence that obligation of the defendant was to be performed within this jurisdiction. That submission is, I consider, met by the principles enunciated in *Johnson* v. *Taylor Bros. and Company, Ld.*, [1920] A.C. 144, at 151. My brother MACDONALD has made an analysis of this decision and I am in agreement with the conclusion reached by him in connection therewith.

That leaves for consideration *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, wherein it was held, on the facts of that case, that a transfer of shares in an English company by an American resident in the United States was a contract which according to its terms ought to be performed in England. I cannot read the present contract in that light. I may add that the decision of IRVING, J., in *Oppenheimer* v. *Sperling, supra* (so far as I am aware), has stood unchallenged in this Province for over 40 years. In that case plaintiff resident in this Province sued

defendants resident in England for damages for breach of a contract for transfer of shares of a British Columbia company. IRVING, J. set aside the writ and after reviewing the authorities said at p. 99:

> The plaintiffs seek to enforce a contract to transfer shares in a British Columbia company. The defendant would satisfy their demand by executing the deed in England, or anywhere else. There is nothing to be performed under the contract in British Columbia . . . in respect of the transfer of the shares. . . .

In my view this decision is in harmony with the general trend of authority.

I would therefore, with respect, allow the appeal.

O'HALLORAN, J.A.: I concur in the judgments of my learned brothers MACDONALD and SLOAN. I would allow the appeal.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Bourne & Des Brisay.*

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

HOBBS v. DAVID SPENCER LIMITED.

Highways—Sidewalk in city—Driveway constructed by abutting owner across sidewalk—Snow and ice on driveway—Liability of owner.

Under an agreement with the city of Vancouver the defendant company constructed a driveway across the sidewalk that adjoined one side of its building. On a morning in February, the plaintiff, while walking on the sidewalk which was icy and had a light coat of snow on it, fell as he stepped on the driveway and was injured. The defendant was obliged under said agreement to maintain the driveway but there was no evidence of any defect in it or want of repair. A city by-law as to the cleaning of snow and ice from the sidewalks, although referred to, was not put in evidence, and there was no evidence to show that the defendant had not swept off the sidewalk that morning before the accident.

Held, that an abutting owner or occupant who has not assumed the duty of removing snow and ice from the sidewalk in front of his building or has not been guilty of a breach of a by-law respecting its removal, is

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not liable for injuries to pedestrians resulting from a natural fall of snow or ice on to the sidewalk. The defendant was not the owner or occupier of the driveway, he merely had the right of ingress and egress over it, and he owed no duty to pedestrians in respect to it. Furthermore the plaintiff did not exercise care appropriate to the prevailing conditions. The action therefore fails.

ACTION for damages resulting from the plaintiff falling on the driveway of the defendant crossing the sidewalk on the west side of Richards Street, between Hastings and Cordova Streets. There was a light coat of snow on the ground at the time the plaintiff fell, and the driveway was in a slippery condition. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 12th and 27th of June, 1939.

Paul Murphy, for plaintiff.
Bull, K.C., for defendant.

Cur. adv. vult.

28th June, 1939.

MANSON, J.: This action arises out of an accident which befell the plaintiff as he and his wife were walking north on the sidewalk at the west side of Richards Street between Hastings Street and Cordova Street, in the city of Vancouver, B.C., about 9.10 o'clock in the forenoon of February 9th, 1939. The defendant owns and operates a departmental store bounded on the south by Hastings Street, on the east by Richards Street and on the north by Cordova Street in the said city. The store abuts the sidewalk on the west side of Richards Street. Some time antecedent to the date of the accident the defendant, under an agreement with the city of Vancouver, and doubtless in conformity with its specifications, constructed a driveway across the sidewalk on the west side of Richards Street to give vehicle ingress and egress to its store (*vide* Exhibit 1). The driveway is 32 feet 2 inches wide at the kerb and slightly less than 25 feet wide at the entrance to the store. The driveway is of concrete construction as is the sidewalk which is some 12 feet 6 inches wide. The sidewalk from Hastings Street to Cordova Street is on a rather steep grade. At the point in question the average grade is 8.2 per cent. downwards towards the north. The driveway from the store entrance to the kerb slopes downwards to the kerb

with a grade of 5.8 per cent. The driveway rounds up to the sidewalk from the point .16 to the point "X" as shown on Exhibit 1 on a grade of 15 per cent. It was not alleged in the pleadings that there was any defect in the construction of the driveway, nor that there were any pockets or depressions therein where water might accumulate and form ice. There are hundreds of these driveways across sidewalks in the city of Vancouver and it did not appear from the evidence that this one differs from the ordinary driveway which the city permits to be constructed. The grade was such as to drain off the water to the street. According to the meteorological observer of the Dominion Government there was one-quarter of an inch of snow on February 7th and it had partially melted. There was none on the 8th, and the temperature on that day was 32.6 degrees Fahrenheit at its highest. On the night of the 8th-9th there were about 12 degrees of frost and on the morning of the 9th there was a light snowfall—small dry flakes. There had been a trace of snow on the night of the 8th-9th. On the morning of the 9th the snowfall commenced at 7 o'clock. At 8 a.m. one-tenth inch had fallen. Pedestrians tramped down the snow as it fell. The streets and sidewalks, according to the observer, were icy and slippery, and a great number of accidents resulted. The plaintiff said that as he and his wife walked along Richards Street there was but the barest film of snow on top of the icy sidewalk. They saw a truck enter the defendant's store over the driveway as they came along. The tires of the truck were throwing small pieces of snow and ice as the truck went up the driveway. There was a suggestion, but no evidence, that these small pieces of snow and ice contributed in some way to the accident. As the plaintiff stepped on the driveway (his wife says, "as he was about to step on the driveway") his feet shot forward from under him and he fell and sustained physical injuries which incapacitated him for some time. The plaintiff testified that he fell at the point marked "A" on Exhibit 2. He says that he was looking forward and not down at his feet. The probability is that he doesn't know exactly at what point he fell, and he certainly would have been wiser to have been watching his steps rather than looking straight ahead. Certainly he ought to have been exercising great caution.

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As pointed out above, there was no allegation of a specific defect in the construction of the driveway. No evidence was adduced to indicate any post construction defects. However, counsel for the plaintiff contended that, even though there was no structural defect, as generally understood, nevertheless the sharp grade at the south-east corner, that is, at the kerb, amounted to a structural defect in that, when ice and snow were superimposed, something in the way of a trap for pedestrians passing northward across the driveway was created. I cannot accept that contention. But in any event it cannot be said that the defendant was the owner or occupier of the driveway. It had no more than a right of ingress and egress over it. The driveway remained part of the sidewalk and the property of the city. The defendant owes no duty to pedestrians in respect of the driveway. *Vide Reid* v. *Town of Mimico* (1926), 59 O.L.R. 579; [1927] 1 D.L.R. 235, followed by my brother MCDONALD in *Patterson* v. *Kearney & Co. Ltd.* (1939), [*ante*, p. 140].

It was admitted by counsel for the defendant that under its agreement with the city it was obliged to maintain the driveway. I assume that the maintenance referred to was structural maintenance. No evidence was led as to the exact obligation of the defendant in that connection. Reference was made by counsel on both sides to a city by-law with regard to cleaning snow and ice off sidewalks by owners and occupiers and it was said that the by-law provided a penalty for failure to clean away snow and ice prior to 10 o'clock in the forenoon. The by-law was not put in evidence. The evidence does not establish that the defendant did not sweep off the sidewalk on the morning of the accident. The plaintiff, upon discovery, upon being asked as to whether or not the Richards Street sidewalk had been swept that morning replied: "Well, no doubt it had been" and in response to his own counsel he said in the same connection, "It had as far as I know." The foreman of the defendant, upon discovery, said that the sidewalks about the defendant's building were swept every morning except on Sundays. I understood him to mean that the sweeping took place without regard to the presence of snow or ice. The foreman further said that he knew that the sweeper was in the store on the morning of February 9th and

that he went out at 6.30 a.m. He presumed that he went out to perform his accustomed task which ordinarily occupied his time for an hour or an hour and a quarter.

An abutting owner or occupant is not liable at common law for injuries resulting from snow or ice coming upon the sidewalk through natural causes; nor is he bound to guard against the risk of accident by sprinkling ashes or sand. Counsel for the plaintiff referred to *Stewart* v. *Standard Pub. Co.* (1936), 55 P.(2d) 694. There the Court of Appeal of the State of Montana held that an abutting owner who constructed a sidewalk and assumed the duty of maintaining the same and of removing accumulations of snow and ice therefrom was liable for injuries to a person who slipped and fell on an accumulation of ice and snow on the sidewalk. That is obviously not this case. The evidence does not warrant the conclusion that this defendant assumed the duty of removing snow and ice from the sidewalks adjacent to its building, nor does it appear that the defendant was guilty of a breach of the city by-law, and it becomes unnecessary, therefore, to express an opinion as to whether, had the defendant been guilty of a breach of the by-law, it would have been liable.

Assuming the facts to be as I have found them above, *Proctor* v. *Harris* (1830), 4 Car. & P. 337; 172 E.R. 729; *McMichael* v. *Town of Goderich* (1928), 62 O.L.R. 547, and *Smith* v. *City of Winnipeg,* [1939] 1 W.W.R. 260, cited by counsel for the plaintiff, do not assist. In the first-mentioned case the defendant was held liable by a jury upon Tindal, C.J.'s statement of the law that the defendant who had an opening in the sidewalk adjacent to his premises for use in lowering casks of beer to his basement "was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury." In the *McMichael* case the law was similarly stated by Riddell, J.A. In *Smith* v. *City of Winnipeg,* Taylor, J. held that the city had constructed a sidewalk with a dangerous slant, and having done so had not taken special care to protect users of it in icy weather and was, therefore, liable. I cannot find that the defendant here constructed the driveway with a dangerous slant. The simple and regrettable

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fact is that the plaintiff, while exercising some care, did not, in my view, exercise care appropriate to the prevailing conditions.

While the action must be dismissed and, if the defendant so asks, with costs, I shall assess the damages which I would allow had I taken another view.

Damages: I would assess the special damages at $251 as claimed. The plaintiff sustained quite serious injuries, that is, rather more serious injuries than one would have expected. He has not yet completely recovered although he has been able to be about since about the end of March. His present incapacity is not great and the doctor's evidence does not indicate any permanent disability. I would assess the general damages at $500.

Action dismissed.

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Oct. 12;
Dec. 6.

THE KING *EX REL.* THE MINISTER OF JUSTICE AND THE MINISTER OF MINES AND RESOURCES v. CHIN SHUK.

Criminal law—Conviction for distributing opium—Order for deportation—No notice of right to appeal to the minister—Habeas corpus—Release of accused—Appeal—R.S.C. 1927, Cap. 93, Secs. 23 and 78.

The accused was convicted on a charge of distributing opium. Pursuant to complaint that accused was subject to deportation the Deputy Minister of Immigration ordered that he be taken into custody for examination by a Board of Inquiry. Accused's sentence expired on April 9th, 1938, and an immigration officer duly appointed and pursuant to the order of said Deputy Minister, examined the accused on the 11th of April, 1938, and ordered that he be deported. On *habeas corpus* proceedings accused complained that the order for deportation contained no notice that he had a right to appeal to the Minister of Mines and Resources, and he was released.

Held, on appeal, reversing the order of MANSON, J., that the absence of the notice at the end of Form C in the Immigration Act is not an essential part of it and not, therefore, strictly speaking, necessary. The omission should not be regarded as more than an irregularity which does not go to the extent of invalidating the order itself. The Board had jurisdiction over the subject-matter, and nothing occurred therein which can be construed as being a violation of natural justice. The submission of the Crown that there was no jurisdiction in the Court below to frustrate the Board's action, in view of the provisions of sections 23 and 78 of the Act, should prevail.

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APPEAL by the Crown from the order of MANSON, J. of the 13th of May, 1938, refusing an application for a writ of *certiorari* for the production of the record of proceedings before H. Crump, an immigration officer exercising the powers of a Board of Inquiry, and for an order that Chin Shuk be rearrested and delivered to the District Superintendent of Immigration at Vancouver with a view to deportation in accordance with the warrant of the Commissioner of Immigration of the 16th of April, 1938. On the 16th of September, 1935, Chin Shuk was convicted of distributing opium and sentenced to two years' imprisonment and fined $1,000, or in default of payment to an additional twelve months' imprisonment. His sentence expired on April 9th, 1938. On October 4th, 1935, one A. J. Williams, an immigration officer, made a complaint to the Minister of Immigration that Chin Shuk was subject to deportation. The Deputy Minister of Immigration and Colonization then ordered that Chin Shuk be taken into custody and detained at an immigration station for examination and investigation of said complaint, the examination to be made by a Board of Inquiry or an officer acting as such. Pursuant to said order H. Crump, an immigration officer, made an examination and investigation, and did order that Chin Shuk be deported to China under section 42 (3) of the Immigration Act.

The appeal was argued at Victoria on the 12th of October, 1938, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

Donaghy, K.C., for the Crown: Accused was convicted for an offence under The Opium and Narcotic Drug Act, 1929, and was ordered to be deported. He was discharged by MANSON, J. on *habeas corpus*. The case of *Rex* v. *Low Kee* (1937), 52 B.C. 151, is just this case. The only difference is the failure to back the deportation order with notice of the right to appeal to the minister, but he said he did not want to appeal. He lost his Canadian domicil when convicted. He falls under the undesirable class.

A. De B. McPhillips, for respondent: Deportation proceedings must be strictly carried out under the Immigration Act.

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An appeal to the minister is as solemn as any other part of the proceedings, and the right to do so should follow the order for deportation. It cannot be ignored: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 305. Crump had no jurisdiction to act as a board of inquiry. The order is a nullity: see *Rex* v. *Sue Sun Poy* (1932), 46 B.C. 321.

Donaghy, replied.

Cur. adv. vult.

On the 6th of December, 1938, the judgment of the Court was delivered by

MARTIN, C.J.B.C.: We are of opinion that this appeal should be allowed. Putting the matter briefly, and leaving it open, if we think it necessary to do so, to amplify the judgment we are at present delivering, we take the view that the absence of the notice at the end of Form C is not an essential part of it and not, therefore, strictly speaking, necessary. We do not regard the omission as more than an irregularity which does not go to the extent of invalidating the order itself. To that we add that we have no doubt the Board had jurisdiction over the subject-matter, and it clearly appears nothing occurred in its exercise which can be construed as being a violation of natural justice, and therefore the submission of the Crown that there was no jurisdiction in the Court below to frustrate the Board's action, in view of the provisions of section 23 and section 78 of the Act should prevail, and hence the order for *habeas corpus* was improvidently issued.

Our judgment, therefore, is that the said order appealed from be set aside and the above named respondent be rearrested and delivered to the District Superintendent of Immigration at Vancouver for deportation in accordance with the warrant herein.

Our brother MACDONALD is not with us this morning, but authorizes us to say that he concurs with our view.

Appeal allowed.

Solicitor for appellants: *D. Donaghy.*
Solicitors for respondent: *McPhillips & McPhillips.*

WILKINSON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

C. A.
1939
March 31;
June 30.

Negligence—Sudden stop of street-car in middle of block followed by sudden start again—Passenger on her feet falls and is injured—Damages—Pleadings—Amendment to conform with evidence.

The plaintiff, a passenger on a street-car, was on her way to the rear exit to alight at the next corner, when the car, being then at about the middle of the block, suddenly stopped, then immediately started forward again with a jerk. The plaintiff was thrown down and sustained injuries. The only allegation of negligence in the statement of claim was that "The street-car was unexpectedly stopped with a violent jerk, or alternatively, the speed of the street-car was suddenly and unexpectedly checked or reduced with a violent jerk." The evidence disclosed that the car stopped or nearly stopped and then started up again with a jolt and due to this jolt the plaintiff pitched forward and fell. It was so found on the trial and judgment was given for the plaintiff.

Held, on appeal, affirming the decision of MANSON, J., that an amendment should be allowed so as to make the pleadings conform to the evidence, and the appeal should be dismissed.

APPEAL by defendant from the decision of MANSON, J. of the 13th of December, 1938, in an action for damages for injuries sustained owing to the negligence of the servants of the defendant company. On the afternoon of the 30th of January, 1936, the plaintiff was a passenger for hire on the defendant's street-car, proceeding westerly on Fourth Avenue. The motorman was signalled to stop at Vine Street, and the plaintiff got up to go to the rear of the car for the purpose of getting off when the car suddenly stopped or nearly stopped in the middle of the block and then started up again with a violent jerk, and she was thrown off her feet and against one of the seats and then to the floor, injuring her left knee, left arm and left shoulder. The plaintiff recovered $725 special damages and $2,500 general damages.

The appeal was argued at Vancouver on the 31st of March, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

J. W. deB. Farris, K.C., for appellant: There were three people standing up when the car stopped and she was the only

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one to fall. It was equally consistent with something that was not negligence: see *Wing* v. *London General Omnibus Company*, [1909] 2 K.B. 652, at pp. 662-3; Beven on Negligence, 4th Ed., 127.

Donaghy, K.C., for respondent: We base our case on what was said by the trial judge: see *Vivian* v. *B.C. Electric Ry. Co.* (1930), 42 B.C. 423, at p. 432. They must show why they had to stop in the middle between the two streets: see *Angus* v. *London, Tilbury, and Southend Railway Company* (1906), 22 T.L.R. 222. The rule of *"res ipsa loquitur"* does not apply. There was no obstruction on the street according to the evidence. As to knowledge being particularly in the head of one person see *Flannery* v. *W. & L. Rail. Co.* (1877), 11 Ir. R. 11 C.L. 30, at p. 39.

Farris, in reply: The car was all right but it does not stop in the middle of the block unless there is some sudden obstruction: see *Ballard* v. *North British Railway Co.*, [1923] S.C. (H.L.) 43, at p. 48.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: We have come to the conclusion the amendment should be allowed so as to make the pleadings conform to the evidence; not, I may say, without, on my part, some hesitation (because I think that without such amendment the judgment cannot be supported), but there is no doubt the Court has that power as was decided long ago in the first case of the kind in this Province in *Foley* v. *Webster et al.* (1892), 2 B.C. 137; 21 S.C.R. 580, and that view was also taken by the Full Court, the Court of Appeal of that day, in *Jackson* v. *Mylius* (1894), 3 B.C. 149, at 153; 23 S.C.R. 485; and later in this Court the same course was adopted in *Bligh* v. *Gallagher* (1921), 29 B.C. 241.

As a result of that amendment, however, the costs occasioned thereby will be a matter to be spoken to because it may affect the disposition of them out of the ordinary, as the case in some respects, which the appellant's counsel considered vital, was

changed, and he submitted it was not, as the pleadings then stood, sustainable.

It follows that the appeal should be dismissed.

MACDONALD, J.A.: Appeal from the judgment of MANSON, J., awarding respondent damages for injuries received whilst a passenger on one of appellant's street-cars moving along Fourth Avenue in the city of Vancouver. On her way to the rear exit to alight at Vine Street (but before reaching that point) the car suddenly stopped and, as shown by the evidence and findings of the trial judge, started forward again with a jerk, one or other of such movements throwing the respondent down and causing the injuries referred to.

The only allegation of negligence in the statement of claim is that:

> The street-car was unexpectedly stopped with a violent jerk, or alternatively, the speed of the street-car was suddenly and unexpectedly checked or reduced with a violent jerk.

It was submitted therefore by counsel for appellant that, by the pleadings, if not by the evidence, we must assume that the accident occurred because the car stopped suddenly and draw the inference, that it did so because of some obstruction on the track. Neither the conductor nor the motorman had any recollection of the occurrence. The incident itself is therefore the only evidence. If the inference must be that an obstruction caused the motorman to stop suddenly and because of this emergency the accident occurred it was submitted an action based thereon would not lie.

I would not dispose of this appeal on that basis. If the respondent was injured, not when the car stopped, but when it started again with a jerk, the explanation of an obstruction on the track disappears. Her evidence supports that view and there is a finding to that effect, as least in alternative form, by the learned trial judge. He said:

> The car came to either an abrupt stop or almost a stop and started immediately again.

Mrs. Douglas, a passenger on the car and a witness for respondent said that she left her seat after it stopped in the middle of the block and moved "towards the back of the car."

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Macdonald, J.A.

The respondent was directly in front of her. Then while both were moving toward the exit "the car started up again with a sudden jolt." And again "it stopped suddenly and then it started up with a jolt again, a distinct severe jolt," also "when the car gave the jolt" (just referred to) the respondent "pitched forward and fell towards the left side—she pitched forward." As respondent was facing the back of the car falling in that direction could only be attributable to a sudden movement forward of the car. Asked again if it was the stop that threw her this witness said "no—it was the start."

The finding referred to was made in an oral judgment at the close of the trial. The point was not taken that by the pleadings it was alleged that the injuries were caused solely by the street-car unexpectedly stopping with a violent jerk. An amendment of the pleadings should have been sought to conform with the evidence. I am satisfied that if an amendment had been made and an adjournment granted for further examination for discovery of the injured respondent her evidence would remain unchanged. The evidence of Mrs. Douglas too would not be affected.

I would permit an amendment and support the judgment on the basis that there is evidence to justify the conclusion that the accident occurred in the manner indicated. As intimated too the direction of the fall (forward) could not be accounted for on the basis that it was caused by the car suddenly stopping.

I would dismiss the appeal.

O'HALLORAN, J.A.: I am of the view, with respect, that Mr. Justice MANSON reached the correct conclusion. I concur moreover in directing the pleadings to be amended so as to conform to the facts established in the evidence.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *R. P. Stockton.*

REX v. NOWELL.

C. A.
1938
June 24;
July 20.

Criminal law—Evidence—Accomplice—Corroboration—Warning to jury—Misdirection—No substantial wrong.

The rule requiring warning as to the evidence of an accomplice applies equally whether such evidence be or be not corroborated. It is proper for the trial judge to advise a jury not to convict on the unconfirmed testimony of an accomplice, but such advice should be coupled with the instruction that while there is danger in basing a conviction on such uncorroborated testimony, it is within their legal province to do so. It is improper to direct a jury that it is their duty to convict if they believe the evidence of an accomplice, when such evidence stands alone and is uncorroborated. Every charge must be read as a whole and the specific direction complained of scanned as an integral part thereof.

Misdirection is no ground for reversal of conviction where the jury properly directed would have reached the same conclusion, no substantial wrong or miscarriage being involved.

APPEAL from the conviction by McDONALD, J. and the verdict of a jury at the Westminster Spring Assizes at New Westminster, on the 13th of May, 1938, on a charge of breaking and entering the store of one Robert M. McDonald at Atchelitz, B.C., and stealing goods of the value of $62.11, the property of the said McDonald. On the evening of November 29th, 1937, at about 7.30 o'clock, the accused stopped with his car at the Signal gas station at Yarrow, where he bought gasoline for his car. The witnesses Fast and Kehler (both having records) got into the accused's car and with Fast driving they went to Sardis where they stole a car, and they then took the two cars to Nowell's place where they left Nowell's car, and the three of them drove off in the stolen car. They first drove to Yarrow and from Yarrow they went to Rosedale, from there they went to Atchelitz where they stayed for a time, and then Nowell and Kehler broke into McDonald's store and taking certain goods they put them in the car. At this time Fast saw a car coming and they drove away, but the car followed them and after a chase the car following, which was a police car, caught up to them. They then stopped their car, jumped out and ran across a field into woods beyond, where they escaped. Two days later Fast and Kehler were

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arrested. They pleaded guilty on a charge of stealing a car and were convicted. Fast gave evidence of what happened on the night of the 29th of November and the following morning, but Kehler remembered very little about it, as he was under the influence of liquor that evening.

The appeal was argued at Vancouver on the 24th of June, 1938, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

D. J. McAlpine, for accused: Accused is seventeen years old and was convicted of stealing various articles from a store that was broken into. On the evening of November 29th, at about 7.30, accused stopped at Yarrow where he bought gasoline. The two men, Henry Fast and Frank Kehler (both having records), got into the car with him and drove away. What happened that night is told by these two men only. Two days later the two men were arrested and convicted of stealing a car. The defence is an *alibi.* The boy's father, mother and sister say he was at home at 8 o'clock in the evening, where he stayed all night. Fast attempts to implicate the accused and he is an accomplice. On the charge to the jury there was misdirection: see *Gouin* v. *Regem,* [1926] S.C.R. 539; 46 Can. C.C. 1; *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, and on appeal [1935] S.C.R. 367. The defence was not adequately presented: see *Rex* v. *Nicholson* (1927), 39 B.C. 264, at p. 270. Where the trial judge does not refer to material evidence a new trial will be ordered: see *Rex* v. *Bailey,* [1924] 2 K.B. 300; *Rex* v. *Beebe* (1925), 41 T.L.R. 635; 19 Cr. App. R. 22.

A. S. Duncan, for the Crown: This is not a case of uncorroborated evidence of an accomplice, as there is corroboration. In the first place accused was seen at the gas station with the two men alleged to be accomplices, and they were seen driving off together. In the next place the policeman Brunton testified that when accused saw Fast and Kehler after he was arrested he said to them: "Why did you tell them? If you had said nothing, they had nothing on us." There was ample corroboration.

McAlpine, replied.

Cur. adv. vult.

20th July, 1938.

MARTIN, C.J.B.C.: In this case, which raises an important question respecting the proper direction to be given to a jury in the case of accomplices, we took the matter under further consideration, because the question was, on the particular language employed by the learned trial judge, a rather difficult one, upon the line indeed. Our brother SLOAN has written a judgment which will be that of the Court, and the result is that while we find there has been some degree of misdirection, nevertheless the case is such that we should, we think, dismiss the appeal by applying subsection 2 of section 1014 of the Criminal Code, which says that the Court may

> dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

As expressed by our brother SLOAN we think the jury if properly directed must inevitably have reached the conclusion that the appellant was guilty, and therefore he has not suffered any substantial wrong or miscarriage of justice, and so the appeal is dismissed.

MACDONALD, J.A. agreed with SLOAN, J.A.

SLOAN, J.A.: The appellant appeals from his conviction at the Court of Assize held at New Westminster on May 13th last, on a charge of breaking and entering a store and stealing therefrom certain goods. The Crown relied upon the testimony of two accomplices and introduced evidence in corroboration thereof.

Several grounds of appeal were advanced but none of them, was in my opinion, of any real merit except the criticism of the charge of the learned trial judge to the jury relative to the evidence of the two accomplices. The relevant portion of the charge to which exception is taken follows:

> Now, I have to warn you about accomplices, as counsel said, judges have to tell you that. You must view the evidence of an accomplice (which Kehler and Fast both are, on their own evidence) with great care; and you are not supposed to convict on that evidence alone. I must warn you not to do it on that evidence alone. But you have corroboration here, if you believe it. Some of it is in the fact that the three were together that night when they left that gas station. But I would think that would be a

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little weak, in itself. What I do ask you to consider very carefully is the evidence of constable Brunton. He was cross-examined on it, as to whether he could make a mistake. Now, you have to be fair about witnesses. That officer gave his evidence here, and you heard him, and it is on his oath, and he knows the consequences if he is making a mistake; and he says that this accused young man said—I wrote it down—that is what he swears to—that the accused said to Kehler and Fast, "Why did you tell them? If you had said nothing, they had nothing on us." Now, if you believe constable Brunton, that would be corroboration of the story that is told by Fast. It is for you. This is your community. It is for you to uphold the law. If you believe that this man is guilty, you ought to say so.

In my view the learned trial judge was right in instructing the jury that if the evidence of Brunton was believed there was corroboration of the testimony of the accomplices—*Rex* v. *Canning,* [1937] 3 D.L.R. 375; 68 Can. C.C. 321, but

the rule [requiring warning] applies equally whether there be or be not corroborative evidence of the testimony of an accomplice:

Boulianne v. *Regem* (1931), 56 Can. C.C. 338, at p. 339; [1932] 1 D.L.R. 285, at p. 286.

It has been pointed out by the Supreme Court of Canada in *Boulianne's* case, *supra,* at p. 339, Can. C.C.; p. 286, D.L.R., that the direction given by that Court in *Vigeant* v. *Regem* (1930), 54 Can. C.C. 301, at pp. 303-4; [1931] 3 D.L.R. 512, at pp. 513-4, "should be strictly followed by trial judges."

The direction in *Vigeant's* case is as follows (Can. C.C. 304; D.L.R. 514):

He should then proceed to instruct the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the defendants, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated; that the law does not preclude their doing so—indeed, they are at liberty to do so—but that there is danger in basing a conviction on such uncorroborated evidence.

In my view the language of Lord Hewart, L.C.J., in *Rex* v. *Beebe* (1925), 19 Cr. App. R. 22, wherein he was giving his interpretation of *Rex* v. *Baskerville,* [1916] 2 K.B. 658 (since adopted by the Supreme Court of Canada in *Gouin* v. *Regem,* [1926] S.C.R. 539, at p. 542; [1926] 3 D.L.R. 649, at p. 652; 46 Can. C.C. 1, at pp. 4-5) may be applied to the limited direction in *Vigeant's* case. Lord Hewart said (p. 26):

It is quite clear when one looks at that enumeration of the various courses, that nowhere is to be found directly or indirectly any reference to a case in

which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict.

Turning now to the charge herein, in my opinion, with respect, the learned trial judge erred in instructing the jury, that they were "not supposed to convict on that evidence alone" and "I warn you not to convict on that evidence alone." While it is proper for the trial judge, in the exercise of his discretion, to advise a jury not to convict on the unconfirmed testimony of an accomplice (*Beebe's* case, *supra,* at p. 25) the jury should not be told in effect to acquit the prisoner on such testimony (*Vigeant's* case, p. 304, Can. C.C.; p. 514, D.L.R.). It seems to me that the language of the learned trial judge exceeds mere advice not to convict but be that as it may in any event those observations are not coupled with the instruction that it is within "their legal province to convict upon unconfirmed testimony" (*Beebe's* case, p. 25), or that "the law does not preclude their doing so—indeed, they are at liberty to do so" (*Vigeant's* case, p. 304, Can. C.C.; p. 514, D.L.R.). This misdirection, of course, militates against the Crown's case and was unduly favourable to the accused. Had the jury acquitted him on this direction the Crown, in all probability, would now be the appellant instead of the convicted man.

So far as the appellant is concerned the question here is whether or not the learned trial judge has departed from the express direction in *Vigeant's* case, and has brought himself within *Gouin's* case.

The answer to that question turns upon the construction proper to be placed upon the following excerpt from his charge to the jury:

> Now, if you believe constable Brunton, that would be corroboration of the story that is told by Fast. It is for you. This is your community. It is for you to uphold the law. If you believe this man is guilty, you ought to say so.

If the learned judge had said "If you accept the corroborative evidence and if upon the whole case you believe this man is guilty you ought to say so," then I do not think it would be misdirection for, in that event, as our brother MACDONALD said in *Rex* v. *Schwartzenhauer,* 50 B.C. 1, at p. 15; [1935], 2 D.L.R. 739, at p. 751; 63 Can. C.C. 269, at p. 283 (reversed on other

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grounds by the Supreme Court of Canada, [1935] S.C.R. 367; [1935] 3 D.L.R. 711; 64 Can. C.C. 1):

> It would be their duty to convict and it cannot be misdirection to advise them to do their duty.

It was within the province of the jury however to disbelieve the corroborative evidence adduced and if they had done so then the language of the learned trial judge, in this part of his charge, "may very well have led the jury to understand that he was in effect advising them" (*Gouin's* case, p. 653, D.L.R.; p. 6, Can. C.C.) that even if they disbelieved the corroborative evidence but were satisfied the accomplices told the truth they "ought" (*i.e.*, it was their duty) to say he was guilty upon that evidence alone.

It seems to me when one considers the whole charge on this branch of the case that the jury would retire to their deliberations thinking somewhat as follows: We are warned not to convict the accused upon the uncorroborated testimony of the accomplices but nevertheless if upon the whole case, or upon the uncorroborated testimony of the accomplices alone, we believe this accused is guilty we are told it is our duty to say so.

If I am right in thus interpreting the charge it will be of interest to turn to the direction of Mr. Justice Roche in *Beebe's* case, *supra* (pp. 23-4). There the learned judge said:

> If you are quite certain that that girl is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience, although it is uncorroborated, you ought to act upon it.

Hewart, L.C.J., in dealing with that passage says at p. 26:

> Those words are not only not a warning of the danger of so acting, and not only are they not a refraining from advising the jury so to act, but they are clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this Court that direction is not such a direction as should, according to the law laid down in *Baskerville's* case, be given.

As I previously pointed out the law laid down in the *Baskerville* and *Beebe* cases is indubitably the law of Canada by virtue of the adoption and approval thereof in *Gouin* v. *Regem, supra.* With great respect, in my opinion, the learned trial judge in making a "substantial departure" (*Boulianne's* case (1931), 56 Can. C.C. at p. 339; [1932] 1 D.L.R. at p. 286) from the direction in *Vigeant's* case has brought himself within the prin-

ciple enunciated in *Gouin's* case, *supra*. As Mr. Justice Rinfret said in delivering the judgment in *Gouin's* case, [1926] S.C.R. at p. 543; [1926] 3 D.L.R. at p. 653; 46 Can. C.C. at p. 6:

> Now, in such a case, [*i.e.*, when the evidence was solely that of an accomplice] while a jury may convict, the rule is not that it is their duty to convict.

In the interpretation I put upon the charge in this case the jury may have been of the view that it was their duty to convict solely upon the evidence of the accomplices (provided they believed them to be telling the truth) and an instruction upon which such a construction can reasonably be placed cannot be supported in my understanding of the authorities cited, and with respect, is an improper direction.

While the relevant decisions are to be regarded in the light of the circumstances and language employed in each case, and every charge read as a whole and the specific direction complained of scanned as an integral part thereof nevertheless the cases referred to are of high authority as a guide to the interpretation of the language employed in any particular charge that may be under review.

While I am satisfied there has been misdirection according to the decisions, as I have indicated, nevertheless I am also satisfied

> that the jury, properly directed, must have reached the same conclusion as that actually reached in this case. . . . The case, therefore, is one for the application of s. 1014 (2) of the Criminal Code . . . :

Boulianne v. *Regem, supra,* at pp. 338-9 Can. C.C.

I would therefore affirm the conviction and dismiss the appeal.

Appeal dismissed.

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Sept. 15, 16; *Nov.* 8.

MURGATROYD v. STEWART *ET AL.*

Testator's Family Maintenance Act — Petition by testator's daughter— Launched before will is admitted to probate—Right to do so—R.S.B.C. 1936, Cap. 285, Secs. 3 and 11.

Section 11 of the Testator's Family Maintenance Act provides that "No application shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made within six months from the date of the issuance of probate of the will in the Province or the resealing in the Province of probate of the will."

An application by a daughter of the testator for adequate provision for maintenance under section 3 of said Act launched before the will was admitted to probate, was dismissed on the ground that she could not present her application until probate had been granted.

Held, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, J.A. dissenting), that section 3 of said Act confers a right in general to make application without reference to any temporal limitation, and this right is not taken away by section 11 of the Act, which is one purely of limitation as to when the application may be brought, namely, within six months from the date of issuance of probate of the will.

APPEAL by petitioner from the decision of MCDONALD, J. of the 13th of June, 1938, dismissing the petitioner's application for adequate provision from her father's estate for her maintenance and support under the Testator's Family Maintenance Act. The petition was filed on the 25th of March, 1938. John Jefferson died in New Westminster on the 3rd of March, 1938, a widower, and left him surviving four sons and eight daughters. By his will he left two-thirds of his estate in equal shares to his three youngest daughters and one-third in equal shares to his nine other children. His estate consisted of approximately $6,500 in cash and 1,500 shares in an English company of the saleable value of £1 each. Mrs. Stewart of New Westminster, the second to youngest daughter, was made sole executrix under the will and probate was issued on May 6th, 1938. Up to the time of hearing the petition the executrix was unable to ascertain the value of the assets of her father's estate in England, and until the assets and liabilities of the estate are determined she does not know the net value of the estate for distribution under the terms of the will. The petitioner is the second to oldest of

the children and is the only one to take exception to the terms and provisions of the will of the late father.

The appeal was argued at Victoria on the 15th and 16th of September, 1938, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

J. A. MacInnes, for appellant: There are twelve children, the youngest being 51 years of age. The petitioner, the second to oldest, is 66 years of age. All the others were served with the petition, but with the exception of the executrix, none of them took part in the petition. Probate was granted on May 6th, 1938, and the petition was dismissed on June 13th, 1938. We say the right to petition under the Act arises when the father dies having made a will. The question is the interpretation of section 11 of the Act, and the word "within": see *Atherton* v. *Corliss* (1869), 101 Mass. 40; Annual Practice, 1938, p. 1388, r. 961. Probate is not a condition precedent, it may be necessary to get probate during the proceedings, but it is not a condition precedent: see Williams on Executors, 12th Ed., 193.

J. A. Campbell, for respondents: The jurisdiction to allow maintenance depends on whether probate is granted or administration is taken out: see *Legault* v. *Legault* (1924), 62 Que. S.C. 419. The Court must know the will is proved in proper form. The debts must be settled and the succession duty paid. In case of delay he has his remedy under section 9 of the Administration Act. In any case this petition is without merit on the face of it. There are twelve children and all approve of the will except the petitioner: see *In re Estate of W. S. Pedlar, Deceased* (1933), 46 B.C. 481. A will becomes a will when it is probated: see Jarman on Wills, 7th Ed., 44.

MacInnes, replied.

Cur. adv. vult.

8th November, 1938.

MARTIN, C.J.B.C.: The appeal is allowed, our brother MACDONALD dissenting for reasons which he is handing down.

Speaking for myself, I take the view, which is largely shared, I believe, by the other member of the Court (I understand our brother SLOAN is handing down his judgment) that section 3 of

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the Testator's Family Maintenance Act, Cap. 285, R.S.B.C. 1936, confers a right in general to make application without reference to any temporal limitation which right is not taken away by subsequent section 11, which is one purely of limitation, as to when the application may be brought, that is to say, within six months from the date of issuance of probate of the will.

Taking that view of the matter, with all respect to the learned judge below, who did not give any reasons in support of the view that the applicant could not present her application until probate had been granted, it seems to me, with all due respect, legally impossible to dislodge the applicant from the general right which is conferred by section 3 by resorting to a subsequent section which deals only with limitation of the time within which application may be made or "shall be heard."

We add that we are obliged to counsel for their diligence in getting for us the report of *Re Found, Found* v. *Semmens*, [1924] S.A.S.R. 236, from the Library of the Supreme Court at Ottawa, which was not available here. We are glad they did that because it was submitted to us by respondent's counsel that the decision in that case would support the order made by the learned judge below, but, after examining it we find that it does not do so, and the statement on its effect in the English & Empire Digest, Vol. 44, at p. 1289 is misleading.

MACDONALD, J.A.: This appeal involves the construction of section 11 (in conjunction with section 3) of the Testator's Family Maintenance Act (R.S.B.C. 1936, Cap. 285) reading as follows:

> 11. No application shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made within six months from the date of the issuance of probate of the will in the Province or the resealing in the Province of probate of the will.

The short point is this—has the Court jurisdiction to hear a petition under this Act if it is launched before the will is admitted to probate: in other words immediately after the death of the testator or at some subsequent period up to six months after probate? Mr. *MacInnes* submitted that a petition may be launched by one of the beneficiaries mentioned in section 3 at once after the death of the testator before probate and for six

months after the latter date. Mr. Justice McDONALD did not agree with this submission and I think he was right. It was said that if an application should be made six months after probate it would be launched "within six months from the date of the grant"; also if made six months (or any shorter period) before the grant of probate it would again be made "within six months from the date of the grant." Even this novel reading of the section would not make provision for a petition launched immediately after death if probate were not granted until nine months thereafter. Some further support therefore must be found to justify the submission that at any time after death and up to six months beyond the grant of probate this application may be made.

By the plain reading of the section, at all events the construction reasonably necessary to carry out the intendment of the Act, the petition can only be launched during the six months' period immediately following probate and at no other period. By preventing applications until probate is granted the right will and testament will be dealt with; by limiting the time to six months thereafter distribution will not be unduly delayed. While support for the construction submitted by the appellant may be found in other statutes, not entirely similar, it is because their intendment is effected by such a construction. It is not appropriate to the Act under review. As stated the intention was that the will should first be authenticated and that distribution should take place within a reasonable time. The Court would then know the nature and extent of the estate—assets and liabilities—with which it had to deal. The will could not be altered fairly without that knowledge.

The submission against this view is that the word "within" in section 11 should be read as meaning "not later than." That interpretation, as intimated, is supported in some American cases (*e.g., Jennings* v. *Russell* (1891), 92 Ala. 606; 9 So. 421; *Levert* v. *Reach,* 54 Ala. 529), but a perusal of the Acts considered show why it was adopted. To substitute the words "not later than" for "within" in our section 11 seems to me to be taking a greater liberty with the English language than the facts warrant and strong reasons—found only in the desire to accom-

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plish the purposes of the Act—should be present to justify it. In the case at Bar it would not be proper to give it this extended meaning. The Court has no means of knowing what claims may be made on the estate before probate nor for a limited time thereafter. To say, as was suggested, that the judge might adjourn the hearing until after probate is to concede that such a construction is not workable without resorting to adventitious aids.

I would dismiss the appeal.

SLOAN, J.A.: I concur in the reasons of my Lord the Chief Justice and, with respect, allow the appeal.

Appeal allowed, Macdonald, J.A. dissenting.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondents: *McCrossan, Campbell & Meredith.*

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Oct. 31;
Nov. 19.

IN RE BARKER ESTATE. *IN RE* TRUSTEE ACT AND ADMINISTRATION ACT.

Will—Life interests—Oil lease—Sale for certain sum and royalty—Whether the sum and royalty are capital or income.

A testator at the time of his death was owner of an undivided three-quarter interest in an oil lease. Negotiations for the sale of the lease, under way during his lifetime, were consummated after his death. The lease was sold for $15,000 and an overriding royalty. Questions arose under the testator's will as to whether (1) The three-fourths share of the $15,000 is capital or income? (2) If the three-fourths share of the $15,000 is income is it distributable forthwith or otherwise? (3) The three-fourths share of the overriding royalty is capital or income? (4) If the three-fourths share of the overriding royalty is income is it distributable forthwith or otherwise?

Held, that the capital value of the lease be assessed at $5,000 and the answers to the questions were: (1) $5,000 capital, $10,000 income. (2) Forthwith, subject to clause (3) fifth page will. (3) Income. (4) Forthwith, subject to clause (3) fifth page will.

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IN RE BARKER ESTATE

ORIGINATING SUMMONS pursuant to an order of the Court to answer certain questions in reference to the Barker estate. Heard by MANSON, J. at Vancouver on the 31st of October, 1938.

A. Bruce Robertson, for executors-trustees.
G. Roy Long, for unborn issue of certain beneficiaries.
Ray, for A. W., M. F. and N. J. Forrest.

Cur. adv. vult.

19th November, 1938.

MANSON, J.: Originating summons pursuant to the order of MCDONALD, J., of the 23rd of September, 1938.

The testator was at the time of his death (December 25th, 1936) the owner of an undivided three-fourths' interest in a petroleum and natural gas lease in the Province of Alberta. Negotiations for the sale of the lease, under way during the lifetime of the testator, were consummated on February 6th, 1937. The lease was sold for $15,000 and an overriding royalty. Questions arise under the will as to whether upon the true construction thereof: (1) The three-fourths share of the $15,000 is capital or income? (2) If the three-fourths share of the $15,000 is income is it distributable forthwith or otherwise? (3) The three-fourths share of the overriding royalty is capital or income? (4) If the three-fourths share of the overriding royalty is income is it distributable forthwith or otherwise?

Seven thousand five hundred dollars of the $15,000 has been paid and a well has been drilled on the lease by the purchaser and has proved productive.

The owners might, in their discretion, have drilled the lease themselves and, had a producing well been brought in, their revenue therefrom would, without question, have been income. To make possible the development a capital expenditure in a considerable sum would have been required for the purchase of equipment. At the end of the development the equipment would have had some salvage value. The estate would have been entitled to the return from production income (if any) of the difference between the salvage value of the equipment and its original

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laid down cost. The owners, however, did not choose to develop the lease themselves. They sold the lease upon terms *(inter alia)* that the purchaser would develop the lease, pay the owners $15,000 and an overriding royalty varying with the volume of production. The lease had a capital value. The capital value was speculative. It has been said that "gold is where you find it." That statement is not exhaustive but it is as true of petroleum and natural gas as it is of gold. The capital value of the lease is determined by its location. Geological reports can tell us something of the structural value. Geologists may err; nevertheless their opinions are of value and they eliminate in part at least something of the speculation in arriving at the value of the lease. The material does not assist greatly in putting a capital value upon this lease prior to the time when the well was brought into production, nor does it assist in forming an opinion as to how many commercial wells may be brought in upon it. I am disposed to assess the capital value at the nominal figure of $5,000 and to allocate from the $15,000 payable by the purchaser that sum as capital and the balance of $10,000 as current income.*

I find nothing in the will prohibiting the distribution of income to the life tenants. The questions will therefore be answered as follow: (1) $5,000 capital, $10,000 income. (2) Forthwith, subject to clause (3) fifth page will. (3) Income. (4) Forthwith, subject to clause (3) fifth page will.

Costs out of the estate.

Order accordingly.

* See *Spooner* v. *Minister of National Revenue*, [1933] 3 W.W.R. 97 (P.C.) holding that the percentage, referred to as a "royalty," of the oil and gas to which the owner of land was entitled under an agreement for the sale of the land was not "income" within the meaning of the Income War Tax Act, R.S.C. 1927, Cap. 97, Sec. 3, amended after said decision by 1934, Cap. 55, Sec. 1.

SHARP AND THOMPSON v. FURBER.

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April 5, 13, 14, 17, 24.

Architects—Preparing plans and specifications for apartment-house—Fees in respect thereof—Plans not in accord with defendant's requirements.

The plaintiff, an architect, brought action for his fees preparing plans and specifications for an apartment-house to be built by the defendant. It was found that the defendant made it clear to the plaintiff that she wished to build a first class two storey apartment-house of Tudor design with 30 suites complete with electric stoves, frigidaires and garages, at an outside figure of $120,000, and that while she did consider plans and suggestions made by the plaintiff which were not in accordance with her original requirements, she had never abandoned those requirements and the plaintiff never drew a plan in accordance with them.

Held, that the plaintiff failed to make out a case. It may be that the defendant's requirements were such that the apartment-house would have cost at least $150,000, but as defendant had placed a limit on the amount which she was willing to put into an apartment building it was up to the plaintiff, who should have a very good idea of these things, to tell her that she could not get what was desired for approximately the price she was prepared to pay, or to state to her that he would draw plans in accordance with her instructions and call for tenders, but that she would have to take the risk of the tenders exceeding $120,000.

ACTION by plaintiffs, who are architects, for their fees for preparation of plans and specifications for the construction of an apartment-house to be built by the defendant, or in the alternative for a *quantum meruit*. Tried by ROBERTSON, J. at Vancouver on the 5th, 13th, 14th and 17th of April, 1939.

Nicholson, and *Eades*, for plaintiffs.
McAlpine, K.C., and *J. S. W. Pugh*, for defendant.

Cur. adv. vult.

24th April, 1939.

ROBERTSON, J.: The plaintiffs are architects. They sue the defendant for their fees for the preparation of certain plans and specifications for the construction of an apartment-house proposed to be built on the defendant's lot (177 x 132) in Vancouver. Alternatively they claim on a *quantum meruit*.

In the autumn of 1937 the defendant was minded to build

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an apartment on her lot. At that time she, and a friend Carmichael, met Sharp at his house. It was stated that she was thinking of building an apartment-house of Tudor design containing 30 suites, some of four, some of five and some of six rooms. She said she wanted a two-storey building, open fireplaces in the best rooms, pass pantries, copper plumbing, good sized dining-rooms that would seat six or eight persons comfortably and everything to be of the very best. Sharp said the cost would be somewhere between $3,500 and $4,000 per suite and this would include all her requirements for the type of apartment she desired to build, including frigidaires, electric stoves and everything complete. Carmichael says that at this time he told Sharp he was arranging the finances and had to know the exact cost and that the plaintiff said no doubt the building could be put up at a cost not exceeding $4,000 per suite and there would be no extras. It was agreed by all that the Tudor design was the most suitable. The defendant said she would think it over and if she decided to go ahead Sharp could measure the property and make a sketch plan.

In the latter part of December or early part of January, 1938, Carmichael drove Sharp out to the defendant's house for lunch. Carmichael says that at the lunch there was a repetition of the former conversation in the autumn. The defendant said she wanted sixteen garages if possible. McLennan, who became interested in the transaction about this time, says that Sharp told him he could build a 30-suite apartment building on this lot for $120,000. There is no material dispute as to what took place up to this time. Sharp said that the defendant never modified her initial requirements. Further, she did not vary the price she was willing to pay until the discussion on Exhibit 19B, which will be referred to later. One or two weeks after this the defendant told Sharp she was going ahead with the building and to prepare sketches. After this the evidence is very contradictory. Sharp says that in January he prepared Exhibits 1 and 2 and showed these to the defendant. She denies this. Exhibits 1 and 2 show a three-storey building of Tudor design containing 30 suites. Sharp says she then began to talk of her ideas and he saw she wanted something better. She wanted

large living and dining-rooms, cupboards, pass-pantries, open fire-places and balconies, all of which were not provided for in Exhibit 1. He says that prior to this there had been no discussion as to the number of storeys the building was to have and it was not discussed then. He then told her the increase in the size of the rooms, etc., would add considerably to the cost. He says she made no comment and asked no questions. The defendant denies all this. Sharp said he then made a trip to Seattle in February, 1938, for the purpose of looking at apartment-houses there. About this time the defendant sent him Exhibit 3, which shows an apartment building of a modern type. As a result he drew sketch plans (Exhibits 4 and 5) in which he tried to embody the defendant's ideas as communicated to him, as he alleges, and the design shown in Exhibit 3. These plans are not according to the Tudor design. They are a "simple modern design" and contain 27 suites. It may be well to state that Exhibit 19A, to which reference will hereafter be made, is a blue print of Exhibit 4. He says he showed Exhibits 4 and 5 to the defendant who said she did not like the "corners cut off" and the round dining-rooms; that she made no comment about the change in style of architecture. He told her that he would rectify the plans to meet her objections. On the other hand, the defendant says she told Sharp the apartment, as shown in Exhibits 4 and 5, was not what she wanted, *viz.*, a two-storey apartment of Tudor type, etc., and Sharp said "he could not get it down to two storeys on her lot." She also said she objected to the dining-rooms and the square ends, stating the plan was impracticable as the furniture would not fit. She also said she wanted the whole of the ground space utilized as she did not want the upkeep of gardens. She asked him what it would cost and he said he would have to find out. He left the plan, which she afterwards returned to him, telling him that she thought it was impracticable. Sharp said it was a wonderful plan; that he would find out the cost and telephone her later. Later Sharp telephoned the defendant that the plan was "definitely out"; it was beyond her price. Sharp said he would have to get out another plan which would suit her price. She told him to get out a plan of a two-storey Tudor design apartment to be con-

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structed of timber and stucco; with dining-rooms that would accommodate from six to eight persons and that would reduce the price. The defendant says she again pointed out to him that his plan only provided for 27 suites and three storeys. Carmichael says that the defendant told Sharp that the building, as shown in the plan, was not in accordance with the design she wanted; that Sharp pointed out the attractive features of the plan; that the defendant pointed out the whole lot was not being utilized; that she did not want the upkeep of a garden and she wanted a two-storey building. Later Sharp came to the defendant's house and a discussion took place with her along the same lines. Sharp then prepared Exhibit 6 (floor plan) and Exhibit 7 (elevation) and had one or two meetings with the defendant about these. Exhibit 19B is a blue print of Exhibit 6. The defendant saw the blue print at a meeting at which Sharp, McLennan, Carmichael, Knight and Sutherland were present. Defendant pointed out she did not like the court-yard; it was too large and she said the buildings should cover more ground space. McLennan asked if Sharp could not cover more ground space and get the suites into a two-storey building. Sharp said he could not get 30 suites of the type the defendant wished in a two-storey building and to do away with the court-yard would destroy the air supply; that the type of building she wanted was raising the price "over the original idea." Sharp says that McLennan said the defendant could raise $150,000 on the building and that, as the defendant did not object, he took this to mean that the defendant realized the increased cost of the apartment she wished would result in the increase of the price from $120,000 to $150,000. He then prepared the necessary working plans and specifications to go with Exhibits 6 and 7 and called for tenders to be in by April 17th. The defendant says she never authorized the calling of tenders. The lowest tender (by Marble) was $167,450 exclusive of heating which would cost at least another $10,000. Sharp told defendant the tenders were too high; that he would have to look into it and see how he could reduce it. About April 27th he took Marble to see her. By this time he had prepared Exhibit 12 which differed from Exhibit 19B in that the pass-pantries and balconies were taken

out; some of the rooms were reduced in size and sun-rooms were put in. He said he showed Exhibit 12 to the defendant. She denies this and no one else, who was at the meeting, was able to say that he saw this exhibit there. Sharp did produce a plan at this meeting which the defendant says is Exhibit 18. Sharp went through a plan with the defendant and Sutherland. Carmichael and Marble were in another room a short distance away. Sharp says that after the general discussion and going through the plans the defendant asked if she could not have pass-pantries as she would like them and Sharp said they were very expensive and, if they put them in, he could not get the cost down. Further, the defendant regretted the size of the dining-rooms. Marble said that with the proposed alterations and reductions he thought he could put up the apartment-house (without heating) for about $125,000. Sharp said if Marble could get his figures down to that he thought the building, complete, could be put up for $150,000 and to assist matters he was willing to modify his fees. Sharp says Carmichael then asked him how long it would take to get out the plans and after some conversation told him to go ahead and get figures; that the defendant wanted to get her loan. Carmichael denies this and Sutherland and the defendant say that Carmichael did not make any such request. Further, Sutherland says when Sharp said he could get the cost down to $150,000 Carmichael said it was "absolutely out." Both Exhibits 12 and 18 were plans of an apartment containing 27 suites. Sharp says he then went ahead and had about completed the working plans, etc., when he got a letter from the defendant (Exhibit 13) dismissing him. The defendant says that Sharp came to see her bringing Marble. He produced Exhibit 18; Carmichael and Sutherland were there. Sharp said they might get three to four chairs in the dining-room. She then said it was no good to her; the cupboards were too small and the plans were perfectly useless to her as an apartment-house; that she had never authorized sun-rooms or balconies. Sutherland says that he never saw Exhibit 12; that Sharp produced Exhibit 18 which he said could be built cheaper; that the defendant asked him about the size of the rooms and she took objection to the size of the dining-rooms and the lack of

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cupboard space; that she told Sharp it was not possible to put ordinary dining-room furniture in the dining-rooms as they were too small. She also suggested an increase in the size of the dining-rooms by eliminating the sun-rooms and balconies. She also objected to the court-yards and that the whole of the lot was not utilized. Sharp said he thought he could make changes in the dining-rooms which would meet with her approval. The defendant says Carmichael never told Sharp to proceed. The defendant says she never agreed to increasing the price from $120,000 to $150,000; that she never approved of the change in design from Tudor to modern; that when Sharp left the meeting at which Exhibit 18 was considered there was no understanding he was to prepare further plans. The defendant had been trying from January until about May 9th to get plans for an apartment along the lines she desired. There is nothing to suggest that the defendant had any ulterior motive when she wrote the letter of May 9th. It was apparent, from time to time, that she could not get what she wanted. I find that the defendant made it clear to Sharp that she wished to build a first class two storey apartment-house of Tudor design with 30 suites complete with stoves, frigidaires and garages at an outside figure of $120,000. While she did consider plans which were not of Tudor design and contained 27 suites, and were therefore not in accordance with her initial requirements, she never abandoned these. No doubt she did consider the suggestions made by Sharp. I find Sharp never drew a plan in accordance with the defendant's instructions. I further find that the defendant's limit of price was $120,000. To my mind it is clear that Sharp was mistaken when he thought from what McLennan said that the defendant was willing to pay as much as $150,000. It is obvious that none of the buildings designed by Sharp could be constructed for less than $150,000. The buildings were not of Tudor design and contained only 27 suites. I think the plaintiffs have failed to make out a case. I refer to *Wilson* v. *Ward* (1908), 14 B.C. 131, and to the following American cases cited in 6 C.J.S. at pp. 310 and 311; *Svarz* v. *Dunlap* (1928), 271 P. 893; *Brinckle* v. *England* (1910), 78 Atl. 638; *Clas* v. *State* (1928), 220 N.W. 185, and *Schwender* v. *Schrafft* (1923), 141

N.E. 511. It may be that the defendant's requirements were such that the apartment-house would have cost at least $150,000 but, as defendant had placed a limit on the amount which she was willing to put into an apartment building, it was up to Sharp, who should have a very good idea of these things, to tell her that she could not get what was desired, for approximately the price she was prepared to pay, or, to state to her that he would draw plans in accordance with her instructions and call for tenders but that she would have to take the risk of the tenders exceeding $120,000. He could have protected himself in this way.

The action is dismissed with costs.

Action dismissed.

LINDSAY AND LINDSAY v. ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA.

The Farmers' Creditors Arrangement Act, 1934—Application to Crown (Provincial)—Pre-emptors of land—Debtors purchasers under agreement for sale also beneficiaries under will of pre-emptor—Proposal of board of review binding on Province—Costs—Can. Stats. 1934, Cap. 53—R.S.B.C. 1936, Cap. 144.

M. obtained a certificate of pre-emption record for 320 acres in the Cariboo District in 1901, and a certificate of improvements in 1912. In 1928 he entered into an agreement for sale of the property to the plaintiffs for $5,000, the plaintiffs to take over the management of the property under M.'s supervision, M. to receive all moneys produced from its operations and retain $500 per year, to be applied on account of the purchase price. M. died in February, 1936, and by will bequeathed all his estate to the plaintiffs. There was then owing to the Province $811.56 for principal, balance of interest on the purchase price, survey and Crown grant fees. The plaintiffs then requested the Board of Review established under The Farmers' Creditors Arrangement Act, 1934, to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement of their affairs. The Board advised the Department of Lands of this application and that they would deal with it. The Board then formulated a proposal but the Department of Lands took no action. The plaintiffs then offered the department the amount proposed by the Board but it was refused. In an action

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for a declaration that the proposal formulated by the Board is binding upon the Province and a *mandamus* commanding the defendants to accept the terms of settlement ordered by the Board:—

Held, that the plaintiffs are entitled to the land under the agreement for sale from the pre-emptor to themselves, also as sole beneficaries under the pre-emptor's will and The Farmers' Creditors Arrangement Act, 1934, applies to the Crown in the right of the Province in respect to a debt owing to it by a farmer. The plaintiffs therefore being "creditors" within the meaning of section 1 of said Act and amendments thereto, the Crown in the right of the Province is bound by the proposal in respect to the plaintiffs formulated by the Board of Review.

ACTION for a declaration that a proposal confirmed by the Board of Review, established under The Farmers' Creditors Arrangement Act, 1934, is binding upon the Province and a *mandamus* commanding the defendant to accept the terms of settlement ordered by the Board. Tried by ROBERTSON, J. at Vancouver on the 27th of April, and 3rd and 4th of May, 1939.

J. A. Russell, K.C., and *E. N. R. Elliott*, for plaintiffs.
Pepler, D.A.-G., for defendant.

Cur. adv. vult.

11th May, 1939.

ROBERTSON, J.: On December 23rd, 1901, Fritz Menzinger obtained a certificate of pre-emption record for 320 acres in the Cariboo District of British Columbia pursuant to the provisions of Cap. 113, R.S.B.C. 1897, to which it will be convenient to refer as the Land Act.

On July 13th, 1912, he received a certificate of improvements to this land which in the meantime had been surveyed as lot 2927.

On May 31st, 1928, Menzinger entered into an agreement for sale with the plaintiffs as joint and equal partners, whereby he agreed to sell the pre-emption to them for $5,000. One dollar was paid on the execution of the agreement. The plaintiffs agreed to pay $500 per annum until the full principal sum had been paid, the first payment to be due and payable on or about June 1st, 1929. The agreement contained special provisions which, shortly, were that the plaintiffs were to take over the active management and operation of the pre-emption under the "supervision, guidance and instructions of Menzinger"; he

was to receive all moneys produced from the sale of stock or the sale of anything produced on the property and to retain the sum of $500 per year to be applied on account of the purchase-price; the plaintiffs to "keep and sustain Menzinger in reasonable comfort so long as he lived." In consideration of this, if the plaintiffs lived up to this contract, they were, on Menzinger's death, to own the pre-emption without being required to make any further payments to him. Menzinger died on February 21st, 1936. By his will, dated May 31st, 1928 (the same date as the agreement) he bequeathed everything he owned to the plaintiffs in equal shares and appointed them executors. Menzinger had never been able to make the payments to the Province necessary to obtain a Crown grant of his pre-emption. Certain small payments had been made which had been applied against interest. The position in October, 1937, was that there was owing to the Province $811.56, for principal due on the pre-emption, the balance of the interest on the purchase-price, the survey fee and Crown grant fee. On October 8th, 1937, the registrar of the Board of Review, established under The Farmers' Creditors Arrangement Act, 1934, Cap. 53 (Dom.), notified the Department of Lands at Victoria by notice intituled "In the matter of a proposal for a composition, extension or scheme of arrangement of Francis Dayler and Elizabeth Lindsay, farmers," that a written request had been received from these farmers that the "Board of Review endeavour to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement" of their affairs and that the Board would proceed to deal with this request at a meeting on October 27th, 1937. It further stated representations in writing might be made or the department might apply to be heard orally if it so desired.

On October 29th, 1937, the Superintendent of Lands of the Province advised the registrar of the Board of Review "of the position of this account as at December 31st, 1937."

On or about November 9th, 1937, the Board notified the Department of Lands in writing by notice (intituled in the same way as the notice of October 8th, *supra*) which contained the following paragraph:

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A request having been made by the above-mentioned farmers to the Board to endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor; and the Board having formulated such a proposal, copy of which is hereto attached, you are hereby required to assent or dissent to the same in writing within fifteen days from the posting of this notice, and in the event of your dissenting your reasons should be clearly stated. In the event of your failing to file with the registrar of the Board a written dissent within the said period of fifteen days, you will be deemed to have assented to the said proposal.

According to the attached copy, the Board proposed, *inter alia*: (1) That the claim of the Department of Lands in the sum of $811.56 be reduced to the sum of $410 as of December 31st, 1937; and (2) the Province's claim for $278.71 for taxes owing up to and including 1935 be paid without interest or penalty in five equal and annual instalments of $55.54 each on December 31st in the years 1938 to 1942 inclusive. The Department of Lands took no action. On December 29th, 1937, the Board confirmed the proposal for a composition and declared the same to be binding on all the creditors and the debtors. On July 14th, 1938, the plaintiff tendered to the defendant the sum of $410 in full settlement for the balance due on the pre-emption. This was refused. The plaintiffs ask for a declaration that the proposal confirmed by the Board of Review is binding upon the Province and a *mandamus* commanding the defendant to accept the sum of $410 and otherwise to accept the terms of settlement ordered by the Board. The action is against the Honourable *Gordon S. Wismer,* Attorney-General for the Province of British Columbia. Counsel for the defence submitted that the form of action in this case was not one which was open to the plaintiffs but that, as it was desired to obtain a decision, the Attorney-General consented to this action being brought in this way. No objection was taken to the form of proceedings before, or by, the Board of Review or to any matter of that sort. The defendant submits: (1) That the Crown, in the right of the Province, is not bound by the Act as it is not mentioned in the Act; (2) That the plaintiffs, prior to May 1st, 1935, had no interest or right in the pre-emption and were not debtors to the Province in that they were not liable to the Province for moneys due in respect of the pre-emption or for the taxes which had been imposed upon the property prior to Menzinger's death. They rely upon section 19 of the Act.

I think the question raised by the first point has been settled by the decision of the Supreme Court of Canada in *Reference re Farmers' Creditors Arrangement Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 384; 17 C.B.R. 359. If not, I think subsection (2) of section 2 of the Act and section 188 of the Bankruptcy Act, R.S.C. 1927, Cap. 11, show the Crown is bound. I hold the Act applies to the Crown in right of the Province.

I now turn to the second point: Section 28 of the Land Act provides Menzinger shall be "governed by" and complete his title to the pre-emption under that Act. The balance owing in respect of the pre-emption was a debt due to the Crown (section 24). Section 27 provides that in the event of the death of the pre-emptor his devisees shall be entitled to a Crown grant subject to the issue of a certificate of improvement and payment for the land. The plaintiffs, as sole beneficiaries under Menzinger's will, were entitled to the benefit of this section. I also think that the plaintiffs were entitled to the land under the provisions of the agreement for sale. Counsel for the defence relied upon section 26 which provides that no transfer of any surveyed or unsurveyed land pre-empted under the Act shall be valid until after a Crown grant of the same had been issued. It was held however in *Simpson* v. *Proestler* (1913), 18 B.C. 68; 5 W.W.R. 820, that "there was nothing illegal in an agreement to sell land comprised in a pre-emption record."

As to the taxes: Section 142 of the Taxation Act, R.S.B.C. 1924, Cap. 254 enacted that the person assessed for taxes is personally liable. Section 146 provided that these taxes might be recovered in an action against the taxpayer. Section 143 declared that the taxes were a lien and charge on the land.

Section 19 of The Farmers' Creditors Arrangement Act, 1934 provides that the Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after May 1st, 1935. Counsel for the defendant claims there was no debt, so far as the plaintiffs are concerned, until the death of the pre-emptor in 1937. I am of the opinion that the debts owing in respect of the purchase price of the pre-emption claim and taxes were incurred prior to May 1st, 1935. The Act was amended in 1938. The definition of "creditor" in section 1 was amended to read as follows:

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"Creditor" includes a secured creditor and, notwithstanding the absence of privity of contract between the debtor and any of the persons hereinafter mentioned, a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof . . .

The same year subsection (13) of section 12 was added which reads as follows:

In the case of a proposal formulated by a Board of Review prior to the coming into force of this subsection whereby a secured debt was dealt with, the farmer shall, notwithstanding the absence of privity of contract between himself and a secured creditor as herein defined, be entitled to have such proposal confirmed by the Board of Review in the like manner and with the like results as if this subsection had been in force at the date of the filing of his proposal by the farmer, or if such proposal was confirmed prior to the coming into force of this subsection it shall be binding as if it had been confirmed after the coming into force of this subsection.

The result is that the Act as amended in 1938 applies to the plaintiffs' proposal. The right of the Crown in respect of the taxes is clearly a lien. In my opinion the Crown had a vendor's lien for the balance due in respect of the Crown grant. In any event the right of the Province to cancel the pre-emption for non-payment under section 24 of the Land Act was a "privilege on or against the property of the debtor." I hold then that the Crown was bound by the statute and that under the circumstances the composition is binding on the Crown in the right of the Province. No argument was offered on the claim for a *mandamus*. I doubt whether or not it would lie in this case. See *Clarke et al.* v. *Chief Commissioner of Lands and Works* (1886), 1 B.C. (Pt. 2) 328. If the plaintiff so desires the matter may be spoken to. I think the Crown Costs Act, R.S.B.C. 1936, Cap. 67, applies. Accordingly there will be no order as to costs.

Judgment for plaintiffs.

REX v. GANDA SINGH.

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Criminal law—In possession of poppy heads—Declared to contain opium—Used for medicine—"Mens rea"—The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49, Secs. 4 (1) (d) and 17.

On a charge of having portions of the opium poppy in his possession, the accused claimed that he had the poppy heads solely for the purpose of making poppy tea, which he alone used as a medicine. An analyst declared that the poppy heads contained opium. The learned trial judge *held* that he could find the accused guilty on the evidence given, but as he had given a very reasonable explanation he found the accused not guilty on the ground that no "*mens rea*" had been shown.

Held, on appeal, reversing the decision of WHITESIDE, Co. J., that while the accused had given a very reasonable explanation and while under section 17 of the said Act the accused may maintain a successful defence by proving his lack of knowledge of the fact that he did have a drug in his possession, he did not succeed on this defence, but upon the erroneous view of the law taken by the Court below in placing upon the Crown the burden of proving *mens rea* as an essential ingredient of the offence charged, and the appeal should be allowed and a new trial ordered.

APPEAL by the Crown from the decision of WHITESIDE, Co. J. of the 19th of October, 1938, dismissing a charge against Ganda Singh that he

unlawfully did have in his possession a drug, to wit, portions of the opium poppy *(papaver somniferum)* other than the seed, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto.

The accused was arrested when taking his truck across the Pattullo Bridge with a quantity of poppy heads, on the 14th of August, 1938. He did not use the poppy heads in a commercial way but had them only for his own use. He had an illness and made poppy tea and used it as a medicine. An analyst, when examined, said the poppy heads contained opium.

The appeal was argued at Vancouver on the 23rd of November, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

A. S. Duncan, for the Crown: On August 14th, 1938, accused was arrested when crossing the Pattullo Bridge with his truck in which was found a quantity of poppy heads. The learned judge found the necessary facts for conviction. The accused was

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a man in ill health and said he drank poppy tea as a medicine. The learned judge found him not guilty on the ground that no "*mens rea*" had been shown. He collected poppy heads for his own use. The analyst said the poppies contained opium. It is not necessary to prove "*mens rea*": see *Rex* v. *Wong Loon* (1937), 52 B.C. 326, at p. 329; *Belyea* v. *Regem*. *Weinraub* v. *Regem*, [1932] S.C.R. 279, at p. 296.

J. A. Grimmett, for accused: This became an offence on August 1st, 1938, and the accused did not know that he had the specific type of poppy in his possession that comes within the offence. On the question of "*mens rea*" see *Rex* v. *Regina Cold Storage & Forwarding Co.* (1923), 41 Can. C.C. 21; *Rex* v. *Hyde* (1925), 44 Can. C.C. 1.

Duncan, replied.

Cur. adv. vult.

On the 10th of January, 1939, the judgment of the Court was delivered by

SLOAN, J.A.: This is an appeal by the Crown from a dismissal by His Honour Judge WHITESIDE of a charge against Ganda Singh for that he

unlawfully did have in his possession a drug, to wit, portions of the opium poppy *(papaver somniferum)* other than the seed, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto.

The learned trial judge in delivering oral reasons in explanation of his dismissal of the charge said:

I think I could find the accused guilty on the evidence given. Undoubtedly he had these poppies in his possession, but he had been so having them for probably fifteen years back, and the accused seems to have been suffering from serious illness from time to time, which this poppy tea relieved. Indeed, it would; it is a narcotic. But he has given a very reasonable explanation, and even the doctor does not seem to have objected to his taking it. I think I will find the accused not guilty on the ground that no *mens rea* has been shown.

Counsel for the appellant complains that the learned trial judge misdirected himself as to the law in relation to a charge of this nature when he concluded his observations by finding the accused not guilty "on the ground that no *mens rea* has been shown."

I am of the opinion, with respect, that this contention is well founded. In *Rex* v. *Wong Loon* (1937), 52 B.C. 326, we held that *mens rea* is not an essential ingredient in a prosecution

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under section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929—the section under which this charge was laid.

While it is true the learned trial judge said in his reasons that the accused had given "a very reasonable explanation" and while it is also true that under section 17 of the said Act, it is open to the accused when charged with having a drug in possession to maintain a successful defence by proving his lack of knowledge of the fact that he did have a drug in his possession—*Rex* v. *Wong Loon, supra,* nevertheless it was not that defence which succeeded here but the accused was found not guilty because of the erroneous view of the law (with respect) of the learned trial judge which led him to place upon the Crown the burden of proving *mens rea* as an essential ingredient of the offence charged.

The appeal is allowed and a new trial ordered.

Appeal allowed and new trial ordered.

REX v. GANDA SINGH. (No. 2).

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Criminal law—Carrying portions of opium poppy—Claim of its use as a medicine only—"Mens rea"—The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49, Secs. 4 (1) (a) and 17.

A charge against the accused that he "did take or carry from the Municipality of Surrey in the County of Westminster . . . , a certain drug, to wit, portions of the opium poppy *(papaver somniferum)* other than the seed, contrary to the provisions of The Opium and Narcotic Drug Act, 1929, and amendments thereto," was dismissed, the learned judge quoting from Crankshaw's Criminal Code, 6th Ed., pp. 1515-16: "But it is a principle that *mens rea* is of the essence of all criminal cases unless the statute creating the offence otherwise provides and it should be presumed that where the penalty is pecuniarily large or is imprisonment the Legislature did not intend to impose punishment for unintentional breaches of the statute."

Held, on appeal, reversing the decision of WHITESIDE, Co. J., that *mens rea* is not an essential ingredient in the proof of a charge under section 4 (1) (*a*) of The Opium and Narcotic Drug Act, 1929, any more than it is in the prosecution of a charge under section 4 (1) (*d*) standing alone. *Rex* v. *Wong Loon* (1937), 52 B.C. 326, applied.

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Section 17 of said Act refers only to a charge of having a drug in possession, namely, section 4 (1) (*d*), and has no application to a charge laid under section 4 (1) (*a*).

APPEAL by the Crown from the decision of WHITESIDE, Co. J. of the 19th of October, 1938, dismissing the charge against Ganda Singh that he

did take or carry from the Municipality of Surrey in the County of Westminster . . . , a certain drug, to wit, portions of the opium poppy *(papaver somniferum)* other than the seed, contrary to the provisions of The Opium and Narcotic Drug Act, 1929, and amendments thereto.

The accused was arrested at the south end of the Pattullo Bridge when taking poppy heads in his truck into New Westminster. The accused made poppy tea from the poppy heads and used it as a medicine.

The appeal was argued at Vancouver on the 23rd of November, 1938, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

A. S. Duncan, for the Crown: This charge is against the same man under the same circumstances as in the previous case [*ante*, p. 191], and the same argument applies to it: see *Rex* v. *Hyde* (1925), 44 Can. C.C. 1; *Rex* v. *Regina Cold Storage & Forwarding Co.* (1923), 41 Can. C.C. 21.

J. A. Grimmett, for respondent: He is put in jeopardy on the same set of facts the second time. The cases cited in the previous case apply here.

Duncan, replied.

Cur. adv. vult.

On the 10th of January, 1939, the judgment of the Court was delivered by

SLOAN, J.A.: This is an appeal by the Crown from the dismissal by His Honour Judge WHITESIDE of a charge against Ganda Singh for that he

not being a common carrier, did take or carry from the Municipality of Surrey in the County of Westminster to the Pattullo Bridge in the County of Westminster, both being places in Canada, a certain drug, to wit, portions of the opium poppy *(papaver somniferum)* other than the seed, contrary to the provisions of The Opium and Narcotic Drug Act, 1929, and amendments thereto, and contrary to the form of statute in such case made and provided.

The learned trial judge in his reasons said:

I think I must be bound by what I find in Crankshaw's Criminal Code, 6th Ed., at the bottom of p. 1515; and this is a decision under The Opium and Narcotic Drug Act, 1929. I am quoting from that page as follows:

"But it is a principle that *mens rea* is of the essence of all criminal cases unless the statute creating the offence otherwise provides and that it should be presumed that where the penalty is pecuniarily large or is imprisonment the Legislature did not intend to impose punishment for unintentional breaches of the statute."

Now, I do not think that the accused had any intention of breaking this law. It is of very recent origin, and I think I must hold, upon the authority of the case cited here, that the accused is not guilty.

The note in Crankshaw's Criminal Code referred to by the learned trial judge is based upon *Rex* v. *Hyde* (1925), 44 Can. C.C. 1, a decision of Hopkins, Co. Ct. J., but that case was decided not upon the relevant sections of The Opium and Narcotic Drug Act, 1929, but upon the Ontario Temperance Act, and with respect is not of assistance in the determination of the question in this case.

In my view *mens rea* is not an essential ingredient in the proof of a charge under section 4 (1) (*a*) of The Opium and Narcotic Drug Act, 1929, any more than it is in the prosecution of a charge under section 4 (1) (*d*) standing alone. *Rex* v. *Wong Loon* (1937), 52 B.C. 326. It must also be noted that section 17 has no application to a charge laid under section 4 (1) (*a*). Section 17 refers only to a charge of having a drug in possession (section 4 (1) (*d*)) which is a distinct and separate offence to that specified in section 4 (1) (*a*).

The learned trial judge erred (with respect) in following *Rex* v. *Hyde, supra,* and the appeal is allowed and a new trial ordered.

Appeal allowed; new trial ordered.

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HAYWARD *ET AL.* v. PARK *ET AL.*

Agriculture—Natural Products Marketing (British Columbia) Act—Co-operative Associations Act—Association acting as agent of marketing board without complying with section 26 thereof—R.S.B.C. 1936, Cap. 165; Cap. 53, Sec. 27.

Section 27 of the Co-operative Associations Act enacts that the rules of an association incorporated thereunder may provide for the carrying on of its business as a pool association. This means that if the association is carrying on a business of its own and wishes to carry it on as a pool association, then it must comply with that section. If on the other hand it is merely acting as an agent, it is not carrying on its own business, it is carrying on the business of the marketing board as its agent. Further it may, as an agent, carry on a business for its principal which it may not carry on for itself. Under these circumstances it is not necessary for the clearing house to comply with section 27 of said Act.

ACTION by certain producers of milk for sale in the Fraser Valley area, established under the Natural Products Marketing (British Columbia) Act, for an injunction restraining the clearing house, incorporated under section 3 of the Co-operative Associations Act, from carrying on a pool and acting as an agent of the marketing board, and for an injunction against the marketing board to restrain it from enforcing its orders on the ground that they are *ultra vires*. Tried by ROBERTSON, J. at Vancouver on the 15th of May, 1939.

J. L. Farris, for plaintiffs.
Williams, K.C., for defendants.

Cur. adv. vult.

18th May, 1939.

ROBERTSON, J.: Section 2 of the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165, defines "marketing" to include buying and selling; "natural product" to mean "any product of agriculture, . . . , and any article of food or drink wholly or partly manufactured or derived from any such product"; and "regulated product" to mean "any natural product the regulation of the marketing of which is provided for in any scheme approved or established under this Act."

Section 4 (1) of this Act says that:

The purpose and intent of this Act is to provide for the control and regulation in any or all respects of the . . . marketing of natural products within the Province, including the prohibition of such . . . marketing in whole or in part.

Section 4 (2) authorizes the Lieutenant-Governor in Council to establish a scheme for the control and regulation within the Province of the marketing of any natural products; to constitute a marketing board to administer such scheme; to vest in such board any powers considered necessary or advisable to enable it effectively to control and regulate such marketing; and to prohibit such marketing in whole or in part. Section 4 (3) provides that the scheme may relate to any area within the Province and to one or more natural products. Pursuant to section 4 (2), by order in council passed March 31st, 1939, the Lieutenant-Governor in Council established a scheme known as the "Milk Marketing Scheme of the Lower Mainland" for an area in British Columbia which, for the sake of briefness, may be referred to as the "Fraser" area. The order in council appointed a marketing board to administer the scheme—to be known as the "Lower Mainland Dairy Products Board"—and appointed as its members the defendants *Williams,* Barrow and Kilby. The order in council declared that the purpose and intent of the scheme was to provide for the effective regulation and control in any respect or in all respects, *inter alia,* of the marketing of the regulated product, *i.e.,* milk within the Fraser area, including the prohibiting of marketing in whole or in part. Clause 10 reads, in part, as follows:

10. The Marketing Board shall have all the powers of a body corporate and shall have power within the area to regulate and control in any respect or in all respects the . . . marketing of the regulated product, including the prohibiting of such . . . marketing in whole or in part, and, without limiting the generality thereof, shall have the following powers:—

(*a.*) To regulate the time and place at which and to designate the agency through which the regulated product shall be marketed; to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time; and to prohibit the marketing of any grade, quality, or class of the regulated product;

. . . . .

(*c.*) To prohibit the marketing of the regulated product except through the agency or agencies designated:

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(*d.*) To authorize any agency to purchase the regulated product marketed through it or any part thereof, and to prohibit the sale of such regulated product otherwise than to such agency.

On January 19th, 1939, the Milk Producers Clearing House Co-operative Association, conveniently referred to as the "clearing house," was incorporated under section 3 of the Co-operative Associations Act, R.S.B.C. 1936, Cap. 53. Paragraph 3 of its memorandum stated the objects for which it was formed were, *inter alia,* to market milk; to buy and sell milk; to buy, sell and offer for sale the regulated product, as defined in the Milk Marketing Scheme of the Lower Mainland of British Columbia, authorized under the provisions of the Natural Products Marketing (British Columbia) Act; to act as an agency designated under the provisions of the said scheme; and to equalize the returns of producers, marketing regulated products through it, from the sale of products dealt in by it and particularly for that purpose to pool and distribute the proceeds from the sale amongst producers, recognizing in the settlement to each producer the value of quality, class and a consistent supply. There were five subscribers to its memorandum of association, each for one share. The capital of the clearing house consists of an unlimited number of shares of $1 each. Rule 53 provides that the business of the clearing house shall be managed by the directors who may exercise all its powers subject to the Act and Rules. The defendants Park, Carmichael and Sherwood are the directors of the clearing house. It is admitted they were not elected pursuant to section 27 of the Co-operative Associations Act. On April 11th, 1939, the Marketing Board passed an order requiring that all producers within the Fraser area who marketed the regulated product within the area should register with the Marketing Board. On April 12th, 1939, it passed order 2, which provided that no person within the Fraser area should process, market or transport the regulated product unless he were the holder of a licence from the board for each calendar month commencing with June 1st, 1939, the fee for which was $2,000 payable on the first day of each calendar month. By order No. 3 passed on April 13th, 1939, the clearing house was appointed "the sole agency for the purchase from producers of the regulated product and for the resale of the regulated product

to dealers," etc. This order further provided that all of the regulated product produced and marketed within the area and all of the regulated product produced outside the area and marketed within the area should be marketed "exclusively to" the clearing house. The order further provided for the appointment of inspectors by the clearing house who should not function until their appointment had been approved by the Marketing Board, whereupon such inspectors were to be officers of the Marketing Board as well as officers of the clearing house. Their remuneration was to be paid by the clearing house. Further, the Marketing Board was empowered to revoke any such approval where the inspector was to cease to function as an officer of the Marketing Board. The clearing house was required to submit to the Marketing Board its proposed plan for selling milk for manufacturing purposes. It provided that the clearing house should purchase milk only from licensed producers and licensed producer-vendors whose dairy farms were situate within the Fraser area and that the clearing house should sell milk only to licensed producer-vendors, dealers and manufacturers operating within the Fraser area. It provided the Marketing Board should furnish the clearing house with the names of licensed producers, producer-vendors, dealers and manufacturers and that the clearing house should not purchase milk from nor sell milk to persons not listed, resident within the Fraser area, unless with the approval of the Marketing Board. It also provided that the clearing house should report to the Marketing Board a summary of the operations of the clearing house for each settlement period, the report to be mailed or delivered to the Marketing Board on or about the fifteenth day after the close of the settlement period.

By order 4 of the Marketing Board, passed on April 14th, 1939, it is provided that all milk produced within the Fraser area by producer or producer-vendor and marketed, and all milk produced outside the area and marketed within the area, should be marketed "exclusively to" the clearing house. It also provided the prices payable by the clearing house and the price at which the milk should be sold by the clearing house. It also provided for settlement periods, both on the milk purchased by

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the clearing house, and milk sold by the clearing house. It also provided for the points at which delivery of the milk should be made, inspection, bottle caps, pasteurization, overage milk, times for delivery of fluid milk and various other things. There was also a provision in an order passed April 20th, 1939, amending order 4 for deduction by the clearing house from the amount payable to persons selling to the clearing house of an amount based upon a rate which should be sufficient to meet the expenses of the clearing house.

The plaintiffs are producers of milk for sale in the area, or, are engaged in distributing milk and cream and in carrying on a general dairy business in the city of Vancouver or in the city of New Westminster. The plaintiff Hayward, as a member of the clearing house, asks an injunction restraining it and its directors from carrying on a pool and acting as an agent of the Marketing Board. The plaintiffs ask for an injunction against the Marketing Board to restrain it from enforcing its orders on the ground that they are *ultra vires*. The plaintiffs' contention is that the clearing house is carrying on its business as a pool association; that it is illegal for it to do so because its rules do not comply with section 27 of the Co-operative Associations Act which reads:

> The rules of an association may provide for the carrying-on of its business, subject to this section, as a pool association in which case its rules, . . . , shall provide for the following matters:

Shortly, these matters are a division of the territory, in which the association has members, into districts and the formation in each district of a local organization comprising all its members residing within the district; the number of directors to be elected from such district and the election of these directors; the election of district delegates by each local organization, and various other important matters.

It is admitted by the defence that there has been no compliance with section 27. It is then submitted the orders of the Marketing Board are null and void, as it is beyond the powers of the Board to appoint as its agent a corporation which has not power to act as a pool association. Under section 3 of the Co-operative Associations Act any five or more persons may form an incorporated association for the purpose of carrying on any lawful industry, trade or business with certain exceptions not important here. By

section 11 the association, in addition to other powers conferred by the Act, is to be deemed to have powers to buy and sell and deal in all articles and things within the scope of its business and to do any of these things as agents. In view of this and the objects contained in its memorandum it seems to me clear that the clearing house had the right to buy and sell milk as the agent of the Marketing Board. It is clear upon reference to the orders which I have made that the clearing house was to act, solely, as the agent of the Marketing Board. There is one provision that might suggest the contrary, *viz.*, the high monthly licence fee which is to be paid by the clearing house. This licence fee of course would not come out of the funds of the clearing house but would come out of the moneys it is to receive from the sale of milk. I think, obviously, this was intended to produce to the Marketing Board a revenue for the purpose of covering its expenses. Now section 27 enacts that the rules of an association may provide for the carrying on its business as a pool association. In my opinion this means that if the association is carrying on a business of its own and wishes to carry it on as a pool association, then it must comply with that section. If, on the other hand, it is merely acting as an agent, it is not carrying on its own business. It is carrying on the business of the Marketing Board as its agent. Further, it may, as an agent, carry on a business for its principal which it may not carry on for itself. See Bowsted on Agency, 9th Ed., 6; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 198; *In re D'Angibau; Andrews* v. *Andrews* (1880), 15 Ch. D. 228. From its terms, it is clear to me section 27 could not have been intended to apply where an association was acting merely as an agent. Under these circumstances I am of the opinion that it was not necessary for the clearing house to comply with section 27. In view of my conclusion, it is not necessary to deal with the other defences raised by Mr. *Williams*. The injunction is dissolved.

The action must be dismissed with costs.

Action dismissed.

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May 22, 23; *June* 12.

REX v. JING FOO.

Criminal law—Speedy trial—Carnal knowledge of a girl under fourteen years of age—Evidence of child of tender years—Corroboration—Lesser offence included in greater—Indecent assault on female—Criminal Code, Secs. 301 (1) and 835—R.S.C. 1927, Cap. 59, Sec. 16.

On a charge of having carnal knowledge of a girl under the age of fourteen years, the learned trial judge believed the evidence of the girl, but concluding that her evidence was not corroborated in some material particular implicating the accused, he could not convict him on that charge. He found, however, that the accused was guilty of the lesser offence of "indecent assault on a female" as empowered by section 835 of the Criminal Code, and sentenced him to one year's imprisonment.

Counsel for the accused took objection to the girl's evidence being received, on the ground that prior to the reception of her evidence the trial judge did not examine her as to her understanding of the nature of an oath.

Held, overruling the objection, that although the learned judge did not examine the girl as to her understanding of the nature of an oath, she was examined by Crown counsel as to this and he was entitled to act upon information elicited by him.

TRIAL of an accused charged with having carnal knowledge of a girl under the age of fourteen years, not being his wife. The facts are set out in the reasons for judgment. Tried by WHITESIDE, Co. J. at New Westminster on the 22nd and 23rd of May, 1939.

Petapiece, for the Crown.

P. D. Murphy, for accused.

Cur. adv. vult.

12th June, 1939.

WHITESIDE, Co. J.: The accused was charged with having on the 14th of November, 1937, carnal knowledge of Mary DeBodt, a girl under the age of fourteen years not being his wife.

The evidence of the mother, supplemented by birth certificate put in as evidence by the Crown shows that the girl was born on 28th July, 1925. Owing to the absence of accused from the district in which the offence was committed, the warrant for his arrest could not be executed until December 28th, 1938, on which date the accused was arrested at the Immigration Sheds in Vancouver and was tried before me on May 22nd, 1939.

Counsel for the accused has by written memorandum filed in Court, taken the objection that Mary DeBodt's evidence should not have been received at all, for the reason, that prior to reception of her evidence, I did not personally examine her as to her understanding of the nature of an oath, and generally because of non-compliance with section 16 of the Canada Evidence Act, and section 1003 of the Criminal Code.

Counsel for the accused did not take exception to the evidence of the girl at the trial but in his memorandum cited the case of *Rex* v. *Sankey* (1927), 38 B.C. 361 in support of his contention. I do not think the *Sankey* case sustains the submission of accused's counsel. Section 16 of the Canada Evidence Act requires that if in the opinion of the judge, a child offered as a witness does not

> understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, . . . , such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Counsel for accused seemed to be of the opinion that I should personally have examined this girl as to whether she understood the nature of an oath or not. This was done for me, by the Crown counsel, and I think I was entitled to act on information elicited by him. The objection is overruled.

I do not think it necessary to go into the sordid details of the girl's evidence which I accept and believe, and I would convict the accused on the charge on which he was tried, if there were any evidence of corroboration which would meet the requirements of section 1002 of the Code, which provides that:

> No person accused of an offence under [section 301] shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The evidence of the doctor cannot be considered as corroborative; although he is independent, his evidence does not implicate the accused. The evidence of the parents must be rejected as non-corroborative, and that leaves the Crown with only the evidence of Davies, which I think falls far short of meeting the test of corroboration implicating the accused. I cannot therefore find the accused guilty of the charge of having carnal knowledge of Mary DeBodt. Section 835 of the Code, however, empowers me to convict the accused of a lesser offence included in the greater. I find the accused guilty of indecent assault on a female, and the sentence is one year in Oakalla with hard labour.

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Mar. 17, 20, 21, 22, 23, 24; *June* 30.

Contract—Sale of Siam rice—Sample of previous year's crop submitted before contract—Whether sale by description or by sample—Sale of Goods Act, R.S.B.C. 1936, Cap. 250, Sec. 22.

There having been negotiations for the sale of Siam rice by the plaintiff to the defendant, in October, 1935, the assistant manager of the plaintiff left with the president of the defendant four samples of paddy harvested from the 1934-35 crop, the samples being labelled "Siam extra super paddy rice." On February 11th, 1936, the parties entered into a written contract for the sale by the plaintiff to the defendant of "Siam rice—extra super paddy—new seasons crop. Guaranteed fully up to type and grade as shown by sample handed you of last seasons' crop. 2,750 long tons 5% more or less to suit vessel." The ship with the rice arrived at the defendant's dock on the Fraser River on May 19th, 1936. Owing to an unusually long rainy season the extra super paddy of the year 1935-36 (the paddy shipped) was not as good in quality as the extra super paddy of the previous year (from which the samples were taken). After examination the defendant claimed the paddy was not up to sample and paid the plaintiff $57,002 only, when the price agreed upon was $80,752.83. The plaintiff then brought this action for the balance of $23,750.83, and the defendant claiming it overpaid the plaintiff by $7,024.30, counterclaimed for that amount. It was *held* on the trial that the sale was by description as well as by sample, and the purchase price should be reduced by $11,315.40. The defendant appealed and the plaintiff cross-appealed, claiming the full purchase price.

Held, on appeal, dismissing the appeal and allowing the cross-appeal, that when one purchases a future season's crop one can only ascertain quality after it is harvested and milled. The contract was therefore speculative in character. So far as the sale of unascertained goods is concerned, it was a sale by description. There was the finding not only that the shipment was in accordance with the description, but also that extra super paddy of one year may not be of as good quality as extra super paddy of another year, so that while the quality differs from year to year the "type" and "grade" are always the same. The words in the contract "as shown by" indicate that the sample was taken as an illustration or guide and only in respect of type and grade. This was a sale by description and the plaintiff is entitled to judgment for the full purchase price less the amount received.

APPEAL by defendant from the decision of ROBERTSON, J. of the 17th of June, 1938, in an action for $23,750.83, being the balance owing for the price of rice sold and delivered by

the plaintiff to the defendant at the defendant's request. The defendant operated a rice mill on Lulu Island on the Fraser River and obtained its supplies of rice from China, Burma and Siam. The plaintiff company has an office in Seattle, is a subsidiary of a larger Danish company and another subsidiary of the parent company is the East Asiatic Company Ltd. of Bangkok, Siam. In August, 1935, the Seattle company and the defendant negotiated for a sale of Siam rice of the 1936 crop, samples of the Siam paddy of the 1935 crop being shown by the manager of the Seattle firm to the president of the defendant company. Paddy is rice in its rough state as harvested, the grain being covered by an inner skin and over this is the outer husk. The 1936 crop was not up to the quality of the 1935 crop, owing to excessive rains during the 1936 season. A contract was entered into on February 11th, 1936, for 2,750 long tons of "Siam rice—extra super paddy—new seasons crop. Guaranteed fully up to type and grade as shown by sample handed [the defendant] of last seasons' crop." The paddy arrived at the defendant's wharf on the Fraser River on the 19th of May, 1936, and the defendant took delivery of the rice. The defendant claimed the rice was not up to sample and was a lower grade than that contracted for. The price of the rice under the contract was $80,752.83, and the defendant claimed the value of the rice actually delivered at the time of delivery was $49,977.70, and the price payable is diminished by the sum of $30,775.13. The defendant paid the plaintiff $57,002, which by their mistake exceeded the sum they considered was due the plaintiff by $7,024.30, and the defendant counterclaimed for this amount.

The appeal was argued at Vancouver on the 17th to the 24th of March, 1939, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

Griffin, K.C., for appellant: The language of the contract is clear and unambiguous. The contract says the very best Siam paddy of the crop just harvested, equal in type and grade to the sample handed to you of the previous crop. It was a sale by description and sample. It is governed by sections 20 and 22 of the Sale of Goods Act. There is an implied condition that

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the bulk shall correspond with the sample in quality: see Benjamin on Sale, 7th Ed., 735 and 775; *Wieting & Richter Ltd.* v. *Braid, Tuck & Co. Ltd.* (1936), 51 B.C. 135; *Azemar* v. *Casella* (1867), L.R. 2 C.P. 677; *Morse* v. *Moore* (1891), 22 Atl. 362. The learned judge said it was a sale by sample and description, that the quality of shipment was not up to grade, and in 1936 there was no market in British Columbia in which this shipment of paddy could be sold. The appellant had the right to reject the whole shipment, but having elected to accept the goods its rights and remedies are set out in section 58 of the Act. In pursuance thereof the appellant set up breach of warranty and deducted $23,750.83 from the contract price. The learned judge found the appellant's loss was $11,587.42. As to buyer's right to purchase substitute see *Hobbs and Wife* v. *The London and South-Western Railway Company* (1875), 32 L.T. 252; *Le Blanche* v. *London and North Western Railway Co.* (1876), 1 C.P.D. 286, at p. 303; *Hinde* v. *Liddell* (1875), L.R. 10 Q.B. 265; *Erie County Natural Gas and Fuel Company* v. *Carroll*, [1911] A.C. 105, at p. 117; Mayne on Damages, 9th Ed., 179; *Hardwood Lumber Co.* v. *Adam & Steinbrugge* (1910), 68 S.E. 725; *Sunny South Grain Co.* v. *Webb-Sumner Oil Co.* (1924), 101 So. 803; Halsbury's Laws of England, 2nd Ed., Vol. 29, secs. 270 to 273; Chalmers on Damages, 6th Ed., 106; Sedgwick on Damages, 9th Ed., sec. 226 (*g*).

Bull, K.C., on the same side: The learned judge made a mistake in calculation of $1,959.31, and in any case the judgment should be reduced by this amount. There were six issues: (1) Was the contract a sale by sample? (2) Was it essential to proper performance that the shipment should accord with the sample? (3) Was the certificate of quality conclusive? (4) Did the shipment accord with the sample? (5) Was there any market in British Columbia for the sale of paddy? (6) To what deduction from price was the appellant entitled? The appellant succeeded on issues (1) to (5), and the sixth was divided, but notwithstanding this the respondent was given three-quarters of its costs, and the appellant has been denied any costs: *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560; [1919] 1 W.W.R. 783; *Reid, Hewitt and Com-*

pany v. *Joseph,* [1918] A.C. 717; *Williams* v. *Stanley Jones & Co.,* [1926] 2 K.B. 37; *May* v. *Imperial Oil Limited* (1931), 44 B.C. 175. If the seller gives no evidence at all of the value of the article actually delivered and the buyer proves any difference between the article delivered and the article agreed to be delivered, the action fails: see *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at pp. 567-9; *Wallis, Son & Wells* v. *Pratt & Haynes,* [1910] 2 K.B. 1003, at p. 1015; [1911] A.C. 394; *Smallman* v. *Bates,* [1919] 2 W.W.R. 238; *Purkin* v. *Miller,* [1938] 1 W.W.R. 640, at p. 644. That the certificate of quality is not final see *Bird* v. *Smith* (1848), 12 Q.B. 786; *South American Export Syndicate* v. *Federal Steam Navigation Company* (1909), 25 T.L.R. 272; *Studebaker Distributors, Limited* v. *Charlton Steam Shipping Company, Limited* (1937), 54 T.L.R. 77; Halsbury's Laws of England, 2nd Ed., Vol. 29, p. 72, sec. 83.

Hossie, K.C. (*Ghent Davis,* with him), for respondent: The appellant complains it was not allowed the actual loss and damage, but appellant did not prove its actual loss and damage. The whole shipment was sold and the figures were available but not given. Only eleven tons of the 494 tons of superior rice purchased to bring the quality of the rice to standard was used for that purpose. The appellant by carrying out its contractual obligations in making payment under the contract and then suing for return, could have avoided all risk of costs, but having elected to take upon itself the assessment of damages cannot now complain if held liable for costs. This was a sale by "description" and not by "description and sample." The sample was not a sample of the paddy to be supplied but was a paddy of a previous year. The quality of paddy varies from season to season, though the grade is standard. The distinction must be drawn between a "sale by sample" on the one hand and a "sale from sample." In the former the quality governs, in the other it does not: see *Re Faulkners Limited. Arthur & Co. (Export) Limited's Claim* (1917), 40 O.L.R. 75; *Dominion Paper Box Co. Limited* v. *Crown Tailoring Co. Limited* (1918), 42 O.L.R. 249. The appellant bought a "new seasons crop." The contract was fulfilled by the supply of Siam extra super paddy of the

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1935-36 season, even though the quality was inferior to the same grade of the previous year, owing to the wetness of the season. The measure of damages, if appellant were entitled to any, is the difference between what the paddy was actually worth at Vancouver at the time of delivery, and what it would have been worth at Vancouver on that date if it had been up to the description: *Purkin* v. *Miller,* [1938] 1 W.W.R. 640; *Brenner* v. *Consumers Metal Co.* (1917), 41 O.L.R. 534; *Erie County Natural Gas and Fuel Company* v. *Carroll,* [1911] A.C. 105; *James Finlay & Co.* v. *N.V. Kwik Hoo Tong H. M.,* [1929] 1 K.B. 400; *Radovsky* v. *Creeden & Avery* (1919), 27 B.C. 303, and on appeal (1920), 28 B.C. 331; *Bainton* v. *Hallam Limited* (1920), 60 S.C.R. 325. The appellant having failed to prove its damages upon a proper basis is not entitled to any. The counterclaim having failed, the respondent is entitled to the costs of the counterclaim.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: We are of opinion that the appeal should be dismissed and the cross-appeal allowed.

I may say that is the judgment of this Court, but I wish it to be understood I have not exactly arrived in all respects at a final decision of the matter, although I am so much disposed to the same view as my brothers that I feel it would not be well to delay the determination of the appeal any longer.

MACDONALD, J.A.: This is an appeal from a judgment of ROBERTSON, J. awarding respondent, plaintiff in the action, $12,163.41, the balance due for a cargo of paddy rice sold to appellant under a contract in writing dated 11th February, 1936. The appellant company, defendant in the action, operates a rice mill on the Fraser River near Vancouver, B.C., and purchased the paddy for milling purposes. Paddy is rice in its original condition as grown and harvested, in this case in Siam. It is covered by an inner skin and outer husk. When it is milled it produces several products referred to as "out-turn," *viz.,* hulls or husks (valueless) meal, broken rice and whole or head rice, the latter the most valuable product. The best paddy rice there-

fore gives a good out-turn of whole rice reasonably free from defects, such as lack of uniformity, broken and discoloured grains, etc.

Certain negotiations took place before execution of the contract. For example, four samples of paddy harvested in November, 1934, and eleven samples of rice milled from paddy of the same crop year were left with appellant for examination as an indication of the paddy it might expect to receive if it decided to purchase. These samples included one, afterwards known at the trial as Exhibit 6, labelled "Siam extra super paddy rice." It was taken from the crop of the previous season and is the sample referred to in the written contract. Obviously a sample could not be furnished from a new crop yet to be harvested, about to be made the subject of a contract, in order that appellant contracting in advance of requirements, might be assured of a supply for the coming year. The importance of this feature is that, due to climatic conditions, paddy rice varies in quality from year to year. If the season should be wet the quality would be affected. It might be quite impossible therefore—in this case it was impossible—to obtain a supply of paddy from the "new seasons crop" to keep the mill going and at the same time insist that it should be precisely similar in quality to paddy rice or a sample of paddy rice of an earlier crop year. The contract therefore cannot be interpreted without reference to facts known to the contracting parties.

Nothing that occurred prior to the execution of the contract, except identification of what is now known as Exhibit 6 as the sample referred to therein, has any bearing on its interpretation. It must be construed by the language used, unaided by anything that occurred in preliminary negotiations. The conduct of the parties, surrounding circumstances and known facts will be an aid to interpretation should difficulty be encountered. It was said that before entering into the contract the appellant, by its representative, inspected all the samples of paddy left with it by respondent's assistant manager and milled a small part of Exhibit 6. It produced whole rice of a good quality in reasonable volume with only normal breakages or defects. It was submitted that this act of appellant in milling a part of the sample

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before signing the contract indicated that it expected to receive, and it was intended that it should receive, under the contract, paddy rice that would mill equally well. That does not necessarily follow. The rights and obligations of the parties must still be found in the written contract. Indeed the fact that appellant did not preserve the rice milled from Exhibit 6, for later production and comparison with rice milled from the shipment ordered by the contract and at the trial relied on the oral evidence of its employees given from memory as to the out-turn obtained from it would appear to indicate that it did not expect to receive rice that would produce precisely similar results. One would expect if the parties contemplated furnishing and securing paddy rice, giving an out-turn similar to the out-turn from Exhibit 6 that it would be milled in the presence of representatives of the contracting parties, each keeping a record of the result. That was not done. They did not contract on the basis of milled rice. Such a contract would be impossible of performance unless climatic conditions were similar in two succeeding years. It was impossible to insist, as one term of the contract, upon obtaining a supply of paddy from the new season's crop and as a second term that it should have the same out-turn as a sample taken from an old season's crop.

When the shipment arrived in Vancouver from Bangkok it was inspected and, according to appellant's evidence, found not to be equal in quality or out-turn to the sample, Exhibit 6. Without canvassing the evidence it may be said that the finding of the trial judge, that the shipment did not correspond with the sample, cannot be contested. If therefore under the terms of the contract appellant agreed to furnish paddy rice precisely, or substantially similar in potential out-turn, to Exhibit 6, this judgment, except possibly in respect to *quantum* of damages, should not be disturbed. Certain communications took place with representatives of appellant and it was conceded not only orally but in cablegrams that the shipment did not in quality correspond with the sample. The basic point remains however —under the contract was it obligatory on respondent to supply rice from the "new seasons crop" precisely similar in quality to the sample—Exhibit 6—or so similar that in respect to any slight difference the *de minimus* rule would apply.

The contract price was $80,752.83. Appellant, assessing its own alleged damages, valued the shipment at $50,036.20 paying this amount to respondent. It now professes to have made an over-payment of $7,002 and counterclaims for that amount. The respondent, plaintiff in the action, sued for the difference, namely, $23,750.83 and, as stated, was awarded $12,163.41 by the trial judge. The learned trial judge assessed damages at an amount less than that claimed by appellant: the latter appeals contending that it properly assessed its own damages by way of diminution of the purchase price. The respondent cross-appeals on the ground that it is entitled to payment in full under the terms of the contract.

The contract is fully outlined in the reasons for judgment. Under it respondent agreed to supply appellant with approximately 2,750 long tons of "extra super paddy Siam rice" of the "new seasons crop." One should look at the original contract to properly appreciate its terms as it is typed in part and printed in part, a fact not shown in the appeal book. The subject-matter is printed in the margin of a stock form of contract with the terms agreed upon by the contracting parties typed opposite thereto. One of the subject-matters printed in large capitals is "Commodity" and opposite to it the following words are inserted: "Siam rice—extra super paddy—new seasons crop." Then follows in the margin the printed word "Quality" and presumably opposite this heading the following words are inserted: "Guaranteed fully up to type and grade as shown by sample handed you of last seasons' crop." It would be more accurate to say, as there is no period after the word "crop" in the original contract, that all of the foregoing forms one statement under the two headings "Commodity" and "Quality." The contract therefore was to furnish "extra super paddy Siam rice" of the "new seasons crop" guaranteed "fully up to *type* and *grade* as *shown* [my italics] by sample handed [appellant] of last seasons' crop." That sample is Exhibit 6. If this was meant to be an ordinary sale by sample where the bulk must correspond with the sample the words were not well chosen. In that event no reference to "type" and "grade" would be necessary. It would be enough to insert the words after "Quality" "as per sample." If too

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it is treated as a sale by sample the contract could not be fulfilled. Because of excessive rains it was impossible to furnish from the new season's crop paddy rice equal in quality to the sample. There is no evidence that from any part of the "new seasons crop" in Siam extra super paddy could be obtained equal in out-turn to Exhibit 6.

As stated, the sample was taken, not from the "new seasons crop" purchased but from last seasons' crop, not purchased. If the weather had been very dry instead of very wet the purchaser might have secured paddy superior in quality to the sample. The contract was therefore speculative in character. When one purchases a future season's crop one can only ascertain quality after it is harvested and milled. Because of this difference in quality from year to year, due to climatic conditions, it would be impossible to secure a supply in advance on the terms suggested by appellant. If therefore this contract is to be interpreted as workable it cannot be the ordinary sale by sample under section 22 of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250. A sale on such terms would only be appropriate when made after harvest from a sample taken from the crop in bulk. The purchase of the "new seasons crop" is an important term in the contract. Appellant, no doubt, must contract in advance to be assured of supplies. If a sale by sample was intended there would be no purpose in inserting the term "new seasons crop." A shipment from a crop of the previous year would serve equally well. The "new seasons crop" is wanted; it might be better than the sample. In that event respondent could not refuse to supply it. Excessive rain seriously affecting the "new seasons crop" would not render the contract incapable of performance unless so damaged that it could not reasonably be regarded as commercially usable in the ordinary course of business. In that event the consideration for the contract would have failed. That is not this case. The purchaser milled the paddy rice received and sold the out-turn, using a small quantity of other paddy to improve the quality.

It is rather suggestive—it would be important if we had to consider damages—that no evidence was given as to terms of sale of the rice so milled. Appellant cannot say that the respondent could not and did not supply the thing bargained for.

A further examination of the contract is necessary however before accepting the foregoing views. If on the contract's proper interpretation it is a sale by sample the respondent must bear the loss. If willing to enter into such a contract, hazardous though it may be, a breach of the contract would render it liable in damages. What therefore is meant by "Siam rice—extra super paddy—new seasons crop. Guaranteed fully up to type and grade as shown by sample handed you of last seasons' crop"? Other terms of the contract need not be referred to; they present no difficulty. There is no trouble about the "Commodity": it is Siam rice of the kind referred to. The difficulty, if any, is in respect to "Quality." Although that word is printed in the margin the terms of the contract inserted opposite that heading do not, at least to the full extent, relate to "quality." "Type" has nothing to do with quality but it appears under that head. Does the word "grade" mean "quality" as Mr. *Griffin* contended? If so the contract would read "fully up to type and quality as shown by sample," etc. If that is so I would agree that on the facts the decision under review is right: the respondent on that view took the chance of being able to secure from the "new seasons crop" paddy of a quality equal to Exhibit 6 and having failed must pay damages for the breach. The sample, however, taken from the previous season's crop was to indicate merely "type" and "grade." It was to be "up to" type and grade as shown by the type and grade of the sample. What does "grade" mean? This should be determined by the evidence and by general knowledge of the ordinary meaning of the word. There may be different "grades" of rice as there are of wheat. No. 1 hard is a grade of wheat; it differs in quality from No. 1 Northern. Wheat may be graded by numbers. True the grade indicates quality but it is more than that. Grade is a constant factor; hence a ready and satisfactory basis for a contract. Quality is not constant. Quality differs in different grades and even wheat or other commodities of the same "grade" may vary in quality. Boys may be in the 5th grade in school. While thus graded their work will differ in quality. As the Chief Justice suggested during the argument, we have wines of different grades and vintages. Though the grade or vintage is constant the quality

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will vary with the seasons. Number 1 hard wheat might be called "super wheat": No. 1 Northern "extra super wheat." These words in themselves appear to denote "grades" and not "types." The "type" of wheat may be Marquis, Blue Stem, etc. I would suggest therefore that the words "super paddy" or, as here "extra super paddy" naturally and reasonably denote "grades."

Mr. *Griffin* defined "grades" from the dictionary as "degree in rank, proficiency, quality or value." While the word "quality" is given as one meaning of the word among others one must select the meaning most appropriate to the case. Is it reasonable to interpret "grade" in the sense contended for by the appellant? It submitted that the contract shipment must be of the same "grade" as Exhibit 6; in other words of the same quality. I have given reasons for rejecting that view. The appellant ascertained by milling that the sample would produce a certain percentage of whole rice and smaller percentages of broken rice, meal and husks, the first being all-important. Damages were computed on that basis. It was not however rice as it came from the mill but paddy, as it came from the harvest field, that was sold: it had to be of the same "type" as the sample and of the same "grade." If milled rice was the basis of the contract the "paddy" (Exhibit 6) retained would be of no importance, except to show the source of the milled rice.

The foregoing is outlined apart from the evidence. The evidence of the president of appellant company, Mr. Gavin, ought to be conclusive against it on this point. He was familiar with Siamese paddy. He gave this evidence:

Are you familiar with Siamese super paddy? Well, we won't buy on a name and description:

(It is for the Court to interpret the contract).

The witness proceeded:

I know, of course, that there are such "grades" as Siamese super paddy, and extra super paddy, but we don't buy on that.

As a matter of fact, are you familiar enough with Siamese paddy to know that the grades of paddy are extra super, super and feeding? Yes.

Those are grades of Siamese paddy? And I think there is another one there. I have forgotten the name of it.

Siamese rice is divided into a large number of grades? I believe so.

Counsel in error, I take it, then asked this question:

But the milled rice is divided into those I have mentioned—extra super, super and feeding?

There is no answer to this question. It is apparent that the questioner intended to summarize the previous evidence and used the word "milled rice" instead of paddy. There is no question from this evidence as to the meaning of "grade": it does not mean "quality" in the sense claimed by the appellant. This witness also explains the meaning of the word "type." He gave this evidence:

> They are all of the same type, of course? [*i.e.*, the different grades referred to]. Yes.
>
> Type, referring to Siam as against Burma, Chinese, and so on? Yes.
>
> It is a type of rice? Yes.

I may add it is clear from all the evidence that appellant was supplied with Siamese rice and that the "grade" was "extra super paddy," the same grade as Exhibit 6. There is a finding on this point supported by the evidence. If respondent supplied "super paddy" it would not be "up to" the grade as shown in the sample: that was "extra super paddy." I do not suggest that the foregoing is all the evidence on the meaning of the word "grade." It is the evidence of appellant's president familiar with the facts and of all the witnesses for the respondent. Other witnesses for appellant suggested, rather than definitely asserted, that "grade" means "quality." I feel free to accept the view of the main witness for appellant, most competent to speak, more particularly as viewed aright there is no specific finding on the point. The absence of a specific finding is due to the method of approach of the learned trial judge. He was of the opinion that the sole question was whether or not the shipment was "up to" the sample in the sense that the out-turn from both would be similar: in other words the ordinary case of sale by sample where the bulk must correspond to it. Had the learned trial judge adopted the interpretation of the contract outlined herein I think it probable he would have accepted the meaning assigned to the word "grade" by appellant's chief witness as in consonance with the facts.

I think, therefore, with the greatest deference, there is error in the viewpoint of the learned trial judge. In the course of the trial he said:

> In the final analysis it comes down to the question of whether or not this shipment is up to the sample.

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In his reasons, as intimated, he found

> from the evidence that the shipment was of extra super paddy of the "new seasons crop."

There is therefore a finding of fact on this point amply supported by evidence. The contract in that respect was fulfilled at all events. He rejects, however, respondent's view that the sample was to be used only to establish the type and grade of the commodity sold and not to establish the actual thing the appellant was entitled to receive. No one could guarantee that. The trial judge held that it was a sale by description as well as by sample but we are not concerned with that aspect: there is no trouble on the question of description. So far as the sale of unascertainel goods are concerned it was a sale by description. There is however another important finding, supported again by evidence, *viz.*, not only that the shipment was in accordance with the description but also that extra super paddy of one year may not be of as good quality as extra super paddy of another year. The importance of this is that while the quality differs from year to year the "type" and "grade" are always the same. After dealing with section 22 of the Sale of Goods Act the trial judge again states the question for determination in these words:

> The question then is whether the shipment was up to the sample in quality. This is a question of fact.

With respect I think that viewpoint is erroneous. This is repeated by the statement:

> I have no hesitation in finding upon the whole evidence that the quality of the shipment was not up to the sample.

There is no doubt the evidence supports such a finding if that is the proper interpretation of the contract. Apart from all other considerations it is difficult to believe that, if it was so intended plain apt words, few in number, would be used, such as "quality," as per sample, etc. The words "as shown by" indicate that the sample was taken as an illustration or guide and only in respect to type and grade.

It should be observed too that there is a difference between a sale "by" sample and a sale "from" sample. Sales where the sample must correspond to the bulk, as pointed out in *Re Faulkners Limited. Arthur & Co. (Export) Limited's Claim* (1917), 40 O.L.R. 75, at p. 84 are not as common today as formerly.

They were applicable, as therein pointed out, to sales of bulk goods like wheat, flour, etc., and I would add to sales of products of the year in which they were grown. Nowadays sales by grade are more prevalent. As stated at p. 84, "in these days sales according to grade have almost entirely superseded sales by sample." It is the nearest approach to certainty. And again "sales by sample have very much gone out of vogue while sales from samples have very much come in." True in the contract under consideration we have not the words "from sample." We have, however, a group of words ("as shown by," etc.) clearly indicating the purpose served by the use of the sample referred to.

I think respondent, plaintiff in the action, is entitled to judgment for the full purchase price less the amount received. This means that the judgment should be set aside, the appeal dismissed and the cross-appeal allowed. A small item in respect to bags was mentioned. It may be spoken to if not adjusted by the parties.

SLOAN, J.A.: I agree (with respect to the learned trial judge) with the reasons and conclusions of my brother MACDONALD.

Appeal dismissed; cross-appeal allowed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondent: *Davis & Co.*

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Negligence — Shop premises — Defective flooring between entrance and sidewalk—Duty of occupant to invitee—Window-shopper steps through flooring—Personal injuries—Damages.

The plaintiff, wishing to have a better view of goods through a window on premises occupied by the defendant, stepped from the sidewalk on to tiling in front of the entrance. The tiling gave way and both her feet went into a hole about a foot deep and up to her knees, and she was injured. The defendant was a tenant of the premises for eighteen months prior to the accident. For the first fifteen months of his occupancy the premises were used as a shop, and after that as a ware-

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house for the storage of furniture. The word "Furniture" was on the window in small letters.

Held, that the goods apparently displayed for sale on the premises were such as to constitute an invitation to the plaintiff to approach and examine the goods. She was therefore an invitee and the defendant was under a duty towards her to take reasonable care to see that the premises were safe. The defects in the tiling had existed for a length of time, such as would make them known to the defendant and give him warning of the danger. He should have had the floor inspected and repaired and not having done so he was liable.

ACTION for damages resulting from the tiling giving way in front of the entrance to the premises at 2031 West Fourth Avenue, Vancouver, and off the sidewalk. The plaintiff walked from the sidewalk on to the tiling which gave way, and both her feet went into a hole about one foot deep and up to her knees. She sustained personal injuries. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 19th and 20th of June, 1939.

McAlpine, K.C., and *H. Freeman*, for plaintiff.
Maitland, K.C., and *W. C. Thomson*, for defendant.

Cur. adv. vult.

8th July, 1939.

FISHER, J.: In this matter I find that about 11 a.m. on Sunday, June 26th, 1938, the plaintiff walked on the tiled floor at the entrance to the building on the premises at 2031 West Fourth Avenue, Vancouver, B.C., in order to get a better view of what she thought might be a table on the said premises and when she was a little distance from the street sidewalk the tiling collapsed, making a hole (see photo Exhibit 4A) about a foot in diameter and about a foot deep. The plaintiff fell down and both of her legs went into the hole up to her knees. She sustained personal injuries and brings this action for damages against the defendant who was the tenant and occupier of the said premises at the time of the accident and had been so since in or about the month of January, 1937.

The first question that arises is as to the duty which rests upon the occupier of premises towards the persons who come on the premises and such duty of course differs according to the category

into which the visitor falls. See *Indermaur* v. *Dames* (1886), L.R. 1 C.P. 274, especially at p. 288. In the present case counsel on behalf of the plaintiff contends that she was an invitee and so I have to consider whether this contention is correct. It is necessary to examine the circumstances. On her examination for discovery the plaintiff said in part as follows:

How did you come to be on the floor of this doorway? I saw something in the window that attracted my eye.

What did you see? I didn't know if a table or fire-screen. That is what I stepped up to look at.

And what was it? I still don't know.

You saw it? I couldn't swear if a table or a fire-screen. It had roses painted on it and it was round.

And you saw it there? It was tilted.

You saw it from the street as you walked along? It took my eye, and I stepped in to try and get a better look at it.

As you walked along the sidewalk you saw what you thought was either a table or a fire-screen? Yes.

In the window of these premises; is that right? Yes.

And you stepped in to get a better look at it? Yes.

Were you interested in buying it? I needed a table for my living-room.

And you were interested in buying it? If it were a table.

Had you been to these premises before? No, sir, never.

. . . . .

Would it be correct to say you were just killing time on window-shopping? I was waiting for the street-car.

And window-shopping? Call it that, I suppose. I looked in as I walked along. I had missed one car.

In his examination for discovery the defendant says in part as follows:

What kind of business are you in? Antique furniture business.

Are you the tenant of a store at 2031 West Fourth Avenue? Yes, that is our warehouse.

. . . . .

How long have you occupied those premises? I don't know whether it was December, 1936, or January, 1937.

It is approximately since that period? Yes.

Have you occupied them continuously since that time? Yes.

And you were the tenant of the premises on or about the 26th of June, 1938? Yes.

. . . . .

These premises you occupy as a warehouse were formerly used as a store? Yes.

Were they ever used as a store by yourself? Yes, up to three months before this alleged accident happened.

Did you keep any employees stationed at the premises? Yes, three.

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Would they be there continuously? Yes.

. . . . .

Did you make any alterations in the front of the store after you used it as a warehouse? None whatever.

So that the appearance of the premises had not altered since you occupied it as a store? The front of the store, no.

Were there any words painted on the front of the building or the window? The word "Furniture" is on the window in small letters. That sign was put there by the people who had the store before I occupied it.

. . . . .

Is that all? I believe there is "Furniture" on that window, that is all, and then on the next door they have "Curios."

Not in this store? No. There are two stores connected by an archway inside.

. . . . .

Was there any notice or warning of any kind on the premises to keep persons away from the entrance to the doorway? No.

Was there any obstacle placed in the entrance to prevent people coming in the doorway? None.

Upon this and other evidence before me I find that the said premises at 2031 West Fourth Avenue were not used by the defendant as a store for the sale of goods to the public at the time of the accident or for some three months before. I also find, however, that at the time of the accident and during the said three months the defendant had goods on said premises which sooner or later would go to other premises of the defendant at 1815-1823 West Fourth Avenue for the purpose of sale there. The defendant states that at the time of the accident his name did not appear on the said premises at 2031 West Fourth Avenue and that he did not intend to use the premises at 2031 West Fourth Avenue for the purpose of displaying goods for sale either there or elsewhere. With some hesitation I accept this evidence of the defendant. I am satisfied however and find that to a passer-by such as the plaintiff, the goods in the said premises reasonably appeared to be displayed for the purpose of sale and that the plaintiff entered on the premises for the purpose of getting a better view of what appeared to be an article that she might wish to buy.

Counsel for the defendant contends that, in order to constitute the relationship of invitee and invitor, there must be a common interest and that the visitor must go on the premises upon business which concerns the occupier as well as the visitor. It is

argued that there was no such common interest here for, even assuming that the plaintiff went on the premises with the intention of buying, if she was satisfied with the article and its price, the defendant had no intention of selling. During the argument many authorities were cited and reference might be made to the following: In Salmond on Torts, 9th Ed., the learned writer says, in part, as follows, at p. 511:

> There are two ways in which, apart from contract, a man may lawfully enter upon land in the occupation of another. He may enter by the permission of that other, express or implied; or he may enter by right, as in the case of an officer entering to execute legal process, or exercising some statutory right of entry and inspection.

At pp. 513-14:

> Entry by permission of the occupier is of two kinds. Using the established language of the authorities on this matter, the permission amounts either to an invitation or to a mere licence. A person invited to enter is commonly referred to as an invitee, or a licensee with an interest (*e.g.*, in *Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899; *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K.B. 746), while he who is merely licensed to enter is distinguished as a licensee or a bare licensee. . . . A licensee may be defined as a person who enters on the premises by the permission of the occupier, granted gratuitously in a matter in which the occupier has himself no interest. The typical example is a gratuitous licence to use a way across the occupier's land for purposes which exclusively concern the licensee himself. Another example is the case of a guest receiving hospitality in a private house. An invitee, on the other hand, is a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier has himself some pecuniary or material interest. He is a person who receives permission from the occupier as a matter of business and not as a matter of grace (*Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. p. 80). An invitation is a request to enter for the purposes of the occupier; a licence is a permission to enter for the purposes of the entrant himself. The invitor says: "I ask you to enter upon my business." The licensor says: "I permit you to enter on your own business."

It must be noted that in the passage above set out from Salmond on Torts the word "permission" is used with respect to both invitees and licensees and that, in order to be classified as either an invitee or licensee, the visitor must have the permission of the occupier to enter. The learned writer of the article also states that the permission may be express or implied. In the present case I think permission to enter must be implied from the circumstances and the only question then remaining is whether the implied permission was to enter for the purposes of the occupier as well as of the entrant or solely for the purposes

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of the entrant. So far as the intention of the occupier of premises, such as those in question herein, is to be considered in the determination of this question as to the nature of the permission, it must be the apparent intention to one looking at the premises in the control of the occupier and not necessarily the real intention that must be considered as the passer-by in such a case can only know from the appearance of the premises whether he is being permitted to enter on the premises for the purposes of the occupier or solely for his own purposes. Upon the evidence before me I hold that the appearance of the premises was such that the plaintiff as a passer-by reasonably concluded that the building was a store and that she was being permitted to enter on the premises upon the business of the occupier as well as on her own business. In other words, I hold that, even though the premises were not a store, the arrangement of the premises and of the goods thereon was such that it constituted an invitation to the plaintiff to approach and examine the goods apparently displayed for sale. In this connection reference might be made to 45 C.J., at p. 811, and cases there referred to:

> The maintenance of a show window in a store constitutes an implied invitation to passers-by to approach and examine the goods displayed. Where the owner or person in charge of property has, by his conduct, induced the public to use a way over the premises in the belief that it is a street or public way which all have the right to use, and where users will be safe, the liability of the owner or person in charge is coextensive with the implied invitation.

The footnote 29 [c] reads as follows:

> Entry Into Building.—A show window of a store facing on the entrance to the building in which the store is located constitutes an invitation to examine the goods displayed therein, and persons who go into the entrance to examine the goods are invitees. *Murphy* v. *Broadway Impr. Co.*, 189 App. Div. 692; 178 N.Y.S. 860.

My conclusion therefore is that the plaintiff was an invitee of the defendant and I have to say that it would seem to be settled law now that the duty of the occupier to the invitee is to take reasonable care that the premises are safe. See *Indermaur* v. *Dames, supra,* especially at p. 288; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; 98 L.J.P.C. 119, and *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, especially at p. 223.

Dealing now with the issue as to whether or not the defendant

did take reasonable care to see that the premises were safe, I have to consider the nature of the premises. In this connection reference might be made to some of the evidence reading as follows. On her examination for discovery the plaintiff said as follows:

And is it correct to say you would see what you were stepping upon? Yes. There is no doubt about that? No doubt whatever.

And did I understand you to say you had no warning of the possibility of that thing giving way until it gave way? I didn't have any warning whatever until I heard the crash and down I went.

You told me you saw what you were stepping upon? Yes.

Did you see anything wrong with it? No, I didn't.

Anything defective in the construction? No. If there was, I didn't see it.

But you were looking? I didn't see it.

But you were looking? That is correct? Yes, sure.

And you say you saw nothing defective in the construction? I didn't see any defects in the sidewalk.

In the floor in the doorway? In the floor in the doorway, I mean.

If there had been anything there to suggest defects, you wouldn't have walked on it? Certainly not.

And you were looking sufficiently to enable you to see there was nothing defective in that construction from where you were standing? Yes.

Didn't this floor shake when you went on it? I didn't feel it shake.

Were there not chunks of this tile out of this floor when you walked on it? I didn't see any.

But you would see it if it was so? There wasn't any then.

The tile was intact? Smooth.

It was all intact? Yes, when I walked on it.

And when you walked on it it looked like a perfect floor? Yes.

On his examination for discovery the defendant said in answer to questions as follows:

Have you examined under the surface of the tile flooring since the accident? Yes.

Did you examine the wooden frame underneath? Yes.

What did you observe? Dry rot in the boards underneath, the boards supporting the tile across the beams.

The boards lying on the beams supporting the tiling had dry-rotted? Definitely.

Had you ever had the building examined by anyone for the purpose of checking up on its condition? No; there was no apparent reason for it.

Why would you walk across it? I use it as a warehouse. Sometimes I go there, once a week or once in every ten days, to tell the men what to do.

Would you walk through that door? Yes.

Would your employees use it? Yes.

That is the ordinary entrance to the warehouse? Yes.

Would you tell me how many times during the course of say 60 days

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prior to the action? I was ill in April, and was off about two months. The doctor told me to go away for a rest and I was away about eighteen or nineteen days. I would say that during the three months previous I had walked across that floor possibly, at the most, ten or twelve times. I do not think it was as many times as that.

You did not pay close attention to the floor? Naturally I would see it when I would walk across it.

The same as you see anything you are walking upon? If you are walking across a floor and it was cracked, especially if I was renting it, I would see it.

And if there were any tiles missing you would see that? Yes.

At the trial evidence was given by Mr. Manlow E. Giddings. In his evidence Mr. Giddings, a building contractor, said in part as follows:

You went out and inspected the entrance to the premises 2031 Fourth Avenue West, Vancouver, did you not? Yes.

What date was that, Mr. Giddings? I can't recall the date; some time last February.

. . . . .

Was this hole still there then? Yes.

. . . . .

How big was the hole in diameter? I don't know, about a foot, I would say.

Did you see on what the tiles rested? Yes.

What did they rest on? Well, they rested on shiplap.

. . . . .

All right. Is that all that was supporting the tiles in the area where this hole was? Except the 2 by 4s or 3 by 4s which had been thrown across to support that.

. . . . .

At any rate, there was no 2 by 4 underneath that hole? No.

. . . . .

Did you notice whether or not on other parts; Oh, I was going to ask what is the nature of that tiling? Well, it is the ordinary glazed tiling used usually for store entrances and bath-rooms.

. . . . .

All right, what did you find there? . . . I found the slab about an inch and a half thick, if I remember correctly—we were not there very long. The hole was right through. There was no shiplap directly below the hole. . . .

What was the depth? You might tell me that. Did you measure the depth from the surface of the tiling to the ground? Around a foot, but we didn't measure.

I was asking you how the tiling was laid down. First of all I want to ask, are these all small tiles? Yes, all small tiles.

What would be their dimensions? About an inch square.

And I want to get the construction. How do you lay the tiling? Is it solid or does it divide itself up into those little squares? The tiling is

composed of tiles an inch square and they are put down on a bed of cement and usually come with paper backs and laid down and tamped into the bed of cement.

. . . . .

Now in your opinion would the dry rot of the shiplap underneath affect the strength of that entrance? Oh, yes.

. . . . .

Apart from these two pieces, did you look underneath any of the other tiling to see? Just around there there was indications of dry rot too, naturally.

It would appear that the defendant had taken the said premises over from Mr. Arthur Edward Osborne in or about the month of January, 1937, and had employed Mr. Osborne on the premises until in or about the month of January, 1938. In his evidence Mr. Osborne said in answer to questions as follows:

What was the condition of that tile? I thought it was good.

What was its construction? Tile, mostly. There were a few tile missing.

Any cracks in the tile? I can't remember, if there were, they were very slight. There were one or two slight cracks.

. . . . .

Can you tell his Lordship about where it was some pieces of tile were out in 1937? Yes, over on that side of the building.

At which side of the building? The east side.

The defendant was also examined at the trial with regard to the tiling and said in part as follows:

Now you heard Mr. Osborne state, did you not, that tiling—there was some tiling missing in the entrance of 2031, in the year 1937? Yes.

Do you deny that is so? No.

Your answer was no? Yes.

. . . . .

My learned friend asked you about some missing tiling. What was the extent of the missing tiling? A very small spot on the right-hand side of the east window, that is close to the east window of 2031.

How much was missing, I am asking you. I would say roughly about two or three inches, a very small spot.

What was the size of these tiles? I would say about an inch or an inch and a quarter.

When did you notice that first, if you please—about when? It is pretty hard to say just when, I would say about, oh, a few months after we went in the store.

Counsel on behalf of the plaintiff has referred to *Dolan* v. *Burnet* (1896), 23 R. 550, especially at pp. 554 and 556, as authority for the proposition that in the case of a building such as the one in question here which was not a new one the duty

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of the occupier to take reasonable care that the premises are safe involves the duty of inspection and that the occupier must be found liable if anything happens which could have been prevented by his inspecting the premises with a view to seeing that they were in a safe condition. In the *Gordon* case, *supra,* at pp. 224-5, MARTIN, J.A. (now C.J.B.C.) said "What is 'reasonable care' varies, of course, with the circumstances." In the present case it is apparent from the evidence hereinbefore set out that there was dry rot in the material underneath or supporting the tiling, that some of the tiling was missing and there were some slight cracks in the tiling. I am satisfied that this defective and unsafe condition had existed so long that it should have been known to the defendant. It may be said that the plaintiff admits that she did not see any defects in the floor but she was on the premises only once and, on the other hand, the defendant was on the premises frequently and admits that he knew that some of the tiling was missing and in my view the condition of the tiling was such long before this accident that the defendant as tenant and occupier of the building had sufficient warning under the circumstances and should have had the premises inspected before the tiling crashed in and caused an accident. It is suggested on behalf of the defendant that inspection would not have disclosed the unsafe condition without doing incalculable damage to the premises but I do not agree with this suggestion. I am satisfied that inspection by a competent person would have disclosed the unsafe condition without any serious damage. My conclusion on this phase of the matter therefore is that the defendant did not take reasonable care to see that the premises were safe and is liable to the plaintiff in damages.

I now come to consider the personal injuries sustained by the plaintiff. With respect to the claim for injury to one of her teeth I accept the evidence of the plaintiff that the accident caused a break in one of her upper teeth. With regard to the rest of the plaintiff's claim considerable evidence was given at the trial and I have had the advantage of hearing medical evidence on both sides. I find that there was no displacement of the coccyx. After the accident the plaintiff was first attended by Dr. G. E. Kidd who testified that he attended the plaintiff until about the

middle of August, 1938, and it would appear that the plaintiff had no further medical attention until on or about November 25th, 1938. She was attended by Dr. John R. Naden then and several times thereafter when she was found to be suffering from arthritis. It is common ground however that the arthritic condition had existed prior to the accident. It is argued by counsel on behalf of the plaintiff that she might have gone on for the rest of her life without suffering from arthritis and that the accident caused it to "flare up." As to this argument I have first to say that I accept the evidence of the witness, Rose Callahan, to the effect that in or about the year 1933 the plaintiff had complained to her about suffering from arthritis. It would appear from the evidence of the plaintiff herself that she had had two major operations during the three years preceding the accident. As I indicated at the trial I am unable to accept or give any weight to any medical evidence based upon reports made by the doctors attending the plaintiff at the time of her operations and not called before me. Under the circumstances it is not easy to assess the damages but my conclusion is that before the accident the arthritic condition had caused the plaintiff pain and would have caused her considerable pain and incapacity in any event. I think it is or must be admitted, however, that the arthritic condition was aggravated by the accident to a certain extent but all that the plaintiff has established to my satisfaction is that it was aggravated to a very small extent. The plaintiff went back to her work about the middle of July and has been able to carry on her work since although she says this has been with considerable difficulty. Upon my findings as indicated I do not think that the plaintiff should be entitled to claim as special damages the exact amount of the medical or other expenses incurred in or since the month of November, 1938. I have to add however that I take into consideration in estimating the general damages my finding that the arthritic condition, which in my view would involve certain medical expenses, was aggravated to the extent aforesaid by the accident. I think I am doing justice to both parties in estimating, as I do, the special damages at $74, being the total of the following items:

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Dental expenses	$20.00
Medicines	8.00
Dr. Kidd's account.....	21.00
Paid housemaid	25.00

and general damages at $850.

Judgment accordingly in favour of the plaintiff against the defendant for $924 and costs.

Judgment for plaintiff.

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THE EAST ASIATIC COMPANY INC. v. CANADA RICE MILLS LIMITED. (No. 2).

Costs—Scale—"Amount involved"—"Value of the subject-matter in question" in the cause or matter—Order LXV., rr. 10 and 10A—Action for balance of purchase price of goods—Counterclaim dismissed.

The plaintiff sued for $23,000, a balance of the purchase price of rice sold to the defendant. The defendant counterclaimed for $7,000, contending the rice was defective in quality. Judgment was given for the plaintiff for $23,000, and the counterclaim was dismissed, the plaintiff being allowed the costs throughout.

Held, that the defendant's contention prevails, the judgment is in favour of the plaintiff for $23,000, and the taxation should be under Column 3 of Appendix N.

APPLICATION by plaintiff to review taxation of costs. Heard by MCDONALD, J. in Chambers at Vancouver on the 15th of September, 1939.

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

Cur. adv. vult.

16th September, 1939.

MCDONALD, J.: This is an application to review a taxation of costs. Plaintiff sued for $23,750.83, balance of the purchase price of certain rice sold to the defendant. The defendant disputed the claim and counterclaimed for $7,024.30, contending that the rice was defective in quality and in the Court of Appeal

judgment was given for the plaintiff for $23,750.83 and the counterclaim was dismissed, the plaintiff being allowed its costs throughout [*ante*, p. 204]. Plaintiff contends on this application that the taxation should be based on Column 4 of Appendix N, the argument being that the value of the subject-matter in question "in the cause or matter," as defined in Order LXV., r. 10, as amended in 1938, is $30,000.

While the matter is not at all clear I am of opinion that defendant's contention must prevail, *viz.*, that as against the defendant, Order LXV., r. 10A, must apply. If so, "the judgment given or decision rendered" is in favour of the plaintiff for $23,000 and the defendant's counterclaim is dismissed. I therefore think the taxing officer was right in the conclusion which he reached.

Application dismissed.

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THOMPSON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence—Electric train—Intending passenger crossing tracks in front of train beyond station—Struck by train—Negligence of motorman—Trespass.

A girl eighteen years old, in attempting to catch a west bound interurban tram at Gladstone Station, ran up a path and crossed the double tracks from the south side about thirty feet west of the north platform of the station, the train being on the north tracks. On reaching the south tracks she signalled the tram by waving her arm, but continued across the north tracks in front of the tram. There was a steep embankment just beyond the north rail with a drop of sixteen feet, and owing to this she stopped too soon and was struck by a protruding step on the front end of the first car. As there were no passengers at the Gladstone Station, the motorman continued on without stopping. He saw the girl waving when he was opposite the middle of the platform and he put on his brakes, but the tram (going about fifteen miles an hour at the time), went some distance beyond the point of impact before stopping. It was *held* on the trial that the motorman was solely to blame.

Held, on appeal, reversing the decision of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that the motorman was in no way negligent towards the injured plaintiff however her *status* may be regarded.

Per SLOAN, J.A.: The plaintiff was a trespasser at the time and place in question, and the only duty owing to her was that described by Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, at p. 365.

APPEAL by defendant from the decision of MCDONALD, J. of the 2nd of February, 1939, in an action for damages resulting from the alleged negligence of a servant of the defendant company, in driving an interurban two-car tram which struck the plaintiff, Victoria Thompson, in the city of Vancouver on the 31st of March, 1938. On the said date the interurban tramcar was travelling west on its right of way near Gladstone Station in Vancouver. At the time and place aforesaid said Victoria Thompson proceeded across the right of way of the said railway just west of Gladstone Station, on a pathway which was used by passengers to get on board the tramcars. She crossed both tracks in front of the oncoming tram, but there was a steep bank going down on the north side of the northerly track. As she cleared

the track she stopped, owing to the steep bank on that side of the track, and she was struck by a step on the north side of the first car and was severely injured.

The appeal was argued at Vancouver on the 15th and 16th of March, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C. (Riddell, with him), for appellant: This girl wanted to catch the train so she crossed the tracks in front of the oncoming train which was a double train. There was no one waiting at the Gladstone Station, so the train, after slackening its speed when approaching the station, proceeded on past the station. There is a steep bank on the north side of the railway right of way, and after clearing the tracks she did not get out far enough to avoid the side steps of the oncoming car and was struck. The learned judge below said she was a trespasser.

Lucas, for respondents: The motorman neglected to apply his emergency brake until he struck her. She was not a trespasser, she was an invitee: see Salmond on Torts, 9th Ed., pp. 513-4; Clerk & Lindsell on Torts, 9th Ed., 538, and as to the duty of a driver at p. 263. See also *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *The Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541; *Herdman* v. *Maritime Coal Co.* (1919), 49 D.L.R. 90, at p. 96; *Green* v. *C.P.R.,* [1937] 2 W.W.R. 145; *Acadia Coal Co. Ltd.* v. *MacNeil,* [1927] S.C.R. 497; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, at p. 371.

McAlpine, in reply, referred to *Scott* v. *Fernie* (1904), 11 B.C. 91; *Field* v. *David Spencer Ltd.* (1938), 52 B.C. 447; *Anderson* v. *Smythe* (1935), 50 B.C. 112; *W. E. Sherlock Ltd.* v. *Burnett and Bullock* (1937), 52 B.C. 345, at p. 349; *Brown* v. *Weil,* [1927] 4 D.L.R. 218; *Hayhurst* v. *Innisfail Motors Ltd.,* [1935] 1 W.W.R. 385, at p. 389; *Capital Trust Corporation* v. *Fowler* (1921), 64 D.L.R. 289; *Montreal Tramways Co.* v. *Hamilton* (1918), 43 D.L.R. 243; *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at p. 136; *Grand Trunk Railway of Canada* v. *Barnett,* [1911] A.C. 361, at p. 367; *Jenkins* v. *Great Western Railway,* [1912] 1 K.B. 525.

Cur. adv. vult.

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17th April, 1939.

MARTIN, C.J.B.C.: The appeal is allowed and the action dismissed, our brother MCQUARRIE dissenting. The Court is of opinion that no ground has been shown upon the evidence which, it is to be noted, is not conflicting, to support the learned judge's view thereof that this accident was due solely to the negligent conduct of the motorman of the interurban tram: on the contrary, and with all due respect to the learned judge, we are of opinion that the motorman was in no way negligent towards the injured plaintiff, however her *status* may be regarded, and therefore the appeal should be allowed, and the action dismissed as aforesaid.

MACDONALD, J.A.: Appeal from the judgment of MCDONALD, J., in an action for damages brought by Victoria Thompson (aged eighteen) through her next friend Elizabeth Thompson against appellant for injuries suffered while crossing, or immediately after crossing, in front of an interurban two-car tram, travelling west on the north track between Central Park and Vancouver. Double tracks run east and west at this point, with a devil strip between about seven feet in width.

Attempting to catch the approaching tram at Gladstone Station the injured infant respondent ran across the two sets of tracks about 25 or 30 feet west of the platform provided for prospective passengers and was hit presumably by a protruding step near the front end of the first car. Had she taken one more step the accident would not have happened; nor would it have happened if she exercised ordinary care and refrained from crossing in front of a moving train.

Two stations or shelters to protect passengers from sun and rain with large platforms in front are located on each side of the double tracks, their use dependent on the direction an intended passenger might travel. The proper means of approach was by ascending steps leading to the platform. If, as in this case, west-bound trams were sought prospective passengers, living south of the tracks, should cross from the platform on the south side by a cross-walk to the platform on the north side on clear tracks.

A shorter way to the station was taken by the injured respondent, *viz.*, by a pathway running diagonally from the south edge of the right of way connecting with the south tracks about 40 feet west of the south platform. This path necessarily ended at the south track. After leaving it one could walk along the side of the track to the south platform or cross diagonally to the north platform for a tram going west. Whether or not, because of user, one was not trespassing in using this footpath, far removed from the proper means of access to the station, there was at least no invitation after leaving it to cross double tracks and the devil strip to board cars west of the station: doubly so as the tracks were elevated with embankments on either side. The only safe and proper place to board a car was at the station provided for passengers.

We are only concerned, in my view, with the respondent and motorman after the former reached the south track at the end of the pathway and signalled—as she did—with uplifted hand for the tram to stop. Before she reached that point and gave the signal referred to the motorman could not reasonably anticipate that she would cross the tracks in front of him. We must consider, therefore, their relative positions at that time. At that moment the motorman was about 50 feet from the point of impact travelling slightly less than fifteen miles an hour. He would cover that 50 feet in 2.2 seconds; or allowing for a slight reduction in speed—probably a second more. In that time the respondent had to travel across two raised tracks and devil strip, in all about 20 feet to be clear of danger beyond the moving car. The fact is that to properly cross out of danger she would have to travel a little further. The rails, coupled with a steep embankment beyond the north track, would retard her progress. At five miles an hour it would take her 2.7 seconds to travel 20 feet. It is altogether impossible to say that she was justified in attempting to cross without at least a greater margin of safety: she should, of course, have stopped on the south track or devil strip, waiting in a place of safety, for the tram to stop; proceed around either end of it and board the car, assuming the motorman was willing to take her aboard west of the

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usual stopping place. The motorman—for aught we know—may only have attempted to stop to avoid hitting her.

It was also dangerous to cross the north tracks in front of an oncoming tram because of the steep embankment on the far side already referred to falling sharply to a point sixteen feet below the top of the rails. It would appear, that there was only a narrow shoulder at the top of this declivity making it difficult to find a place to stand clear of the car. Because of the nature of the slope or the fact that she had not time to step clear she was hit by the protruding step about three feet from the front end of the first car.

As to the motorman's alleged negligence there is no evidence that he approached Gladstone Station in a reckless manner. He approached at fifteen miles an hour or less, sounded a warning whistle 100 or 150 feet east of the station; reduced speed slightly as he passed; released the air on finding no prospective passengers in sight thereby increasing the speed slightly (there is no evidence as to what extent), and then for the first time noticed the injured respondent 50 feet away signalling to him from the south track. As she was also moving towards the devil strip it was his duty to anticipate danger and doing so in his own words he "plugged it—gave it all the emergency she had." He was not, however, able to stop in time to avoid the accident.

He placed the distance at "possibly 50 feet." The front end of his car was, he said, "about the middle of the platform." If that is so she would be 70 or 75 feet from him when he first saw her. The difference does not affect the result. The motorman apparently required 230 feet—or at least took that distance—to stop after the impact. This will be later referred to.

The trial judge held that the motorman was solely to blame. He said "I can only see this case in one way. I think the motorman was wholly to blame for the accident." "He ran her down." His Lordship's view as stated to appellant's counsel was this:

> She is trying to get on your car and you know she is, but you say [*i.e.*, the motorman] "I am going to run her down, I am going right over her."

And again:

> "I [the motorman] do not care a snap about you. If you do not get out of my road——"

If this is so, this judgment should stand even on the basis that the injured respondent was a trespasser.

While not agreeing I appreciate the learned trial judge's viewpoint. He was concerned I think over the unexplained failure of the motorman to stop in less than 230 feet. He also felt after counsel for the respondent used as part of his case the motorman's examination for discovery (he had no other alternative), that official should have been called by the defence to clear up, if possible, the suggestion that his evidence, as to what occurred before the impact, did not conform with the true facts.

With great deference, the evidence does not show that the motorman deliberately "ran her down": if so he should have been indicted. Nor whatever may be said for the view that in justice the motorman should have been called, it was not necessary to do so. We must take the evidence as we find it and not substitute for it conclusions based on conjecture.

The motorman's evidence on discovery is the only relevant evidence in the case of any value and some of it is not as clear as it might be (this does not assist the respondent). I quote the material parts of it.

When you blew your whistle you looked and there was nobody on the platform? Yes.

And that was about 100 feet back from Gladstone Station? From 100 to 150.

At that time how fast was your tram going? Oh, approximately fifteen.

Fifteen? I had already made a stop at Nanaimo Road.

Yes, approximately fifteen. From then on did you increase your speed or go at about the same speed? About, until I got to Gladstone Station, less than that.

Less than that. At the time you were in your front cab, passing the Gladstone Street station platform you would be going less than fifteen miles an hour? Approximately, yes. I don't know exactly at fifteen.

In your best opinion it would be less than fifteen miles an hour? At any time.

From then until the accident occurred did the speed of your tram increase? No. Wait a minute. When I got to this platform and there was nobody coming out of the station I released my air.

. . . . .

. . . However, you did have on your brakes as you approached the station. Can you remember how far back from Gladstone Station you applied your air? No. You always do apply your air. At any time somebody may come out of the station.

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And you say you recollect that as you went past the station you released your air? Yes.

And for that reason you think that possibly it may have picked up a little speed before you got to—before the accident? It might have, yes.

Now as you approached Gladstone and passed it, did you have your power applied? No.

No. You had come up to Gladstone Station with your power off and your brakes on? Yes.

. . . . .

Did you see Miss Thompson, the plaintiff, before the accident? Yes.

Where was the front end of your car when you first saw Miss Thompson? About the middle of the platform.

And where was she when you first saw her? She was on the opposite track.

On the west? The eastbound track. I was travelling west.

Just describe her movements and what direction she was coming, and how was she proceeding? The first I saw of that young lady she had her hand up on the opposite track, proceeding towards my track. Just as soon as I saw her I knew she wanted my train. I plugged it, as we call it, gave it all the emergency she had. She ran across me right in front.

Now at the time you got your first glimpse of her how far out ahead of your tram was she? I could not say that, except possibly 50 feet.

Did she get all the way across both tracks before the accident? I will put it this way: where was she with respect to the right-hand rail when the tram struck her? Had she cleared the entire railroad track? Absolutely.

I put it to you this way—that the step, the front step hit her? Yes.

From the last you saw of her would you consider that likely? Likely, yes.

And the last you saw of her was she running, or do you remember? She was running. She ran across me.

It is clear from this evidence that the motorman's last act before the impact was an attempt to stop his train: not to increase its speed. It is also clear that this attempt to stop immediately followed the signal of the injured respondent at the south track.

There was further evidence adduced but apart from establishing distances it was not material. A police officer found the injured respondent lying at the foot of the embankment about 25 feet from the track directly opposite a point 25 feet west of the west end of the north platform; also that the front end of the tramcars (each about 55 feet in length) stopped as already stated, 230 feet beyond the latter point. Must we recast the motorman's evidence as to what occurred before the impact because he travelled 230 feet after it? I think not. There is no evidence by test or otherwise to show that this fact indicated excessive speed before the impact contrary to the motorman's

evidence. He may have decided to stop his car gradually, not with a sudden jerk, affecting the safety and comfort of passengers. Had he been asked he might have given other reasons. The length and weight of the car would be a factor. My own view, in the absence of evidence, is that he could have stopped sooner but rightly or wrongly did not do so. His negligence, if any, depends not on what occurred after the impact but before it.

A police officer was taken to the scene some days after the accident to observe the movements of other trams approaching Gladstone Station with other motormen in charge. The motorman's acts on the day in question could not be established by the acts of other motormen in other cars at a later date *a fortiori* when not confronted with an emergency. Mr. *Lucas* submitted, if I understood him aright, that he proved in this way that a tramcar or cars approaching the station at 22 miles an hour could make a normal stop within 200 feet. That is of no assistance. The motorman had only 50 feet or at the outside 60 or 70 feet left after he saw the respondent. No doubt had he seen passengers at the station, he could have stopped in less than 200 feet. Had he been asked he doubtless would have said that he knew there were no prospective passengers before he reached it. None was visible on the platform and they would not likely remain inside, particularly after the whistle sounded. We are concerned therefore with a motorman intending to pass the station without stopping. Had he discovered a prospective passenger when directly opposite the station he still had at least 110 feet to stop—the length of his train.

The question remains—was he obliged to know before he reached the station that she might cross in front of him? I have said that he was not obliged to anticipate danger until she signalled from the south track. In addition, apart from signalling, until she abandoned the pathway, leading not across the tracks but to the station platform—because it pointed that way, it is impossible to say that reasonably he should anticipate that she would cross in front of him. He did see her at that point and as stated tried to stop. The only other view is the extreme one —and I cannot accept it—*viz.*, that he should have seen her on the pathway before reaching the south track and realize at that

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stage that she might cross in the face of his approach and warning whistle. Seeing her at a distance running, not to the point of impact, but towards the station would not indicate that she would run in front of his tram. Conduct so rash could not reasonably be foreseen while she was still on the pathway. His attention too was at least partly directed to the station platform, the only place where prospective passengers had any right to be stationed.

I will not say, whether or not, in my opinion, it would have been possible for the trial judge to apply the provisions of the Contributory Negligence Act. Viewing it independently I cannot do so. Even if there was negligence on the motorman's part the case would not fall within *Swadling* v. *Cooper,* [1931] A.C. 1, where not more than a second of time intervened at the crucial moment: nor does it apply where there is ultimate negligence. It is, I think, clear that if I am wrong in acquitting the motorman of negligence the injured respondent with her greater mobility could have avoided the accident.

The case is somewhat similar to *Montreal Tramways Co.* v. *Hamilton* (1918), 43 D.L.R. 243; she attempted to cross the street-car track when the tram was too close to make it safe to do so. If viewed on the other theory, *viz.,* that although it was dangerous to make the attempt she did have time to cross but because of the embankment remained too close to the car, the case for the plaintiff is not improved. While no legal difficulties are presented *The Royal Trust Company* v. *Toronto Transportation Commission,* [1935] S.C.R. 671, may be referred to. The duty of a motorman is stated by Davis, J. There too, neither the motorman nor the conductor were called as witnesses and no explanation was offered. At page 676, the judgment of Lord Dunedin in *Fardon* v. *Harcourt-Rivington* (1932), 48 T.L.R. 215, at 216, is quoted. Where "the possibility of danger emerging is reasonably apparent then to take no precautions is negligence." That possibility, as stated, would not arise until she reached the south track. He, then, by the only evidence in the case, took all possible precautions. I may add that I

have disposed of the case apart altogether from any question of trespass.

I would allow the appeal.

McQUARRIE, J.A.: As to the appellant's contention that the infant respondent was a trespasser on the appellant's property when she was injured, I cannot see that there is any possibility of her being regarded to be in that class. She had gone to that station from Vancouver earlier in the day on one of the appellant's tramcars and was attempting to catch a train which she says she thought was stopping at the same station for the return journey. To board the car it was necessary for her to cross the tracks and in her hurry so as not to miss the train she took what she doubtless thought was a short cut across. If the train had stopped at the station as it appeared to her to be doing she would have been perfectly safe and could have caught it without any trouble. Surely an intending passenger cannot be regarded as a trespasser under these circumstances.

As to the main ground of appeal the learned trial judge in delivering judgment made the following positive finding:

> I can only see this case in one way. I think the motorman was wholly to blame for the accident. There will be judgment accordingly. . . .

With all due deference to the majority of the Court I would say that in my opinion there is evidence to support that finding and I would not disturb the judgment.

The appeal should be dismissed.

SLOAN, J.A.: The evidence in this case falls far short of establishing an actionable breach of duty by the defendant's servant towards the plaintiff. She was a trespasser at the time and place in question and as such the only duty owing to her was that described by Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, at 365 as follows:

> The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser or at least some act done with reckless disregard of the presence of the trespasser.

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I can find no evidence in the record to support either a finding of a "deliberate intention of doing harm" or one of "reckless disregard of the presence of the trespasser."

The appeal, in my opinion, with respect, should be allowed.

O'HALLORAN, J.A.: I concur in allowing the appeal.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *V. Laursen.*

Solicitor for respondents: *H. Richmond.*

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Oct. 2, 3, 5.

TURNER'S DAIRY LIMITED *ET AL.* v. WILLIAMS *ET AL.*

Lower Mainland Dairy Products Board—Orders made by the board pursuant to scheme passed by authority of Natural Products Marketing (British Columbia) Act—Right to attack orders for lack of bona fides—Examination of member of the board for discovery—Scope of examination—R.S.B.C. 1936, Cap. 165.

The Lower Mainland Dairy Products Board, pursuant to a scheme promulgated under the provisions of the Natural Products Marketing (British Columbia) Act, passed certain orders for the regulation of the sale of milk. In an action questioning the validity of the orders on the ground that they were not made *bona fide*, the chairman of the board, on his examination for discovery, refused to answer certain questions including those as to the purpose and intent of the board in passing them.

Held, that the board is not a legislative but an administrative body and does not stand on any higher ground than a municipal council, and may be attacked for lack of *bona fides*. A member of the board who is examined for discovery must answer any question, the answer to which may be relevant to that issue.

APPLICATION by plaintiffs to compel the defendant *W. E. Williams, K.C.*, chairman of the Lower Mainland Dairy Products Board, to answer certain questions put to him on his examination for discovery. The facts are set out in the reasons for judgment. Heard by McDONALD, J. in Chambers at Vancouver on the 2nd and 3rd of October, 1939.

J. L. Farris, for the application.
Locke, K.C., for defendant *Williams*.

Cur. adv. vult.

5th October, 1939.

McDONALD, J.: This is an application to compel the defendant *W. E. Williams, K.C.*, chairman of the defendant board [Lower Mainland Dairy Products Board] to answer certain questions put to him on his examination for discovery. One hundred and seventeen questions were asked of which some 54 were answered, many of them being of a purely formal nature. This indicates how far counsel are apart in their views as to what matters may and may not be gone into on an examination for discovery.

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McDonald, J.

The practice in British Columbia has been settled since 1903 when in the case of *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, it was laid down that a party being examined must answer any question, the answer to which may be (not necessarily is) relevant to the issues, and the examination may be conducted as a cross-examination would be conducted at a trial.

The defendant board, pursuant to a scheme promulgated under the provisions of the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165, had passed certain orders for the regulation of the sale of milk. The plaintiffs allege that the defendant board, whose members are the defendants *Williams,* Barrow and Kilby, made the said orders with the purpose and intention of providing for equalization of returns to all the farmers producing milk for sale in the Lower Mainland area. It is further alleged that such orders were not made *bona fide* by the board but that the said orders constituted a colourable attempt to disguise the true purpose of the board which is to provide for the equalization of such returns, and that the so-called sales and resales to and by the defendant Milk Clearing House Ltd. are not in fact sales and resales but are merely colourable and are intended to be made for the sole purpose of evading the law.

The plaintiffs contend that the defendant board, having previously passed certain orders of a somewhat like nature, finding themselves met with the contention that such equalization of prices amounts to indirect taxation, shifted their ground and passed the new orders not *bona fide* with a view to administering the law but for the sole purpose of evading the law; in other words, that the board is attempting to do indirectly what it cannot do directly. That, as I understand it, is the clear issue between the parties and it is upon that issue and upon various questions going to prove or disprove that issue that the plaintiffs seek to examine the chairman of the board. Counsel for the chairman takes the position that no such examination or cross-examination can be held either on discovery or at the trial. The contention is that this board acting within the authority conferred by the statute must not be questioned as to its policy, as to its motives or as to its reasons for taking any action. In

maintaining this contention counsel places the board upon the same plane as a Parliament or Legislature. I think this contention cannot be upheld.

The board in question is not a legislative but an administrative body. It does not, I apprehend, stand on any higher ground than does the council of a municipal corporation and it has been decided more than once that while the wisdom or folly of a municipal council may not be questioned, provided it acts within the limits of its jurisdiction, nevertheless when the *bona fides* of the members of the council is in question the matter may be gone into and if *bona fides* is lacking a municipal by-law may be successfully impugned. See *Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233; *Re Campbell and Village of Lanark* (1893), 20 A.R. 372, referred to by MARTIN, J.A. (as he then was) in *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274, at 288. In my opinion Mr. *Williams* must be ordered to attend at his own expense and answer the questions which, upon advice of counsel, he has declined to answer.

Application granted.

McALLISTER v. BOARD OF EXAMINERS IN BARBERING.

Barbers Act—Board of Examiners—Failure of candidate to pass—Appeal by candidate to County Court—Finality of—Failure of judge to refer matter to special tribunal under section 11 (4) of Act—R.S.B.C. 1936, Cap. 21, Sec. 11.

The appellant took an examination before the Board of Examiners appointed under the Barbers Act, and failed. He appealed to the County Court under section 11 of said Act on the grounds that the Board of Examiners were prejudiced against him, that they failed him with wilful intent notwithstanding his qualifications, and because it was and is their planned policy to fail the appellant and other students in order to limit the number of students to be qualified to practise as barbers. The appeal was dismissed. On appeal to the Court of Appeal:—

Held, on preliminary objection, that there is jurisdiction to hear the appeal as this case is not one involving any question of degree as to the amount

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involved, but the personal right of the appellant's means of livelihood, and it is difficult to distinguish in principle this lowly personal right from the highest one in which members of the leading professions are concerned.

Larsen v. *Coryell* (1904), 11 B.C. 22, distinguished.

Held, further, reversing the decision of HARPER, Co. J., that there should be a new trial as through some misconception of the situation the objects of section 11 of said statute have been frustrated, particularly in that under the circumstances the special tribunal of three barbers established by subsection (4) of section 11 of the Act "for inquiry and report" was not resorted to, as it should have been.

APPEAL by plaintiff from the order of HARPER, Co. J. of the 20th of December, 1938, dismissing an appeal of the plaintiff from the decision of the Board of Examiners in Barbering of the 20th of May, which decision of the said board failed the said John Wilfred McAllister on an examination in haircutting, an examination under the provisions of the Barbers Act.

The appeal was argued at Vancouver on the 30th and 31st of March, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

McCrossan, K.C., for appellant.

Maitland, K.C. (*Remnant*, with him), for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal. Under subsections (4) and (7) of section 11 of the Barbers Act, relief is given to those who fail in the examination, and there is a right of appeal under section 119 of the County Courts Act, but it does not apply to this case: see *Larsen* v. *Coryell* (1904), 11 B.C. 22.

McCrossan, contra: Section 119 of the County Courts Act is broad. There is no reason for a narrow interpretation and once leave is given the jurisdiction is clear: see *Faulkner* v. *Martens*, [1934] 4 D.L.R. 243, at pp. 244-5.

MARTIN, C.J.B.C. (*per curiam*): We have considered the preliminary objection to our jurisdiction and we are all of the opinion that it should be overruled.

We distinguish this case from *Larsen* v. *Coryell* (1904), 11 B.C. 22, a decision of the old Full Court, with my then brother DUFF, now Chief Justice of Canada, dissenting, because we

think on examining that case that it is based upon two elements which are not present here, *viz.*, the learned Chief Justice drew attention to the "grotesque" consequences that would be involved by allowing appeals from the Small Debts Court, and also that the special Act created a Court of petty jurisdiction and provided for a choice of tribunals to which appeals might be taken therefrom: those two elements are absent herein.

Furthermore, this case is one not involving any question of degree as to amount, but the personal right of this man's means of livelihood, and while it is a humble occupation yet if we extend *Larsen's* case to cover this the consequences might be very awkward, because it would be very difficult to distinguish in principle this lowly personal right from the highest one in which members of the leading professions are concerned.

Preliminary objection overruled.

McCrossan, on the merits: This man's apprenticeship has been served. The case of *Harley* v. *Barbers' Association of British Columbia* (1936), 50 B.C. 327 does not apply here at all. The provisions of subsections (3) and (4) of section 11 of the Barbers Act should have been put in operation.

Maitland: The issue was fraud but it comes down to the just and equitable rule: see *Loch* v. *John Blackwood Ld.,* [1924] A.C. 783, at p. 788; *Armes* v. *Russell* (1924), 33 B.C. 303; *Rex* v. *Bush* (1938), 53 B.C. 252; *Thompson* v. *British Medical Association (N.S.W. Branch),* [1924] A.C. 764, at p. 778; Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 546.

McCrossan, in reply, referred to *Local Government Board* v. *Arlidge,* [1915] A.C. 120, at p. 138; *Parker* v. *The Great Western Railway Company* (1844), 7 Man. & G. 253; *Attorney-General* v. *Barnet District Gas & Water Co.* (1909), 101 L.T. 651, at p. 656.

Cur. adv. vult.

17th April, 1939.

MARTIN, C.J.B.C.: We are of the opinion, unanimously, that the appeal should be allowed and a new trial ordered. We feel, briefly, that through some misconception of the situation by all

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concerned the unfortunate result has been that the objects of section 11 of the statute—the Barbers Act, Cap. 21, R.S.B.C. 1936—have been frustrated, particularly in that under the circumstances the special tribunal of three barbers established by the Act "for inquiry and report" was not resorted to as it should have been, as the matter now presents itself.

MACDONALD, J.A.: I agree. I would add that if on a new trial the point is reached where the question is referred to three barbers who are members of the association (Cap. 21, R.S.B.C. 1936, Sec. 11 (4)) for inquiry and report, I trust the powers conferred by the Legislature, not only on the board but upon the three members of the association thus selected will be fairly exercised to the end that it cannot truthfully be said that there is an ulterior purpose in view, *viz.*, using these powers so conferred as a means of limiting the number of barbers admitted to practise in that trade regardless of qualifications. Such conduct would render the proceedings nugatory.

There is too no reason under the wording of subsection (4) ("inquiry and report") why the three members selected should not inquire by demonstration as to the competency of the appellant and report back to the judge.

O'HALLORAN, J.A.: I concur in allowing the appeal and directing a new trial.

Appeal allowed; new trial ordered.

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

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

HOLLYWOOD THEATRES LIMITED v. TENNEY *ET AL.* (No. 3).

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Mar. 24, 27, 28, 29, 30; *Sept.* 19.

Trade unions—Contract between theatre owners and union—Dispute as to interpretation — Watching and besetting theatre — Object to compel acceptance of union's interpretation—Nuisance—Injunction—Damages —R.S.B.C. 1936, Cap. 289.

Mrs. Fairleigh was manager of the Hollywood Theatre in Vancouver, she and her husband being the owners, and the husband was a qualified projectionist. The regulations under the Fire Marshal Act require the presence of two projectionists in each booth. In October, 1937, Mrs. Fairleigh entered into an agreement with the British Columbia Projectionists' Union whereby she agreed to employ only projectionists supplied by the union "except and only when members of her family are not available." At this time Mrs. Fairleigh's son was studying to become a projectionist, and on March 26th, 1938, he became qualified and took out a projectionist's certificate. The union projectionist who was employed as second projectionist in the theatre was then dismissed and the son took his place. The union protested that it was understood that only one member of the family would act at a time and that one union man would always be employed. The union picketed the theatre and carried on a system of watching and besetting before the entrance. In an action for damages and an injunction, it was *held* that the defendants acted in concert on a prearranged plan and in pursuance thereof, without authority, were attempting to compel the plaintiff to do what it was not legally obligated to do in conducting its business, and the plaintiff was entitled to judgment.

Held, on appeal, affirming the decision of McDonald, J. (Martin, C.J.B.C. dissenting in part), that it was a concerted plan by the defendants to damage the plaintiff's business to such an extent that it would be forced to accept the defendants' interpretation of the contract, and does not come within the protection of the Trade-unions Act.

APPEAL by defendants from the decision of McDonald, J. of the 28th of December, 1938 (reported, 53 B.C. 389) in an action for a declaration that the defendants, their and each of their servants or agents have unlawfully damaged the plaintiff by publishing defamatory statements of or concerning the plaintiff and its business and by creating or causing a nuisance adjacent to the plaintiff's premises and by molesting, threatening and seeking to intimidate the plaintiff's patrons and by watching and besetting the plaintiff's premises with a view to compelling the plaintiff to do something that it is not compelled

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to do, for damages and for an injunction. An *interim* injunction was granted by MCDONALD, J. on the 21st of June, 1938, and an appeal from his order was dismissed. On the application of the plaintiff at the trial, a representative order was made that certain defendants for the purposes of this action represent and be authorized to defend the action on behalf of all persons constituting the British Columbia Projectionists' Society, Local No. 348, and that other certain defendants represent the Vancouver, New Westminster and District Trades and Labour Council. Judgment was given in favour of the plaintiff by granting a perpetual injunction. The plaintiff is a private company whose shareholders are R. E. Fairleigh, Mrs. Fairleigh and their son David. Mrs. Fairleigh owns the building in which the company operates a moving-picture theatre on Broadway, and she is the manager. Mr. Fairleigh is a qualified projectionist. Differences arose in the Fall of 1937, which was followed by a strike of projectionists, resulting in the closing of the theatres. Differences were finally adjusted and contracts with the union for a two-year period were approved. Contracts were sent out to the various theatre owners to sign and one was sent to the plaintiff. On the 5th of October, 1937, Mr. Fairleigh signed the contract which provided that the theatre would employ only projectionists supplied by the union, but Mr. Fairleigh inserted an addition thereto as follows:

> Except and only when members of the family of the party of the first part are not available.

The contract was handed back to one Pollock, the president of the union. It was then executed by the officials of the union and mailed back to Fairleigh. A union projectionist, one Nicholls, was at this time working for the plaintiff but in March, 1938, was given notice discontinuing his employment, Fairleigh giving as a reason therefor that his son David, who had been studying to become a projectionist, was now licensed as a projectionist and he would take over the position, father and son working in the booth together. The defendants claimed that Mrs. Fairleigh had told them that when David was licensed Mr. Fairleigh would retire from personally operating the booth. The union representatives tried to come to an arrangement with Mr. Fair-

leigh, but he would not do anything, and the union started picketing on May 7th, 1938.

The appeal was argued at Vancouver on the 24th and 27th to the 30th of March, 1939, before MARTIN, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

J. A. Campbell (*Beckett,* with him), for appellants: The learned judge below expressly found there was nothing in the demeanour of the witnesses that would assist in arriving at a conclusion as to credibility, so that the Court of Appeal is therefore untrammelled by any finding below: see *Raymond* v. *Township of Bosanquet* (1919), 59 S.C.R. 452, at p. 460; *Montgomerie & Co., Limited* v. *Wallace-James,* [1904] A.C. 73, at pp. 75 and 83. There were serious matters in difference besides the understanding of the parties in respect to this agreement, and the strict legal effect, scope and interpretation of the contract in which Fairleigh inserted an exception clause. There was the background of a general strike which the contract was designed to settle, and there was the understanding given to various union members by Mr. and Mrs. Fairleigh themselves, including the business agent of the union, namely, that Mr. Fairleigh would retire when his son was ready to take charge of the projection booth. Exceptions in a contract are to be construed strictly against the party in whose favour they are inserted: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 327. The exception clause is unintelligible. Parol evidence is admissible to clarify ambiguity: see Halsbury, *supra,* p. 340; *Bank of New Zealand* v. *Simpson,* [1900] A.C. 182, at p. 188. A non-union projectionist, Robinson, was engaged at various times by the Hollywood Theatre. He also trained apprentices in the theatre, which was a violation of the contract. The learned trial judge failed to comprehend the scope of the grievances involved. They contend we conspired to injure them. We say there was no conspiracy to injure and no illegal means were employed. The defendants' acts and conduct are justified under the Trade-unions Act of British Columbia and at common law. What was done was to protect and defend the trade interests or purposes of the defendants, and was lawful: see *Sorrell* v. *Smith,* [1925]

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A.C. 700, at pp. 712-14. This is shown by the efforts of both the union and the Trades Council to adjust all differences with Fairleigh in an amicable way. The learned judge quotes no authority and gives no reason for disregarding this evidence. Facts probative of the main facts are admissible: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 554. The state of a man's mind is a matter of fact and so the subject of evidence: see *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483; *In re Grove. Vaucher* v. *The Solicitor of the Treasury* (1888), 40 Ch. D. 216, at p. 242. The learned judge misdirected himself in ignoring the evidence of various conferences with Fairleigh. The acts of the defendants were justified if done, not with the intent to injure but with intent to further legitimate trade purposes: see Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 657; *Mogul Steamship Company* v. *McGregor, Gow & Co.*, [1892] A.C. 25; *Sorrell* v. *Smith, supra; Sweeney* v. *Coote,* [1907] A.C. 221, at p. 222; *Allen* v. *Flood,* [1898] A.C. 1, at p. 128; *Sleuter* v. *Scott* (1915), 21 B.C. 155. The defendants' acts were justified: see Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 660. The learned judge followed *Allied Amusements Ltd.* v. *Reaney,* [1937] 3 W.W.R. 193, and *Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130, following *Quinn* v. *Leathem,* [1901] A.C. 495. All three are distinguishable as in these cases the purpose was violence. There is no intent to injure here: see *Bulcock* v. *St. Anne's Master Builders' Federation* (1902), 19 T.L.R. 27; *Hay* v. *Local Union No. 25, Ontario Bricklayers et al.,* [1929] 2 D.L.R. 336. Peaceable picketing for the purpose of obtaining information is lawful: see *Besler* v. *Matthews,* [1939] 1 W.W.R. 113, at p. 128; *Ward, Lock, and Co. (Limited)* v. *The Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327. The plaintiffs rely on *J. Lyons & Sons* v. *Wilkins,* [1896] 1 Ch. 811, but that case was decided on a statute and the facts are radically different. The word "person" in the Trade-unions Act is referable to members of the public generally: see *Re The Township of King and The Marylake Agricultural School and Farm Settlement Association,* [1939] O.R. 13. No illegal means were used, merely handbills and peaceful picketing. The placing of the plaintiff

on the non-patronage list was done *bona fide* and for the furtherance of the trade interests: see *Ware and De Freville Ld.* v. *Motor Trade Association,* [1921] 3 K.B. 40; *Peto* v. *Apperley* (1891), 35 Sol. Jo. 792; *Jenkinson* v. *Nield* (1892), 8 T.L.R. 540; *Hardie and Lane, Ltd.* v. *Chilton,* [1928] 2 K.B. 306, at p. 313; *Thorne* v. *Motor Trade Association,* [1937] A.C. 797, at p. 804. The evidence of Fairleigh is full of animus and bias; he is contradicted throughout the trial. There was error in granting a representative order to the plaintiff: see *Mercantile Marine Service Association* v. *Toms,* [1916] 2 K.B. 243, at p. 246; *United Mine Workers* v. *Williams* (1919), 59 S.C.R. 240; *Walker* v. *Sur,* [1914] 2 K.B. 930; *London Association for Protection of Trade* v. *Greenlands, Limited,* [1916] 2 A.C. 15, at p. 39; *Russell* v. *Amalgamated Society of Carpenters and Joiners,* [1912] A.C. 420, at pp. 430-1; Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 17. The union and the Trades Council are not legal entities and as such are not capable of being sued or having judgment against them: see *Metallic Roofing Co.* v. *Local Union No. 30* (1905), 9 O.L.R. 171. Any damage recoverable must be shown to be due to an illegal act of the defendants: see *Vulcan Iron Works* v. *Winnipeg Lodge* (1911), 21 Man. L.R. 473. There is no effort to segregate any damages for illegal acts, if any, from damage which may have been otherwise suffered: see *Varner* v. *Morton* (1919), 46 D.L.R. 597; *Gibbins* v. *Metcalfe* (1905), 15 Man. L.R. 560.

Bull, K.C., for respondent: The respondent business was a family affair and claims the right to operate it as such so long as it abides by the laws of the Province, including the regulations relating to the operation of a moving-picture theatre. In the absence of contractual obligation to the contrary, respondent is entitled to employ non-union men. The respondent's obligation under the contract is to employ projectionists supplied by the union only when members of the family are not available. There was no attempt by appellant to prove at the trial that there was any collateral oral agreement varying the terms of the contract. The appellants tried to accomplish their ends by coercion. The situation here is supported by *Allied Amusements Ltd.* v. *Reaney,* [1936] 3 W.W.R. 129, at p. 134. To watch and beset a man's house with a view to compelling him to do

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or not to do what is lawful for him not to do or to do is wrongful and without lawful authority: see *J. Lyons & Sons* v. *Wilkins,* [1899] 1 Ch. 255. Watching and besetting is wrongful, (1) because it is an offence within section 50 (*f*) of the Criminal Code, and (2) because it is a nuisance at common law: see *Schuberg* v. *Local No. 118, International Alliance of Theatrical Stage Employees* (1927), 38 B.C. 130. There was never any difficulty between the respondent and its employees, and no basis is laid for the application of the Trade-unions Act. The Act was intended to give immunity to a certain extent for things done by labour unions and officers of unions in upholding the rights of employers and the principles of trade unions, but "a labour dispute or trouble" is necessary before section 4 of the Act can be invoked. The respondent submits that if the fact that the parties differed as to the proper construction of the contract in question could be said to be a "labour grievance or trouble," before said section 4 of the Act can have any application there must be in existence a "labour grievance or trouble" *ejusdem generis* with the particular words "strike or lock-out," and that the words "labour grievance or trouble" in the section must be interpreted *ejusdem generis* with such particular words. This is a clear case for the application of that doctrine: see Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 495, sec. 631. Prior to trial respondent applied in Chambers for a representation order giving the plaintiff leave whereby all members of the projectionists' union and the Trades and Labour Council respectively would be represented in the action by their officers respectively joined as defendants. The matter was referred to the trial judge when it was argued, and the order was granted. There has been no appeal from that order and it still stands: see *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426; *Metallic Roofing Co.* v. *Local Union No. 30* (1905), 9 O.L.R. 171, at p. 177; *Barrett* v. *Harris* (1921), 69 D.L.R. 503; *Sykes* v. *One Big Union,* [1934] 1 W.W.R. 655; *Shapiro* v. *Toronto Council, K. of C.* (1926), 29 O.W.N. 416; *The Cumberland Coal & Ry. Co.* v. *McDougall, et al.* (1910), 44 N.S.R. 535; *Mitchell* v. *Forster* (1928), 35 O.W.N. 203. *Metallic Roofing Co.* v. *Local Union No. 30, supra,* should be followed.

Campbell, replied.

Cur. adv. vult.

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MARTIN, C.J.B.C.: The appeal is dismissed, I dissenting in part.

I will just briefly give my reasons for dissenting, for the time being, the matter being one of considerable importance. I think the case is governed by section 4 of the Trade-unions Act, Cap. 289, R.S.B.C. 1936, and I think that there was here a "labour grievance or trouble," even though it might not originally have had that aspect—which I am not prepared to say—but nevertheless as the matter progressed it did assume that aspect and come within the definition of section 4 of a "labour grievance or trouble." And therefore by the several provisions of that statute —which are not to be found, be it noted, in any other Province of Canada, or in England, and therefore the cases must be read in that light, and they are not analogous to but anomalous to our statute—I think that the defendants were entitled, as the statute says, to "publish information," and to "warn," and to "urge," as therein provided. But I think that they did transgress the statute and go beyond it, and are not entitled to its protection, when they arranged to hold and put in force the "mass demonstration"—on 11th June—which is particularly objected to, and which was the immediate cause of the injunction being granted. Prior to that, their actions I think came within the statute and so they are not liable for the result thereof, being protected thereby.

I intend, if time permits, to write a judgment amplifying my views, as the matter is a very important one. But I have not departed at all from the view that I took in the *Schuberg* case (1927), 38 B.C. 130; in fact, after further consideration of it, I am confirmed therein.

But it ought to be added that I also think the appeal should be allowed on another ground, to a certain extent, and that is this, that there was no jurisdiction in the learned judge below to make the representative order which was the cause of so much discussion on the argument before us. I shall say no more at present.

MCQUARRIE, J.A.: I agree with my brother O'HALLORAN that this appeal should be dismissed. As I see it this was an

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attempt by the appellants to force upon respondent their interpretation of the contract subsisting between the parties, or in other words to take the law into their own hands and in that case the Trade-unions Act, R.S.B.C. 1936, Cap. 289, is no protection to them. I think the learned trial judge was correct in his view that the whole issue was the interpretation of the contract.

I cannot draw any distinction between the mass demonstration by the appellants, which we are all agreed was unlawful, and the other picketing, hand-bills, "We do not patronize" list, circulars and propaganda for which the appellants were also responsible. It was all a concerted plan by the appellants to damage the respondent's business to such an extent that it would be forced to accept the appellants' interpretation of the contract, or they

> without lawful justification, were attempting to compel the plaintiff to do what it was not legally obliged to do in conducting its business,

to quote Donovan, J., referred to in *Allied Amusements Ltd.* v. *Reaney,* [1936] 3 W.W.R. 129, at 134, cited by my brother O'HALLORAN. This was not a labour dispute but a high-handed proceeding which surely does not come within the protection of the Trade-unions Act.

As to the jurisdiction of the trial judge to make the representative order I would adopt the reasons of my brother O'HALLORAN whose judgment I have had the privilege of perusing.

On the question of damages I also agree that we should not disturb the judgment of the learned trial judge.

O'HALLORAN, J.A.: One group of appellants are the officers and trustees of British Columbia Projectionists Local No. 348 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada; the other group are officers and trustees of the Vancouver, New Westminster and District Trades and Labour Council. The respondent, a private company in which the sole shareholders are R. E. W. Fairleigh, his wife, and their son David, owns and operates a moving-picture theatre on Broadway West in suburban Vancouver. The appellants seek to set aside a judgment for $2,000 damages awarded against them with an

attendant injunction, after a six-day trial before the learned trial judge Mr. Justice McDONALD, for "picketing" the respondent's movie-picture theatre, and interfering with its business under circumstances to be related. Reference should be made at the outset to the background of the differences between the projectionists' union and the respondent. I have in mind what a former Chief Justice of this Province (HUNTER, C.J.B.C.) said in *Graham* v. *Knott* (1908), 14 B.C. 97, at pp. 106-7:

> In no case is there a greater obligation on the Court to be alert to maintain the rights of both parties than in that originating in trade or labour disputes, for in none is it more difficult for the Court to satisfy all persons that it has lived up to the time-honoured tradition that it holds an even scale. . . . It is necessary that the Court take especial precautions to get a thorough understanding of the facts before it can decide. . . .

On July 2nd, 1936, the Lieutenant-Governor in Council amended an existing regulation to provide that, subject to the installation of certain safety devices, every moving-picture theatre equipped with two or more kinematographs could operate with one licensed projectionist (instead of two as theretofore); it was to become effective on the 1st of January, 1938. Opposition developed and the Provincial Government appointed *J. M. Coady,* Esquire, of Vancouver, a well-known barrister of the Province, a Commissioner to investigate. Mr. *Coady* reported in September, 1937, in favour of the amended regulation permitting one licensed projectionist. Shortly thereafter the projectionists' union began negotiations with the Vancouver theatre operators for a two-year contract requiring employment of two projectionists instead of one, as would be permitted by the amended regulation when it came into force. When the theatre operators insisted on a three or four-month contract instead of a two-year contract, the projectionists' union called a strike. After the strike had lasted two days the theatre operators capitulated and accepted the union's terms; that is to say they were forced by the strike to employ an additional projectionist in each theatre, although an independent commission found after a thorough investigation that it was not necessary. It should be added that on the 27th of September, 1937, an order in council was passed extending the coming into force of the one-man regulation until the 1st of January, 1939, but on the 13th of Sep-

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tember, 1938, another order in council was passed cancelling the one-man regulation entirely.

Following the strike, the respondent as one of the theatre operators, on the 5th of October, 1937, entered into a contract with the projectionists' union. The present trouble between the parties arose out of the interpretation of one paragraph of that contract reading:

> The party of the first part agrees to employ only projectionists supplied by the party of the second part. Except and only when members of the family of the party of the first part are not available.

The issue relates to the last clause thereof:

> Except and only when members of the family of the party of the first part are not available.

These words were not in the contract when it was presented to Fairleigh by Pollock the president of the union; they were inserted under these circumstances: Fairleigh, who was a licensed projectionist, expected his son David would complete his apprenticeship in March, 1938 (some five months later), and would then become a licensed projectionist. Fairleigh explained this to Pollock and told him the clause would have to be amended because when David became licensed the respondent would not need a projectionist from the union as he and David would serve as the two licensed projectionists required under the existing regulation. Fairleigh then took the contract, wrote in the words above mentioned, signed it on behalf of his wife and handed it back to Pollock. Some weeks later a copy was returned to him duly executed by the projectionists' union.

When David Fairleigh obtained his licence in March, 1938, a licensed projectionist, in the respondent's employ and a member of the union named Nicholls, was then given two weeks' notice, the requisite notice for dismissal according to the contract. Thereafter Fairleigh and his son David operated the projectionist machines. The union objected to Nicholls' dismissal on the ground that the above-mentioned clause in the contract meant that the respondent should employ one union projectionist in any event who was not a member of the Fairleigh family. The respondent contended this was so only if there were no members of the Fairleigh family available. Failing to induce the respondent to accept its interpretation of the contract, the union

attempted to compel it to do so by "picketing" the theatre from the 7th of May to the 21st of June, 1937, when an *interim* injunction was obtained.

On the 7th of May, 1938, two "pickets" commenced patrolling the front of the theatre; they paraded in opposite directions and wore white coats bearing an inscription to the effect that Hollywood Theatre did not employ members of projectionists' union affiliated with the Vancouver, New Westminster and District Trades and Labour Council. Two days later the number of "pickets" was increased to four, parading in pairs, in opposite directions. This "picketing" was conducted under the supervision of the business agent of the projectionists' union; two kinds of hand-bills were printed and distributed. Passers-by and would-be patrons were intercepted and given these hand-bills by other union agents in plain clothes. A picket dressed in plain clothes often paraded with the others and warned would-be patrons not to patronize the theatre as it was a "scab" theatre. One witness was given a hand-bill a mile and a half from the theatre; another witness who intended to go to the theatre with his young daughter, did not do so; he said

> as I was approaching it I saw these pickets about, and decided I would not go, as I did not want any trouble;

two other witnesses gave evidence they were accosted by a person in plain clothes giving out hand-bills and warned the theatre was unfair to organized labour.

On Saturday night, the 11th of June, there was a mass demonstration of some 60 to 70 "pickets" organized in front of the theatre; they represented some 24 different unions and trades in addition to the projectionists' union, all having membership in the Vancouver, New Westminster and District Trades and Labour Council. They wore white coats with sashes showing the different unions they represented and bearing the inscription "We do not patronize." Crowds assembled. The "pickets" paraded in front of the entrance to the theatre in two snake lines, giving the effect of a circle, with the result that in effect entrance to the theatre was obstructed. There was no evidence given of violence or threats of physical injury. In addition the respondent was placed on the "We do not patronize list" of the

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Vancouver, New Westminster and District Trades and Labour Council, which was published in its official organ "The Labour Statesman." Both the projectionists' union and the Trades and Labour Council authorized and concurred in what was done. As a result the respondent suffered damage. Special reference should be made to the larger of the two hand-bills, some 6,000 copies whereof were distributed to houses and shops within six blocks of the theatre in each direction, that is among the people who would be regarded as patrons or prospective patrons of this suburban theatre, as the heading itself indicates:

To Hollywood Theatre
Patrons:
THE TRUE STORY

Last October a contract was signed with the Hollywood Theatre for two years to employ one union man. The owner inserted a clause to the effect that his son would be permitted to work there when he was successful in procuring a Government Projectionist Licence, this was satisfactory to the union, with the understanding that he, the owner, would himself leave the projection-room and still employ one union man. Contrary to this agreement, when his son was able to go to work he locked the union man out, while the owner was holding down two jobs by conducting an Equipment and Supply Store on Davie Street during the daytime and working as a projectionist and managing the Hollywood Theatre at night.

The union was not responsible for the colored people marching in front of the Hollywood Theatre. It was an attempt to ridicule our pickets and a Dominion Act of Parliament which permits peaceful picketing.

Would you call this fair to organized labour?

B.C. Projectionists' Society,
Local No. 348,
I.A.T.S.E. & M.P.M.O.

This hand-bill labelled the "true story" confirms other evidence that the real issue between the parties and the real and only reason for the "picketing" was the appellants' insistence that the respondent accept its interpretation of the above-mentioned clause in the contract. The title and language of this hand-bill left the learned trial judge no alternative but to conclude as he did in these words [53 B.C. 395]:

The real matter which was in issue, has continued throughout to be in issue, and is still in issue, is that the defendants insist upon a construction of the contract which the plaintiff insists the contract cannot possibly bear. In my opinion that is the issue and the only issue of substance which has given rise to this litigation.

It is stated in the hand-bill and maintained by the appellants in argument that the above-mentioned clause in the contract

was subject to a further understanding or verbal agreement between the parties. But this is negated by an explicit term of the contract (which was prepared by the union), for the second to last clause therein reads as follows:

> All previous contracts are hereby cancelled and this contract is not subject to any other understanding or agreement either written or verbal.

The appellants led evidence to support the alleged verbal arrangement. The learned trial judge held such evidence should be inadmissible, but rather than decide the action on that ground alone, he found (with which I agree) that even if such evidence were admissible, it fell far short of establishing any agreement in variation of the written terms of the contract. In my view the evidence relating to the alleged verbal variation of the contract is inadmissible. If for no other reason, a specific term of the contract makes it so.

The purpose of "picketing" was to influence the people resident in the suburban area tributary to the theatre to refrain from patronizing it; that is to say the purpose was to inflict such financial injury upon the respondent that it would be compelled to accept the union's interpretation of the contract or else go out of business. The Trade-unions Act, Cap. 289, R.S.B.C. 1936, introduced in this Province in 1924 exempts a labour union from liability for "publishing information" concerning a labour dispute and for "warning" and "urging" workmen not to seek employment with or patronize an employer party to the dispute. We are concerned to determine whether what was done in this case comes within these statutory exemptions, as is claimed by the appellants. Two important questions appear—first, whether what was done—described by the appellants as "peaceful picketing"—is permitted as such by the statute; and secondly, whether the appellants could exercise their statutory exemptions to enforce the union's interpretation of its contract with the respondent. Counsel for the appellants contended that the existence of a contract strengthened his position within the statute.

In approaching these questions it is to be borne in mind that this is not an ordinary labour dispute in which the appellants seek to improve their conditions of employment by a strike

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accompanied by "picketing" of the employer's premises. On the contrary, it involves interpretation of an existing contract to which the projectionists' union is a party and by which it is bound in law. The union had not rescinded the contract, nor had it taken any legal action for the alleged breach. The respondent has said in effect in these proceedings,—

> I acknowledged the projectionists' union and entered into a contract with it; now the union refuses to live up to that contract and seeks to compel me by moral coercion and economic pressure in the form of unlawful "picketing" to agree to a breach of that contract which it considers in its interest to impose upon me. I adhere to the contract and ask the Courts of this country to give me damages for losses inflicted upon me by the union in its unlawful attempts to compel me to do so.

Throughout the argument the appellants have adhered to the term "peaceful picketing." Before discussing the legality of what was done, it should be said at once that in my view at least the term "peaceful picketing" has no place in the law of this Province. It is a negation in terms, for "picketing" as conducted here cannot be described as peaceful. While violence did not occur, it was not due to lack of provocation; the display of organized labour strength and the atmosphere of labour power, cowed active opposition and discouraged retaliatory or protective measures which would have led inevitably to violence. Without intimidation, obstruction and moral coercion it was useless for the purposes employed; with them it was provocative. Professor Dicey in the introductory chapter to the "Law of the Constitution," 8th Ed., at p. xl., wrote:

> Hence the invention of that self-contradictory idea of "peaceful picketing," which is no more capable of real existence than would be "peaceful war" or "unoppressive oppression."

In *American Steel Foundries* v. *Tri-City Council* (1921), 257 U.S. 184, Mr. Chief Justice Taft in delivering the majority opinion of the Supreme Court of the United States observed at p. 205:

> The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful.

The first question to determine is whether what was done by

the appellants comes within the British Columbia statute. We were told by counsel that the Trade-unions Act, *supra,* has no counterpart in Canada. Hence no guide to its interpretation is available from otherwise valuable decisions of Courts of last resort in other Provinces of Canada. The Trade-unions Act was considered by this Court in *Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130. The Court being equally divided, the judgment of the learned trial judge, the late Mr. Justice GREGORY (1926), 37 B.C. 284, awarding damages against the union, was upheld. In that case no contract existed and the picketing occurred during a strike of employees; it does not appear from the report that the picketing was engaged in by persons not belonging to the local union whose members were directly affected. Furthermore it does not appear from the report that an organized patrol took place to the extent and in the manner that occurred here. No organized mass demonstration occurred. In fact from the report it appears that the plaintiff there admitted most of it was "joking and making fun." Such an admission would, of course, greatly weaken charges of intimidation, obstruction and moral coercion. What took place in the *Schuberg* case was therefore of a much milder and less aggressive character, concerning terms and conditions of employment and by the people directly affected, and with no relation to an existing contract; yet in the result the judgment against the union was upheld.

Because of difference in legislation little assistance in the interpretation of our Trade-unions Act may be obtained from the English decisions. It is true that the English Trade Disputes Act, 1906, permitted a person in furtherance of a trade dispute "to attend at or near" a place of business or residence for the purpose of peacefully "obtaining" or "communicating" information or of peacefully "persuading" any person to work or abstain from working. No assistance in its interpretation is available, however, for section 4 (1) thereof gave complete immunity for wrongful acts, by the simple expedient of providing that no Court should entertain an action against a trade union or its members in respect of any tortious act alleged to have been committed by or on behalf of the trade union. It should be

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noted also that in England 21 years later, by section 3 (1) of the Trade Disputes and Trade Unions Act, 1927, the right "to attend at or near" a place of business or residence for the purpose of "obtaining" or "communicating" information or "persuading" any person to work or abstain from working was declared unlawful:

> if they so attend in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace; . . .

In section 3 (2) thereof the expression "intimidate" as used above, is declared to mean:

> to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependants or of violence or damage to any person or property,

and the expression "injury" last used above, is defined to include:

> injury to a person in respect of his business, occupation, employment or other source of income, and includes any actionable wrong.

It will be shown shortly that (1) the exemptions relating to "communication" and "persuasion" in section 2 (1) of the English Act of 1906 appear almost word for word in part of section 20 of the Clayton Act passed by Congress of the United States in 1914; the language in our own statute is hereafter related thereto; (2) section 20 of the Clayton Act is more explicit and wider than the British Columbia Trade-unions Act; (3) the Clayton Act has been interpreted by the Supreme Court of the United States to prohibit the kind of "picketing" which occurred in this case; (4) the interpretation of what constitutes "communication" and "persuasion" in the Clayton Act was similar to that adopted in effect in the English Act, 1927. Decisions of the United States Supreme Court cited hereafter carry greater effect because the local projectionists' union is a member of the great United States union and is governed to a large extent by the latter's policy; likewise the movie-picture theatres are affected in their operation in so many ways by what is done in the United States. I regard as *apropos* in this respect, what was said by Lord Atkin in *Beresford* v. *Royal Insurance* Co., [1938] A.C. 586, at p. 600, when he referred to the importance of uniformity of result in the Courts of the United States and Great Britain in matters of strong mutual interest.

I shall refer to the close parallel between our Trade-unions Act and the Clayton Act, *supra*. Their similarities as well as their differences provide in my view an assistance which it would be unwise to ignore in searching for the true interpretation of a statute which has already been the subject of divided opinion in this Court in the *Schuberg* case. I am impelled further towards this view in the absence of more comparable Canadian or English legislation.

I shall refer to *Truax* v. *Corrigan* (1921), 257 U.S. 312. The circumstances of the "picketing" and the statute law will be compared with and applied to the case under review. In the *Truax* case a restaurant in Bisbee, Arizona, was "picketed" during a strike of cooks and waiters arising out of a dispute concerning the terms and conditions of employment of members of their union; the purpose of the "picketing" was to end the strike and compel an eight-hour day and employment of union cooks and waiters. In the case at Bar there was no strike but the purpose of the "picketing" was to enforce the union's interpretation of its contract with the employer; in the *Truax* case no contract existed. In both cases (a) union pickets patrolled the front of the employer's premises with banners or signs indicating the employer was unfair to organized labour; (b) would-be customers were intercepted and given hand-bills stating the employer had broken faith with the union; (c) the epithet "scab" well-known to be opprobious in labour circles was applied; (d) no violence occurred. In the *Truax* case the "picketing" appears to have been more vociferous and the references to the employer personally to have been more offensive; but in each case the employer was held up to public opprobrium. In the *Truax* case no evidence appears of an organized demonstration of some 60 to 70 pickets in front of the theatre such as occurred in this case on the 11th of June. This distinction is important to remember in considering the judgments later referred to.

Section 20 of the Clayton Act considered in the *Truax* case is now set out for comparison with the British Columbia Act; the clause therein reading:

or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating informa-

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tion, or from peacefully persuading any person to work or to abstain from working;

is couched in almost the same language as section 2 (1) of the English Act of 1906. The relevant sections of the Clayton Act and the British Columbia statute are now set out for comparison.

Trade-unions Act, Cap. 289, R.S.B.C. 1936 (introduced in 1924):

4. No such trade-union or association, or its officer, member, agent, or servant, or other person, shall be enjoined or liable in damages, nor shall its funds be liable in damages, for publishing information with regard to a strike or lockout, or proposed or expected strike or lockout, or other labour grievance or trouble, or for warning workmen, artisans, labourers, or employees or other persons against seeking, or urging workmen, artisans, labourers, employees, or other persons not to seek, employment in the locality affected by such strike, lockout, labour grievance or trouble, or from purchasing, buying, or consuming products produced or distributed by the employer of labour party to such strike, lockout, labour grievance or trouble, during its continuance.

Clayton Act, United States Congress, 1914:

20. That no restraining order . . . shall be granted . . . , in any case between an employer and employees, . . . , or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless . . . And no such restraining order or injunction shall prohibit any person or persons, . . . , from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; . . .

The Clayton Act permits "recommending," "advising" or "persuading" others to cease patronizing any party to a labour dispute; the British Columbia Act permits "warning" or "urging" "workmen, . . . or other persons" not to patronize an employer party to the dispute. It is reasonably apparent that the words "recommending," "advising" and "persuading" in the Clayton Act convey a meaning similar to the words "warning" and "urging" in the British Columbia Act when read in the context of their respective sections. In any event, whatever perceptible "shades" of meaning may exist, any variations attributable thereto are inconsequential for present comparative purposes. In my view the two statutes bear such a close parallel

in this relevant aspect that the cited decisions of the United States supreme Court may be related logically to the comparable circumstances of "picketing" now under review.

The term "picket" is not used in either statute. By no straining of the language may such terms as "communicating," "persuading," "recommending," "advising," "warning," and "urging" be extended to include marching backwards and forward in an organized manner in front of the employer's premises, let alone include the organized mass demonstration of the 11th of June. Tactics of this character have little in common with "warning," "urging," "persuading," "recommending" and "advising"; instead such tactics imply an atmosphere of moral coercion, intimidation and obstruction. They are more in the nature of command than of persuasion, of implied threats than "warning and urging"; the more so when it is apparent to the onlooker that the proceedings are organized in a militant manner and are supervised by the powerful Trades and Labour Council representing all sections of organized labour in a large city. So organized and conducted the "picketing" in this case was tantamount to a public declaration that anyone patronizing the respondent's theatre was an enemy to organized labour; it carried an implied challenge to members of the public to flaunt openly if they dared the power of organized labour and incur its animosity.

In view of what took place both here and in the *Truax* case, it is significant that neither the Clayton Act nor the British Columbia Act permits persons "attending at or near" the employer's premises to "persuade" members of the public not to patronize the employer. The words "attending at or near" do not appear at all in the British Columbia Act. The words "attending at any place" appear in the Clayton Act, but are confined to the purpose of "peacefully obtaining or communicating information"; they do not apply therein to "persuading" members of the public to cease patronizing an employer. This is made clear by following the divisions in section 20, marked plainly by the word "from." It is apparent that a number of persons "attending at or near," *viz.*, in front of a theatre for the purpose of organized and militant patrol and demonstration create quite a different

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effect than if it occurs at a place which is not "at or near" the theatre; also that an organized patrol and mass demonstration wherever it is held will have quite a different effect than if "communication" and "persuasion" is conducted quietly by individual persons without an outward display of organized force and massed action. In *American Foundries v. Tri-City Council* (1921), 257 U.S. 184, Mr. Chief Justice Taft, in delivering the majority opinion of the Court, observed at p. 204:

> The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer. Attempted discussion and argument of this kind in such proximity is certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes.

That these results may be expected in ordinary course from such conduct by persons "attending at or near a place" must have been recognized in the English Act of 1927, when as already pointed out such attendance was declared unlawful, if,—

> in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace;

(and note the definitions of "intimidate" and "injury" in the English Act as given previously).

It is true the words "in the locality" are used in our statute, *supra,* but they are limited expressly to "warning . . . or urging workmen, . . . not to seek, employment in the locality affected by" the labour dispute. That may be done in the public interest quite easily, effectively and peacefully without "attending at or near" the employer's premises and engaging there in militant and organized tactics under a covering atmosphere of moral coercion and intimidation. For these reasons I am of the view that the Trade-unions Act of this Province does not include in its exemptions the right to "attend at or near" a place to conduct a "picket" thereof in the manner already described.

However even if the words "attending at or near" could be read into our Trade-unions Act the appellants are not entitled to succeed. Mr. Chief Justice Taft, in delivering the majority opinion of the Court in *Truax* v. *Corrigan, supra,* said, pp. 327-8:

> The patrolling of defendants immediately in front of the restaurant on the main street and within five feet of plaintiffs' premises continuously

during business hours, with the banners announcing plaintiffs' unfairness; the attendance by the picketers at the entrance to the restaurant and their insistent and loud appeals all day long, the constant circulation by them of the libels and epithets applied to employees, plaintiffs and customers, and the threats of injurious consequences to future customers, all linked together in a campaign, were an unlawful annoyance and a hurtful nuisance in respect of the free access to the plaintiffs' place of business. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. . . . Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy.

American Foundries v. *Tri-City Council* (1921), 257 U.S. 184 (already referred to) concerned "picketing" incidental to a strike in a plant. No question arose there as here and in the *Truax* case of inducing the public not to patronize the employer. But as it involved "persuading" emloyees not to work for the employer it is in point in regard to the meaning of "persuading" in the Clayton Act. Mr. Chief Justice Taft said in the course of delivering the majority opinion of the Court, at pp. 203-4:

If, in their attempts at persuasion or communication with those whom they would enlist with them, those of the labour side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the Court's duty . . . , so to limit what the propagandists do as to time, manner, and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work.

And also at p. 204 appears this illuminating passage concerning the legal rights of employees going to work:

How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

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It cannot be said that the members of the public and in particular customers present and prospective, have not similar privileges.

In the *Truax* case, *supra,* Mr. Chief Justice Taft referred to *American Foundries* v. *Tri-City Council,* just quoted, in these terms, at p. 340:

> We held [there] that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labour union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it.

This passage interpreted what was intended by the Clayton Act in the section permitting "attending at or near" for the purpose of "obtaining" or "communicating" information and "persuading" a person to abstain from working. It is directly applicable to the interpretation of the terms "communicating," "warning" and "urging" in the Trade-unions Act, if the latter statute permitted these acts to be done "at or near the employer's premises" (which it does not, as already pointed out). The words "peaceful" or "lawful" do not appear in section 4 of the British Columbia Act. But they are understood; their insertion would be declaratory only. Legislative authority to do an act is an authority to do it in a "lawful" and "peaceful" manner. Section 2 of the British Columbia Act renders a trade union liable in damages for wrongful acts of commission or omission in connection with a labour dispute. For the above reasons I follow the view that "picketing" the respondent's premises in the manner described is not within the exemptions in the Trade-unions Act, *supra.*

However, I am of the view also there is another ground fatal to the success of the appellants. Even if "picketing" in the manner described were permissible under our statute, there is, as I see it, no authority therein to enable a labour union to "warn" or "urge" members of the public not to patronize the respondent's theatre. By section 20 of the Clayton Act, *supra,* an injunction may be granted:

in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,

but no injunction shall prohibit:

peacefully persuading any person . . . to abstain from working; or from ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do. . . .

It might appear that the word "others" in the second last quoted line would include persons other than a party to the dispute. But it is not so. In *Duplex Co.* v. *Deering* (1921), 254 U.S. 443, a decision of the Supreme Court of the United States, in the majority opinion delivered by Mr. Justice Pitney, at p. 472, the scope of the Act is thus defined:

Full and fair effect will be given to every word, if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective.

And further at p. 472:

Nor can section 20 [cited *supra*] be regarded as bringing in all members of a labour organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute.

This decision was followed and applied by the Supreme Court of the United States in *American Foundries* v. *Tri-City Council, supra,* at p. 202:

In my view the British Columbia statute goes no further in this respect than the Clayton Act. The words in section 4, *supra,* of our Act

strike or lockout, or proposed or expected strike or lockout, or other labour grievance or trouble,

although expressed in different phraseology have no larger meaning than the words in the Clayton Act, *supra,*

involving, or growing out of, a dispute concerning terms or conditions of employment. . . .

The immunity given in section 4 of the British Columbia Act in respect to "warning" or "urging" persons not to patronize an employer is confined to

workmen, artisans, labourers, employees, or other persons;

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"other persons" is limited thereby as well as by the context to persons of the same *genus* as workmen, artisans, labourers and employees; that is to say, of the *genus* "who are proximately and substantially concerned as parties to an actual dispute" which affects "the terms or conditions of their own employment, past, present or prospective"—*vide Duplex Co.* v. *Deering, supra,* and *American Foundries* v. *Tri-City Council, supra.* "Workmen" in the English Act of 1906, was declared to mean

> all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises.

No such extension of the term appears in the British Columbia statute. There is nothing in our Trade-unions Act to indicate that the right to "warn" or "urge" against patronizing an employer party to the dispute is to do more than enable a labour union without legal liability therefor to warn and urge persons affected by the complained-of action of a particular employer, not to patronize him. There is nothing in the statute to indicate that the right to "warn" or "urge" against patronizing an employer party to a labour dispute is to extend to the exercise of intimidation and moral coercion of his customers actual or prospective.

Counsel for the appellants contended also that they had the right at common law to "picket" as they did, because their intention in doing so was to further their own union trade interests; that any injury to respondent was incidental to the "picketing" and not the primary purpose of the picketing. The second principle discussed in *Sorrell* v. *Smith,* [1925] A.C. 700, was relied on, *viz.* (p. 712):

> If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

But *Sorrell* v. *Smith* was not a "picketing" case; it did not involve an issue arising out of the relation of employer and employee. The Lord Chancellor, Viscount Cave, made this emphatically clear when he observed at p. 714:

> There is here no question of a "trade dispute" within the meaning of the Trade Disputes Act, 1906. The quarrel here is not between employer and workman or between workman and workman, but between trader and trader. The above observations, therefore, are not directed to such a case.

Finally it did not involve the issue with which we are concerned

in this case, *viz.*, the right of a labour union to picket an employer in order to enforce its interpretation of a contract with him.

But if, notwithstanding the distinction in basic facts, it is still sought to apply *Sorrell* v. *Smith* to a labour controversy within or without the Trade-unions Act of this Province, it must be read in the light of its own background of which the English Trade Disputes Act of 1906 forms a part; section 3 thereof provides in part:

> An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only . . . that it is an interference with the trade, business, or employment of some other person . . .

Furthermore, section 4 (1) of the said Act specifically provides that no Court shall entertain an action against a labour union for any tortious act, committed by it or on its behalf. If *Sorrell* v. *Smith* could be freed from its background and applied to a labour controversy in this Province in my view the first principle therein discussed would apply to the facts of this case, *viz.* (p. 712):

> A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

As pointed out previously, the purpose of "picketing" in this case was to injure the respondent in its trade, so that it would be compelled by loss of revenue to accept the union's interpretation of its contract or go out of business. The union could not further its trade interest in this case without first so injuring the respondent's business that it would be compelled to do one or the other. The primary purpose was to injure the respondent's business. Injury to respondent's business was not an incidental, consequential or ancillary consideration; it was the primary and pivotal consideration. Furtherance of the union's trade interest would be effected by the injury caused to respondent's business. *Vide* also *Allied Amusements Ltd.* v. *Reaney*, [1937] 3 W.W.R. 193, a decision of the Manitoba Court of Appeal; Mr. Justice Robson at pp. 218-9; and *Besler* v. *Matthews*, [1939] 1 W.W.R. 113, also a decision of the Manitoba Court of Appeal, Mr. Justice Robson at pp. 128-9, and the *Truax* case and the *Schuberg* case, *supra*.

Then comes the second important question to be determined,

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viz., if what was done was within the Trade-unions Act exemptions whether the appellants could exercise their statutory exemptions to enforce the union's interpretation of its contract with the respondent? Study of the Trade-unions Act, *supra*, fails to disclose any such extraordinary powers. There is no indication therein that a labour union which is a party to a contract, has acquired by that statute any wider or different remedies for its interpretation, enforcement or rescission than those possessed under our law by any other contracting party. In my view the immunities conferred upon a labour union by the statute do not apply during the existence of a contract to which the labour union is a party. A controversy concerning the interpretation of such contract is not in my view a labour dispute within the meaning of the Trade-unions Act. When the union entered into and accepted the contract it thereby eliminated all need for the exercise of the statutory immunities as a weapon to protect its trade interests; for it is to be assumed with this weapon at its command the union would not have entered into the contract if the conditions and terms of employment had not been acceptable to it. In fact, by using the strike as a weapon it had compelled the respondent to enter into the contract, it now seeks by "picketing" and other means to force him to vary. If the employer committed a breach of the contract the union had its remedy in the Courts.

The argument of counsel for the appellants in plain words amounts to this: That a trade union which has entered into a contract with an employer may, in the furtherance of what it asserts to be its trade interests, compel the employer to accept its interpretation of the contract without recourse to the Courts. This is an attempt to impose a law which has no authority behind it beyond the physical and economic power of the particular group; by these means it is sought to ignore and to over-awe the agencies of law enforcement. It seeks to supplant the law of the land by the demands of the particular group which seeks the furtherance of its own trade interests. It is an effort to set up a particular group as the judge of the legality of its own acts and as the final arbiter of its conduct. It seeks to override the "rule of law" which remains to this day as the chief rampart of

a legal system built upon protection of individual liberty. Professor Dicey in the "Law of the Constitution," 8th Ed., observed at p. 198:

> That "rule of law," then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

And after discussing the two other meanings, he adds in respect to the third:

> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

The concept that an organized group may enforce upon others its interpretation of the law or of its contractual obligations by economic or physical force without an appeal to the Courts of the land to determine the legal rights involved is of itself a determined attempt to ignore the "rule of law" and as such is fundamentally inconsistent with our system of law. Any attempt to place labour or business controversies outside of organized society and refuse to subject them to social controls is repugnant equally to our common law and our statute law. Industrial and business relations and the activities of both labour and capital must be regulated according to legal principles if chaos is to be averted. As Professor Dicey says further, pp. 198-9:

> The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.

The foregoing analyses have led me to the conclusions (1) the exemptions in the Trade-unions Act, *supra,* do not apply to the contract in issue here. The statute does not apply to this contract. (2) Even if this were not so yet in no event whether under the statute or at common law, were the appellants permitted (a) to engage in the mass demonstration in front of the respondent's premises; (b) to patrol and picket the respondent's premises in the manner described; (c) to intercept, and distribute hand-bills of the nature described to present or prospective customers at or near the respondent's premises; (d) to warn or urge persons, not "proximately and substantially" affected by

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this dispute in "the terms or conditions of their own employment, past, present, or prospective," to refrain from patronizing the respondent's theatre.

Whether it is desirable that labour unions shall possess all or any of the above powers is not for the Courts, but for the Legislature to decide. That it was the purpose of the Legislature to grant labour unions certain immunities and protection, as well as to subject them to liability for wrongful acts, is evidenced in the Trade-unions Act. The language and context of that statute cannot be strained however to include exemptions equivalent to the exercise of what is virtually an economic blockade of a small business by the organized labour union resources of a large city. If the Legislature intended to confer such powers its intent should be recognized by the Courts, in the clear and unequivocal language of the statute. In *Rex* v. *Sung Chong* (1909), 14 B.C. 275, a decision of the old Full Court of this Province, Mr. Justice IRVING pointed out that one's good name and the unmolested pursuit of one's trade or occupation are among the normal rights "available to every British subject against all the world." He observed at p. 278:

> Where a restraint is sought to be put upon any person in respect of the exercise of any of these natural rights, I think it is the duty of the Court to assume that the Legislature did not intend to interfere with them unless clear and unequivocal words have been used.

The appellants raised a number of further points: First, it is said the learned trial judge erred in making a representative order whereunder certain persons should,—

> for the purposes of the action, besides representing themselves, represent and be authorized to defend the action on behalf of and for the benefit of all other persons and associations constituting

the British Columbia Projectionists' Union and the Vancouver, New Westminster and District Trades and Labour Council; secondly, it is said neither the union nor the Trades and Labour Council are incorporated; neither were named defendants in the action, but judgment for damages was given against both of them in the formal judgment as entered. On the first point it is said rule 131 of our Supreme Court Rules does not apply in actions of tort; on the second point it is said unincorporated bodies cannot be sued and therefore judgment cannot be given against them. However, even if rule 131 should be limited as

asserted by the appellants, yet in my view at least the representative order herein is not vitiated thereby, for the reason it is impliedly sanctioned by the Trade-unions Act, *supra*. By section 2 thereof it is clear that the trustees of a trade union or any association of workmen or employees may be made liable in damages in their representative capacity. By sections 2, 3, and 4 thereof it is also clear that the funds of a trade union or association of workmen and employees may be made liable in damages when its trustees are sued in their representative capacity. It must follow, therefore, that the trustees may be sued in their representative capacity; for they could not be made liable in damages in a representative capacity unless they could be sued in that capacity. Counsel for the appellants pressed us with *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees* (1919), 59 S.C.R. 240, as an authority that the representative order in this case could not be supported. That case is clearly distinguishable in the first place on the ground alone that the Supreme Court did not have to consider a statute such as our Trade-unions Act wherein trustees of a labour union may be sued in their representative capacity.

The material issue in the *United Mine Workers* case, *supra*, arose out of the refusal of the trial judge to grant an application made at the close of the trial to amend the statement of claim by adding the individual appellants as defendants in a representative capacity. For the majority Mr. Justice Anglin held, at p. 258, the appellants were not proper representatives, but held as well, pp. 259-260, that a representative order could not be made; Mr. Justice Brodeur concurred; Mr. Justice Duff (as he then was) p. 246, disposed of the appeal on the ground that it was not a proper case for amendment but refrained from deciding whether a representative order could or could not be made. Mr. Justice Idington and Mr. Justice Mignault dissented; the former (p. 244) on the grounds a representative order could be made and (p. 245) that the defendants were fairly representative; the latter regarded it as a matter of procedure in which he would not interfere with the judgment of the trial Court. But two judges out of five held that a representative order could not be made. Reading this decision in respect to the material issue

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with that of the Appellate Division of Alberta [1919] 1 W.W.R. 217, from which the appeal was taken, I am not able to conclude that it goes further than to uphold the decision of the trial judge, that in the circumstances there it was not a proper case for the amendment to be granted. It is not in any event in my view an authority to support the proposition that the representative order was not properly made in this case.

In the case at Bar, although neither the projectionists' union nor the Trades and Labour Council were named as party defendants, judgment was given against them as their trustees were sued in their representative capacity. If the union and the Trades and Labour Council had been sued as such it would have been unnecessary to sue their trustees in a representative capacity. In *United Mine Workers* v. *Coronado Co.* (1922), 259 U.S. 344, the Supreme Court of the United States held that labour unions were suable in the Federal Courts for their acts and that their funds were liable. In coming to this conclusion the Supreme Court of the United States accepted the judgment of Mr. Justice Farwell as the House of Lords had done 21 years before in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426. In the latter case the defendant society had taken out a summons to strike out its name as defendant on the ground that it was neither a corporation nor an individual and could not be sued in a *quasi* corporate or any other capacity. Mr. Chief Justice Taft in delivering the opinion of the Court in the *Coronado* case, *supra,* referred to that decision in the following terms at p. 390:

> In the case of *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426, an English statute provided for the registration of trade unions, authorized them to hold property through trustees, to have agents, and provided for a winding up and a rendering of accounts. A union was sued for damages growing out of a strike. Mr. Justice Farwell, meeting the objection that the union was not a corporation and could not be sued as an artificial person, said:
>
> "If the contention of the defendant society were well founded, the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents."
>
> He therefore gave judgment against the union. This was affirmed by the House of Lords. The legislation in question in that case did not create

trade unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them general power to sue, nor imposed liability to be sued.

The Lord Chancellor, the Earl of Halsbury, stated at p. 436, of the *Taff Vale Railway* case:

> I am content to adopt the judgment of Farwell, J., with which I entirely concur; . . . If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.

It is true that in *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees, supra,* the majority of the Court (Duff, Anglin, and Brodeur, JJ.) held that the local union in that case was not a suable entity. In the *Taff Vale* decision, *supra,* in the House of Lords not only the Lord Chancellor but also Lord Macnaghten, Lord Shand and Lord Brampton adopted the judgment of Mr. Justice Farwell referred to *supra* (Lord Lindley said "the orders of Mr. Justice Farwell were right"); it may be properly inferred, I think, that the local union before the Supreme Court of Canada could not have possessed the characteristics of the union under consideration in the *Taff Vale* case. The projectionists' union and Trades and Labour Council not only possess many of the characteristics discussed in the *Taff Vale* decision, but in addition are subject to statutory liability in tort (which was not so in either the *Taff Vale* or *United Mine Workers* (Canada) cases); they may be made liable in damages for wrongful acts by section 2 of our Trade-unions Act, *supra;* that is to say the statute specifically renders a union liable to be sued in tort in a case such as this.

In this case the projectionists' union had sufficient legal personality to enter into the contract with the respondent which is the cause of this litigation. Both the union and the Trades and Labour Council are recognized as statutory entities in the Trade-unions Act, *supra;* as such by section 2 thereof they are made liable in damages for specified wrongful acts. In sections 3 and 4 thereof by necessary implication their funds are similarly made liable. However, since the projectionists' union and the Trades and Labour Council were not named as party defendants judgment should not be entered against them as such. I would vary the judgment as entered accordingly and insert a direction

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that pursuant to the Trade-unions Act, *supra,* their funds are liable for the damages and costs awarded against their respective appellant trustees in their respective representative capacities. This direction does not affect the result of the appeal. The funds of the projectionists' union and the Trades and Labour Council are liable in either case. It is to be observed that the judgment as entered in the form now objected to was "approved as to form" by appellants' solicitor, and that neither the union nor the Trades and Labour Council as such are party appellants hereto. In the *Taff Vale* decision, *supra,* Lord Lindley said that even if a trade union could not be sued in tort in its registered name (which that decision decided it could be) its proper representatives could be sued, and (p. 443)

> an order could be made in the same action for the payment by them out of the funds of the society [trade union] of all damages and costs for which the plaintiff might obtain judgment against the trade union.

On the question of damages and other points raised, I see no reason to disturb the judgment of the learned trial judge. For these reasons I would dismiss the appeal.

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

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

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

PIKE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

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May 2, 3, 4; *June* 30; *Sept.* 29.

Negligence—Collision between automobile and street-car—Appeal—Misdirection—New trial—Costs of abortive trial to abide result of new trial—R.S.B.C. 1936, Cap. 56, Sec. 60.

On appeal by the plaintiff from the dismissal of his action against the defendant company for damages resulting from a collision between an automobile in which he was a passenger and a car of the defendant company, the appeal was allowed on the ground of misdirection, but as the appellant did not raise below, as he should have done, the objection here taken to the direction of the learned judge, he must, as section 60 of the Supreme Court Act directs, pay the costs of this appeal.

Held, further, that the general rule is that the costs of the abortive trial should follow the result of the second trial "except under very exceptional circumstances," and that is the direction which the Court gives in the present case in the absence of "very exceptional circumstances."

APPEAL by plaintiff from the judgment of MORRISON, C.J.S.C. of the 15th of February, 1939, and the verdict of a jury in an action for damages for injuries sustained by the plaintiff while a passenger in an automobile on the 5th of September, 1937, at the intersection of Burrard and Davie Streets in the City of Vancouver, when the automobile was struck by a street-car of the defendant company. The plaintiff was a passenger in a car driven by one Harling. The driver and five passengers were in the car and they were driving south on Burrard Street to take one of the passengers home. The accident took place about 12.45 a.m. On reaching Davie Street Harling continued across and he was struck by a tramcar which was going east on Davie. The tramcar had stopped on the west side of Burrard to let off passengers and then started up again and struck the side of the automobile when about half way across Davie. The appeal was allowed and a new trial ordered.

The appeal was argued at Victoria on the 2nd, 3rd and 4th of May, 1939, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

Lucas, for appellant: This is a motion for a new trial for misdirection, non-direction and owing to remarks made during

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the course of the charge. One Harling was driving the automobile south on Burrard Street. When he reached Davie Street he saw that an east-bound car had stopped on the west side of Burrard Street. He then proceeded to cross the intersection when the car suddenly started up and struck him before he could get across. The issue was whether the motorman was negligent. This was not properly put to the jury by the trial judge. There was misdirection: see *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257; *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546.

McAlpine, K.C., for respondent: There is no ground whatever for a new trial. The motorman had the right of way and properly took care that the traffic on his right would not interfere with him. It was clearly Harling's duty to give way to traffic on his right. He did not do so and is liable. The objections to the charge would have no bearing on the result: see *Robinson* v. *Freeman* (1921), 61 D.L.R. 248; *Alaska* v. *Spencer* (1904), 10 B.C. 473, at pp. 485-6.

Lucas, in reply, referred to *Warren* v. *Grinnell Co. of Canada Ltd. and Leggatt* (1936), 50 B.C. 512; [1937] S.C.R. 353.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: The appeal is allowed for misdirection, but because the appellant did not raise below, as he should have done, the objection here taken to the direction of the learned judge, he must, as the statute directs—section 60 of the Supreme Court Act—pay the costs of this appeal.

The costs of the abortive trial are in our discretion, and as they have not been spoken to counsel may do so at some convenient time.

MACDONALD, J.A.: Appeal from the verdict of a jury dismissing an action for damages against the respondent for injuries received in a collision between an automobile in which she was riding and one of respondent's street-cars at the intersection of Burrard and Davie Streets in the city of Vancouver.

The appeal is based on objections to the charge to the jury

by the trial judge, MORRISON, C.J.S.C. Under section 60 of the Supreme Court Act, R.S.B.C. 1936, a party to an action has the right to have the issues for trial submitted and left by the judge to the jury

> with a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues.

In collisions of this character at intersections the evidence, as to relative distances from the point of impact of the respective parties when, as here, the motorneer and the driver of the motor-car became aware (or should have been aware) of the necessity to regulate their conduct in relation to each other, is all important. Here the tram, after coming to a stop at the intersection, started again, and in crossing collided with the motor-car at the centre of the intersection, carrying it some distance down Davie Street and injuring the plaintiff. If the motor-car entered the intersection before the tram started to cross, the jury would have no difficulty in deciding the issue. As the tram proceeded easterly on Davie Street after stopping, the motor-car approached from the south. The former being to the right had the right of way. That right might be displaced, however, if the motor-car had either entered upon the intersection or (if the jury chose to so regard it because it is a question of fact) was so close to it that reasonably the motorneer should have allowed it to pass. It was a question of fact for the jury, whether or not by reason of relative positions at the crucial moment either the tram or motor-car should have been permitted to cross the intersection in safety. I cannot say it is clear that the motorneer was blameless and that therefore we should not direct a new trial. The question could not be withdrawn from the jury. That request was not made at the trial. It was essentially a question for their decision on a proper direction.

The foregoing indicates the evidence and issues proper for submission to the jury. On these questions, however, upon which the decision depended, there was no direction by the trial judge. The issues should have been defined and the evidence bearing thereon, *viz.*, respective speeds; relative distances from the final point of impact, evidence in respect to joint negligence, if any; the position of the motor-car when the tram resumed its journey, etc., should have been discussed with the jury.

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I have considered the evidence to determine whether or not failure of the trial judge to place the real determinative evidence and issues before the jury was material. If clear that in any event the action should have been dismissed a new trial would not be directed. If obvious, for example, that the tram started to cross the intersection at a time when the driver of the motor-car was at such a distance from the final point of impact that reasonably the latter should have stopped a new trial should not be directed. There is evidence however that the motor-car, travelling at a reduced speed, reached or nearly reached (it was for the jury to determine) the property line of Davie Street as the tramcar was about to resume its journey. Having regard to the point of impact, relative positions and this evidence of reduced speed, it was a question of fact whether or not the right of way of the motorneer was displaced by the proximity of the motor-car. The provisions of section 60 of the Act referred to should have been followed.

No objection, however, was taken at the trial to the charge on the ground that the real issues were not submitted to the jury. The costs of the appeal therefore must be paid by the appellant, the costs of the abortive trial to be in the discretion of the Court. Other objections were raised to the charge but I do not regard them as substantial. I do not overlook the fact that the ground relied upon herein was not specifically raised in the notice of appeal. It was fully discussed on the hearing, however, without objection by the respondent's counsel.

The notice may be amended.

I would direct a new trial.

MCQUARRIE, J.A. agreed in the result.

Appeal allowed; new trial ordered.

29th September, 1939.

MARTIN, C.J.B.C.: We have considered this matter of costs and we are agreed that the usual rule should not be departed from in directing this new trial, *i.e.*, that the costs of the abortive trial should follow the result of the new one. This is in conformity with long standing decisions of this Court, the leading

ones being *Errico* v. *British Columbia Electric Ry. Co. Ltd.* (1916), 23 B.C. 468, wherein after a review of the cases up to that time we decided unanimously that the general rule is as I have stated it, that the costs of the abortive trial should follow the results of the second trial, "except under very exceptional circumstances," and that was followed by our decision in *Robinson* v. *Corporation of Point Grey* (1927), 38 B.C. 243.

Those cases were, it is true, not decided upon the statute now under consideration, *i.e.*, section 60 of the Supreme Court Act, wherein the special provision is made allowing a new trial under certain terms in cases where objection was not taken to the direction of the judge to the jury. This section is one of very long standing, and has its origin in the Supreme Court Act of 1903-4, more than 35 years ago, in section 66 thereof, and in all essentials that original section is identical with that which we are considering today. It is somewhat strange that there is no reported decision of this Court upon the proper practice thereunder, but I recall many cases wherein the usual rule respecting costs of new trials has been adopted without argument, and in *Budd* v. *Canadian Pacific Ry. Co.* (1932), 45 B.C. 161, at p. 167, in a Court which was equally divided, my brother MCPHILLIPS and myself—the Court was not divided upon this—but my brother MCPHILLIPS and myself took the view that the costs of the former trial in the circumstances of the case should abide the result of the new one.

It is to be noted that the penalty imposed by said section 60 is in itself a severe one for failure to take the objection below in that it is imperative that the costs of the appeal "shall be paid" —which means paid forthwith—by the successful appellant. But having paid that penalty the case then is on the same plane as other cases of new trial and the costs of the abortive trial will, "except under very exceptional circumstances" follow the result of the new one. I am reminded that in *Field* v. *David Spencer Ltd.* (1938), 52 B.C. 447 we recently adopted that rule without argument, as a matter of course. Therefore that is the direction which we give in the present case in the absence of "very exceptional circumstances."

Costs of abortive trial to follow result of new one.

Solicitor for appellant: *G. Roy Long.*
Solicitor for respondent: *V. Laursen.*

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April 18, 19; May 1, 2; July 26.

YOUNG v. TORONTO GENERAL TRUSTS CORPORATION *ET AL.*

Deed of settlement—Death of settlor—Mental capacity—Action for declaration that settlor of unsound mind—Evidence—Action dismissed.

The administrator of the estate of an intestate brought action for a declaration that the intestate was of unsound mind when she executed a certain deed of settlement.

Held, after considering the whole of the evidence and applying the principles laid down in *Pare* v. *Cusson*, [1921] 2 W.W.R. 8, at p. 16; *Lloyd* v. *Robertson* (1916), 35 O.L.R. 264, at p. 276; *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, at pp. 564-8, that the action failed.

ACTION for a declaration that one Esther Ann Young was of unsound mind at the time of executing a deed of settlement of the 2nd of November, 1935, transferring to the Toronto General Trusts Corporation and her nephew Frank Young her securities amounting to about $7,500, to hold same as trustees for herself during her lifetime and after her death for the defendants other than said trusts corporation and one W. H. Mowat. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 18th and 19th of April, and 1st and 2nd of May, 1939.

Donaghy, K.C., and *Howard*, for plaintiff.
Norris, K.C., for the Youngs.
Tysoe, for Toronto General Trusts Corporation and Mowat.

Cur. adv. vult.

26th July, 1939.

FISHER, J.: The plaintiff, John Henry Young, is the administrator of the estate of his sister, Esther Ann Young, deceased, who died, aged 71, at the city of Vancouver, B.C., on December 31st, 1937, the cause of death according to the certificate of death (Exhibit 4), being coronary sclerosis. The said Esther Ann Young had been a school-teacher in England for years and having retired came from England in October, 1934, to live with the plaintiff and his wife, the defendant Annie Young, at their home

in North Vancouver, B.C., and lived there till in or about the month of February, 1935, when she went to live with her nephew, Frank Young, son of the plaintiff, and his wife, Ethel Young, two of the above-named defendants at their home in Vancouver, B.C. In September, 1935, she left the latter home apparently without any notice to her nephew or his wife and went to the Y.W.C.A. home in Vancouver. She remained there for two days when arrangements were made through a solicitor, *David B. Wodlinger,* employed by the said Frank Young, that she should go to a private nursing-home kept by Mrs. Edith Fowler in the city of Vancouver. She remained there until about the end of June, 1936, then she went to the home of Mrs. Mary Matheson in the city of Vancouver for a week and then to the home of Mrs. Hughes in the said city of Vancouver where she continued to live until her death.

The plaintiff's claim is for a declaration that the said Esther Ann Young was of unsound mind at the time of executing a deed of settlement, dated November 2nd, 1935 (Exhibit 1), transferring to the defendant, the Toronto General Trusts Corporation, and the said defendant, Frank Young, the funds, bonds, stocks and securities therein enumerated amounting in all to approximately $7,500 to hold the same as trustees for the said Esther Ann Young during her lifetime and after her death to stand possessed of the residue thereof in trust for all the defendants, other than the Toronto General Trusts Corporation and William Hugh Mowat. In support of this claim the plaintiff pleads that

> at the time of the execution of the alleged deed the said Esther Ann Young was in such a condition of mind and memory as to be unable to understand the nature of the act and its effect, the extent of the property of which she was disposing, or to comprehend and appreciate the claims to which she ought to give effect.

[After reviewing the testimony at length, FISHER, J. continued:]

As was said by MACDONALD, J.A. in *Crabbe* v. *Shields,* 36 B.C. 89, at 97; [1925] 2 W.W.R. 701, at 707, expert opinions should be "carefully scrutinized and the Court should not abrogate its function of drawing its own conclusions." In the present case I do not accept Dr. Manchester's conclusions, particularly

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because he never saw or examined the deceased and bases his conclusions upon assumptions some of which have not been proved and others of which have been put to him in the absence of proof of all the surrounding circumstances.

I now come to consider the argument of counsel on behalf of the plaintiff that the deceased manifested a failure of judgment in suggesting to the said *David B. Wodlinger,* after she had known him only about ten days, that she make him the trustee of the settlement deed. It must be noted, however, that she apparently preferred to have a person she knew rather than a corporation appointed as trustee and Mr. *Wodlinger* was a solicitor recommended to her by her nephew for whom she undoubtedly had a great liking and respect. The suggestion may have been a foolish one but it was never carried out and in any event I would say that under all the circumstances the fact that the deceased made it can hardly be relied upon to prove that her mind was unsound.

Then it may be argued that the deed of settlement is inofficious and this may be relied upon as evidence of mental incapacity on the part of the settlor. It is true that nothing was given to her brother, the plaintiff. One-eighth of the residue of the trust fund, however, was given to his wife, the defendant, Annie Young, and it is apparent from the evidence of the plaintiff himself that he and his sister were not on the best of terms. Some of the evidence given on his examination for discovery reads as follows:

Now when she came to British Columbia with you she lived in your house? She lived in my house.

At first? Yes.

And she was hard to get along with while she was in your house? Yes, she was hard to get along with while she was in my house.

Was she quarrelsome? Well, she was always quarrelsome and always grumbling and always making assertions at me and all that, you know, and was all the time making trouble that way and going out and getting lost, and I was hunting all over the place for her for hours and hours.

And you didn't get along with her, either? Well, I couldn't get along with her very well.

It is clearly established by the evidence of *David B. Wodlinger* that the deceased had carefully considered the claims of the plaintiff and rejected them. If she made a mistake in thinking that she had transferred to him certain shares in the Lever

Brothers Soap Company that might indicate some lapse of memory but would not be sufficient ground for setting the deed aside. See *Pare* v. *Cusson,* 31 Man. L.R. 197, at p. 20; [1921] 2 W.W.R. 8, at p. 16, where Cameron, J.A. says, in part, as follows:

> There is the other contention that he was under a delusion that he had advanced his daughter and her family $25,000. . . . It is unreasonable to speak of it as an insane delusion, and such a mistake of that kind does not invalidate a will: *Box* v. *Barrett* [(1866)], L.R. 3 Eq. 244, at p. 249; 15 W.R. 217.

It is further argued however by counsel on behalf of the plaintiff that the deed of settlement itself discloses evidence of an irrational mind in that it only permitted and did not oblige the trustees to pay the settlor during her life the net income derived from the trust fund for her maintenance and support and was irrevocable as to the disposal of the rest of her estate after death whereas the making of a will would have left her more control of the whole situation. It must be remembered, however, that there is evidence showing that she desired to have her English securities exchanged into Canadian ones and had difficulty in valuing Canadian money in terms of English money. It seems reasonable under the circumstances therefore that she should make such a deed of settlement providing for conversion and control by her trustees, especially when one of them was her nephew as aforesaid. In any event I think it may be said of a settlor, as was said of a testator by Meredith, C.J.C.P. in *Lloyd* v. *Robertson* (1916), 35 O.L.R. 264, at 276:

> The disposition which a testator makes in his will may afford evidence for or against the validity of the will, sometimes very strong evidence, but always evidence that must be considered with great care; for no person is required to make a will such as others may think reasonable or proper; every one capable of making a will can be as unreasonable as he or she pleases.

See also *Pare* v. *Cusson, supra,* at p. 207, where Cameron, J.A. says:

> There has been a good deal of adverse criticism of the terms of the will. Indeed much of the argument was based upon it. But it is a dangerous thing for the Court to interfere with a man's will because its provisions or some of them may seem inadequate, inequitable or unfair. It is not given to us to know the reasons that enter into a testator's mind when he makes his decisions in these matters unless he makes them known himself.

As to the measure of the degree of mental power which should

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be insisted on and the meaning of the terms "a sound and disposing mind and memory" reference might be made to what was said by Cockburn, C.J. in *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549; 39 L.J.Q.B. 237. As already indicated, I appreciate the fact that I am dealing in the present case with a deed of settlement and not a will but I think the same principles apply.

In *Banks* v. *Goodfellow, supra,* at pp. 564-8, Cockburn, C.J., delivering the judgment of the Court, said in part as follows:

> For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. . . . It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
>
> Here, then, we have the measure of the degree of mental power which should be insisted on. . . .
>
> It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause—namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a case of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. . . . This part of the law has been extremely well treated in more than one case in the American Courts. . . .
>
> In the case of *Den* v. *Vancleve* (2 Southard, at p. 660) the law was thus stated: "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature

of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

In the subsequent case of *Stevens* v. *Vancleve* (4 Washington, at p. 267) it is said: "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But this memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

After considering the whole of the evidence and applying the principles laid down in the cases hereinbefore referred to my conclusion on the whole matter is that at the time of the execution of the said deed of settlement the said Esther Ann Young was, in the language of the law, possessed of a sound and disposing mind and memory or, in other words, that her mind and memory were sufficiently sound to enable her to know and understand the nature and effect of the act in which she was engaged and the extent of the property of which she was disposing and to comprehend and appreciate the claims to which she ought to give effect. The action must therefore be dismissed. With respect to the question of costs I would like to say that, as most of the parties to this action are closely related, I trust they will be able to agree on a consent order as to costs without prejudice of course to the right of appeal. If they cannot agree the matter may be spoken to.

Action dismissed.

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Sept. 11, 19.

CANNON v. HUDSON'S BAY COMPANY.

False imprisonment—Employee in department store—Detained for examination on termination of work—Suspected of theft—Damages.

The plaintiff was employed as a cleaner by the defendant company at its store after the day's business was over. Upon finishing his work at about 2 o'clock in the morning, he went to the exit door on his way home but found the door was locked. He asked the doorman to let him out but he was told that he was "wanted at the office" and that he could not get out. Later he was invited to enter the elevator and was taken up to the manager's office and was searched and questioned as to thefts that had been committed of the company's goods. He was then told that he could go. He made no objection to being searched and was treated civilly.

Held, that what was done at the door constituted false imprisonment, and damages were assessed at $100 and costs.

ACTION for damages for false imprisonment. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 11th of September, 1939.

Denis Murphy, Jr., for plaintiff.
Hossie, K.C., and *Ghent Davis*, for defendant.

Cur. adv. vult.

19th September, 1939.

ROBERTSON, J.: On November 1st, 1938, the defendant was carrying on a large departmental store in Vancouver, B.C., employing during the daytime about 900 persons. At night fourteen men and three women cleaned up the store. Plaintiff was one of these men. These cleaners came on duty at 6 p.m. The women finished their work at 1 o'clock and the men at 2 o'clock the next morning.

For some time prior to November 1st, 1938, thousands of dollars' worth of goods had been stolen from the defendant's store. Some of these goods had been stolen at night when the only persons on the premises were the cleaners. The company's officials thought that some one or more of these cleaners must be the guilty party or parties. Accordingly it was arranged that an investigation should be held. Stanfield, the manager in the

defendant's store at Vancouver, suspected that one of the women was the guilty party. He states that plaintiff "was beyond any suspicion of theft." "We did not suspect him." At 1 o'clock on the morning of November 1st Stanfield, together with McDonough, personnel superintendent, Abrahamson, assistant to McDonough, Lougheed, building superintendent, two city detectives, Messrs. Gill and Cruickshanks, Galbraith, private investigator employed by the defendant, Mrs. Price also employed by it as a detective and Clifford, the head janitor, met at a point close to the employees' entrance of the defendant company and then proceeded into the company's store. All these persons were under the personal orders of Stanfield who delegated "certain people to specific jobs and positions." He says he told Abrahamson to stay down at the employees' entrance door and meet the cleaners as they came from their work and ask them if they would mind coming upstairs for a talk; Clifford was told to act as doorman, that is, to open and shut the entrance door which was always kept locked at night. About 2 o'clock the plaintiff, on his way home, came to the entrance door. He pushed it and found it was locked. He spoke to Clifford, telling him that he was going to "lose his car," if he was not let out. Clifford told him "he was wanted up at the office," and that he could not get out. Another cleaner, Taylor, came along and pushed the door and he also found it locked and had to remain. Later on other men came. Sometime after this they were invited to enter the elevator and were taken up to the fifth floor to Stanfield's office. Shortly after this Lougheed came in. He explained that the company had been losing thousands of dollars' worth of goods and asked if any one had any objection to being searched. Nothing was said. Later on a detective motioned the plaintiff to come into another room which he did. There he took off his overcoat and coat and the detective "tapped" him and satisfied himself the plaintiff had nothing on him belonging to the company. The plaintiff was also taken into another office where he was questioned by Stanfield and others. The plaintiff says about 4.15 a.m. Stanfield came in and said if any one wished to go he was at liberty to do so. The plaintiff left somewhere in the neighbourhood of 5 o'clock. Stanfield was not called as a witness. It

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seems to me quite clear that the intention was to hold the cleaners in the premises while an investigation was being made if they would not consent to remain. Clifford was not called so there was no denial of the plaintiff's statement as to what Clifford said to him. Abrahamson said he was at the entrance door and asked the men if they would mind going up to Stanfield's office to have a talk. He was not able to say that the plaintiff was there and the plaintiff denies any such conversation. I accept then the plaintiff's evidence as to what took place at the door. I have no doubt that what was done constituted false imprisonment. See *Warner* v. *Riddiford* (1858), 4 C.B. (N.S.) 180; *Meering* v. *Grahame-White Aviation Company Limited* (1920), 122 L.T. 44. See Winfield on the Law of Tort, 1937, p. 231. The plaintiff made no objection at the time. He continued to work until April of this year when he was allowed to go as there was no work for him. As I said he did not object to being searched. There was nothing about the search itself which was objectionable. He appears to have been treated with civility. Under these circumstances, while I think he is entitled to damages, I think these should not be large. I assess the damages at $100. He is entitled to his costs.

Objections were taken by defence counsel to admissibility of certain evidence. I overrule these objections as I think this evidence was admissible.

Judgment for plaintiff.

STEPHENS v. HUDSON'S BAY COMPANY.

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1939
Sept. 13, 19.

False imprisonment—Action for damages—Lack of evidence of detention—Action dismissed.

The plaintiff, who was an employee in the defendant's store, brought action against the company for false imprisonment. On the evidence it was found that the plaintiff had not been detained but had remained voluntarily in the defendant's store when asked to do so, and the action was dismissed.

ACTION for damages for false imprisonment. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 13th of September, 1939.

P. D. Murphy, for plaintiff.
Hossie, K.C., and *Ghent Davis,* for defendant.

Cur. adv. vult.

19th September, 1939.

ROBERTSON, J.: The plaintiff claims damages for false imprisonment, which is said to have occurred during an investigation, the general particulars of which I have set out in my reasons for judgment in *Cannon* v. *Hudson's Bay Co.* (1939) [*ante,* p. 290]. It is only necessary in this case to state the following additional facts:

The plaintiff met McDonough, who walked with her to the lobby of the employees' entrance and, there, asked her would she mind coming upstairs as he would like to have a chat with her. She consented. They went up to Stanfield's office when Stanfield explained about the stealing; said that there was reason to believe that some member of the night staff had been stealing; that he would like to get the matter cleared up and asked if she would submit to being searched. She said "Yes" because as, she explains, she thought she could be forced to do so. She was "searched" by Mrs. Price who then reported to Stanfield that she was satisfied that the plaintiff had nothing belonging to the store. Mrs. Price did not lay hands on her. Then McDonough asked her would she "mind having a chat with us" and she went

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into another room where she was asked various questions. Stanfield also said she was then told she could go and she did so, McDonough taking her down to the door. Lougheed, who was at the door, said to her "You can go now" and he let her out. Next day she was called to McDonough's office when she was further questioned. She was not accused at any time of stealing anything. The plaintiff never thought that she was detained in any way. Exhibits 1 and 2 show that she had the kindliest feeling towards the company. She did not leave its employ until February, 1939. I have no doubt the defendant would have detained her on its premises if she had refused to remain on the morning of November 1st; but she did not refuse and therefore it was unnecessary for the defendant to detain her. I find as a fact that she was not detained; she remained voluntarily. Accordingly I find there was no imprisonment.

The action is dismissed with costs.

Action dismissed.

C. A.
1939
Oct. 6, 17.

REX v. MINICHELLO.

Criminal law—Attempt to steal when armed with pistol—Line-up—Identification—Evidence—Appeal.

At 11 o'clock at night two men entered M.'s store when M. was behind a counter, and one of them going to the counter with his cap well pulled down (nothing else on his face) pointed a revolver at M. and told him to hand over his money. M. looked at him for about two seconds and then suddenly made for a back room where he had a gun. On getting the gun he came back into the store but the men were gone. The store was fairly well lighted. On the same night at the police station M. was shown a volume of pictures and he picked out the picture of accused as the man who held him up, and on the next day in a line-up of twelve men he picked out the accused as the man who held him up. On the trial M.'s evidence was accepted as identifying the accused, and that the evidence proved the *alibi* set up by the defence was unreliable, and he was convicted.

Held, on appeal, affirming the decision of HARPER, Co. J., that the incidents in the evidence fully justify M.'s firm statement throughout in identifying the accused as the man who held him up, and the attempt to establish an *alibi* was discredited by the evidence of the police officers.

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APPEAL by accused from his conviction by HARPER, Co. J. on the 13th of June, 1939, on a charge that when armed with a pistol he assaulted one Marshall with intent to steal money and goods of the said Marshall. Marshall owned a store on East Thirteenth Street in Vancouver, with living quarters at the back. There was a bell on the front door, and at about 11 o'clock on the night of the 3rd of April, 1939, on hearing the bell at the front door ring, Marshall came out from behind the store and stood behind the counter. Two men had come in, and one of them coming up to the counter with his cap pulled down (nothing else being on his face), pointed a revolver at Marshall and told him to hand over his money. The other man stood at the door with his coat over his head. After looking at the man for about two seconds, Marshall suddenly made for the back room where he had a gun. On getting his gun he came back into the store, but the two men had gone. The store was well lighted.

The appeal was argued at Victoria on the 6th of October, 1939, before MACDONALD, MCQUARRIE and O'HALLORAN, JJ.A.

Castillou, for appellant: The whole question in this case is the identification of the accused, and the learned judge in giving his judgment was weighing evidence that did not exist.

Carew Martin, for the Crown.

Cur. adv. vult.

On the 17th of October, 1939, the judgment of the Court was delivered by

MACDONALD, J.A.: A difficulty arose because of statements in the report of the trial judge. The sole witness on the only point in the case, *viz.*, the question of identity, was one Marshall a storekeeper whom, it is alleged, the accused attempted to rob at the point of a gun. The trial judge said the accused "stuck a gun in his [Marshall's] face," meaning, I assume, not that he used it as a bayonet but rather pointed the gun at Marshall's face. The evidence showed however that the gun was pointed at his stomach. The discrepancy is important. The gunman, wearing a brown hat, "kind of over his eyes," was about 5 feet 6 inches tall while Marshall was over 6 feet in height. With the

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gun pointed at Marshall's stomach and the hat drawn down Marshall would not see the upper part of the bandit's face. He said "I could see his eyes, but I did not look at his eyes," and again "it was all I could do to see his eyes." If, however, as the trial judge reports, he pointed the gun at Marshall's face the shorter man's head would be raised giving Marshall a better view.

Further in support of the view that the trial judge may have misconceived the evidence he said in his report that Marshall "had a good opportunity to observe his [the bandit's] features," although he observed only part of his "features."

We decided to read the evidence carefully to see if, in any event, notwithstanding any misconception revealed, a miscarriage of justice occurred. Having done so we are now satisfied that the conviction should not be set aside. Marshall who remained cool and collected throughout testified that he looked closely at the accused for about two seconds before running for his gun, and driving the bandits away. Only the forehead would be concealed. He was positive on the question of identification. The appellant was under a light some two feet away from Marshall. The latter could see his eyes, although he did not look at them. If he could see his eyes he could also see his nose, mouth and jaws, enabling him to receive an impression of a definite cast of countenance. When we add to this appellant's height, age, bearing and complexion all of which Marshall observed it cannot be said that he could not visualize the personal characteristics and individuality of the accused to the extent necessary to enable him to identify him the next day when wearing the same or a similar hat.

A few hours later Marshall picked out the accused in a line-up at the police station. The criticism of his evidence in that connection, *viz.*, in respect to the position of the accused in the line-up is not of a substantial character. Further upon being given a volume of pictures to examine he selected therefrom, without assistance from anyone, the picture of the accused. These incidents fully justify Marshall's firm statement throughout, *viz.*, that "This is the man that held me up in the store; that is all."

The accused gave evidence on his own behalf and attempted

to establish an *alibi*. Fostey who testified that he was in his company at material times was discredited by the evidence of police officers.

It follows that in our opinion in any event the trial judge would inevitably convict. We would refuse leave and dismiss the appeal.

Appeal dismissed.

GUARASCIO v. PORTO.

Trial—Judgment delivered—Formal judgment not entered—Application to reopen trial—New evidence and further argument—Refused.

Although a trial judge may reopen the trial after judgment on an application to adduce new evidence and for further argument, the power to reopen is one which ought to be exercised with the very greatest care.

On an application to reopen the trial there was no suggestion that the witness might not have been called at the trial, and where it appeared that even if the evidence were admitted the result would have been the same, the application should be refused.

APPLICATION by defendant that the trial be reopened to adduce new evidence, and for further argument. Heard by MCDONALD, J. in Chambers at Vancouver on the 18th of October, 1939.

J. L. Farris, for the application.
R. H. Tupper, contra.

Cur. adv. vult.

23rd October, 1939.

MCDONALD, J.: This action was tried before me at the Assizes holden at Cranbrook in May last. Judgment was given for the plaintiff after evidence had been adduced and argument heard. Formal judgment has not yet been entered.

Application is now made on behalf of the defendant that the trial be reopened, new evidence adduced and further argument heard.

While I am bound by the decisions of the majority of the

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McDonald, J.

Court in *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28, to hold that a trial judge in this Province does possess the power which I am now asked to exercise, one cannot read the judgments in that case or the authorities referred to, without realizing that the power to reopen a case after judgment is, as it always was, one which ought to be exercised with the very greatest care, and, under circumstances which must be rare indeed.

On the application now before me counsel for the applicant frankly admits that he has only one witness whose evidence it is suggested might be admissible and who was not called. There is not the slightest suggestion that this witness might not have been called at the trial and I have considered carefully the question of whether or not his evidence would be admissible even if he were called. I have the very gravest doubt that his evidence is admissible but, even if it be so, having perused my notes of the proceedings at the trial, I am convinced that the result would have been the same even had the witness in question been called.

On the application to hear further argument upon the question of whether or not I was right in holding that there had been part performance of the alleged contract sufficient to take the case out of the operation of the Statute of Frauds, it must, I think, be clear that such liberty ought not to be allowed unless the trial judge be himself of the opinion that an injustice has been done. My opinion in this case is to the contrary.

I have considered the matter more carefully, in view of the fact that the action is against the estate of a deceased person, and I am convinced that this is not a case where the trial should be reopened. The application is therefore dismissed with costs.

Application dismissed.

HAYWARD *ET AL.* v. PARK *ET AL.* (No. 2).

C. A.
1939
June 21, 22, 23, 26, 30.

Agriculture—Natural Products Marketing (British Columbia) Act—Co-operative Associations Act—Right of association to act as agent of marketing board without complying with section 27 thereof—R.S.B.C. 1936, Cap. 165, Secs. 4, 5 and 9; Cap. 53, Sec. 27.

Upon the dismissal of the plaintiff's action for a declaration that the appointment of the defendants Carmichael, Park and Sherwood as directors of the defendant Milk Producers Clearing House Co-operative Association is illegal and void and contrary to the provisions of the Co-operative Associations Act, for an injunction restraining said defendants from acting as directors of the Milk Producers Clearing House Co-operative Association, for an injunction restraining the Milk Producers Clearing House Co-operative Association from carrying on the business of a pool association and acting as an agency of the Lower Mainland Dairy Products Board, for a declaration that orders 3, 4, 5, 6, 7 and 8 of the Lower Mainland Dairy Products Board are *ultra vires* of the board, and that said board be restrained from ordering or permitting the Milk Producers Clearing House Co-operative Association to act as an agency of the board:—

Held, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A. dissenting), that section 27 of the Co-operative Associations Act applies to this incorporated Clearing House Association and so it is not an effective "agency" within the meaning of the "scheme" establishing the board in the admitted absence of the additional rules required by said section.

APPEAL by plaintiffs from the decision of ROBERTSON, J. of the 18th of May, 1939 [reported, *ante*, p. 196]. The appellant Hayward is a member of the Milk Producers Clearing House Co-operative Association (called the Clearing House), Messrs. Park, Carmichael and Sherwood are directors of the Clearing House. Hayward's action is for an injunction restraining the Clearing House from carrying on the business of a pool association and from acting as the agency of the Lower Mainland Dairy Products Board, and a declaration that the election of said directors is null and void. Hayward and Savage are farmers producing milk, the other plaintiffs being distributors of milk in the cities of Vancouver and New Westminster. The action of all the appellants is for an injunction restraining the board from enforcing certain orders it has passed on the ground that

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they are *ultra vires*. In the area in question there are two markets for milk (a) the fluid market, and (b) the manufacturing market. The price for milk on the fluid market is substantially higher than for milk on the manufacturing market. Some farmers were able to dispose of all or substantially all their milk on the fluid market, for which they received a higher return, and it was felt that a system of marketing milk should be inaugurated whereby the returns to all farmers would be equalized. By an order in council passed under the Natural Products Marketing (British Columbia) Act a scheme was established to regulate the marketing of milk in said area. By section 5 of the scheme the board was established, and under section 7 its members are the respondents *Williams,* Barrow and Kilby. By section 10 of the scheme the board is given power to regulate and control in all respects the transporting, storing and marketing of milk within said area, and to designate the agency through which the regulated product shall be marketed, and to prohibit marketing except through such agency. In the exercise of such powers the board passed orders designating the Clearing House as the sole agency through which the product may be marketed. The effect of the orders was that all milk must be sold to the Clearing House, and the Clearing House then disposes of as much of the milk as it can on the fluid market, and the surplus on the manufacturing market. After deducting expenses the Clearing House distributes the returns to the farmers on a *pro rata* basis. The proportion of the returns each farmer receives will be in the same ratio as the amount of his shipments bears to the total shipments received by the Clearing House. The plaintiffs claim the Clearing House is conducting a pool of all the milk received. The Clearing House is a co-operative association incorporated under the Co-operative Associations Act. The plaintiffs claim that section 27 of said Act has not been complied with in regard to the rules of the association, that the rules provide for the carrying on of its business as a pool association, but the Clearing House has not complied with any of the provisions of section 27 of said Act, that it is illegal and *ultra vires* of the Clearing House to carry on the business of a pool association and to act as the agency of the board.

The appeal was argued at Vancouver on the 21st, 22nd, 23rd and 26th of June, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

J. W. deB. Farris, K.C. (J. L. Farris, with him), for appellant: The pooling orders for equalization are bad, as being in substance an indirect tax: see *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (1932), 102 L.J.P.C. 17; [1933] A.C. 168. The Legislature cannot do indirectly what it cannot do directly: see *Madden* v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626, at p. 628; *Union Colliery Company of British Columbia* v. *Bryden, ib.* at p. 587; *Cunningham* v. *Tomey Homma,* [1903] A.C. 151, at p. 157; *Re Insurance Contracts* (1926), 58 O.L.R. 404; *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328; *Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.*, [1930] A.C. 357; *Attorney-General for Alberta* v. *Attorney-General for Canada,* [1938] 2 D.L.R. 81; *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919,* [1922] 1 A.C. 191. In all these cases it is held that the Courts will look through the form of the Act to its real pith and substance. An attempt to do indirectly what it cannot do directly is termed "colourable legislation": see *In re Insurance Act of Canada,* [1932] A.C. 41; *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328. The pith and substance of the orders, their purpose and intent, is to compel the producers who are in reality selling in the fluid market, to "divide up" with those who are selling on the manufacturing market. In its intent and in its result the scheme takes the equalization money from the one and gives it to the other. The pretence of sale is colourable. In pith and substance the orders constitute a tax and bonus as in the old Act. All the Courts held in the previous case that the tax was indirect. The tendency to pass it along to someone else is the true test: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561; *Attorney-General for British*

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Columbia v. *Canadian Pacific Ry. Co.*, [1927] A.C. 934; *In re Anderson Estate*, [1928] 2 W.W.R. 365; *Rex* v. *Caledonian Collieries*, [1928] A.C. 358; *Brandon* v. *Municipal Commissioners*, [1931] 3 W.W.R. 225; *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1932] 3 W.W.R. 477.

Williams, K.C., for respondent: Section 27 of the Co-operative Associations Act is not compulsory upon every co-operative association. The object is the business of buying and selling milk. The pool provision is merely a method of operating the business: see *Cotman* v. *Brougham*, [1918] A.C. 514, at p. 522. The power to operate a pool in the memorandum of association is of no effect, because the statute confers such a power to operate a pool. When a statute is passed creating new rights, it ought, if possible, to be so construed as not to extinguish existing rights: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 385; *Watton* v. *Watton* (1866), L.R. 1 P. & M. 227 at p. 228; *In re Cuno. Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12. It is not intended that section 27 (1) should apply to a co-operative association that operates in a single area. It can only be used by a co-operative association that has groups of members residing in different areas throughout the Province. It would be interpreting an absurdity into the Act to hold that section 27 (1) applies to all co-operative associations which operate pools. It would be foisting machinery upon them which they could not use and which they are not using at the present time: see *Simpson* v. *Unwin* (1932), 3 B. & Ad. 134; 110 E.R. 50; *The Queen* v. *Bishop of Oxford* (1879), 4 Q.B.D. 245, at p. 261; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 301; *Duke of Devonshire* v. *O'Connor* (1890), 24 Q.B.D. 468, at p. 478; *Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C. 193, at p. 197; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 634. Section 27 is purely an elective section which a pool association may adopt if it suits its requirements. The effect of the certificate of incorporation and section 6 of the Co-operative Associations Act is to close the door against any objection that the memorandum and rules are not in accord with all the requirements of the statute: see *Cotman* v. *Brougham*, [1918] A.C. 514, at pp. 517-19; *Bowman* v. *Secular Society*,

Limited, [1917] A.C. 406, at pp. 438-9; *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325, at p. 354. The rules are part of the incorporation and they must be accepted as valid rules and cannot be questioned for non-conformity with any section of the statute: see *Hammond* v. *Prentice Brothers, Ld.,* [1920] 1 Ch. 201, at pp. 213-4. Section 27 (1) has no application to the case where a corporation merely buys and sells milk and complies with laws binding on the corporation and emanating from another statute: see *In re Jubilee Cotton Mills, Ld.,* [1923] 1 Ch. 1. The Clearing House is not attempting to use any of its corporate powers to operate a pool, it operates in accordance with the by-laws or orders of the Marketing Board. Hayward is a member of the Clearing House and he is precluded from claiming an injunction because the rules are part of his contract and he is bound by same, and he cannot question the validity of the rules as against the certificate of incorporation: see *Re Massey Manufacturing Co.* (1886), 13 A.R. 446, at pp. 451-3; *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *Baker* v. *Smart* (1906), 12 B.C. 129, at pp. 142-3. The claim for an injunction against the Marketing Board is precluded by section 13 of the Natural Products Marketing (British Columbia) Act.

J. L. Farris, in reply, referred to *Bowman* v. *Secular Society, Lim.* (1917), 86 L.J. Ch. 568, at pp. 573 and 590; *Kozlowski* v. *Workers' Benevolent Society,* [1934] 1 D.L.R. 237, at p. 242.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: We allow the appeal, Mr. Justice McQUARRIE dissenting.

We allow it upon the first ground, *i.e.,* that section 27 of the Co-operative Associations Act applies to this incorporated Clearing House Association and so it is not an effective "agency," within the meaning of the "scheme" establishing the board, in the admitted absence of the additional rules required by said section. Therefore on that ground alone we have decided to give our decision now, because, since we take that view, it will be unnecessary to pursue the matter further, and it is desirable,

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in view of its public importance, that it should be decided as soon as possible.

In consequence of that, it will not be necessary for counsel to continue the preparation of the factums which at one time we thought it desirable to have.

MACDONALD, J.A. would allow the appeal.

MCQUARRIE, J.A.: I am of the opinion that the learned trial judge came to the right conclusion and with all deference to the majority of the Court, I would dismiss the appeal. In doing so I adopt the reasons of the learned trial judge.

SLOAN, J.A. would allow the appeal.

O'HALLORAN, J.A.: The respondent Clearing House was incorporated under the Co-operative Associations Act, Cap. 53, R.S.B.C. 1936. Section 27 of the said Act provides, *inter alia*:

> The rules of an association may provide for the carrying-on of its business, subject to this section, as a pool association, in which case its rules, in addition to or in modification of the provisions required by subsection (1) of section 26, shall provide for the following matters:—

It seems to be common ground for the purpose of this appeal in any event, that the respondent Clearing House was carrying on as a "pool association." Counsel for the appellants contended that rule 53 of the Clearing House provided for the carrying-on of its business as a "pool association" within the meaning of the first part of section 27, *supra*. In any event it is admitted that the Clearing House has not passed the additional or modifying rules mentioned in the latter part of section 27, *supra*.

Counsel for the appellants contended that the respondent Clearing House has not power to operate as a "pool association" because it has failed to comply with the requirements of section 27, *supra*. Counsel for the respondents maintained that section 27 does not apply, firstly, in that the power to carry on as a "pool association" is of the essence of a co-operative association as such; and secondly the Clearing House has never attempted to operate a pool under the Co-operative Associations Act, but has done so under the mandatory orders of the respondent Lower

Mainland Dairy Products Board engaged in administering a "scheme" under the Natural Products Marketing (British Columbia) Act, Cap. 165, R.S.B.C. 1936.

In my view the contention of the appellants must prevail. "Pool association" is not defined in the Co-operative Associations Act, *supra,* and is mentioned only in section 27, *supra.* The language of this section read with the Act as a whole, compels the conclusion that whatever the term "pool association" may or may not include, it does not include an incorporated co-operative association as such unless section 27 is complied with.

Furthermore as the respondent Clearing House is an incorporated association it is limited both in its powers and in the exercise thereof, by its incorporating statute. The respondent Lower Mainland Dairy Products Board cannot therefore order the incorporated Clearing House to do things which the latter of itself has no corporate power to do, or to do such things it has the corporate power to do in a manner not permitted by its incorporating statute.

This view has made it unnecessary to consider whether the "scheme" established by the respondent Lower Mainland Dairy Products Board is within the powers conferred by the Natural Products Marketing (British Columbia) Act, *supra.* It affects only the competence of the incorporated Clearing House as now constituted, to carry out the board's orders under the "scheme," as a "pool association." This conclusion as well renders it unnecessary for the determination of the appeal to consider a further contention of the appellants (not raised in the Court below) that the "scheme" itself is invalid as a colourable plan to bring about equalization of returns to producers in a manner held *ultra vires* the Provincial Legislature by this Court in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1932), 45 B.C. 191, which was affirmed by the Judicial Committee, 102 L.J.P.C. 17.

I would allow the appeal.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellants: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for respondents: *Williams, Manson & Rae.*

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May 27;
June 30.

CRYSTAL DAIRY LIMITED v. LOWER MAINLAND DAIRY PRODUCTS BOARD.

Agriculture—Natural Products Marketing (British Columbia) Act—Validity of orders in council and orders of the marketing board—Co-operative Associations Act—R.S.B.C. 1936, Cap. 165, Secs. 4 and 5; Cap. 53, Sec. 27.

In an action for a declaration that the Milk Marketing Scheme of the Lower Mainland of British Columbia, established by order in council of the 31st of March, 1939, and in particular clause 10 (*d*) thereof is *ultra vires*, and for a declaration that orders 3, 4, 5 and 6 of the defendant board made pursuant to the provisions of the Natural Products Marketing (British Columbia) Act and amending Acts, and of the Milk Marketing Scheme of the Lower Mainland of British Columbia are *ultra vires*, the evidence disclosed that section 10 (*d*) of the scheme gives the board power to designate the agency through which the regulated product should be marketed, and to prohibit the marketing of the regulated product except through such agency. By order 3 of the board, the Clearing House Association (incorporated under the Co-operative Associations Act) was designated as the sole agency through which the regulated product may be marketed. The action was dismissed.

Held, on appeal, reversing the decision of ROBERTSON, J. (MCQUARRIE, J.A. dissenting), that section 27 of the Co-operative Associations Act applies to the incorporated Clearing House Association, and so it is not an effective "agency" within the meaning of the "scheme" establishing the board in the admitted absence of the additional rules required by said section.

APPEAL by plaintiff from the decision of ROBERTSON, J. of the 18th of May, 1939, in an action for a declaration that the Milk Marketing Scheme of the Lower Mainland of British Columbia, purporting to be established by order of the Lieutenant-Governor in Council of the 31st of March, 1939, and in particular clause 10 (*d*) thereof, is *ultra vires*, for a declaration that orders 3, 4, 5 and 6 of the defendant, purporting to have been made pursuant to the provisions of the Natural Products Marketing (British Columbia) Act and amending Acts, and of the Milk Marketing Scheme of the Lower Mainland of British Columbia, are and each and every one of them is *ultra vires* and not binding on the plaintiff, and for an injunction restraining

the defendant, its officers, servants and agents from exercising any of the powers purporting to have been vested in it by said scheme.

The appeal was argued at Vancouver on the 27th of May, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Norris, K.C. (*McFarlane,* with him), for appellant: It is a question of the interpretation of the Marketing Act. The power given by sections 4 (2) and 5 (*a*) of the Natural Products Marketing (British Columbia) Act to designate the agency through which any regulated product should be marketed was a power only to establish an agency as an agency for the producers of milk and not a power to establish a Milk Producers Clearing House Co-operative Association as the only purchaser of milk produced by producers in the area. Clause 10 (*d*) of the scheme is *ultra vires* as granting a power to establish a system whereby the designated agency becomes a jobber or wholesaler instead of an agent, and whereby such agency becomes the only body which may purchase and sell milk produced in the area, the granting of such power not being authorized by the said Natural Products Marketing (British Columbia) Act. If clause 10 (*d*) of the scheme is *ultra vires* it follows that orders 3 to 6 inclusive of the defendant are *ultra vires* and not binding on the plaintiff. On the interpretation of the words "control and regulate" see *Robinson* v. *Local Board of Barton-Eccles* (1883), 8 App. Cas. 798, at p. 801. As to regulating and prohibiting see *Rex* v. *Sung Chong* (1909), 14 B.C. 275, at pp. 277-8. This is a prohibition of lawful trade: see *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1912), 107 L.T. 439, at p. 445; *Minet* v. *Leman* (1855), 24 L.J. Ch. 545, at pp. 547-8; *Galloway* v. *Corporation of London* (1864), 2 De G. J. & S. 213, at p. 228.

Williams, K.C., for respondent: Section 4, subsection (1) of the Marketing Act gives the intention and purpose of the statute. This section defines the scope of the statute and extends to the limit of prohibition, and this is clear from reading section 4, subsection (2) of the Act. He says that there was no power to pass clause 10 (*d*) of the scheme, but the submission is

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that it comes within the powers conferred by sections 4 and 5 of the Act.

Norris, replied.

Cur. adv. vult.

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MARTIN, C.J.B.C.: For the same reason as enunciated in *Hayward et al.* v. *Park et al.* [*ante,* p. 299] we allow this appeal. Though that same first ground was not argued below herein, yet we think we cannot refuse to allow it to be raised now under the present circumstances. We bore in mind the respondent's objection to this course being permitted at this stage, yet we think it should be raised because there is nothing really in justice to prevent it. Nevertheless the question of costs occasioned thereby may be spoken to.

Mr. Justice MCQUARRIE dissents.

MACDONALD, J.A. would allow the appeal.

MCQUARRIE, J.A.: With all due deference to the majority of the Court, I think that this appeal should be dismissed for the reasons stated by the learned trial judge.

SLOAN, J.A. would allow the appeal.

O'HALLORAN, J.A.: This appeal was argued immediately following *Hayward et al.* v. *Park et al.* [*ante,* p. 299] and before judgment was given therein. The appellant attacked the validity of the "scheme" as sought to be enforced by the respondent Lower Mainland Dairy Products Board, on the ground that there is no power under the Natural Products Marketing (British Columbia) Act, Cap. 165, R.S.B.C. 1936, to set up a "scheme" whereunder milk may not be bought from producers nor sold to distributors except by an agency designated by such board, in this instance the Milk Producers Clearing House Co-operative Association.

Our judgment in the *Hayward* case held the Clearing House incompetent as then constituted to carry out the board's orders as a "pool association." That decision rendered the scheme inoperative in the manner it was then sought to be enforced. It

has made it unnecessary therefore for the disposition of this appeal, to determine the validity of the scheme itself when considered in the light of conditions which have rendered it inoperative.

The appeal should be allowed accordingly.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *White & McFarlane.*
Solicitors for respondent: *Williams, Manson & Rae.*

YOUNG v. INDUSTRIAL CHEMICALS COMPANY LIMITED AND BRUNT.

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June 12, 13, 19, 30.

Conflict of laws—Action on tort—Accident in foreign country—Administration Act and Families' Compensation Act—Right of action under—Damages—R.S.B.C. 1936, Caps. 5 and 93.

The plaintiff brought action under the Administration Act and the Families' Compensation Act for damages resulting from the death of her husband in an accident that took place in the State of Washington. The defendant Brunt was sales manager of the defendant company, and as such had authority to make the trip in which the accident occurred from Vancouver to Seattle, and to use the company's car. Brunt asked deceased to accompany him with a view to having his assistance in attempting to bring about a possible extension of the defendant company's business in the State of Washington. A railway-train was travelling on the track parallel to the arterial highway on which the defendant Brunt was driving, and in attempting to pass in front of the train the accident occurred, resulting in the death of the plaintiff's husband. The accident was found to be solely due to the negligence of the defendant Brunt.

Held, that an action will not lie in one country for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the *forum;* and secondly, it must not have been justifiable by the law of the country where it was done. The wrong in this case is actionable in British Columbia. The second condition can be fulfilled in two ways: (a) If the wrong is actionable in the foreign jurisdiction it is satisfied; (b) if the wrong is punishable in the foreign jurisdiction it is satisfied. Therefore the action was maintainable against the individual defendant, but as the plaintiff was obliged to

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rely on the second alternative condition of her right of action, namely, punishability, and the presumption was that since the company was not punishable under British Columbia law it was not punishable under the foreign law, and the plaintiff did not prove that it was so punishable, the Court had no jurisdiction so far as the action was against the company.

ACTION for damages resulting from the death of the plaintiff's husband in an accident that took place in the State of Washington. The defendant Brunt was the sales manager of the defendant company, and as such had authority to make the trip in question to Seattle, and he requested deceased to accompany him to Seattle with a view to having his assistance in attempting to bring about an extension of the business of the company. A railway-train was travelling on a track which runs parallel to the arterial highway on which the accident occurred, and Brunt passed in front of it, resulting in the accident. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 12th, 13th and 19th of June, 1939.

I. A. Shaw, and *H. D. Arnold,* for plaintiff.

Nicholson, and *J. R. Young,* for defendant Industrial Chemicals Company Limited.

Sheppard, for defendant Brunt.

Cur. adv. vult.

30th June, 1939.

MURPHY, J.: Defendants object that the Court has no jurisdiction to try this action because the statement of claim shows it is founded on the Administration Act, R.S.B.C. 1936, Cap. 5, and the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, whilst the same pleading shows that the alleged tort occurred in a foreign jurisdiction, *viz.*, the State of Washington. The matter is one of substance for plaintiff in presenting her case—as distinguished from attempted rebuttal—necessarily could only adduce evidence and did in fact only adduce evidence to substantiate the allegations contained in the statement of claim. To meet defendants' contention plaintiff first argues that the said two British Columbia Acts operate extraterritorially. The presumption to be made is that in enacting said Acts the British Columbia Legislature meant to confine the special remedies,

thereby given to cases occurring within its own jurisdiction as would be the case if an Act of the Imperial Parliament were in question: *Canadian Pacific Railway Company* v. *Parent,* [1917] A.C. 195; 86 L.J.P.C. 123. In that case this presumption was applied to an article in the Quebec Code *in pari materia* with the Acts now under consideration. Their Lordships say at p. 206 [A. C.]:

> The rule of interpretation is a natural one where law, as in the case of both Quebec and England, owes its origin largely to territorial custom. No doubt the Quebec Legislature could impose many obligations in respect of acts done outside the Province on persons domiciled within its jurisdiction, as the railway company may have been by reason of having its head office in Montreal. But in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it was intended to do so, and by so doing to place claims for torts committed outside Quebec on a footing differing from that on which the general rule of private international law already referred to would place them.

There is, in my opinion, nothing in either of the British Columbia statutes upon which this action is founded to suggest that the British Columbia Legislature in enacting them had any such intention. So far as the Families' Compensation Act is concerned the point has been expressly decided adversely to plaintiff's contention in two Manitoba cases on a statute identical in language—*Couture* v. *Dominion Fish Co.* (1909), 19 Man. L.R. 65, and *Johnson* v. *C.N.R.* (1909), *ib.* 179; 12 W.L.R. 124. Plaintiff's counsel relied upon the case of *Davidsson* v. *Hill,* [1901] 2 K.B. 606; 70 L.J.K.B. 788. As I read that case, however, it does not support the proposition for which it is advanced. On the contrary I think it inferentially supports defendants' position. The express point decided in the *Davidsson* case was that under Lord Campbell's Act, of which the relevant sections in our Families' Compensation Act are a re-enactment, the widow of an alien, whose death on the high seas had been caused by the negligence of a British ship, could under that Act recover damages when such alien was at the time of his death a resident in a foreign country as was also his widow. Dealing with the matter of jurisdiction Phillimore, J. points out that on the facts there were three possible *loci delicti commissi.* As the negligence was that of a British ship the *locus* might be regarded as being English or British territory in which case

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the jurisdictional point would not arise; or as being the high seas because deceased had been drowned in which event the law maritime would apply and under that law, as administered in England, there would be jurisdiction; or, thirdly, the *locus* might be regarded as being in Norway inasmuch as deceased was on a Norwegian ship which was sunk in collision by the negligence of the British ship. On the third supposition he founded the jurisdiction of the Court upon the presumption that the law of Norway applicable to the facts was the same as the law of England. No such presumption would have been necessary if Lord Campbell's Act operated extraterritorially. Kennedy, J. excluded the question of jurisdiction entirely on the ground that it did not arise because the negligence and resulting death both took place on the high seas which he held is the common ground of all countries. I hold the said British Columbia Acts have no extraterritorial operation. If this be so then, in order to take jurisdiction on the facts here, this Court must have recourse to the principles of private international law as recognized by British Courts. These principles have been frequently laid down in cases of the highest authority of which *Walpole* v. *Canadian Northern Railway,* 92 L.J.P.C. 39; [1922] 3 W.W.R. 900; [1923] A.C. 113 is a recent instance. In that case the following language is used [A.C. 119]:

> By the well-known rule laid down by Willes J. in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 an action will not lie in one country or province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the *forum;* and, secondly, it must not have been justifiable by the law of the country where it was done. It is unnecessary for the purposes of this appeal to consider the precise meaning of the term "justifiable," as used by Willes J.; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule.

Defendants' counsel argue that plaintiff cannot rely on these principles because her statement of claim bases her case solely on the proposition that the two British Columbia statutes operate extraterritorially and because the evidence led by her—apart from attempted rebuttal—only went to establish liability on that basis. I do not think this contention sound. Plaintiff, in my opinion, is entitled to rely upon a presumption which is a

presumption of law, *viz.*, that the general law of the place where the alleged wrongful act occurred is the same as the law of British Columbia. Where a defendant relies upon some difference between the law of the locality and the law of the *forum* the *onus* is upon him to prove it: *Canadian National Steamships Co. Ltd.* v. *Watson,* [1939] S.C.R. 11, and *Davidsson* v. *Hill, supra.* A presumption of law does not require to be pleaded (rule 221) and of course does not require to be proved. It remains to consider whether plaintiff can bring herself within either of the alternatives contained in the second requirement of private international law. If she can on the authorities cited I am of opinion that the Court will take jurisdiction. First, is the wrong here complained of actionable in the State of Washington? As above stated, the plaintiff is entitled to ask the Court to presume that it is since it is actionable in our jurisdiction. But defendants may meet this presumption by proving that the *lex loci* differs from the *lex fori*: *Canadian National Steamships Co. Ltd.* v. *Watson, supra.* If the trial record discloses a state of facts which would constitute a good defence in the foreign jurisdiction then jurisdiction cannot be taken by this Court under the first part of the second condition of private international law above cited even if said state of facts would not constitute a defence under the *lex fori*: *Canadian Pacific Railway Company* v. *Parent, supra. A fortiori* this is also the case if the record shows a state of facts which if it existed in our jurisdiction would constitute a bar to the action here as well as in the foreign jurisdiction. The plaintiff is suing herein in a representative capacity as executrix of the estate of deceased. Whilst she proved that she had obtained probate in British Columbia before action she adduced no evidence in presenting her case—as distinguished from attempting rebuttal—that she had done so in the State of Washington nor could she do so on her pleadings. In her attempted rebuttal it came out that she had had the British Columbia letters probate resealed by the State of Washington Court but only long after the present action was commenced. She could not, of course, maintain this action in our Courts without first obtaining probate here and proving that she had done so. Legal presumption will not assist her in

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this regard. In fact it would defeat her for the point is one of fact not of law. Further just as it is essential that she should have probate and prove that she had it in British Columbia before starting action here so I find it is essential under the law of the State of Washington that she should have probate or its equivalent and prove that she had it from the Courts of that State before starting any action in that jurisdiction based on the wrong the subject of this litigation. Defendants proved to my satisfaction that there is legislation in Washington similar to though not identical with the relevant provisions of the Administration Act and the Families' Compensation Act; that the rights conferred by that legislation were only enforceable in the State of Washington by the executor or administrator of the deceased and that before such executor or administrator could sue in the Courts of that State he must have obtained probate or resealing thereof in the case of an executor or letters of administration in the case of an administrator. I find as a fact that plaintiff could not have sued in the Courts of the State of Washington for the wrong herein complained of without having first obtained probate or recognition of the British Columbia probate of the will of the deceased from the Courts of that jurisdiction, even assuming that all other requirements, such as service, had been fulfilled by her. So far as action under the Families' Compensation Act is concerned it was decided in the *Couture* and *Johnson* cases, *supra,* that under such circumstances an action such as this could not succeed, the only differences in facts being that these cases involved the law of the North-West Territories and of Ontario respectively whereas this case involves the law of the State of Washington and that the actions were brought by administrators. Plaintiff's counsel attempted to meet this situation in two ways. First he said that whilst this view might be correct if plaintiff were an administrator that would not be so in the case at Bar because she is an executrix. The distinction he makes is that whilst an administrator gets his authority from the Court through the grant of letters of administration an executor derives his from the will. But in my view the cases cited decide that the question is not simply one of authority to bring action in the foreign jurisdiction but also of *status* to

prosecute such action in the foreign Court. Alternatively he applied during the argument to be allowed to amend his statement of claim by alleging that plaintiff had caused the British Columbia letters probate to be resealed by the Washington Court after action brought here and that the evidence of that fact, which was admitted subject to objection in rebuttal, be accepted in proof. Even if this application were granted I think it would be ineffectual but I am also of opinion it should not be granted under the circumstances here. It would be ineffectual because the question involved is the jurisdiction of the British Columbia Court. All facts necessary to give that jurisdiction must, in my opinion, be proven to exist at the time the Court's jurisdiction is invoked, *i.e.*, at the time the writ is issued. The Court will make no presumption of fact necessary to found jurisdiction: *Walpole* v. *Canadian Northern Railway, supra,* at p. 44. Resealing of the British Columbia letters probate was in fact not obtained from the Washington Court until long after this action was commenced. But if this view is erroneous then I would feel bound to dismiss the application to amend. Counsel made it first during the course of proving plaintiff's case. When the probable terms on which it might be granted were stated by me he withdrew the application. It cannot now I think be entertained. A litigant is bound by the way in which he conducts his case: *David Spencer Ltd.* v. *Field,* [1939] S.C.R. 36. Further, had the plea in question been made in the first instance defendants might have adopted a different course in defence. They might, *e.g.*, have admitted liability and paid a sum of money into Court or they might set up some defence to defeat such plea. The Court cannot be certain that on the record as it stands the matter has been fully litigated if such amendment were now allowed. I conclude that this Court cannot take jurisdiction on the first alternative of the second requirement of private international law above set out. The *Davidsson* case, *supra*, does not, as I read it, assist plaintiff on this point. There deceased's widow sued in her own right as she was empowered to do under Lord Campbell's Act and on the legal presumption of identity of law she would likewise be entitled to sue in her own right in Norway. Here the plaintiff, though she too is the widow of deceased,

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does not sue as such but in her representative capacity as executrix and, as shows above, the legal presumption aforesaid does not assist her. There remains the question: Can the Court take jurisdiction on the second alternative, *viz.*, that the wrong complained of is punishable under the law of the State of Washington? As already stated I am of opinion that the plaintiff without pleading or proof has a right to ask the Court to assume as a presumption of law that the law of the State of Washington is the same as the law of British Columbia. On the facts as hereinafter found I hold that the wrong which is the basis of this action is punishable by law in British Columbia by virtue of section 285 of the Criminal Code of Canada, R.S.C. 1927, Cap. 36, as amended by section 16 of 1938, Cap. 44. Defendant Brunt in my opinion was driving his car in a manner which was dangerous to the public within the meaning of that section when the accident occurred. The defendants made no attempt to meet the presumption that the law of Washington makes such conduct punishable because it is punishable in British Columbia; in fact it was proven by plaintiff in rebuttal (though the evidence was objected to) that the conduct of which I hold defendant Brunt to have been guilty is in fact punishable under the law of the State of Washington. So far as the action against Brunt is concerned therefore I hold that this Court has jurisdiction. But with regard to the other defendant, an incorporated company, a further difficulty arises. In the *Parent* case, *supra*, p. 205, their Lordships of the Privy Council used the following language referring to the case of *Machado* v. *Fontes*, [1897] 2 Q.B. 231:

> The conclusion there reached was that it was not necessary, if the act was wrongful in the country where the action was brought, that it should be susceptible of civil proceedings in the other country, provided it was not an innocent act there. This question does not arise in the present case, where the action was brought, not against the servants of the appellants, who may or may not have been guilty of criminal negligence, but against the appellants themselves. It is clear that the appellants cannot be said to have committed in a corporate capacity any criminal act. The most that can be suggested is that, on the maxim *respondeat superior*, they might have been civilly responsible for the acts of their servants.

No proof that such vicarious criminal responsibility exists under the law of Washington was adduced by plaintiff nor could

it be under the pleadings as they stand. It follows, I think, that whilst this action is maintainable against defendant Brunt, there is no jurisdiction to maintain it as against the defendant company. Plaintiff cannot hold defendant company on either of the alternatives set out above. She cannot ask the Court to take jurisdiction on the ground that her action against the company was actionable in the State of Washington when she brought her action here for she did not and could not on the pleadings prove that it was and in fact it was not because she had not obtained probate or recognition of the British Columbia probate there and the Washington Courts would not hear her until she had. If this view is incorrect and if she could ask the Court to take jurisdiction because she had obtained Washington recognition of the British Columbia probate before the trial she adduced no proof of that fact at the hearing—apart from attempted rebuttal —and could not do so on her case as framed and under the circumstances here amendment and admission of such proof cannot now be allowed. She cannot ask it to do so on the second alternative because *quoad* defendant company she has adduced no proof that the alleged tort is punishable in that jurisdiction—in fact could not do so under her case as framed—and the presumption of law is that it is not because it is not under the law of British Columbia. If these views are correct it follows that this Court has no jurisdiction in the case against the defendant company and the action against it must be dismissed.

On the merits of the action I find that the accident in question was wholly attributable to Brunt's negligence. I find that a railway-train was travelling on the track which runs parallel to the arterial highway on which the accident occurred and that Brunt passed in front of it. I find that Brunt was driving at an excessive rate of speed. I accept the evidence of Rodway, the driver of the other car, that Brunt's speed was from 50 to 60 miles an hour. Excessive speed is also proven, I think, by the distance travelled by Brunt's car after the accident occurred and by the manner in which that distance was covered. I find also that defendant Brunt was not keeping a proper lookout. He failed to see the railway-crossing sign and the arterial "stop" sign, which I find were in plain sight; in fact on his

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own testimony he did not even see the arterial highway until he was actually upon it. I feel it my duty to deal with the defence of invited guest or licensee based on the Washington law because consideration of it would become necessary should my views of the law, as hereinbefore expressed, be erroneous and such consideration would involve facts controverted at the trial. I find such defence fails on the facts as regards both defendants. I accept as true the evidence of the plaintiff Mrs. Young and of the witnesses Tinkham and Wonn. I find that the trip to Seattle was arranged between Brunt and the deceased in Vancouver. I find that Brunt requested deceased to accompany him to Seattle with a view to having his assistance in attempting to bring about a possible extension there of the business of the defendant company by arranging for the sale of one of its products "Klensital" in the State of Washington. I find it was arranged between them before the trip started that Brunt and deceased would return to Vancouver on the Tuesday night following the Monday morning on which they left. I find that Brunt was the sales manager for defendant company and as such had authority not only to make this trip to Seattle on behalf of the company, and to use the company's car to do so, but to request deceased to accompany him for the purpose aforesaid. I find that Brunt, deceased and Palmer had a long discussion with Wonn and Tinkham in Seattle with regard to the possible introduction there of the product "Klensital" resulting in an understanding that if no deal was made by defendant company with the Carl Miller Company of Seattle as to the introduction of said product "Klensital" in Washington then the matter would be taken up further with Tinkham and Wonn with a view to their so introducing it. I find that given these facts deceased does not come within the category of an invited guest or licensee under the law of the State of Washington and that consequently the statutory provisions in that State exempting parties who would otherwise be liable for negligence, resulting in a motor-vehicle accident, do not apply. In so far as these findings affect the defendant company I make them so that there may be findings of fact which an appellate tribunal might require to have before it in case my views, that this Court on this record

has no jurisdiction to try the question of defendant company's liability, are erroneous. In this connection I desire to add that on this matter of defence of invited guests or licensee I would, despite Palmer's denial, draw if necessary the inference from the facts found established that he (Palmer) knew and approved of Brunt's action in requesting deceased to accompany them to Seattle for the purpose indicated before the trip started.

There remains the question of damages. When a Court takes jurisdiction in a case of tort as distinguished from contract it assesses damages on its own principles: *Machado* v. *Fontes, supra.* This case is discussed in *Livesley* v. *Horst Co.,* [1924] S.C.R. 605, at p. 611, but as I read that decision it still remains an authority for the proposition stated. Dealing first with damages under the Administration Act I assess them for loss of expectation of life at $1,000 and $191 for special damages proven. As to damages under the Families' Compensation Act it is strenuously argued that, as deceased was proven to have been in financial straits at the time of his death, these damages should be assessed at a small amount only. It must be remembered however that deceased was a consulting engineer. True he had had no employment which resulted in pay in his profession for a period of four years before his death. It does not follow, however, that he would not have had such employment in the future. He was 67 years of age and in good health. He had also apparently some prospects in other directions as he was endeavouring in conjunction with the witness Tinkham to put through some lumber deal. Tinkham is a man of substance and it is a reasonable inference I think that the deal in question, if successfully carried out, would result in deceased earning considerable money as commission. He had in addition some agencies for the sale of chemicals though these do not seem to have been very remunerative. The Court, I think, can take judicial notice that a world-wide depression occurred about 1930 and still persists to some extent, which may account for deceased not having had remunerative employment in his profession. On the whole I think that justice will be done if I assess damages under the Families' Compensation Act at $5,000, $4,000 to the plaintiff, the widow, and $1,000 to the infant son, Walter McGie

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Young. I award no damages to the other son Alexander as I hold the *onus* of proof of loss in his case has not been satisfied. There will be judgment against defendant Brunt for these amounts with costs. The action against the defendant company is dismissed with costs.

Judgment for plaintiff as against defendant Brunt.

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Farmers' Creditors Arrangement Act, 1934, The—Board of Review—Jurisdiction—"Farmers"—Board of Review to decide as to applicant—Interim injunction—Can. Stats. 1934, Cap. 53, Sec. 12 (4).

Where an official receiver under The Farmers' Creditors Arrangement Act, 1934, reports to a board of review thereunder that a certain person designated by the receiver as a "farmer" has made a proposal, it is still open to the board to determine whether the person so designated is a "farmer."

On application to set aside an *interim* injunction restraining the Board of Review from proceeding to formulate a proposal with respect to the defendant corporation until the trial of this action:—

Held, that since the circumstance raised in the action can be determined by the board on the hearing of said defendant's application, the application for the injunction is premature and the Court should not at present exercise its discretion to interfere by an injunction so as to draw within its jurisdiction questions in issue before the board.

APPLICATION to set aside the order of MANSON, J. of the 16th of September, 1939, on the ground that the said order was made without jurisdiction and without sufficient grounds. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 2nd and 5th of October, 1939.

Hossie, K.C., and *Hutton*, for plaintiff.

McAlpine, K.C., for defendant Christian Community of Universal Brotherhood Limited.

W. S. Owen, for defendant Board of Review.

Cur. adv. vult.

20th October, 1939.

FISHER, J.: This is an application to set aside the order herein of my brother MANSON, dated September 16th, 1939, on

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the ground that the said order was made without jurisdiction and without sufficient grounds. By said order it was ordered:

That the defendants, and each of them, be and they are hereby restrained until the trial of this action or until further order from taking any further or other steps under The Farmers' Creditors Arrangement Act, 1934, with respect to the application of the defendant, The Christian Community of Universal Brotherhood Limited, to the defendant, the Board of Review of the Province of British Columbia, to formulate an acceptable proposal for the composition, extension of time or scheme of arrangement of the said The Christian Community of Universal Brotherhood Limited, or with respect to the liabilities of the said defendant.

It would appear that upon the application before my brother MANSON the plaintiff relied upon the affidavit of Mr. *Ghent Davis,* sworn September 16th, 1939, and the exhibits thereto. Paragraphs 7, 8 and 9 of said affidavit read as follow:

7. On September 15th, 1939, the notice now produced and shown to me and marked Exhibit "F" to this my affidavit, was received by the plaintiff from J. E. Merryfield registrar of the defendant Board of Review. [See notice hereinafter set out].

8. The plaintiff has commenced an action in this Honourable Court by writ of summons dated the 16th day of September, 1939, for declarations as set out in the endorsement on the writ of summons and in the prayer in the statement of claim herein and for an injunction.

9. I am advised by counsel and verily believe that the plaintiff has a good cause of action herein and that irreparable damage will ensue if the Board of Review were to formulate a proposal before this action has been disposed of.

The statement of claim herein reads in part as follows:

7. On or about the 23rd day of June, 1939, the defendant, The Christian Community of Universal Brotherhood Limited, filed with W. C. Wilkins, an official receiver under The Farmers' Creditors Arrangement Act, 1934, a request in the words following:

"The Christian Community of Universal Brotherhood Limited requests a review of its debts with the view to a consolidation and reduction of principal and reduction of interest of its indebtedness according to the ability of The Christian Community of Universal Brotherhood Limited as farmers to meet.

"CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LTD., General Management

"N. M. PLOTNIKOFF, President."

8. On or about August 1st, 1939, the said defendant, The Christian Community of Universal Brotherhood Limited, purported to request the defendant, the Board of Review for the Province of British Columbia, to formulate a proposal under the said Act and the defendant board has fixed a date upon which it proposes to consider representations on the part of those interested and to formulate a proposal, notice of which date and intention has been given to the plaintiff and reads as follows:

"NOTICE OF REQUEST FOR REVIEW

"In the matter of a proposal for a composition, extension or scheme of arrangement of The Christian Community of Universal Brotherhood Limited, farmers.

"Take notice that the written request of the above-mentioned farmer that the Board of Review endeavour to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement of the affairs of the said farmer will be dealt with by the board at Nelson, in the county of Kootenay, Province of British Columbia, on Tuesday, the 26th day of September, 1939, at the hour of 2 o'clock in the afternoon, at the Court House.

"You may make representations in writing or you may apply to be heard orally if you so desire.

"Dated at 601 Federal Building, Vancouver, B.C., this 14th day of September, 1939.

"J. E. MERRYFIELD,
"Registrar of the Board of Review of
the Province of British Columbia."

9. The defendant, The Christian Community of Universal Brotherhood Limited, is not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934, and is not entitled to the benefit of the said Act.

10. In the alternative the defendant, The Christian Community of Universal Brotherhood Limited, made no proposal for a composition, extension of time or scheme of arrangement pursuant to The Farmers' Creditors Arrangement Act, 1934, and accordingly the said Act has no application to the said defendant and the defendant board is without jurisdiction to take the intended proceedings.

11. In the further alternative, the defendant, The Christian Community of Universal Brotherhood Limited, did not make to the defendant board a request to formulate a proposal within the meaning of the said Act, and the defendant board has no jurisdiction over the plaintiff and other creditors of the defendant community.

Counsel for the plaintiff relies especially upon *Hedley* v. *Bates* (1880), 13 Ch. D. 498; 49 L.J. Ch. 170; *Kettenbach Farms Ltd.* v. *Henke,* [1937] 3 W.W.R. 703; 19 C.B.R. 92, and *In re Hudson's Bay Co. and Peters,* [1938] 2 W.W.R. 412, at 418-20; 19 C.B.R. 258, especially at 264-5, as authorities for the proposition that the plaintiff's proper remedy in this case is by the action it has brought claiming that the board has no jurisdiction for the reasons set out in the statement of claim herein as aforesaid and asking for a declaration and injunction. On this application, however, the question I have to decide is not whether the action herein should proceed but whether I should dissolve the *interim* injunction granted as aforesaid. On this question counsel on behalf of the said defendant, The

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Christian Community of Universal Brotherhood Limited, submits, *inter alia,* that in any event the application for an injunction was and is premature upon the material before the Court. This submission is based on the contention that the Board of Review has jurisdiction to decide the issues raised in the action, as hereinbefore set out, and may decide the issues in favour of the plaintiff. In reply to this contention counsel for the plaintiff submits that as the matter now stands the Board of Review has no jurisdiction to determine such issues and further that, even if it has jurisdiction, *Hedley* v. *Bates* (see especially pp. 502-3) is authority for the proposition that even in such case an injunction should be granted.

In *Hedley* v. *Bates, supra,* Jessel, M.R. decided that under the Land Drainage Act, 1861, 24 & 25 Vict., Cap. 133, the justices of the peace had not jurisdiction to decide whether or not the notice in question was a proper notice under sections 72 and 73 of said Act. Said sections and part of section 76 of said Act read as follow:

72. Any person interested in land, who is desirous to drain the same, and in order thereto deems it necessary that new drains should be opened through lands belonging to another owner, or that existing drains in lands belonging to another owner should be cleansed, widened, straightened, or otherwise improved, may apply to such owner, who is hereinafter referred to as the adjoining owner, for leave to make such drains or improvements in drains through or on the lands of such owner.

73. Any such application as aforesaid shall be by notice in writing, under the hand of the applicant, and shall be served on the owner, and also on the occupier, if the owner be not the occupier, in manner in which notices are required to be served on owners and occupiers under the First Part of this Act. The notice shall state the nature of such drains or improvements in drains, be accompanied by a map, on which the length, width, and depth of the proposed drains or improvements in drains shall be delineated, and shall further state the compensation, if any, which the applicant proposes to pay.

76. The adjoining owner shall be deemed to have dissented from the application made to him, if he fail to express his assent thereto within one month after the service of the notice of application on him; and in the event of such dissent there shall be decided, by two or more justices in Petty Sessions assembled, unless the adjoining owner require the same within such period of one month to be decided by arbitration, the questions following; that is to say,

(1.) Whether the proposed drains, or improvements in drains will cause any injury to the adjoining owner, or to the occupier or other person interested in the lands:

(2.) Whether any injury that may be caused is or is not of a nature to admit of being fully compensated for by money:
And the provisions of the first part of this Act relating to the decision of the questions therein mentioned shall apply to the decision of the questions mentioned in this section.

Said section 76 definitely sets out the questions which the justices of the peace were authorized to decide and it does not seem to me therefore that under such legislation the justices of the peace would occupy a position or have jurisdiction similar to that of the Board of Review.

In the *Kettenbach* case, *supra,* Harvey, C.J.A., delivering the judgment of the Court, said in part as follows at pp. 703-4:

The defendant is a debtor of the plaintiffs and has made an application for relief under The Farmers' Creditors Arrangements Act, 1934, ch. 53 (Dom.). To be entitled to relief under that Act he must be a farmer and also be "unable to meet his liabilities as they become due." The statement of claim alleges that the defendant had in his application requested that his debts be reduced by fifty per cent., also that he had failed to make a composition with his creditors and that his case had gone before the Board of Review which had set a date for its hearing.

The Board is made a party defendant.

The action is for a declaration that Henke does not come within the provisions of the Act, it being alleged that he is unable to meet his liabilities as they become due, and for an order restraining the Board from formulating a proposal.

The defence having been filed, the plaintiffs applied for an order for directions in accordance with the rules of practice and the defendant on his part applied for a dismissal of the action.

. . . .

A superior Court exercising the powers of the former Court of King's Bench as this Court does has a supervisory authority over inferior Courts and over tribunals which are not judicial for the purpose of seeing that they do not go beyond their jurisdiction unless such authority is taken away by competent legal authority.

There is no suggestion in The Farmers' Creditors Arrangement Act, 1934, or any other Act to which our attention has been directed that the Board of Review is not to be subject to such supervisory authority and, in view of the multitude of cases that come before it, it naturally must proceed generally upon a simple *prima-facie* case of jurisdiction being established, and no special provision is made in the Act for the disposition of a contest on the point.

There being no express withdrawal of this Court's ordinary jurisdiction nor any reason to consider that the question in controversy cannot be satisfactorily determined in the action, there seems to be no proper ground for preventing it from proceeding in the ordinary way.

The *Kettenbach* judgment is apparently cited as authority also for the proposition that no provision is made in the Act for

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the disposition of a contest on the points raised in the action herein but it is quite apparent from the last paragraph of the judgment in the *Kettenbach* case that the question which the Court had to decide, *viz.*, whether the action therein should proceed, was not finally decided on the ground that there was no jurisdiction in the Court of Review to determine the question in controversy but on the ground that there was no express withdrawal of the Court's ordinary jurisdiction nor any reason to consider that the question in controversy could not be satisfactorily determined in the action.

In *Rex* v. *Electricity Commissioners* (1923), 93 L.J.K.B. 390; [1924] 1 K.B. 171, cited by counsel for the plaintiff, the commissioners constituted an electricity district and it must be noted that they had formulated a scheme before the action was taken for a prohibition and the ground on which the application for prohibition was based was that the scheme was *ultra vires* in a certain respect. In the present case it is not contended that the Act is *ultra vires* and the Board of Review has not yet formulated a scheme and may never do so, if it determines that the applicant is not a farmer or that there is no proper proposal.

Dealing now, therefore, particularly with the question as to whether the Board of Review has jurisdiction to deal with the issues raised in the action herein, I have first to say that I note that counsel on behalf of the Board of Review has submitted a memorandum in which he states that the said Board of Review for the Province of British Columbia has on many occasions decided the question as to whether or not an applicant for relief is a farmer both affirmatively and negatively and that the question as to whether or not the said defendant community is a farmer has not yet been decided by the Board of Review. In reply counsel on behalf of the plaintiff submits that the practice adopted by the board makes no difference in law and that the duty of the board is laid down by section 12 (4) of the said The Farmers' Creditors Arrangement Act, 1934, which reads as follows:

(4) In any case where the official receiver reports that a farmer has made a proposal but that no proposal has been approved by the creditors, the board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the

creditors and the debtor, and the board shall consider representations on the part of those interested.

It is contended that no discretion is given to the board once the official receiver has made his report and that said section 12 (4) makes it imperative that the board shall endeavour to formulate an acceptable proposal in any case where the official receiver reports that a farmer has made a proposal.

Even though I might agree with the submission that the practice adopted by the board in the past makes no difference in law, I think it must be noted that of the three commissioners constituting the Board of Review for any province the chief commissioner, according to section 12 (3) of the said Act, is

a judge of the Court of the province invested with original or appellate jurisdiction in bankruptcy by the Bankruptcy Act.

I think it must also be noted that in the cases of *In re Proposal of Marshall Brothers Ltd.*, [1935] 1 W.W.R. 80; *In re Boers*, [1936] 2 W.W.R. 47; 17 C.B.R. 261; and *In re Hockley*, [1936] 2 W.W.R. 268; 17 C.B.R. 300, the Court of Review for the Province of Saskatchewan decided the question as to whether the applicant was a farmer. It would therefore appear that the Boards of Review in other Provinces, as well as that in this Province, constituted as aforesaid, have adopted the practice of deciding the question as to whether or not the applicant is a farmer. I must be convinced therefore that the Board of Review has no jurisdiction to decide such question and no discretion as suggested by counsel for the plaintiff before I would interfere by an injunction and draw within the jurisdiction of this Court matters in issue before the Board of Review. I have, therefore, carefully considered the provisions of section 12 (4) of the Act as aforesaid and I have to say that I do not think the report of the official receiver settles the matter for the Board. It would appear that the official receiver reports that such and such a person (which includes a corporation according to the decision in *Barickman Hutterian Mutual Corpn.* v. *Nault et al.*, [1939] S.C.R. 223; 20 C.B.R. 314) has made a proposal and designates him "a farmer" but I think this still leaves it open to the board to determine whether the person so designated is a farmer and, if it finds that such person is not a farmer, then it would be apparent that the official receiver has

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simply made a mistake in designating the applicant as a farmer in his report and my view would be that in such case his report would not bind the board or take away its discretionary power to determine the issue raised as to the *status* of the applicant. Similarly I think the board has jurisdiction to determine the other issues raised in the statement of claim herein.

Having reached the conclusion that the issues raised in the action herein as aforesaid can be determined by the board upon the hearing of which notice has been given as aforesaid I would say, with all respect to the view expressed by Jessel, M.R. in *Hedley* v. *Bates, supra,* at pp. 502-3, that having in mind the policy of the said Act and its purpose, as set out in the preamble, I would be of the opinion that under the circumstances the application for an injunction was and is premature and that this Court should not at present exercise its discretion to interfere by an injunction and draw within its jurisdiction matters in issue before the board. In this connection reference might be made to *Belrose* v. *Chilliwhack* (1893), 3 B.C. 115, at 120, where it was held by CREASE and MCCREIGHT, JJ., on an appeal to the Divisional Court, that:

> The Court should not, unless under very special circumstances, exercise its discretion to interfere by injunction and draw within its jurisdiction matters in issue in an inferior Court.

I pause here to say that I do not disagree with the view indicated by Harvey, C.J.A. in the *Kettenbach* case, *supra,* that there is no suggestion in The Farmers' Creditors Arrangement Act, 1934, that the Board of Review is not to be subject to the supervisory authority of this Court but, as pointed out by MURPHY, J. in *Neary* v. *Credit Service Exchange* (1929), 41 B.C. 223, citing *Hallack* v. *Cambridge University* (1841), 1 Q.B. 593, and *The Queen* v. *Twiss* (1869), L.R. 4 Q.B. 407, this Court ought not to assume that an inferior Court will go beyond its competency and jurisdiction.

In the *Hallack* case, *supra,* Lord Denman, C.J., said at pp. 614-15:

> . . . Therefore it is said this faculty asks too much; it asks that which cannot be legally granted in any view of the case, that which the Ecclesiastical Court has no jurisdiction to grant; and therefore this Court is called upon to prohibit the Ecclesiastical Court from entertaining the suit for the faculty altogether.

This is obviously premature. This Court has no power to prohibit the Ecclesiastical Court from granting a faculty to confirm the alterations which have been made; the suit, therefore, must proceed *quoad* them, in order that the Ecclesiastical Court, within whose proper jurisdiction that matter is, may determine whether the faculty shall be granted or not. With respect to the other object of the faculty, assuming, for the sake of the argument, that the extensions cannot be legally appropriated as prayed, and also assuming that a prohibition will lie in respect of an application *ex gratia* for a faculty before it is granted (which is by no means a clear point), still we are not to presume that the Ecclesiastical Court will not take care to limit the faculty (if any be granted) to those objects which may be legally embraced in it.

In the *Twiss* case, *supra,* Cockburn, C.J. said at p. 413:

The case of *Hallack* v. *Cambridge* [*supra*] is an authority for saying that where proceedings are pending before the inferior Court, having reference to several distinct things, one or more of which is within the cognizance or competence of the Court and others are not, this Court ought not to assume that the inferior Court will go beyond its competency and jurisdiction; and therefore we ought not to interfere at the present stage of the proceedings. A prohibition may most certainly be applied for as well after as before the granting of the faculty, and if the Ecclesiastical Court should proceed to pronounce judgment, granting the faculty for all the purposes for which it is sought, there is nothing to prevent a fresh application being made to this Court after such sentence is pronounced.

In the present case I have to say that the rule laid down in the *Neary* case, *supra,* and in the cases therein cited applies with reference to the Board of Review which, while not a Court, is a tribunal exercising judicial functions. See *In re Hudson's Bay Co. and Peters* (1938), 19 C.B.R. 258, at p. 264.

I ought not to assume therefore that the Court of Review will formulate a proposal if it decides the issues raised in favour of the plaintiff and I think that it is time enough to apply for an injunction if and when the Board of Review decides the issues against the contention of the plaintiff. I think also that the balance of convenience at present is in favour of dissolving the injunction and in this connection reference might be made to my own reasons for judgment (unreported) dated February 4th, 1938, in the case of *Attorney-General for B.C.* v. *Kamloops Produce Co., Ltd.*,* especially from the foot of p. 27 to the middle of p. 31.

The application therefore is granted and the injunction order herein set aside.

Application granted.

* Said judgment in *Attorney-General for B.C.* v. *Kamloops Produce Co., Ltd.* was given on application to continue until the trial an injunction

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restraining the defendant from doing certain acts alleged to be violations of orders issued by a marketing board established under the Natural Products Marketing (British Columbia) Act, 1934. The injunction was continued, with a variation of its terms. The part of the judgment referred to *supra* was as follows:

Then I come to the question as to whether or not I should exercise my discretion to grant the injunction, and reference is made by counsel on behalf of the defendant especially to *Gaskell* v. *Somersetshire County Council* (1920), 84 J.P. 93, which is referred to in *Bain* v. *Bank of Canada and Woodward*, 50 B.C. 138; [1935] 3 W.W.R. 25. I would like to read from a portion of the judgment of Lord Sterndale in the *Gaskell* case, because considerable reliance is placed upon that, and upon the way in which it is suggested it has been interpreted by some members of our Court of Appeal in the *Bain* case. It may be noted that the head-note says:

"The Court of Appeal on the balance of convenience dissolved the injunction and allowed the action to proceed to trial."

And it seems to me after reading what was said by the members of the Court that that was the basis on which the matter was disposed of. There are some things said by Lord Sterndale, M.R., in such case which would afford considerable basis for the argument put forward by Mr. *Norris* on behalf of the defendant, but I cannot see that the principle upon which the case was decided was contained in the statement made by Lord Sterndale where he says (p. 93):

"The plaintiff may or may not have a good case, but we cannot say that it is obviously right or obviously wrong. The question between the parties has still to be tried, therefore there can hardly be said to be a right to the injunction unless the Court can form an opinion that the plaintiff is clearly in the right."

That statement is made undoubtedly there by Lord Sterndale, M.R., but, with respect, after consideration of the case, it does not seem to me that the case was decided on that basis, and what Lord Sterndale further on says would bear out, I think, that inference, because Lord Sterndale goes on to say in part as follows (p. 94):

"Apparently the plaintiff would not mind the order being made if he could be assured that the defendants would eventually take these lots at their fair market value, but unfortunately the sale could be stopped by the Board of Agriculture if the price were to be considered too high. The defendants cannot therefore give an undertaking that the land shall be bought at its market value, as they may be forbidden to buy if the price is too high. That seems to be the only danger for the plaintiff. In regard, however, to the position of the defendant council, if these lots are sold they can no longer give notice to the present owner, but must give notice to the several purchasers. But what is more important is this: if these lots are sold in small lots, and if they are bought by genuine small holders, the defendants, by the provisions in the Acts, may be unable to acquire them at all. Under these circumstances, all of which were before the learned judge, it seems to me that as the Board of Agriculture have sanctioned the notice to treat in this case, and the defendants have already acquired a good deal of land, the balance of convenience is to dissolve the injunction, allowing the action to take its course."

And that would seem to be the principle on which the decision of the Court of Appeal was made in that case, if I may say so, with all respect. Therefore I come to the consideration of the other cases, one of which is *Dodd* v. *Amalgamated Marine Workers' Union* (1923), 93 L.J. Ch. 65. It might be said in the first place that that is not an injunction case—and I would like to refer to *Dodd* v. *Amalgamated Marine Workers' Union* on another point raised by counsel on behalf of the defendant that it is not the usual practice of the Court upon an interlocutory motion where there has been no consent to treat the motion as the trial of the action to grant all the relief claimed in the action itself. It may be noted there that in that case Lord Sterndale, M.R. says (p. 66):

"It may be right in certain cases to give all the relief claimed in the action upon interlocutory motion, even although there has been no agreement between the parties to treat the motion as the trial of the action, but that is not the rule, and it is not the usual practice of the Court."

It is quite clear from that that there may be cases in which the relief may be given. *Challender* v. *Royle* (1887), 36 Ch. D. 425; 56 L.J. Ch. 995, has been referred to and there is an expression used there which, as I recall it, is used in other cases, and I would like to refer to part of the head-note [in 36 Ch. D.], which I think is borne out by the case itself. At p. 425 of *Challender* v. *Royle* part of the head-note reads as follows:

"In order to obtain an interlocutory injunction the plaintiff must make out a *prima facie* case, *i.e.*, a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, and unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience and inconvenience."

I have in mind that principle in coming to the conclusion which I will hereinafter indicate.

Then reference might be made to *Spottiswoode* v. *Clark* (1846), 1 Coop. T. Cott. 254, at 262; 47 E.R. 844, at 847, in which the Lord Chancellor said in part as follows:

"Where the legal right was obviously such that no one could say on which side it lay, he always asked himself the question whether the Court did not run much greater risk of doing injury by continuing the injunction, than it could do mischief by dissolving it. He always took into his consideration the extent of inconvenience on the one side, and on the other side, as the injunction should be granted or withheld. On which side did the balance of harm preponderate?"

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In Chambers

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June 28;
July 3, 10.

DE LAMPRECHT v. DE LAMPHECHT.

Practice—Judgment delivered but not entered—Application by plaintiff to reopen case to introduce new evidence—Evidence within knowledge of plaintiff at time of trial—Diligence—Discretion.

On an application to reopen a case after judgment has been delivered but before entry thereof, the burden is on the applicant to show reasonable diligence in bringing all available evidence before the Court, and further that the proposed evidence was not only material, but was of such a character that if it had been brought forward in the suit it might probably have altered the judgment.

In this case all the "new facts" were within the knowledge of the plaintiff at the time of trial and could readily have been given by her in her evidence.

Held, therefore, that there was no due diligence, and the application was dismissed.

APPLICATION to reopen the case after judgment is delivered but before judgment is entered, for the purpose of giving new evidence. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vanouver on the 28th of June and 3rd of July, 1935.

Fleishman, for the application.
E. R. Thomson, contra.

Cur. adv. vult.

10th July, 1935.

ROBERTSON, J.: This action was tried by me on the 28th of May, 1935; judgment was reserved and handed down on the 31st of May. I dismissed the action on the ground that the plaintiff had failed to prove any consideration for the alleged contract, contained in the letter of the 28th of February, 1934, from the defendant to the plaintiff. The defendant had pleaded there was no consideration. On the trial, while the plaintiff was in the witness box, I said to plaintiff's counsel:

What is the consideration? Your difficulty is consideration. Is there anything you can bring out from your client to show consideration for this agreement?

Plaintiff's counsel endeavoured to do so, but was not successful.

Judgment has not been formally entered. The plaintiff now

applies to reopen the case for the purpose of giving new evidence and the material shows that the proposed new evidence consists of negotiations or correspondence between the plaintiff and defendant prior to the letter of the 28th of February, 1934, and, therefore, entirely within the knowledge of the plaintiff at the time of the trial.

The plaintiff relies upon *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28, and submits that that case is an authority showing that a trial judge has an "untrammelled or absolute discretion" in a case of this sort. I do not think that is so. In that case the Court was divided. The Chief Justice held that, assuming the right of the trial judge to admit fresh evidence after he has pronounced judgment, and, before entry thereof, the applicant should show he had exercised reasonable diligence to adduce all available evidence at the trial and that such new evidence was conclusive. Mr. Justice MARTIN held that the burden was on the applicant to show reasonable diligence in bringing all available evidence before the Court; and, further that the proposed evidence was not only material, but was of such a character that if it had been brought forward in the suit it might probably have altered the judgment.

As I read Mr. Justice MCPHILLIPS's judgment, he did not deal with this question. He merely held that there was no appeal from the trial judge's decision, until the trial had been completed. He does not deal with the principles which should influence a trial judge in determining the question as to whether new evidence should be admitted when judgment has been pronounced, but has not been entered.

Mr. Justice MACDONALD held the trial judge had the right to reopen a trial before entry of judgment, unfettered by any rules as to diligence, conclusiveness, or otherwise.

Mr. Justice MCQUARRIE does not expressly deal with these points, but held there had been reasonable diligence; and I take it from this that he was of opinion that the applicant should show diligence.

In view of the above, I am of opinion the majority of their Lordships held that due diligence should be shown on an application of this sort. In this case, as I have pointed out, all the "new

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facts" were within the knowledge of the plaintiff at the time of the trial and could readily have been given by her in her evidence. There was therefore no due diligence.

This may appear to work a hardship on the plaintiff.

Mr. Justice MARTIN deals with this question at p. 44 of his judgment in the *Clayton* case and I quote from two of the decisions referred to by him. The first is *Young* v. *Keighly* (1809), 16 Ves. 348, wherein the Lord Chancellor said, p. 351:

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

The second is *Ludlow* v. *Macartney* (1719), 2 Bro. P.C. 67, at p. 71, where the following appears:

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

The application is dismissed with costs.

Application dismissed.

WINSBY v. TAIT AND TAIT & MARCHANT.

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May 16, 17, 18, 19; *Sept.* 21; *Oct.* 19.

Mines and minerals—Interest in "mining property"—Action to recover—Plaintiff not holder of free miner's certificate—Effect of—Partnership agreement—Interpretation—R.S.B.C. 1924, Cap. 167; Cap. 181, Sec. 12.

The defendant, *Tait*, a barrister, was employed by the liquidator of the Zeballos River Mining Company in November, 1934, and becoming interested in the district, interviewed local miners, including one Morrison, who was agent for the owners of the Gold Peak and Privateer groups of mineral claims. In March, 1935, the plaintiff Winsby obtained an option from Morrison on the Gold Peak and Privateer groups, and consulted *Tait* with a view to forming a syndicate to take up the option. Winsby and *Tait* then entered into a partnership agreement on the 21st of March, 1935, whereby each would be entitled to a half-interest in all moneys earned and accruing from the option held by Winsby. Shortly after, in endeavouring to get the records in shape, *Tait* and Winsby with Morrison met two of the owners of the Gold Peak and Privateer groups, and the two owners repudiated the option given by Morrison. The option was lost and *Tait* and Winsby then directed their efforts to forming a syndicate to promote two other claims known as the Van Isle and Rimy. Winsby was continually in *Tait's* office until the 16th of July, 1935. After that he did not visit the office and appeared to take no further interest. In December, 1935, the Privateer claims were relocated by one Ildstad under the name of the Pilgrim group, and a conflict developed between the Pilgrim and Privateer groups. In July, 1935, *Tait* and one Pitre, with the approval of Winsby, formed the Nootka Gold Mining Syndicate for acquiring the Van Isle and Rimy claims, and opened a camp on the Van Isle claim, and the trustee of the Nootka Gold Mining Syndicate sold these claims to the Man-O-War Mines Limited in November, 1937, for a block of shares in the Man-O-War Mines Limited, Winsby claiming an interest in these shares under the agreement of the 21st of March, 1935. Pitre, on behalf of himself and *Tait* obtained an option on the Pilgrim group on the 8th of November, 1936, and *Tait* obtained an option from the owners of the Privateer group on the 10th of December, 1936. *Tait* and Pitre then proceeded with development work on the property and proved the mine to be an extremely rich property. The plaintiff brought action on the 5th of January, 1938, for an accounting and an interest in the Pilgrim and Privateer groups under the agreement of the 21st of March, 1935. The defendants plead alternatively that at no date material to this action and prior to the 4th of January, 1938, was the plaintiff a free miner or lawfully possessed of a free miner's certificate, and by reason thereof the defendants rely on the provisions of the Mineral Act. It was *held* on the trial with reference to the plaintiff not having a free miner's certificate, that the Mineral Act is no bar to the proceedings for an account in this action, that the option covering the Gold Peak

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and Privateer groups originally held by the plaintiff lapsed at or near the end of May, 1935, and the partnership between the plaintiff and defendant was dissolved on the 20th of November, 1937, when the option and all other assets of the Nootka Gold Mining Syndicate were sold to the Man-O-War Mines Limited.

Held, on appeal, affirming the decision of FISHER, J. as to the appeal, and allowing the cross-appeal from the declaration in the judgment respecting partnership

(*per* MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.), that section 12 of the Mineral Act says: "Subject to section 13, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it has a free miner's certificate unexpired." Therefore the mining options upon which the plaintiff relies, options of "mining property" could not be held unless the holder of them, *i.e.*, the person asserting the interest and benefit of them, is in possession of a free miner's certificate.

Per MCQUARRIE and O'HALLORAN, JJ.A.: That the partnership between the plaintiff and defendant *Tait* terminated on the 11th of July, 1935, and the plaintiff is not entitled to any interest in the Privateer Mine Limited. He is only entitled to his share on the stock of the Man-O-War Mines Limited received on the sale of the assets of the Nootka Gold Mining Syndicate to Man-O-War Mines Limited on the 20th of November, 1937.

APPEAL by plaintiff from the decision of FISHER, J. of the 17th of January, 1939, in an action for the taking of an account under memorandum of agreement of the 21st of March, 1935, between the defendant *D. S. Tait* and the plaintiff, whereby they became partners for the taking over and forming a syndicate upon, developing, managing or selling the groups of mineral claims situate in the valley of the Zeballos River on Vancouver Island, comprising 36 claims, including the Gold Peak and Privateer groups. The defendant *Tait* first became interested in the Zeballos District in November, 1934, when employed as a solicitor by a company in that district. One Ewen Morrison was agent for the owners of the Gold Peak and Privateer groups in the beginning of 1935. Winsby obtained an option from him on said groups and came with it to *Tait* on March 18th, 1935, and the two entered into the partnership above mentioned. They tried to promote a syndicate and otherwise tried to deal with the property, but they failed to accomplish anything, and by July 11th, 1935, the matter appeared to have been dropped. Then from July 11th, 1935, to 10th December, 1936, the defendant *Tait* with one Pitre formed a syndicate called the Nootka

Gold Mining Syndicate to take over two other groups of claims in the district, and during this period Messrs. *Tait & Marchant* expended considerable sums to keep the project going, but during this period Winsby took no interest whatever. During this period part of the Privateer group was relocated and known as the Pilgrim group, and on December 10th, 1936, *Tait* and Pitre with others, obtained an option on the Pilgrim and Privateer groups, and in 1937 the Privateer mine was brought to a fair promise of success, and shortly after made a rich shipment of ore. Winsby brought action for his alleged interest on January 5th, 1938.

The appeal was argued at Vancouver on the 16th to the 19th of May, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Maclean, K.C. (*Swencisky*, with him), for appellant: Winsby obtained an option on the Privateer and Gold Peak groups from Ewen Morrison, who was agent for the owners, on March 14th, 1935. Winsby went to *Tait's* office on the 18th of March following when he assigned a half-interest in the option to *Tait* and it was arranged that Winsby would go to Vancouver and get an option on two adjoining groups, and *Tait* paid $50 on the option that he expected to get back from a syndicate to be formed. In December, 1935, Ildstad staked six claims over the Privateer group and *Tait* proceeded to get options from them in July, 1936, which included the Pilgrim extension on which a valuable vein was discovered in September, 1936. The document of May 21st, 1937, shows that Pitre and *Tait,* as owners of the Ildstad agreement and of the option to purchase the Privateer claims, and Pitre and *Tait* with others are the owners of the Progress group, which in part conflict with the Privateer and Pilgrim groups, transferred their interests to the Nootka Zeballos Gold Mines Limited for large blocks of the company's stock. Winsby claims he knew nothing of the Privateer being jumped, or of *Tait's* dealing with the owners independent of him. Winsby claims the learned judge placed a too narrow construction on the partnership agreement of March 21st, 1935. The partnership was not entered into for a single adventure but for all adventures in the Zeballos area, including acquiring mineral

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claims and also acting as brokers. The learned judge was in error in holding that the relationship of solicitor and client did not exist, although *Tait & Marchant* had a retainer and did all the legal work: see *McPherson* v. *Watt* (1877), 3 App. Cas. 254, at p. 366; *Groom* v. *Crocker,* [1939] 1 K.B. 194, at p. 200; *Read* v. *Cole* (1915), 52 S.C.R. 176. The claim that the plaintiff must succeed because Winsby did not have a free miner's certificate is answered by *In re Thomas. Jaquess* v. *Thomas,* [1894] 1 Q.B. 747. The agreement of March 21st, 1935, also applies to the firm of *Tait & Marchant;* that is admitted. The partnership cannot be got rid of without Winsby having had independent advice: see *Wright* v. *Carter,* [1903] 1 Ch. 27, at p. 60; *Carter* v. *Palmer* (1841), 8 Cl. & F. 657, at pp. 705-6; see also *Harris* v. *Lindeborg,* [1931] S.C.R. 235; *Roundy* v. *Salinas* (1915), 21 B.C. 323; *Devine* v. *Somerville* (1931), 44 B.C. 502. The evidence put in at the trial by the defendants constituted a clear admission that the defendants acquired the Privateer group acting as agents for the partnership.

Locke, K.C. (*Davey,* with him), for respondents: It is submitted (a) that the partnership was for a single adventure and terminated when that adventure or undertaking ended; (b) that the partnership was dissolved by agreement; (c) accord and satisfaction; (d) abandonment by the plaintiff of his rights and interests under the agreement; (e) the provisions of the Mineral Act and the failure of the plaintiff to have and obtain free miner's certificates at material times. The appellant went outside the scope of his pleadings as to what were partnership assets: see *In re Gyhon. Allen* v. *Taylor* (1885), 29 Ch. D. 834; *In re Bowen. Bennett* v. *Bowen* (1882), 20 Ch. D. 538. Wilful default cannot be raised unless alleged in the pleadings: see *Barber* v. *Mackrell* (1879), 12 Ch. D. 534, at pp. 538-9; nor can breach of trust: see *In re Wrightson. Wrightson* v. *Cooke,* [1908] 1 Ch. 789; *Dowse* v. *Gorton,* [1891] A.C. 190, at p. 202; *Edmonds* v. *Robinson* (1885), 29 Ch. D. 170, at p. 176; *Sanguinetti* v. *Stuckey's Banking Comany (No. 2),* [1896] 1 Ch. 502, at pp. 505-6. The partnership was restricted to the words used therein and limited to a specific undertaking of exploiting the claims mentioned in the agreement. General

words such as those under consideration must be restricted to what is reasonably necessary for the accomplishment of the object or purpose of the agreement: see Lindley on Partnership, 10th Ed., 483; Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 286-7, secs. 354-5; *Howard* v. *Earl of Shrewsbury* (1874), L.R. 17 Eq. 378, at p. 391. The circumstances as they existed at the time the partnership was formed may be considered in the interpretation of the agreement: see Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 269-70, sec. 366; *Lion Insurance Association* v. *Tucker* (1883), 12 Q.B.D. 176 at p. 186; *Attorney-General* v. *Earl of Powis* (1853), Kay 186, at p. 207; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; *Hart* v. *Hart* (1881), 18 Ch. D. 670, at p. 693. It is permissible to give evidence of acts done shortly after the date of the instrument: see Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 274-5, secs. 343, 344; *Van Diemen's Land Company* v. *Table Cape Marine Board,* [1906] A.C. 92, at p. 98. Assuming the partnership continued, the claims to be taken over were only the Van Isle and Rimy claims. There was a parol agreement on July 11th, 1935, that the partnership was terminated and the agreement abrogated: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 186, sec. 263, and pp. 202-3, secs. 281 and 283; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, at p. 65; *Morris* v. *Baron and Company,* [1918] A.C. 1, at pp. 12 to 38; *G. W. Fisher, Ltd.* v. *Eastwoods, Ltd.,* [1936] 1 All E.R. 421, at pp. 425 and 427; *Berry* v. *Berry,* [1929] 2 K.B. 316. For two years or more after July 11th, 1935, Winsby did nothing from which it may be implied that he intended to abandon the agreement: Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 203, sec. 283. Assuming the partnership was dissolved on July 11th, 1935, the accounts should be taken only up to that date: see Lindley on Partnership, 10th Ed., 618-19; *Jones* v. *Noy* (1833), 2 Myl. & K. 125; *Nerot* v. *Burnand* (1827), 4 Russ. 247, at p. 266; *Pearce* v. *Lindsay* (1860), 3 De G. J. & S. 139, at p. 146. The plaintiff must establish affirmatively that the relationship existed: see *Cane* v. *Allen* (1814), 2 Dow 289; *Edwards* v. *Williams* (1863), 32 L.J. Ch. 763, at p. 765. The rules applicable to formal trusteeships do not apply to such

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quasi-trusteeships as here existed: see Underhill on Trusts, 7th Ed., 322; *Knox* v. *Gye* (1872), L.R. 5 H.L. 656, at pp. 675-6. He must have had a free miner's certificate when he first obtained an option on the Privateer and Gold Peak claims: see *Turner* v. *Vidette Gold Mines Ltd.* (1935), 50 B.C. 202, at p. 212; Halsbury's Laws of England, 2nd Ed., Vol. 24, pp. 458-9; *McNerhanie* v. *Archibald* (1898), 6 B.C. 260; *Roundy* v. *Salinas* (1915), 21 B.C. 323, at 328; *Alexander* v. *Heath* (1899), 8 B.C. 95; *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297; *Phillips* v. *Probyn,* [1899] 1 Ch. 811; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170; *Stuart* v. *Mott* (1894), 23 S.C.R. 384.

Cur. adv. vult.

21st September, 1939.

MARTIN, C.J.B.C.: The majority of the Court have arrived at the conclusion that these mining options upon which the plaintiff relies, options of "mining property," could not be held unless the holder of them, *i.e.,* the person asserting the interest in, and benefit of them, is in possession of a free miner's certificate. As to the consequence of this decision, we think it better that counsel should address themselves thereto, at this stage, because there are other and complicated aspects of the case. Just for the present, in regard to that view, and without attempting to give our reasons therefor, which we shall do later, I may point out that the present section 12 of the Mineral Act, Cap. 181, says that:

> Subject to section 13, no person or joint-stock company shall be recognized as having any right or interest in or to any mining property unless he or it has a free miner's certificate unexpired.

I would just for a moment draw attention to something that is quite interesting and historically instructive because that expression "mining property" is much wider than in the Gold Fields Act of 1859, which is the foundation of our mining laws, *vide* 1 M.M.C. 541 in the Appendix to the reported cases, and which declares:

> No person shall be recognized as having any right or interest in, or to any claim or any of the gold therein unless he shall be, or in case of any disputed ownership, unless he shall have been at the time of the dispute arising, a free miner.

It is well worthy of notice that there is a significant expansion of the original term "claim" into the present much wider term "mining property." Speaking, if I may be permitted to say so, as one of very many years' experience with the mining laws of this Province, it would come as a surprise to any "old-time" miner, that anyone could, to use the time honoured expression among mining men, "bond" (see 1 M.M.C. "Appendix B, Glossary of Mining Terms," p. 859) a mineral claim in this Province without having a free miner's certificate: that is the basis upon which my reasons will be given.

We shall be very much obliged if counsel will consider the said decision of the majority of the Court and make such submissions upon its effect as they may wish to do.

19th October, 1939.

MARTIN, C.J.B.C.: After hearing counsel on the 26th of September on further consideration our final judgment is that the appeal is dismissed and the action dismissed and the cross-appeal from the declaration in the judgment respecting partnership is allowed and consequently paragraphs 1 to 8 in said judgment are set aside. With respect to the consequential result, I think my brothers wish to add something. While we are all in accord that the appeal should be dismissed and the cross-appeal allowed yet my brothers wish to add something about the form of the judgment.

MACDONALD, J.A. agreed with MARTIN, C.J.B.C.

MCQUARRIE, J.A.: I agree with the majority of the Court that the appeal should be dismissed and the cross-appeal allowed. I do not, however, base my judgment on the appellant's failure to hold a free miner's certificate, as to which I do not consider it necessary to express any opinion, except to say that such omission on his part would, of course, under the statute be no obstacle to his holding shares in an incorporated company. I agree with my brother O'HALLORAN that the partnership which existed between the appellant and the respondent *Tait* expired on the 11th of July, 1935, when a settlement was arranged by the appellant and respondent *Tait* under which the appellant was

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to receive three and one-half units in the Nootka Gold Mining Syndicate, which later became, as explained by O'HALLORAN, J.A., 7,000 shares in the Man-O-War Mines Limited, in full satisfaction of any claim which the appellant might have. The facts up to that time and the subsequent developments of the relationship between the respondent and Pitre are clearly and sufficiently set out in the judgment of O'HALLORAN, J.A. and I agree with him that the appellant was not in any way interested in what transpired after the partnership between him and the respondent *Tait* ceased to exist as aforesaid, except to the extent of the 7,000 Man-O-War shares previously referred to. As to the said shares counsel for the respondent *Tait* on the hearing before us stated that the respondent *Tait* foregoes any claim and in any event the said shares are not involved in this action.

SLOAN, J.A.: It is my view that section 12 of the Mineral Act, Cap. 181, R.S.B.C. 1936, is an effective bar to the successful prosecution of the plaintiff's action and in consequence I would dismiss the appeal and allow the cross-appeal.

O'HALLORAN, J.A.: The partnership agreement of 21st March, 1935, between *Tait* and Winsby related to

> purchasing and taking over and forming a syndicate upon, developing, managing or selling the groups of claims [described as the "Gold Peak," "Privateer," "Lone Star," "Van Isle," and "Rimy" groups and "Charity" No. 1 mineral claim, in all 36 mineral claims in the Zeballos area] . . . and any and all other mineral claims rights, interests, etc., which the parties or either of them may acquire or become interested in in that area.

In my view this partnership was entered into to form a syndicate "to develop, manage, or sell" the un-Crown granted mineral claims referred to and did not extend beyond a single adventure. That single adventure was the formation of a syndicate to include the named groups or any other mineral claims in lieu of or in addition thereto which could be brought into such syndicate. I am of the view also that the partnership was dissolved within the meaning of section 35 (*b*) of the Partnership Act, Cap. 213, R.S.B.C. 1936, by the termination of that adventure on 11th July, 1935, at the time when Nootka Gold Mining Syndicate was formed to take over from the partnership and develop the "Van Isle" and "Rimy" groups, the sole remaining options then

held by the partnership. At that time the partnership received ten units in the syndicate in full satisfaction of the purpose of its existence, and then ceased to exist. The distribution of these units between the partners became then a matter of settling accounts between them under section 47 of the Partnership Act, *supra,* following the dissolution of partnership which had taken place.

The partnership agreement should be construed in the light of its essence and nature. The meaning of words in the agreement is governed by the circumstances with respect to which they were used: *vide River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, Lord Blackburn at p. 763. It was not an agreement between two mining promoters intending to open an office and conduct a general mining business in partnership over a period of years. It was a venture separate and apart from their regular occupations; *Tait* was a well-known barrister and solicitor, Winsby was an experienced conveyancer. If the venture proved successful they would share the profits. If unsuccessful the venture would be at an end and they would go their separate ways. It is to be observed that they proposed to form a syndicate, that is one syndicate. It would be composed necessarily of several persons at least who would purchase "units" in the syndicate and thus furnish the syndicate with the money required to carry on the option payments and assessment work and develop the "showings" on the property to a point where it could be considered a "prospect" to enable its sale or the raising of further moneys to "prove" it as a "mine."

It should be fairly obvious that the successful formation of one such syndicate would in itself be an undertaking of some magnitude, particularly in respect to un-Crown granted and undeveloped mineral claims situated in an unknown and unproved district such as the Zeballos area then was. To hold that the agreement extended beyond a single adventure of this character would be to infer that the parties intended to engage generally in the promotion of mining properties and mining syndicates, that is in fact to enter the mining promoters' field. There is no indication in the evidence that it was ever their purpose to do so. I am in agreement with Mr. Justice FISHER,

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the learned judge who tried the case, when he held the agreement was restricted by its terms to a single adventure. With respect, however, I do not agree with him that the partnership continued in existence until the 20th of November, 1937, when Man-O-War Mines Limited was incorporated to take over the assets of Nootka Gold Mining Syndicate. In my view the partnership ceased to exist when it was agreed to form the latter syndicate on 11th July, 1935.

The learned judge held that the partnership did not terminate with the formation of the syndicate because:

> I think the words "developing, managing, or selling" which in the written agreement [cited *supra*] follow the words "forming a syndicate upon" are against such construction and show that the adventure or undertaking was not to terminate when the claims were taken over by the syndicate but when the syndicate sold the claims after some development of them.

With great respect this is a misdirection. The reason for the formation of a syndicate was to raise money to acquire the options from the partnership and develop the property. As the syndicate would then hold the options it would be the syndicate and not the partnership which would "develop, manage or sell the claims." The partnership could have nothing more to do with it as soon as the syndicate was formed. This was in fact what did occur. The opening lines of Nootka Gold Mining Syndicate agreement (Exhibit 18—11th July, 1935), read:

> This syndicate is formed for the purpose of taking over the option acquired by *David S. Tait* for himself and associates . . . and of proving the high grade ore shoot thereon by driving on the same for one hundred feet.

That is to say the syndicate was formed to acquire and develop the properties. The third paragraph of this syndicate agreement provided that fifteen units in the syndicate should be issued to *Tait* and his nominees in exchange for an assignment of the partnership's option in the said properties, and

> in recompense for the money and time expended by him and them on the acquiring and developing of the proposition to date.

L. A. Grogan, a well known Victoria chartered accountant, and the respondent *Tait* acted as trustees for the syndicate. Ray Pitre was the syndicate manager of operations on the ground at Zeballos. *Tait* assisted by Grogan was the syndicate manager and secretary in Victoria. *Tait* received six units and Grogan received one unit from the syndicate in remuneration for these services.

When Man-O-War Mines Limited was incorporated it acquired the assets of Nootka Gold Mining Syndicate by an agreement of 20th November, 1937, entered into by *Tait* and Grogan as trustees of the syndicate. The opening lines of the said agreement read:

> Whereas the vendors [*Tait* and Grogan] are the trustees of Nootka Gold Mining Syndicate, and as such have held on behalf of the said syndicate . . .

and then recites the option agreement on the "Van Isle" and "Rimy" groups. The evidence of *Tait,* Pitre, and Grogan (the latter called by the plaintiff) read with the above agreements establishes that Nootka Gold Mining Syndicate on its formation on 11th July, 1935, did in fact acquire from the partnership and operate the "Van Isle" and "Rimy" groups. There is no evidence to the contrary.

It is significant there is not one word in the partnership agreement regarding the capital of the partnership; nor does it contain any provision for the advance or raising of money by the partners to carry on the options and to do assessment work and development work. It is to be assumed that when the partners made the agreement they knew that acquiring and holding the options, assessment work and the necessary development and survey work to bring the properties to the "prospect" stage (not to mention "proving" them as mines) would require considerable money even under most favourable conditions. There is no indication in the agreement or in the evidence that *Tait* and Winsby ever contemplated the partnership was to assume this financial responsibility. On the contrary the evidence shows all their efforts were directed to the formation of a syndicate to raise the necessary moneys for the purposes above mentioned. It is therefore not an unwarranted conclusion that the essence and nature of the partnership agreement demanded the formation of a syndicate, if the partnership was to function at all; otherwise the financial demands upon the partners would be so heavy that the options could not be held, and the partnership would die almost at its birth.

If the words of the partnership agreement are ambiguous, we may "call in aid the acts done under it as a clue to the intention of the parties"—*vide Doe dem. Pearson* v. *Ries* (1832), 8 Bing.

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178, at 181. In *The Attorney-General* v. *Drummond* (1842), 1 Dr. & War. 353, Lord Sugden, at p. 368, said:

> Tell me what you have done under such a deed and I will tell you what that deed means.

That was said in regard to ambiguities in ancient documents. The Earl of Halsbury, L.C., makes it clear it is not limited to ancient documents, *vide Van Diemen's Land Company* v. *Table Cape Marine Board,* [1906] A.C. 92, at 98:

> The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to show the intentions of the parties whether before or after the execution of the deed itself may be relevant.

And also *Watcham* v. *East Africa Protectorate,* [1919] A.C. 533, at pp. 537-40.

From the commencement of the partnership on 21st March, until the formation of Nootka Gold Mining Syndicate on the 11th of July, 1935, every effort was made by both partners to form a syndicate which would take over the options from the partnership and develop them. Many obstacles were encountered; first of all the partnership encountered a serious set-back when the owners of the "Gold Peak" and "Privateer" groups repudiated the option thereon held by the partnership. The loss of the "Gold Peak" group made it difficult to form a syndicate as it was the most favourably known at that time. Several attempts failed to form a syndicate in respect to the remaining "Van Isle" and "Rimy" groups. An option payment of $800 on the "Rimy" and "Van Isle" groups was due on the 1st of July, 1935. Ray Pitre was coming from Zeballos to Victoria to collect it on behalf of the owners. *Tait* and Winsby were at their wits' end. The partnership at that time was indebted some $900 to $1,000 to *Tait* for moneys advanced by him in his attempts to keep the partnership alive; Winsby bore no part of this expense. Winsby suggested to *Tait* that the latter personally should offer to pay Ray Pitre certain payments on account but *Tait* replied it would be useless unless money was also in sight for assessment work and development work. Under the option agreement Exhibit No. 6, it was required in addition to the payment of $800 on 1st July, 1935, (1) to commence development work not later than 1st July, 1935, and to carry it on continuously thereafter; (2) to do assessment work, and (3) to have

the claims surveyed during the year 1935. Neither *Tait* nor Winsby could see how these requirements could be met. Thus far therefore the partnership had failed in its purpose; its continued existence was in the last doubtful extremity. Winsby then suggested that *Tait* might be able to make some arrangement with Pitre which would keep alive their interest in the option.

Pitre arrived in Victoria early in July; *Tait* told him the difficulties they were in and in particular that they had lost the "Privateer" and "Gold Peak" groups and that they were not able to pay him $800 then due on the option of the "Van Isle" and "Rimy" groups, and were not able to form a syndicate to raise the funds necessary to carry on the development work on these groups to which they were committed under the option. Pitre said this left him in a serious situation, for if the assessment work on the claims was not done shortly he and his associates would be in danger of losing the claims. Both the partnership and Pitre were therefore in a bad predicament. The partnership had failed in its purpose completely and Pitre and his associates were in danger of losing the claims because of the failure of the partnership to make its option payment. Pitre and *Tait* thus pressed were forced to consider joining forces to form a syndicate whereunder the holders of the claims would put in their labour as assessment work and *Tait's* legal firm *(Tait & Marchant)* would start the subscription with $400 cash. It was hoped by this means to establish confidence and attract other persons to join the syndicate.

Pitre however was adamant upon one point, namely, that Winsby should not be associated with this syndicate. He gave evidence that he told *Tait*:

> And I said that I didn't want to go into anything on my own behalf or for my brother, if Mr. Winsby was to be associated with it.

We have reached the point therefore at which the partnership was unable to function any longer. Its inability to pay the $800 due on its sole remaining option marked the end of its resources and its ability to continue. The partners could not be blind to the conditions which marked the end of their venture so clearly when Pitre the man upon whom their last hopes

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centred, definitely refused to extend the option upon any terms if Winsby was to be associated with it. This led to a discussion of what remuneration the partnership should receive for the work *Tait* and Winsby had done; Pitre was willing that the partnership should receive ten units in the syndicate, in addition to five units that *Tait* should receive personally by reason of his disbursements. The Nootka Gold Mining Syndicate agreement, Exhibit 18, was then prepared. One clause thereof read:

> Fifteen units of the capital of the syndicate shall be issued to *David S. Tait* and his nominees in exchange for an assignment of his said option upon the "Van Isle" and "Rimy" groups of mineral claims, and in recompense for the money and time expended by him and them on the acquiring and developing of the proposition to date.

On the afternoon of 11th July, Pitre and Winsby had a meeting with *Tait* in his office. *Tait* and Winsby testified that the plan as set out in the syndicate agreement as well as Pitre's objection to Winsby was then explained to Winsby by *Tait,* and Pitre then agreed to the formation of Nootka Gold Mining Syndicate as set out in the syndicate agreement, Exhibit 18. It was agreed the partnership should be allotted ten units in the syndicate to be placed in *Tait's* name. *Tait* gave evidence that he agreed with Winsby in Pitre's presence that the ten units were to be divided between them on the basis set out in the partnership, *viz.,* six and a half units to him and three and a half units to Winsby. Pitre gave evidence that a final arrangement was made between *Tait* and Winsby but he did not remember what it was, as it was "none of his business." Winsby gave evidence he did not remember what took place but was positive nothing took place which affected his partnership agreement with *Tait.*

The learned trial judge has held if *Tait* understood that what took place at the meeting terminated the partnership, then Winsby did not so understand it; and that as the parties were not *ad idem,* the partnership therefore continued until the 20th of November, 1937, when Man-O-War Mines Limited took over the options from Nootka Gold Mining Syndicate. With respect the learned judge misdirected himself upon the evidence in coming to that conclusion. As pointed out already he had previously misdirected himself in construing the partnership agreement as continuing even after a syndicate should be formed.

This first mentioned and basic misdirection resulted in the second misdirection as to the effect of the evidence of what took place at the meeting of 11th July, 1935, between *Tait,* Pitre and Winsby. Review of that evidence is required.

Both *Tait* and Pitre said the meeting lasted from one and a half to two and a half hours; Winsby said it lasted for a "few minutes." *Tait* said he explained to Winsby the above-quoted clause in the syndicate agreement relating to the allotment of fifteen units to "*David S. Tait* and his associates" and that he *(Tait)* would receive five units personally for the disbursements he had made and that the remaining ten units would be divided between Winsby and *Tait* according to their respective proportions in the partnership agreement, *viz.,* six and a half units to *Tait* and three and a half to Winsby; and that Winsby because of Pitre's objection could have nothing to do with the syndicate. *Tait* said Winsby agreed to this. Winsby could not give evidence of what took place; he said twice he did not remember. He did not deny what *Tait* and Pitre said took place; he could not remember. He denied the legal effect of what took place, but he was unable to state what in fact did take place. When asked by his own counsel what took place at the meeting Winsby said:

> Just what did take place I cannot say, but I do know that there was never any question of . . . that partnership agreement between *Tait* and myself, it had no bearing whatsoever in any of the dealings there with Pitre . . .

Then in cross-examination when called in rebuttal:

> Do you recall during your examination several days ago you were asked what took place at this meeting between Mr. Pitre, Mr. *Tait* and yourself on July 11th, 1935? Yes, sir.
>
> Do you remember what answer you gave? I said I did not remember.
>
> Yes, when? That I was there a few minutes I thought.

Pitre gave the following evidence of what took place:

> Mr. *Tait* asked Mr. Winsby if he would be satisfied to take settlement of a certain portion of his [*Tait's*] shares, . . . There were fifteen units issued to Mr. *Tait* or his firm . . . for the work and money they had put up. And he [*Tait*] made some arrangement, I am not sure what the proportions were that Mr. Winsby took a certain portion of them and then not to be interested in the development of the mine or anything else.

And again:

> I heard the arrangement being made.

And further:

> Mr. *Tait* asked Mr. Winsby if he would take what he suggested, and Mr.

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Winsby said yes. And the arrangements were made right there; right in the office there. I was present, and Mr. *Tait* and Mr. Winsby were present. And the arrangement was made in front of me there. I don't remember what they were, but I think they were—there was definite arrangements made that day.

Maclean: You do not know what they were? No. I know there were definite arrangements to settle the thing right there; that was the end of it so far as Winsby was concerned.

Perusal of Pitre's evidence leaves no doubt that a definite arrangement was made between *Tait* and Winsby in his presence, whereby Winsby agreed to accept a certain number of the ten units and would then have no further association with the syndicate. Pitre did not remember how many units Winsby agreed to accept for he said:

It was none of my business really, it was an arrangement between them; but I heard the arrangement being made.

The learned judge has interpreted Pitre's evidence to mean that he did not remember what took place at the meeting whereas the transcript is clear that what he did not remember, as it was "none of his business" concerned only the division of the ten units between *Tait* and Winsby. His evidence is positive in corroboration of *Tait's* evidence that there was a definite arrangement made between *Tait* and Winsby whereby Winsby was "not to be interested in the development of the mine or anything else" and "that was the end of it so far as Winsby was concerned."

The terms of the division of the ten units between *Tait* and Winsby or for that matter whether they were then divided at all, is not a determining point in this appeal. At best that is a matter of settlement of accounts which would arise after the termination of the partnership. The determining point in the appeal is that a syndicate was then formed to take over and operate the partnership property and the partnership was then paid out in full. It is true the learned trial judge reads the evidence as a whole to restrict what took place on 11th July, 1935, to an agreement concerning the manner in which the balance of the option was to be paid Pitre, the operation of the property and the number of units to be paid *Tait* and Winsby. But it is not asserted that *Tait* said to Winsby in so many words "our partnership is terminated by the formation of the syndicate and the receipt of these ten units." Counsel for the respondent

does assert, however, that the legal effect of what did take place is the same as if *Tait* did use these words and Winsby had agreed. The parties must be held to have intended the legal consequences of their own conduct.

The last-mentioned findings of the learned trial judge, with respect, cannot be supported by the evidence unless they are associated with a finding that a syndicate was then formed which would take over and operate the partnership property and pay out the partnership in full. The termination of the partnership was an obvious consequence in the first place because the formation of the syndicate in itself accomplished the purpose of the partnership agreement, as has been pointed out, *supra*. The allotment to the partnership of ten units in full satisfaction of its interest confirms this. There remained only the question of division of the units among the partners, that is to say a settlement of accounts between the partners, which would not arise until the partnership itself had been terminated. The termination of the partnership was an obvious consequence in the second place because of the acts of the parties entirely apart from what interpretation might be placed on the terms of the partnership agreement. Pitre without whom the syndicate could not be formed refused to be associated with Winsby but agreed that the partnership receive ten units in the syndicate in full of its interest, and in termination of its association with the option.

What occurred on the 11th of July, 1935, was not an alteration of the partnership agreement which still left it subsisting; because of the essence and nature of that agreement it was a complete extinction thereof. The business of the partnership was to form a syndicate which would take over and develop the partnership property. It had failed to do so; Pitre with whom the decision rested was willing to join with *Tait* in forming a syndicate but on conditions which debarred Winsby one of the partners from taking part. In other words Pitre would join in forming the syndicate on condition only that the partnership as such should cease the business for which it was entered into, *viz.*, to form that selfsame syndicate. *Tait* could not join with Pitre therefore in forming the syndicate and remain a member

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of the partnership. Pitre would join with *Tait* but not with the partnership of *Tait* and Winsby. Winsby agreed to what took place. He is bound by the legal consequences. By agreeing he received three and a half units in Nootka Gold Mining Syndicate which later became 7,000 shares of a par value of $3,500 in Man-O-War Mines Limited.

If Winsby had not agreed, the partnership was finished in any event. It had failed in every effort. Pitre was the last chance. It was his terms or nothing. To use the words of Lord Parmoor in *Morris* v. *Baron and Company,* [1918] A.C. 1, at p. 38:

> Where the alteration is such that the conditions of the earlier contract cannot be restored without placing one of the parties under a permanent and substantial disability there is a strong *prima facie* probability of an intention to rescind.

In the case under review Pitre's refusal to be associated with Winsby placed the latter under a permanent and substantial disability in respect to the purpose of the partnership agreement. But the intention to rescind the partnership agreement in the present case was much more than a "strong *prima facie* probability," for it was terminated by the formation of the syndicate and the partnership was paid out in full of its interest. Furthermore Winsby's conduct after 11th July, 1935, was consistent only with his acceptance of that position.

After the syndicate was formed on the 11th of July, 1935, business relations between *Tait* and Winsby ceased entirely. From being almost a daily visitor at *Tait's* office for several months he ceased to come there at all. This speaks for itself. Prior to the 11th of July he and *Tait* were in business association and had many things to discuss. After the 11th of July they were no longer in business association and had nothing to discuss. The appellant, however, placed his position before this Court as if he had been accepted by Pitre as an associate of *Tait* and Pitre in the syndicate. On Winsby's own evidence, after he left *Tait's* office on 11th July, 1935, with the exception of 4th May, 1937, when he called there on another matter he did not appear in *Tait's* office until November, 1937—two and a quarter years afterward, when he heard of a sensational strike on the "Privateer" mine. The call on 4th May, 1937, concerned

another matter and Winsby admits he did not discuss any of the groups mentioned in the partnership agreement. His failure to do so is not consistent with a contention that the partnership agreement had not been terminated on 11th July, 1935, the more so since this was the first time he was in *Tait's* office since that date, or had any opportunity to discuss with him the affairs of the alleged partnership. If he then believed the partnership to be in existence, he would have shown a keen interest in what was taking place at Zeballos.

Under sections 8, 9, and 12 of the Partnership Act, *supra,* one partner has the right to pledge the credit of the firm and obligate it for the purposes of the partnership. Winsby knew that *Tait* was carrying on mining operations at Zeballos; he would be expected to infer that *Tait* was incurring substantial obligations in connection therewith which *Tait* might or might not be able to pay, as substantial sums of money would be required for the purpose. If Winsby believed that *Tait* was doing that as his partner, then as an experienced broker and conveyancer he must have realized that he (Winsby) might be liable to creditors for all the obligations contracted by *Tait,* and would be liable to *Tait* also for his proportion of the moneys advanced by *Tait.* It is a reasonable inference from Winsby's failure to exercise any supervision over let alone display any interest in *Tait's* conduct of the affairs of the alleged partnership and the entire lack of contact between them, that both of them understood that the authority of the other to pledge his credit or involve him in any business obligation or contractual liability was at an end; and that could only be because both of them knew that the partnership had been dissolved on the 11th of July, 1935—*vide* Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 203.

The foregoing analysis forces the conclusion that the partnership was entered into for a single adventure, *viz.,* the formation of a syndicate to take over and develop the properties held by the partnership; and also that the partnership came to an end with the termination of that adventure on 11th July, 1935, by operation of the agreement as well as by conduct of the parties inconsistent with its continuation. Any issue between the parties after that date concerned solely the settlement of accounts of the

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partnership in respect to division of the ten units between them. Having come to this conclusion any accounting should not extend beyond 11th July, 1935, when the partnership was terminated, and should be limited to the manner in which the ten units should be divided between them. But this is settled by the partnership agreement, whereunder *Tait* would receive 65 per cent. and Winsby 35 per cent. The evidence discloses that is what occurred; of the ten units *Tait* received 65 per cent., *viz.*, six and a half units, and Winsby received 35 per cent. or three and a half units. Both of them were allotted shares in Man-O-War Mines Limited for these units on the same basis as all other unit-holders, *viz.*, 2,000 shares of 50 cents par value each in exchange for one unit. *Tait* was allotted 13,000 shares of a par value of $6,500 and Winsby was allotted 7,000 shares of $3,500 par value.

However, even if the partnership between *Tait* and Winsby did not terminate on 11th July, 1935, the evidence fails to disclose any ground upon which Winsby could claim an interest in the 114,000 shares allotted to *Tait* in Man-O-War Mines Limited. The only shares allotted *Tait* for a consideration other than cash were the 13,000 shares above mentioned and 12,000 shares representing six units he received as remuneration for acting as manager and secretary of the syndicate. *Tait* received no bonus or promotion stock, unless the 13,000 shares mentioned can be included in that category; if it can be then it was his proper proportion under the partnership agreement. All the remaining shares allotted to *Tait* were in consideration of cash paid to or on behalf of the syndicate by him personally or by his firm of *Tait & Marchant* and first duly checked and approved by *Tait's* co-trustee L. A. Grogan, a Victoria chartered accountant, who was also the accountant for one of the largest unit-holders in the syndicate. As already pointed out there was no provision in the partnership agreement concerning its capital. It is not to be inferred that *Tait* was to supply all the capital and that Winsby should be entitled to be credited with 35 per cent. thereof as and when if ever he might choose to refund *Tait* that proportion thereof. As the agreement did not provide for partnership capital, these payments by *Tait* should be regarded as

advances by him as distinguished from capital. As such he would be entitled to that priority in repayment thereof—which he took in the form of units later converted into shares—provided by section 47 (*b*) of the Partnership Act, *supra*.

The appellant claimed a partnership interest in the "Privateer" group. The learned trial judge held against him, on the ground that even though the partnership continued after 11th July, 1935, it related only to the "Van Isle" and "Rimy" groups. This finding is amply supported by the evidence. As pointed out previously the owners of the "Gold Peak" and "Privateer" groups specifically mentioned in the partnership agreement, repudiated the option thereof held by the partnership despite the efforts made by the partnership to retain it; for some time at least before the Nootka Gold Mining Syndicate was formed on 11th July, 1935, the "Privateer" group was lost to the partnership beyond hope. More than a year later, in November, 1936, Ray Pitre secured an option for *Tait* and himself from one of the contending factions interested in the "Privateer" group. An option was then obtained by them from another "Privateer" faction as well, and the dispute between the factions was adjusted in the allotment of shares in a company which became Privateer Mine Limited. It is manifest therefore that the interest in the "Privateer" which *Tait* acquired ultimately had no connection with the partnership, with Nootka Gold Mining Syndicate or Man-O-War Mines Limited. This conclusion follows as well from the two conclusions reached already, *supra,* (1) that the partnership related to the single adventure described previously; and (2) in any event the partnership was terminated by the act of the parties on 11th July, 1935, when Nootka Gold Mining Syndicate was formed.

The appellant contended also that a fiduciary relation existed between himself and *Tait* or the latter's legal firm of *Tait & Marchant* because they were solicitors and he was not. I am in entire agreement with the learned trial judge when he finds that *Read* v. *Cole* (1915), 52 S.C.R. 176 is clearly distinguishable because in that case the plaintiff consulted the defendant as his solicitor and they continued in that relation. On Winsby's own evidence that is not this case. The learned trial judge points out

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as well that Winsby did not plead nor prove in evidence that the relationship of solicitor and client existed between the parties. The appellant contended further that the relation of trustee and *cestui que trust* existed between the parties by reason of a clause in the partnership agreement reading:

> All agreements and other documents relating to the said transactions shall be in the name of the said *Tait*, who shall hold an undivided one-half interest therein in trust for the said Winsby unless and until the said Winsby shall name another trustee to hold his said interests, or shall decide to have them transferred into his own name.

The appellant has not pleaded nor proven any breach of trust or any fraud, concealment or impropriety on the part of *Tait* as trustee. At best *Tait* was a bare trustee; he held Winsby's proportionate share at the latter's absolute disposal. He had no duties to perform in respect thereto, nor was he given any powers over Winsby's interest—except to transfer it to Winsby or Winsby's nominee whenever required so to do. It was merely incidental and subservient to the partnership relation out of which it arose and ceased with it and was so treated by *Tait*.

Counsel for the respondent *Tait* argued in his cross-appeal that the learned trial judge erred in not giving effect to his alternative contention advanced in the Court below and again in this Court that Winsby could not succeed in any event because he did not hold a free miner's certificate. In view of the conclusions which I have reached and stated, upon what I will call the merits of the dispute between *Tait* and Winsby, I do not find it necessary for the determination of the appeal and cross-appeal that I express an opinion upon this alternative contention. On the 21st of September, 1939, counsel for the respondent was asked to state how his submission in respect to the free miner's certificate affected Winsby's share in the partnership, represented by the 7,000 shares allotted to him in Man-O-War Mines Limited. Counsel replied to the effect, as I understood him then, and also understand the transcript of what was said then, that these shares represented settlement in full of all Winsby's interest in the parternship which terminated on 11th July, 1935; that it was a concluded transaction, acted upon as such ever since by *Tait*, and, that his submission in respect to the free miner's certificate did not therefore involve or concern this concluded

transaction. Accepting this position it is unnecessary for the determination of this appeal and cross-appeal in the view I have reached, to express an opinion upon the legal effect of Winsby's omission to hold a free miner's certificate.

If, however, it may be contended that counsel's statement did not extend as far as I have said, but must be confined to a waiver of any claim upon these 7,000 shares, I would hold in that event, that *Tait* is precluded from denying the legality of the partnership as well as the legality of any transaction between *Tait* and Winsby under the partnership, whether sanctioned by him and concluded, or agreed to by him but not concluded, if such transaction admittedly would have been lawful, but for the contention that Winsby's lack of a free miner's certificate rendered it unlawful. In effect *Tait* is precluded by his own acts from proving facts which might bring the statute into play. *"Quod fieri non debet factum valet"*; Lord Campbell, L.C. observed in *Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827, at p. 829:

> The doctrine . . . is . . . found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained,—he cannot question the legality of the act he has so sanctioned,—to the prejudice of those who have so given faith in his words or to the fair inference to be drawn from his conduct.

For the reasons stated I am of the view the partnership terminated on 11th July, 1935; that the appellant is not entitled to any interest in Privateer Mine Limited; that the appellant is not entitled to any interest in Man-O-War Mines Limited over and above the 7,000 shares (his right to which is not involved in this litigation) allotted him in exchange for the three and a half units in Nootka Gold Mining Syndicate which he received in full of his interest in the partnership on its termination as aforesaid. The judgment appealed from should be varied accordingly to implement these findings and to that extent the appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed; cross-appeal allowed.

Solicitors for appellant: *Elliott, Maclean & Shandley.*
Solicitors for respondents: *Tait & Marchant.*

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OLAFSON v. MELSTED.

Partnership — Farming — Dissolution — Interpretation of partnership agreement.

In an action for dissolution of a partnership and for an accounting, the plaintiff had purchased from the defendant an undivided one-half interest in the farm in question (80 acres) at the time the partnership was entered into. It was agreed that there should be an order for dissolution of the partnership for carrying on the farm. One clause provided that "All capital expenses and moneys spent on improvements are to be borne equally by the two partners, but if the purchaser requires a dwelling-house he shall erect same at his own expense, and the same shall be and continue to be his own separate property." Another clause provided that the dwelling-house already erected (occupied by the vendor and enclosed by a fence including three-quarters of an acre) should not be included in the sale of the undivided one-half interest in the land, but should remain the separate property of the vendor. The plaintiff did not erect a dwelling-house, but claims an area of land on which to erect a house. Defendant did not object to the allowance of a reasonable parcel of land for a building, but contended the site should be selected by the parties so that the commercial value of the farm should be diminished as little as possible. Another clause provided that in the event of the partnership being discontinued, the dwelling-houses should be sold along with the farm, but that the amount received therefor should be dealt with separately and paid to the partners separately.

Held, that the Court should determine the area to which each of the parties is entitled, leaving it to the parties to agree if possible upon the value of the separately owned parcels, with liberty to apply; and the area to be allowed the vendor should be determined by the particular situation and circumstances of his house and the land surrounding at the time of the agreement, and he was entitled to the three-quarters of an acre enclosed by the fence. The plaintiff was held entitled to a piece of land equal in area to and equally well situated to that allowed the defendant.

ACTION for dissolution of partnership, for the taking of accounts, and for damages. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 2nd of February and 4th of April, 1939.

I. A. Shaw, and *H. D. Arnold*, for plaintiff.

Kidston, for defendant.

Cur. adv. vult.

11th April, 1939.

FISHER, J.: In this action counsel agreed that there should be an order for dissolution of the partnership and the taking of certain accounts. They disagreed, however, on certain other phases of the matter and having heard evidence I have now to deal with certain issues before the taking of the accounts. As some of the issues concern the interpretation of the partnership agreement (Exhibit 1) I set out here certain portions of the agreement, reading as follows:

1. The vendor agrees to sell to the purchaser who agrees to purchase an undivided one-half interest in all and singular that certain parcel or tract of land, farm and premises lying and being in the Province of British Columbia, and being composed of the north half of the north-east quarter of section seventeen (17) in township twenty (20) and range nine (9) west of the Sixth Meridian in the Province of British Columbia, at and for the price and sum of Ten Thousand ($10,000.00) Dollars, in gold or its equivalent to be paid to the vendor at Winnipeg, in the Province of Manitoba, as follows:—

The sum of Fourteen Hundred ($1,400.00) Dollars in cash upon the execution of these presents (the receipt whereof is hereby acknowledged).

The sum of approximately Forty-six Hundred ($4,600.00) Dollars by assuming and discharging a mortgage for that amount registered against the said lands in favour of The Soldier Settlement Board of Canada, each annual instalment including interest at 6% per annum, being Four Hundred and seventeen dollars and fifty-five cents ($417.55), and the total amount being payable in 19 years. The balance or sum of Four Thousand ($4,000.00) Dollars is to be paid as follows:—

. . . . .

3. It is hereby expressly agreed and understood that the dwelling-house now built on the said land is not to be included in the sale of the undivided one-half interest in the said lands, but is to be and remain the exclusive and separate property of the vendor.

. . . . .

6. All capital expenses and moneys spent on improvements are to be borne equally by the two partners, but if the purchaser requires a dwelling-house he shall erect same at his own expense, and the same shall be and continue to be his own separate property.

. . . . .

14. It is hereby agreed that in case of disagreement between the two partners, or in case the partners decide to discontinue partnership, the farm shall be disposed of either to one of the partners or to a third party, and the basis of valuation shall be the present price plus whatever capital expenses are incurred in the meantime, except as to the dwelling-house or houses, which shall be considered separately, and the amount received for same shall be payable to the respective owners thereof separately. If the said farm is sold to a third party for a greater sum than the present valuation plus capital expenditures incurred in the meantime the excess shall be

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divided equally between the two partners, provided, however, that if the purchaser Jon Olafson buys the farm he shall pay the vendor V. J. Melsted Two Thousand ($2,000.00) Dollars more for his share on the basis of valuation above stipulated, and also provided that if the farm is sold to a third party the vendor V. J. Melsted shall be entitled to receive and shall receive Two Thousand ($2,000.00) Dollars more than an even one-half share of the sale price.

It appears that the plaintiff, purchaser, did not erect a dwelling-house on the farm premises as permitted by clause 6, as above set out, but now claims for an area of land on which to erect a dwelling-house. Counsel for the defendant states that the defendant has no objection to the plaintiff being allowed a reasonable parcel of land for building purposes but he argues that the site thereof should be selected by the parties with a view to ensuring that the commercial value of the farm will be diminished as little as possible. In this connection I have to say that, if the commercial or the selling value of the farm is to be the guide, I agree with the submission of counsel for the plaintiff that it is obvious that the farm and the dwelling-house now on it should be sold together. I have to be guided, however, by my interpretation of the provisions of the agreement, the object, of course, being to carry out the intention of the parties as expressed by the words used. After careful consideration of the clauses as above set out, I have come to the conclusion that in providing in clause 14 for the disposal of the farm in case of the partnership being discontinued the parties intended that the dwelling-house or houses should be sold along with the farm but the dwelling-house or houses should be considered separately and the amount received for same should be payable to the respective owners thereof separately. Under the existing circumstances I think justice will be done if I determine the areas to which each of the parties is entitled and then give an opportunity to the parties to agree upon a consent order for the sale of the lands and the manner of determining the value to be placed on the separately-owned parcels with liberty to apply if the parties cannot agree. I deal with this phase of the matter on this basis.

In respect of the area to be allowed the defendant counsel for the parties seem to agree that the word "dwelling-house" used in said clause 3 must be interpreted as allowing the defendant such land as is reasonably necessary for the enjoyment of

the building but they disagree as to the amount of such land. Counsel on behalf of the defendant cites amongst other cases *Grosvenor* v. *The Hampstead Junction Ry. Co.* (1857), 1 De G. & J. 446; 26 L.J. Ch. 731; 44 E.R. 796, in which case The Lord Justice Turner said at p. 454:

> I know of no means by which we can interpret the word "house" in this section, except by a reference to the legal construction put upon that word in other instruments. I take, therefore, the question to be, what would pass under a conveyance of the house? That, as I think, must be judged of by the particular situation and circumstances of the property at the time.

In the present case I have noted that counsel on behalf of the plaintiff contends that the plaintiff was ignorant of the position of the house at the time the agreement was made. Even assuming this to be the case, however, I think that the means of interpretation suggested in the *Grosvenor* case, *supra,* may be applied here and that the question must be determined by the particular situation and circumstances of the property at the time. I accept the evidence of the defendant to the effect that at the time the said agreement was made the land surrounding the house was enclosed within a fence and comprised approximately three-quarters of an acre. The total area of the lands in question is 80 acres and the house must be considered, not as a city residence, but as a country home in which case three-quarters of an acre would be a small parcel of land to go with a house. I accordingly determine that the defendant is entitled to the fenced three-quarters of an acre. I note, however, that the defendant admits that the bunk-house within the enclosure was built after the agreement was made and its cost charged up to the partnership account. In estimating the value to be placed upon this area belonging to the defendant the cost of the bunk-house, as so charged up, should therefore be deducted. In respect of the area to be allowed the plaintiff I am of the opinion that he is entitled to a piece of land equal in area to and equally well situated as that allowed the defendant and I so determine.

In respect of the defendant's claim upon the plaintiff's covenant under clause 1, as above set out, to pay the sum of approximately $4,600 by assuming and discharging a mortgage for that amount in favour of The Soldier Settlement Board of Canada, I have to say that I am satisfied, and find, that all the

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payments made by the plaintiff to the defendant, with the exception of the payment of $1,400 made upon the execution of the agreement, were all paid to the defendant on account of the instalments payable to the director of The Soldier Settlement Board and that the defendant was not entitled to appropriate any of them for capital improvements for which apparently no claim or account had been presented. The payments so made by the plaintiff, therefore, must be considered as paid upon his covenant as aforesaid with the right, however, reserved to the defendant to show upon the accounting how much is still payable by the plaintiff on his covenant and the nature and extent of the capital improvements. I pause here to add that I find the total amount paid by plaintiff to the defendant, including the said payment of $1,400, was the sum of $4,490, being the total of the cheques produced and the cheque for $200 which I am satisfied was paid on or about March 12th, 1928.

The plaintiff claims damages for defendant's failure to carry out his covenant with respect to certain homestead rights as set out in paragraph 11 of the agreement. The defendant's answer seems to be that he did not obtain the homestead rights as he was of the opinion that the lands were not worth holding and he was able to get the grazing rights for use along with the neighbours. The defendant, however, had entered into a covenant with the plaintiff and, as he has failed to carry out same, I think the plaintiff is entitled to damages, which I fix at $500.

The plaintiff's claims for $350 for trip to Scotland in 1933 and $350 for a trip in 1937 are disallowed.

The plaintiff claims damages from the defendant on the ground that he was ejected from the farm and not allowed to live on the farm pursuant to the terms of the agreement. The evidence given by the parties is contradictory and I cannot find that the defendant struck the plaintiff but I am satisfied that the defendant's actions were a breach of the agreement to allow the plaintiff to live on the premises. The plaintiff claims damages for extra cost of living from June 15th, 1937, to date of judgment but there would appear to have been considerable delay on the part of the plaintiff in bringing the action to trial, the writ having been issued on September 4th, 1937. I think I am doing justice

to both parties when I allow the plaintiff, as I do, the sum of $250 damages on account of this claim.

In respect of the other issues arising out of the peculiarly expressed provisions of clause 14 of the agreement it was finally agreed between counsel before me on the 4th instant that I should not deal with them at present and as arranged there will be liberty to apply at a later date for their disposal.

Counsel agreed that under the partnership agreement neither partner has an option to purchase but that the Court has jurisdiction to give liberty to either or both of the partners to bid at the sale (see Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 513) and I have come to the conclusion that such liberty should be given under the circumstances of the present case.

In respect of the time for the sale of the lands in question herein I have to say that my view is that in any event the sale should be deferred until after the taking of the accounts and I will then hear further argument on the question if the parties cannot agree.

There will be an order in accordance with my conclusions as above set out and the draft order (Exhibit 2) covering the points on which the parties agreed should be incorporated therein. In case the parties cannot agree on the form of the order, counsel may file written argument on the matter.

Judgment accordingly.

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BANKS v. CITY OF VANCOUVER AND KITSON.

Negligence—Automobile—Pedestrian run down by—Intersection—Duty of driver to keep look-out—Duty of pedestrian at intersections—Damages.

The accident was at about 5.40 a.m. on the 1st of January, 1939. It was raining at the time and the visibility was only fairly good. There were lights at the south-west corner of the intersection of Kingsway and Carolina Street, and two standard lights on the north side of Kingsway. There was a double street-car line on Kingsway (going east and west). The plaintiff started across Kingsway from the south-west corner. When he got to the devil strip he looked easterly and saw the lights of a car coming some 420 feet away, and assuming there was time, he continued across and was struck by the car coming from the east when about five feet from the north kerb. The distance from the north rail to the north kerb of Kingsway is about 35 feet, and it was found that the impact took place about three feet south of the centre roadway between the north rail and the north kerb.

Held, that both the plaintiff and the driver were negligent in equal degrees, the driver in failing to keep a proper look-out, and the plaintiff in attempting to cross the street without paying strict attention to defendant's oncoming car.

ACTION for damages for injuries sustained by the plaintiff when struck by a motor-car driven by the defendant Kitson with the implied consent of the city of Vancouver. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Vancouver on the 30th and 31st of October, 1939.

Christian, and *Hill,* for plaintiff.
Nicholson, and *Yule,* for defendants.

Cur. adv. vult.

8th November, 1939.

ROBERTSON, J.: The plaintiff sues the defendants for damages for personal injuries sustained by him about 5.40 a.m. on January 1st, 1939, by reason of being struck by a motor-car driven by the defendant Kitson, with the implied consent of the other defendant, the city of Vancouver.

Kingsway runs approximately east and west. Carolina Street runs south-easterly from Kingsway. It is not continued north from Kingsway. There are double street-car tracks on Kingsway. The plaintiff was crossing from a point at or near the

south-west corner of Kingsway and Carolina in a northerly direction on Kingsway. He was struck by the motor-car somewhere between the northerly car rail and the north kerb of Kingsway. At this point Kingsway is roughly 70 feet from kerb to kerb. The distance from the south kerb to the centre of the "devil strip" is about 30 feet. The distance from the north rail to the north kerb is about 35 feet and from the centre of the devil strip to the north kerb about 41 feet. The street is paved. It was raining at the time of the accident but there was nothing out of the ordinary in weather conditions for that time of the year. The visibility was fairly good. There were lights on the service station at the south-west corner of Kingsway and Carolina, a standard light on this corner, and also two standard lights on the north side of Kingsway, a short distance east and west of where the accident took place. Kitson says that the "artificial" light was "reasonably good."

The plaintiff's evidence is that before commencing to cross he looked to his left and saw a car on the south side of Kingsway proceeding east about "half a block away." This was evidently Dickson's car, to which reference will be later made. At that time he saw no other traffic. He then proceeded to cross Kingsway, stopped when he got to the "devil strip," looked to the right along Kingsway and saw the "glare of the lights" of Kitson's car at a point about 420 feet away. The car was then coming out of Fraser Avenue 600 feet away. This car was proceeding west on Kingsway. Although he was not able to estimate its speed, he concluded he had time to cross in front of the car with safety and therefore walked, quickly, "straight across," without looking again, and, when within five feet of the north kerb, was struck. He does not know which part of the car struck him. It is submitted that Kitson's car must have been proceeding at an excessive rate of speed, otherwise the plaintiff would have got safely across Kingsway; further, that Kitson did not keep a proper look-out or he would have seen the plaintiff in time to stop his car and avoid the accident. Kitson was driving a Graham car (5½ feet wide, 15 to 16 feet long) seated on the left-hand side, the car window to his left being partially open. To his right was Marshall, another police officer. There were

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two windshield cleaners on the windshield, one in front of each of the occupants of the front seat. Kitson says at this time the rain was running down the windshield from which it may be judged that he had no proper vision through the windshield except through the area that was kept clean by the wiper. He says his car's speed was 25 miles per hour; that he was looking straight ahead through this area; and that when the front of his car was about 40 feet west of the west kerb of Carolina Street, he suddenly saw a figure "loom up" to the left of his car, approximately three to four feet ahead and "a little to the left, not more than a foot." He immediately put on his brakes and stopped his car in seventeen and one-half feet. He ran back and found the plaintiff lying three to four feet behind the car, his feet fifteen to eighteen feet to the north from the northerly car rail and his head towards the north. He says the point of impact was about 35 feet west of the crossing where people usually cross Kingsway from Carolina Street. He said visibility was not very good. Marshall agreed with Kitson as to the stopping of the car and generally as to the weather conditions. He first saw the plaintiff when he was about one and a half feet from the left front mud-guard. The left part of the bumper of the car struck the plaintiff, who rolled over the left mud-guard and then to the pavement. He said that the windshield was "steamed" but not where the windshield wipers were operating. Both Kitson and Marshall agreed that the car had proper lights which were "regulated down" so that their direct beams would strike the pavement 50 feet ahead of the car but, of course, would light up the street for some distance ahead of this. Marshall said that the car lights were "diffused" two to three feet on each side of the car. Kitson and Marshall said the plaintiff, when they saw him, was in a crouching position as if he were running.

Arnott, a police constable called for the defence, said that the Graham car passed him when he was on the sidewalk on the north side of Kingsway at a point north of the "Arts monuments." Just after this he saw a dark object on the street which he took to be a dog "in the glare of the head-lights" of the Graham car. He was unable to say how far ahead of the Graham car this object was. What he saw was the plaintiff. I find that the

speed of the Graham car was about 25 miles per hour. The two occupants of the car say this and this is confirmed by the fact that the car stopped in the short distance in which it was brought to rest after the accident. To a certain extent (because they were not in a good position to judge its speed) it is also confirmed by the evidence of the Dicksons who say the speed of the car was 25 to 30 miles per hour and by Miss McMullen who says the speed was not more than 30 miles per hour. I find that under the conditions which existed this speed was not excessive. There was nothing in the weather conditions in my opinion which should have prevented Kitson from seeing the plaintiff. It is true the Dicksons and Miss McMullen did not see the plaintiff until after the accident but it is equally clear that they saw him, then, when he was on or falling off the left mud-guard of the car when he was not within the beam of their car's head-lights. Arnott's evidence establishes the fact the plaintiff was within the glare of the head-lights some considerable distance ahead of the Graham car or else Arnott, in the position in which he was, could not have seen him. I therefore come to the conclusion that Kitson was not keeping a proper look-out and that he should have seen the plaintiff. It is argued that Kitson had the right of way and reference is made to clause 10 of the traffic by-law which provides, in part, as follows:

10. (1) 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.

. . . . .

(4) Every pedestrian crossing any roadway at any point other than at or within a marked or unmarked cross-walk shall give the right of way to vehicles upon the roadway; provided that this provision shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of pedestrians.

No attack was made on the validity of this clause. For the purposes of my judgment I shall assume it to be *intra vires*. The defendant's counsel relies on sub-clause (4) and the plaintiff's counsel on sub-clause (1). There was no designated cross-walk at Carolina Street. The defendant submits that if the plaintiff, instead of proceeding directly north from the sidewalk on Kingsway at the corner of Carolina to the north side of Kings-

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way, proceeded in a diagonal direction he is not entitled to the benefit of clause 10 (1) but by clause 10 (4) was bound to give the right of way to the motor-car. I do not find it necessary to decide whether the plaintiff was crossing within an unmarked cross-walk. If he were doing so this would not relieve Kitson from liability to keep a proper look-out. See *Leech* v. *The City of Lethbridge* (1921), 62 S.C.R. 123. If he were not doing so, sub-clause (4) provides that his failure in this respect shall not relieve the driver of the motor-car from "the duty to exercise due care for the safety of pedestrians."

With reference to the plea of contributory negligence it was submitted on behalf of the plaintiff that the motor-car was so far away (about 600 feet) that he had reasonable grounds for thinking that he had time to get across in safety. I do not think he had for the following reasons: The plaintiff says before he started to cross the road he saw Dickson's car when it was opposite the confectionery store, that is, about 200 feet from the point of impact. Dickson says that at this time he saw Kitson's car when it was about 340 feet from the point of impact. Having in mind these distances, and the two rates of speed, Kitson's car would arrive at the point of impact in about nine seconds and Dickson's car opposite to this point in about seven seconds. The plaintiff says that the point of impact took place about five feet from the north kerb, that is, 65 feet from the south kerb. Kitson says that at the time of the impact his car was in the centre of the road between the north rail and the north kerb and as his car was five and a half feet wide, the point of impact would be about three feet south of the centre of the north roadway and therefore about 50 feet from the south kerb. At three miles per hour the plaintiff, starting from the south kerb, would take eleven seconds to arrive at the point of impact fixed by Kitson and about fifteen seconds to reach the point of impact fixed by himself. This is without allowing for any time he may have stood on the devil strip as he said he did. To my mind this shows it was not reasonable for the plaintiff under those circumstances to think he had time to get across before Kitson's car would come along at the point where Dickson says it was. The plaintiff says that when he reached the devil strip Kitson's car

was 600 feet away. From the devil strip to the point where the plaintiff says the impact took place is 45 feet which would take the plaintiff about ten seconds to walk. To the point of impact fixed by Kitson would be 22 feet which would take the plaintiff about five seconds to walk. It would take Kitson's car sixteen seconds to do the 600 feet. Under these circumstances the plaintiff should have reached the north kerb before Kitson's car came along. My opinion is that the impact took place about three feet south of the centre of the roadway between the north rail and the north kerb and that the plaintiff must have been on his way across Kingsway when he saw Dickson's car. In any event, in my opinion, he was not justified, under the circumstances, in crossing without paying strict attention to Kitson's oncoming car. I think the plaintiff was guilty of contributory negligence. Under the circumstances I think the plaintiff and Kitson were equally to blame. It was admitted by the defendants that if Kitson was found negligent the city of Vancouver was also liable.

I allow the special damages which it was agreed amounted to $831.35. The plaintiff's left leg will be slightly shorter by reason of the accident. He sustained a fracture of the tibia and a comminuted fracture of the fibula. The tibia is now knitted together and the fibula is partly so. He was in the hospital until April 6th and has been on crutches up to the present time but will be able very shortly to dispense with these and use a cane. During the time he was in hospital his leg was in a plaster cast. There was some damage to his right knee and there will probably be a slight permanent disability there. He was generally bruised and shocked as a result of the accident and has had considerable suffering. He complains that he is not able to sleep properly as a result of the accident and is still suffering pain. Under all these circumstances I assess the general damages at $2,750. There will be judgment for the plaintiff for one-half the special damages and one-half the general damages. Costs will be in accordance with the provisions of the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52.

Judgment for plaintiff.

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Oct. 28; *Nov.* 13.

CLARKE v. WILLIAMS, LYONS AND FELL.

Mechanic's lien—In possession under agreement for sale—"Owner"—Interpretation—R.S.B.C. 1936, Cap. 170, Secs. 2 and 6.

The defendant F., who was the former registered owner of the lands in question, subject to a mortgage to the defendant L., entered into a written agreement for sale with the defendant W., covenanting and agreeing to sell W. said lands. W. went into possession and the plaintiff entered into a verbal agreement with W. to erect a dwelling on the land. The plaintiff spent in material and labour on the building $772.62, and received in part payment $121. A mechanic's lien was filed for the balance of $658.62, and action was brought for the enforcement of the lien.

Held, that the defendant comes within the purview of section 2 of the Mechanics' Lien Act as an "owner" as she has "an estate or interest legal or equitable in the lands in question." The lands were improved by the erection of the house thereon to from $875 to $900, and the plaintiff is entitled to enforce his lien for the amount claimed.

ACTION for the enforcement of a mechanic's lien. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Penticton on the 28th of October, 1939.

Aikins, for plaintiff.

C. F. R. Pincott, for defendants.

Cur. adv. vult.

13th November, 1939.

SWANSON, Co. J.: The plaintiff is a lumber merchant and building contractor residing and doing business at Penticton, in the county of Yale, B.C. The defendant Mrs. Christiana Williams resides at Penticton. The defendant *Lyons* resides at Penticton, and is the holder of a registered mortgage upon the lands in question in this action, the third defendant Fell being the registered owner of the lands. The defendant Christiana Williams is the holder of a purchaser's interest in the said land under an unregistered agreement for sale made between Fell and Christiana Williams, whereby the said Fell covenanted and agreed with the said Mrs. Williams to grant and convey to her the said lands subject to the terms and conditions therein set forth.

The plaintiff prior to and on December 8th, 1938, furnished and supplied materials to, and did work for, defendant Mrs. Williams at her request in the building and erecting of a certain dwelling-house for her on the lands described in the pleadings, the lands and the building being of an alleged value of less than $2,500. The County Court has exclusive jurisdiction in mechanics' lien cases irrespective of the amount involved.

The evidence is quite conflicting as to the exact nature and terms of the verbal agreement made between plaintiff and Williams. The plaintiff Clarke has resided in Penticton since 1920, being a retail dealer in building supplies and a building contractor. The evidence shows, I think, that he has had wide experience in the building trade. He gave his evidence in a manner which very favourably impressed me. On the other hand I was not very favourably impressed with certain vital portions of the evidence of defendant Mrs. Williams or of her son Harry L. Williams. Defendant Mrs. Williams is a woman of Rumanian racial origin, and speaks and understands English quite readily, but states that she can neither read nor write English. Her son is quite an intelligent young man and received a fair public school education up to Grade 8 in this Province.

There was no written contract between the parties. In the fall of 1938 plaintiff states that he had business dealings with defendant Mrs. Williams regarding the erection by him of a dwelling-house for her on the land in question on Rigsby Street in the town of Penticton. She had recently arrived in that town from the Cariboo, and informed Clarke that she intended to settle in a home in Penticton. Towards the first of November of that year Clarke went to Mrs. Williams's apartment and received from her a rough verbal statement of what she wanted in the line of a small house, and later Clarke submitted to her his estimate including labour and material amounting to $902. They discussed together her financial affairs, and she informed him that she proposed to go to Vancouver to endeavour to effect a sale of certain of her mining shares in order to finance the building of the house. They discussed certain changes in the material bill. She stated that she wanted her two sons, who were then out of work, to secure work on the building as the carpenter's

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helpers, that is to do certain rough carpentry jobs on the building so as to save on the cost of erection. In his first estimate Clarke had figured V-joint material to be used in the interior of the small house, and Clarke stated that if he used shiplap instead of V-joint material in the interior it would save about $50. She agreed that Clarke should use shiplap in the interior. In his estimate he had included $150 for carpenter work. He states that the agreement was that he was to supply the material and furnish a carpenter to do the necessary carpentry work, and allow the two boys to do work helping the carpenter, but that he was not to be under any obligation to pay them, and that any obligation to remunerate them would be that of their mother. Clarke states that it was on these terms that he agreed to build the house for Mrs. Williams. She agreed to pay him $500 within two weeks after he started the building of the house and the balance within four months after it was finished. The building was accordingly erected by plaintiff for Mrs. Williams.

Exhibit 1 is a list of the material supplied in the erection together with cost of labour including plumbing and electrical wiring plus $3 cost of tools supplied to defendant's two sons on the work totalling $779.62, on which plaintiff received in cash $120, leaving a balance owing to him of $659.62, which latter amount less $1 plaintiff now claims as justly owing to him by Mrs. Williams, and it is for that amount that he now seeks to enforce a mechanic's lien on the estate and interest of Mrs. Williams in the lands and premises in this action involved.

The last labour was done on December 6th, 1938, and the last material supplied December 8th, 1938. The affidavit of mechanic's lien was duly filed in the proper registry office January 4th last, and a certified copy of the affidavit of lien was filed in the proper Land Registry office on the 6th of January last. Exhibit 4 is an agreement in writing signed by Mrs. Williams agreeing to an extension of time for instituting proceedings in this Court until 28th July, 1939, filed in the Land Registry office on February 6th last. Action was begun 18th April last, and a certificate of *lis pendens* was filed in the Land Registry office April 29th last. Clarke states that he saw Mrs. Williams after he completed the work several times in December trying to get

some money from her. She always had some excuse for not having the money to pay Clarke. Finally on February 2nd last she signed Exhibit 5 agreeing to pay the balance due plaintiff as set out therein $658.62. Exhibit 4 was prepared by Clarke's solicitor and taken by Clarke to her. Clarke states that he read and explained this document to Mrs. Williams, and that she seemed to understand it; that her son H. L. Williams was present, that he handed the paper to him, and that he read it first before his mother signed the same. She stated that she wanted an agreement from Clarke agreeing to extend the time for payment of balance owing. He states that he left Exhibit 4 with her, and went to his office and typed the paper Exhibit 5 and returned with it to her place, the house now in question. He saw Mrs. Williams and her son was again present. Clarke states that he read over Exhibit 5 to her, and handed it to her son and he read it, and that then she and Clarke signed Exhibit 5. He states that her son made no remonstrance with his mother for signing this paper, although in his evidence her son later testified that he did protest against his mother having signed Exhibit 5 in which the amount admitted as owing by her is set forth as being $658.62.

Clarke claims to have increased the value of the land by the value of this building, *viz.*, $875 to $900. Clarke denied that Mrs. Williams wished the price of building reduced to $600.

Exhibit 7 is in Clarke's handwriting being his original estimate of $902.50. As Clarke could get no satisfaction from Mrs. Williams as to payment for the building he left a portion of the work unfinished. He states that it would take only $45 to $50 of work to finish the building. Clarke supplied the material for a shed erected on the land by Mrs. Williams's sons, which amounted to $41.25. On this account he received $20 leaving a balance on the shed of $21.25. He does not claim any lien for this material as the lien as to this item was not filed in time. He received in all from Mrs. Williams $120, the remaining $100 being on the house contract. Mrs. Williams contended that certain materials to be supplied in the original estimate were agreed to be eliminated and that the price was then fixed at $650, to which she states Clarke agreed. This Clarke quite

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emphatically denied. She claims that the cost of the labour of her two sons should come off that amount. The son claimed that his mother was ill when she signed Exhibit 5, and after signing it said it was just to give them more time to make the payments. He estimated the value of wages of himself and brother on the job as being 518 hours at 40 cents per hour, total $207.20, which amount he said should come off the $650 figure for the house contract. The sons never made any request to plaintiff to pay them any wages whatever on the job. There were differences of opinion amongst builders called as witnesses as to the value of this house, a view of which the Court took in company with the counsel and parties. Mr. Moller a man of wide practical experience called by the defendant stated that he considered $650 a good fair value for this house as it stands today, and that it would cost $150 to complete it.

Mr. H. S. Kenyon a practical builder of over 20 years' experience in his craft, and who superintended the erection in Penticton of some of the most important structures in that town, post office, United Church, Ford Garage, Woolworth Bldg., and several houses of moderate size, stated that this house could not be put in its present shape for the $650 price stated by Mr. Moller.

Mr. Kenyon submitted his figures showing a value of $994.88. Exhibit 7 is his estimate in detail. Mr. Kenyon stated that Mr. Moller's figure for completing the building is too high, that $90 would be more like the price to complete it. He stated that Mr. Clarke's estimate, Exhibit 1, seemed to him quite reasonable.

Mr. A. B. Marchant, another builder of wide experience, stated that his estimate of value of building would be $925, giving his estimate Exhibit 8 in some detail. He stated that he would estimate $125 cost of finishing the building.

I find as a fact that the amount agreed on by the parties hereto was as set forth in Exhibit 5 dated February 2nd, 1939, $658.62. It was therein agreed that Mrs. Williams was to pay Clarke $400 on or before March 15th, 1939, and the balance at the rate of $20 per month, first payment to be made 1st March, 1939, and $20 on 1st of each succeeding month until the balance was paid with interest at the rate of 7 per cent. Plaintiff is

entitled to a personal judgment against Mrs. Williams for the said sum of $658.62.

Various legal points have been raised by Mr. *Pincott* on behalf of the defendants to the effect that plaintiff is not entitled to a mechanic's lien in this matter. His first point is that under section 6 of our Mechanics' Lien Act, Mrs. Williams is not an "owner" as defined by that section, and he refers to the interpretation section 2 of that Act:

> 2. In this Act, unless the context otherwise requires:—"Owner" includes a person having an estate or interest, legal or equitable, in the lands upon or in respect of which the work or service is done, or material is placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work or service is done, or material is placed or furnished, and all persons claiming under him whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the material placed or furnished have been commenced to be furnished.

In my opinion Mrs. Williams comes within the purview of this section as an "owner" as she has an "estate or interest, legal or equitable, in the lands" in question.

It is argued that by reason of section 34 of the Land Registry Act, Cap. 140, R.S.B.C. 1936, because Mrs. Williams's agreement for sale respecting the land in question has not been registered in the Land Registry office at Kamloops, therefore this instrument is utterly inoperative to pass any estate or interest in this land to her until it is duly registered in compliance with the provisions of this Act. In reply to this contention, Mr. *Aikins* referred to a decision of our Court of Appeal in *Dorrell* v. *Campbell* (1916), 23 B.C. 500. The head-note reads as follows:

> Actual possession under grant from the Crown, [which was unregistered] coupled with the statutory right to register the grant, creates an estate or interest within the meaning of the word "owner" in section 2 of the Mechanics' Lien Act upon which a mechanic's lien may attach.

MACDONALD, C.J.A. at p. 503 said:

> This question of law would then arise: Would actual possession under grant from the Crown, coupled with a statutory right to register the grant, and thereupon become the owner in fee, create an estate or interest upon which a mechanic's lien could attach? I think it would. This is not a contest between rival vendees claiming under unregistered agreements from the same vendor, such as was *Goddard* v. *Slingerland* (1911), 16 B.C. 329, so much relied on in the Court below.

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At p. 504, the learned Chief Justice continued:

The city's interest, therefore, was, in my opinion, a very valuable one, and could be made the subject of assignment or sale. In a much weaker case, it was the opinion of Wetmore, C.J., that actual possession alone was an interest in land upon which a mechanic's lien would attach: *The Galvin-Walston Lumber Co.* v. *McKinnon et al.* (1911), 4 Sask. L.R. 68; 16 W.L.R. 310; and while it is, perhaps, not very useful to refer to United States decisions where statutes are involved, I find that the Supreme Court of Iowa held the same view in *Bray* v. *Smith* (1893), 54 N.W. 222.

I would allow the appeal, and declare that all the right, title and interest of the city of Vancouver is charged by the said liens, and subject to be sold to satisfy the same.

MARTIN, J.A. (now Chief Justice of British Columbia) at p. 509 said:

Finally, I note that there is also another class of owner of "an estate or interest, legal or equitable," in land outside of the Land Registry Act, and in addition to those three already mentioned, . . . ; I refer to the right of a free miner in his claim, which has been decided to be an interest in land —*McMeekin* v. *Furry* (1907), 13 B.C. 20; 2 M.M.C. 432, 536. Though section 6 (3) of the Mechanics' Lien Act provides for a lien on a "mine," yet by section 17 of the Land Registry Act—"No mine or mineral claim, as defined by any Mineral Act or Ordinance now or at any time in force in the Province shall be registered in the register of indefeasible fees, nor shall any certificate of indefeasible title to same be issued." . . . A certificate of absolute fee may be obtained after the issue of a Crown grant to a mineral claim under section 74 of the Mineral Act, R.S.B.C. 1911, Cap. 157, but up to that time all conveyances, bills of sale and documents of title relating to mineral claims or placer claims must be recorded with the mining recorder—sections 74-5 of the Mineral Act, and sections 56-60 of the Placer-mining Act. But, nevertheless, no one has yet ventured to contest the right to file a lien against a "mine," of any description, whether under the two Acts already cited or the coal or petroleum mining operations carried on under the Coal and Petroleum Act. . . .

Mr. *Pincott* urges that the decision of the Full Court in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, supports his contention that Mrs. Williams cannot be held to be an "owner" of any interest or estate in the lands in question. I do not think that the decision in that case is fatal to the plaintiff's rights in the present case. That case decided that the Judgments Act gives the judgment creditor only the right to register his judgment against the beneficial interest in lands possessed by the judgment debtor, and in that case the judgment debtor (whose name still appeared in the records of the Land Registry office as the ostensible "owner" although he had previously conveyed the land to the plaintiff so long before the execution creditors' judg-

ment was obtained) was only a "dry trustee" of the land for the use and benefit of the plaintiff. At p. 54, HUNTER, C.J. said:

> It seems to me it was the clear intention of the Legislature to subject to the claim of an execution creditor only those lands in which the judgment debtor has a real or beneficial interest. It cannot be supposed that this judgment debtor could have transferred this property, of which he was a mere dry legal trustee arising from an error in a conveyance, to the execution creditors in liquidation of his debt, and it is difficult to understand on what principle his execution creditors can claim to stand in any better position than himself. In fact, it seems to me that as soon as the execution creditors became apprised of the true state of the facts it became against equity and good conscience for them to insist on their claim against this property. . . . With regard to the case of *Levy* v. *Gleason* (1907), 13 B.C. 357, the question there was as to the position of an unregistered conveyance upon the qualification of an alderman and it was held there by virtue of section 74 of the Land Registry Act that the conveyance had no legal or equitable effect so far as concerned his right to rest upon the fact that he was a registered owner of the property, but in this case we have to consider what right under section 3 of the Judgments Act an execution creditor has against the lands of his debtor, and I have no hesitation in coming to the conclusion that this section does not confer upon the execution creditor any greater interest or any greater right in respect of any real estate than was possessed by the debtor himself, excepting of course in the case of a transfer made to defeat the creditor, which however, is an exception more apparent than real.

See also *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111, decision of CLEMENT, J. See also decision in *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, at pp. 288 and 289, decision of Sir Henry Strong, C.J.

In the concluding portion of the judgment of HUNTER, C.J. in the above case of *Levy* v. *Gleason* the learned Chief Justice stated:

> . . . although no doubt rights capable of enforcement by the Courts may be created *inter partes* by unregistered instruments.

In the case at Bar the registered owner of the lands, Fell, entered into a written agreement for sale with defendant Mrs. Williams covenanting and agreeing to sell to Mrs. Williams the lands in question upon the terms and conditions therein set forth. Upon the implementing by Mrs. Williams of those terms and conditions it would become the duty in equity of Fell to grant and convey these lands to her. In the meantime Fell must be regarded in equity not as the absolute owner of these lands but to be a trustee of these lands *quoad* the beneficial interest therein of Mrs. Williams.

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Now the Mechanics' Lien Act definitely declares that the person who does work or service or places or furnishes material to be used (in the present case) in the constructing and erecting of a building "at the request and upon the credit of the owner" by virtue of section 6 (*b*)

> shall, . . . , have a lien for the price of such work, service, or material, or work, service, and material, upon:—
>
> (*c*.) Said . . . , building, . . .

Mechanics' liens were unknown to the Common Law. The earliest statutes of this remedial nature were introduced into the United States, and from there brought into Canadian legislation, the earliest Canadian Acts being enacted in Ontario and Manitoba in 1873 and in British Columbia in 1879. In the consideration of the Act the whole Act must be read together and one clause considered in the light of the others as stated by Killam, C.J. of Manitoba in *Robock* v. *Peters* (1900), 13 Man. L.R. 124, at p. 142. As stated by Cameron, J.A. in the Court of Appeal of Manitoba in *Polson* v. *Thomson and Watt* (1916), 10 W.W.R. 865, at p. 874 effect should be given to the spirit rather than to the letter of the statute. It must also be borne in mind that our British Columbia Interpretation Act under the heading "Rules of Construction," section 23, subsection (6) enacts that:

> Every Act and every provision or enactment thereof shall . . . receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit:

Lord Shaw of Dunfermline in the House of Lords in *Butler (or Black)* v. *Fife Coal Company, Limited,* [1912] A.C. 149, at pp. 178-9, dealing with the Employers' Liability Act, said:

> The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.

See also the words of Lord Shaw in the House of Lords in the case of *McDermott* v. *S.S. Tintoretto* (1910), 80 L.J.K.B. 161, at p. 167:

> Upon which I observe that I reckon it to be quite unsound, and to be productive of wrong and mischief, to interpret a remedial statute [Workmen's Compensation Act] in the spirit of meticulous literalism.

I also refer to the concluding paragraph of the judgment in the same case of the Lord Chancellor (Earl Loreburn) at p. 163. The Act in question makes it abundantly clear that a person in the position of the plaintiff has his right of lien secured by this Act.

Is it to be supposed that this right conferred upon the plaintiff should be *ipso facto* taken away from him by section 34 of the Land Registry Act, or that a legal right clearly conferred by one statute should be whittled away and rendered practically nugatory by another and wholly different statute? I cannot think so.

It seems to me that the present case falls well within the principle of the decision of our Court of Appeal in the above case of *Dorrell* v. *Campbell, supra.* From the time of the execution of the agreement for sale by Fell and the purchaser the defendant Mrs. Williams, she was in actual possession of the lands in question. She and her sons had a shed erected on these lands before the house structure was undertaken, and her sons members of her family were in actual possession and occupation thereof. She was quite as much in actual possession of the premises as the city of Vancouver was in possession of its property in the *Dorrell* v. *Campbell* case.

It is also argued by Mr. *Pincott* that the lien proceedings are wholly ineffective and must fall to the ground as far as Fell and the mortgagee *Lyons* are concerned as the "consent in writing," Exhibit 4, given under section 23 of the Act was signed only by the defendant Mrs. Williams extending the time for "instituting proceedings to realize the lien." It is to be noted, however, that section 23 expressly provides that this consent in writing is to be "signed by the owner or party whose interest is charged." That party whose interest it is sought to have charged herein is the defendant Mrs. Williams, and she is the proper and only party who is required by this section to give this consent in writing.

A mechanic's lien in respect of work and material contracted for by the purchaser of land under an executory contract for sale and purchase will attach to the interest of such purchaser—*Montjoy* v. *Heward School District Corporation* (1908), 10

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W.L.R. 282; *Hoffstrom* v. *Stanley* (1902), 14 Man. L.R. 227; *British Columbia Timber and Trading Co.* v. *Leberry* (1902), 22 C.L.T., Occ. N. 273, BOLE, Co. J. referring to the decision of DRAKE, J. in *Anderson* v. *Godsal* (1900), 7 B.C. 404, at p. 408. Mr. *Aikins* submits that substantial compliance with the Act is only necessary, and that no prejudice to their rights has been shown by *Lyons* or Fell, quoting the decision of Mr. Justice Cameron in the above case of *Polson* v. *Thomson and Watt*. See also section 20 of the Act.

The evidence of the plaintiff shows that the value of the lands has been improved by the erection by plaintiff of the house thereon to an amount of $875 to $900. Mr. *Aikins* invokes the rights conferred on the plaintiff by virtue of section 9, subsection (2) of the Act that the lien here shall be prior to the mortgage of *Lyons* as against the increase in value of the mortgaged premises by reason of plaintiff's works and improvements but not further.

I am of the opinion that the plaintiff is entitled to the right to enforce his lien herein as set forth in his claim in the plaint. The plaintiff is accordingly entitled to judgment with costs as prayed.

Judgment for plaintiff.

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REX v. LEE SHA FONG.

Statute — Interpretation — Agriculture — Natural Products Marketing (British Columbia) Act—Licensing of transporters of regulated products—R.S.B.C. 1936, Cap. 165.

Order 9 (*c*) made by the B.C. Coast Vegetable Marketing Board under the B.C. Coast Vegetable Scheme, passed by the Lieutenant-Governor in Council under the authority of the Natural Products Marketing (British Columbia) Act, reads "No person shall pack, transport, store and/or market the regulated product within the area, without first obtaining a licence from the board so to do."

Where an accused obtains three sacks of potatoes from another's farm and takes them home in his car for his own use, and there is no evidence that he is in the business of buying and selling or trucking or carrying or storing potatoes, he cannot be convicted of unlawfully transporting potatoes without first having obtained a licence from the board so to do.

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APPEAL by way of case stated by police magistrate Wood for the city of Vancouver, under section 89 of the Summary Convictions Act. The facts are set out in the reasons for judgment. Argued before FISHER, J. in Chambers at Vancouver on the 6th and 8th of November, 1939.

Norris, K.C., for the Crown.
Mellish (*F. C. Hall*, with him), for accused.

Cur. adv. vult.

15th November, 1939.

FISHER, J.: This is a case stated by H. S. Wood, K.C., police magistrate in and for the city of Vancouver, under section 89 of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271. On September 21st, 1939, the learned magistrate dismissed a charge against the said Lee Sha Fong, the charge being that the said Lee Sha Fong, 257 Keefer Street, at the city of Vancouver, B.C., and within the area described in the B.C. Coast Vegetable Scheme authorized under the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165, on July 6th, 1939, unlawfully did transport potatoes without first having obtained a licence so to do. In the first place I have to say that I agree with the magistrate when he says in his oral reasons for judgment as follows:

So far as the evidence goes this man had been out to somebody's farm in Point Grey in his car, a coupe, sedan I think it was, a passenger-car not a truck at any rate, he got three sacks of potatoes and he was taking them home for his own use. That is as far as the evidence shows; whether it is true or not is another matter but I have to take it that it is true. There is no evidence that he is in the business of buying and selling or trucking or carrying or storing potatoes.

The case being as stated in the reasons for judgment as aforesaid the contention on behalf of the respondent is that he cannot be convicted of the said charge under order 9 (*c*) made by the B.C. Coast Vegetable Marketing Board and reading as follows:

No person shall pack, transport, store and/or market the regulated product within the area, without first obtaining a licence from the board so to do.

The real issue therefore is as to the construction of the words of the order 9 (*c*) as aforesaid and the question arises as to the power given to the said board under the scheme known as the

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B.C. Coast Vegetable Scheme and as to the power given to the Lieutenant-Governor in Council by the said Natural Products Marketing (British Columbia) Act under which the scheme was established.

In construing the words used in the said order or scheme or Act the object undoubtedly is to see what is the intention expressed by the words used. See *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at 763; 47 L.J.Q.B. 193, where Lord Blackburn says at pp. 764-5 as follows:

> But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, *viz.*, that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear. In *Allgood* v. *Blake* [(1873)], L.R. 8 Ex., at p. 163, in the judgment of the Exchequer Chamber (which I had the honour to deliver), as to the construction of a will, it is said:
>
> "The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the Court in putting on them another signification, which to that mind seems a not improper signification of the words; whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one; and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I thing it is correct.

In the present case counsel on behalf of the parties both rely on the *River Wear* case, *supra,* and therefore seem to me to agree on the rules of interpretation to be applied but as was suggested in the *Allgood* case, *supra,* the great difficulty in all cases is in applying the rules to the particular case. Counsel on behalf of the appellant contends that the words of order 9 (*c*) as aforesaid must be construed literally while counsel on behalf of the

respondent contends that such a construction would lead to an obvious injustice and the Courts should act upon the view that such a result could not have been intended unless the intention has been manifested in express words. The task of construing the words of the order is not an easy one but, assuming that the object of construing them is to see what is the intention expressed by the words used, I have to say that I think some assistance may be obtained from considering the whole of the aforesaid Act and scheme along with the orders and having done so I would like to refer to certain particular sections.

Section 19 (*c*) of the scheme and section 5 (*c*) of the Act deal specifically with the matter of licensing. Notwithstanding the argument of counsel for the appellant in which he refers to the early parts of said section 19 of the scheme and of said section 5 and also to section 4 of the Act, I do not think that it can reasonably be said that there is a general power to license otherwise even though the board may have the power to say that it would prohibit any one who was not a licensed grower or trucker or dealer or manufacturer or broker from transporting potatoes and thus compel the deliveries to be made by such licensees. The power given under said section 19 (*c*) of the scheme is given in the same words as are used in said section 5 (*c*) of the Act and is as follows:

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.

The power given in section 19 (*d*) of the scheme is given in the same words as are used in section 5 (*d*) of the Act, and is as follows:

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.

It must also be noted that order No. 2, section B (2), requiring that every person

engaged within the area or any part thereof in producing, packing, transporting, storing and/or marketing the regulated product shall register with and obtain a licence from the board,

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uses in effect the same words as are used in section 19 (*c*) of the scheme and yet fixes licence fees only for those persons who are "engaged" commercially or in what may be called "a mercantile way" (as the magistrate puts it) with the regulated product. In this connection reference might be made to the various definitions of the words and terms used in classifying such persons for the purpose of fixing the amount of the fee, *e.g.*, "Trucker" is defined as follows:

> "Trucker" shall mean any person who transports the regulated product (not grown by him) in or upon any vehicle for the purpose of marketing the same, but shall not include railroads, or persons operating by means of water or air transport.

Comparing section 5 (*c*) with section 5 (*d*) as aforesaid and section 19 (*c*) with section 19 (*d*) as aforesaid I think it is obvious that sections 5 (*d*) and 19 (*d*) must be construed as applicable only to persons engaged in a mercantile way with the regulated product and I think it is also obvious from said order 2 that the board has so understood them. This brings me to the consideration of the argument of counsel for the respondent that order 9 (*c*) as aforesaid must also be construed in the same way as applicable only to those who are engaged in a mercantile way with the regulated product and that if it is not so construed great injustice wil be done. In this connection reference might be made to Maxwell on the Interpretation of Statutes, 8th Ed., 177:

> A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words. Thus, where a by-law authorized the Poulters' Company to fine "all" poulters (poulterers) in London or "within seven miles round" who refused to be admitted into their company, it was held that, as no poulter could legally belong to the company who was not also a freeman of the City, the by-law was to be construed as limited to those poulters who were also freemen, so as to avoid the injustice of punishing men for refusing to enter into a company to which they could not legally belong. *The Poulters' Company* v. *Phillips* (1840), 6 Bing. N.C. 314; *Reg.* v. *Saddlers' Company* (1863), 32 L.J.Q.B. 337. See also *Ex parte Corbett* (1880), 14 Ch. D., Brett, L.J., 122, 129.

In the present case my view is that, in order to avoid the injustice of punishing a person for transporting the regulated produce home for his own use without first obtaining a licence

which he could not obtain, the said order 9 (*c*) should be construed as limited to those persons who are required to take out a licence and can become licensees unless there has been manifested in express words an intention to prevent any unlicensed individual from carrying home for his own use a sack of potatoes after he has obtained it from a licensed grower and to oblige him to have the grower or other licensee make the delivery. Having come to the conclusion, as already indicated, that the powers to license and fix licences have been given to the board by virtue of section 5 (*c*) and (*d*) of the Act and section 19 (*c*) and (*d*) of the scheme and that the powers to license and to fix licences have been exercised accordingly, I have therefore now to consider whether the board has exercised the power to prohibit any one who is not a licensee from transporting potatoes from the farm of a licensed grower to his own home for his own use. Counsel on behalf of the appellant apparently argues that in order to control the marketing of the regulated product it may have been necessary for the board to exercise such power and that it has done so. On this phase of the matter I have to say that in my opinion the board has not manifested in express words any such intention and I agree with what the learned magistrate says in this connection:

> In section 19 of the scheme it says "The Marketing Board shall have all the powers of a body corporate, and shall have power within the Province to regulate and control in any respect or in all respects the transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such transportation, packing, storing and marketing or any of them, in whole or in part, and without limiting the generality thereof"—so and so.
>
> It seems clear to me under this that the board might prohibit anyone who is not a licensed grower or trucker or dealer or manufacturer or broker, from transporting potatoes, thus compelling the deliveries to be made by such licensees; thus they would prevent any individual from carrying home a sack of potatoes after he had purchased it from a licensed grower. The grower would have to make the delivery.
>
> I think they could have done that but I do not think they have done it. If the board intended such a wide and drastic measure for control of transportation and deliveries of potatoes they, I think, would have used more apt words.

My conclusion on the whole case therefore is that where, as here, it must be taken as true that the accused respondent had got the three sacks of potatoes from somebody's farm as aforesaid

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and was taking them home in his car for his own use and there is no evidence that he is in the business of buying and selling or trucking or carrying or storing potatoes, he cannot be convicted of the said charge and I think the appeal of the appellant herein by way of a case stated can be disposed of by simply answering question VII. of the case stated and stating, as I do, that my reasons for my answer are as hereinbefore set out. Said question VII. is as follows: "Should the accused have been acquitted of the said charge?" and my answer is in the affirmative.

Appeal dismissed.

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Nov. 23, 27;
Dec. 15.

NATIONAL TRUST COMPANY, LIMITED v. THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LIMITED AND BOARD OF REVIEW UNDER THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934. (No. 2).

Farmers' Creditors Arrangement Act, 1934, The—Application of defendant community for relief under—Whether applicant a "farmer"—Necessity of preserving uniformity of decisions—Can. Stats. 1934, Cap. 53.

On May 18th, 1938, the plaintiff commenced action against the defendant community to have carried into execution the trusts of a deed of trust and mortgage of the 3rd of December, 1935, made between the plaintiff and the community, to secure first-mortgage bonds, there being a balance due of about $170,000. On the 23rd of June, 1939, the community filed with the official receiver under The Farmers' Creditors Arrangement Act, 1934, a request for a review of its debts with a view to consolidation and reduction of principal and interest of its indebtedness, and according to the ability of the community, as farmers, to meet. On August 1st, 1939, the community purported to request the Board of Review to formulate a proposal. The board then sent out a notice to the community's creditors, including the plaintiff, that the community's request as a farmer would be dealt with by the board at Nelson, B.C., on the 26th of September, 1939. On the 16th of September, the plaintiff commenced this action against the community and the board for a declaration, *inter alia*, that the community was not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934.

Held, that the community was not a farmer within the meaning of the Act. The community owns the lands in question but does not farm them. Ownership of farming lands does not constitute the owner a farmer,

much less can it be said that the principal occupation of that owner is farming or tillage of the soil. The tenants of the community were the persons whose principal occupation was farming or tillage of the soil.

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ACTION for a declaration that The Christian Community of Universal Brotherhood Limited was not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934, that the community did not make a proposal as required by the Act, and did not make to the Board of Review a request to formulate a proposal within the meaning of the said Act. Tried by ROBERTSON, J. at Vancouver on the 23rd and 27th of November, 1939.

Hossie, K.C., and *Ghent Davis*, for plaintiff.

McAlpine, K.C., and *C. F. R. Pincott*, for defendant The Christian Community of Universal Brotherhood.

W. S. Owen, for defendant Board of Review.

Cur. adv. vult.

15th December, 1939.

ROBERTSON, J.: On the 18th of May, 1938, the plaintiff commenced an action against the defendant The Christian Community of Universal Brotherhood Limited, to which it will be convenient to refer as the community, to have carried into execution the trusts of a deed of trust and mortgage dated the 3rd of December, 1925, made, between the plaintiff and the community, to secure first-mortgage bonds in the principal amount of $350,000. The amount due at the time of the commencement of the action was, roughly, $170,000.

On the 23rd of June, 1939, the community filed with the official receiver, under The Farmers' Creditors Arrangement Act, 1934, a request in the words following:

The Christian Community of Universal Brotherhood Limited requests a review of its debts with the view to a consolidation and reduction of principal and reduction of interest of its indebtednesses according to the ability of the Christian Community of Universal Brotherhood Limited as farmers to meet.

Christian Community of Universal Brotherhood Ltd.
General Management
N. M. Plotnikoff
President.

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On the 1st of August, 1939, the community purported to request the defendant, the Board of Review, which will be referred to later as the board, to formulate a proposal with the result that the board sent out a notice to the community's creditors, including the plaintiff, as follows:

NOTICE OF REQUEST FOR REVIEW

IN THE MATTER of a proposal for a composition, extension or scheme of arrangement of The Christian Community of Universal Brotherhood Limited, farmers.

Take notice that the written request of the above-mentioned farmer, that the Board of Review endeavour to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement of the affairs of the said farmer, will be dealt with by the board at Nelson, in the county of Kootenay, Province of British Columbia, on Tuesday, the 26th day of September, 1939, at the hour of 2 o'clock in the afternoon at the Court House.

You may make representations in writing or you may apply to be heard orally if you so desire.

Dated at 601 Federal Building, Vancouver, B.C., this 14th day of September, 1939.

J. E. Merryfield
Registrar of the Board of Review of the
Province of British Columbia.

JEM

On the 16th of September, 1939, the plaintiff commenced this action against the community and the board, and, on the same date, filed a statement of claim. It claimed a declaration that the community was not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934; alternatively that the community had not made a proposal, that is, a proposal as required by the Act; and in the further alternative that the community did not make to the board a request to formulate a proposal within the meaning of the said Act. Accordingly it claimed that the Act did not apply to the community; and as a result, the board had no jurisdiction to take any proceedings or to consider the matter at all.

On the same date, an *interim* injunction was granted restraining the defendants and each of them until the trial of the action, or, until further order, from taking any further or any other steps under the Act with respect to the application or the liabilities of the community.

An application was then made to set aside the *interim* injunction on the ground that the order was made without jurisdiction

and without sufficient grounds. My brother FISHER who had heard the application and reserved his judgment, handed down his reasons for judgment on the 20th of October, 1939, in which he held that the application for an injunction was premature. See [*ante*, p. 321]; [1939] 3 W.W.R. 294.

The action came on for trial before me on the 23rd and 27th days of November. At the conclusion of the evidence, it was submitted by counsel for the defendant that I should follow the decision of my brother FISHER, as all the evidence before me, at the trial, was before my learned brother, and, as nothing had occurred since the date of his judgment and the date of the trial to change the situation, and, accordingly, that I should hold that the plaintiff was not entitled to any relief. So far as the injunction is concerned I think I should follow Mr. Justice FISHER's judgment for reasons which I shall now state. I thing all the evidence, so far as the claim for an injunction is concerned which was before me, was before FISHER, J.

In *Sheppard* v. *Sheppard* (1908), 13 B.C. 486, at 488, the Chief Justice of British Columbia (then MARTIN, J.) said:

> With respect to the second point, it would follow, if my learned brother is correct in holding that the said decisions are not binding on him, that his decision is, nevertheless, binding on me because it is a considered opinion given by a judge of this Court which I am bound to follow in accordance with numerous decisions in this Court, cited for the most part in *Watt* v. *Watt*, *supra*, to which I only add the striking example of *Clabon* v. *Lawry*, decided 20th January, 1898, and reported in the note to *Noble Five Mining Co.* v. *Last Chance Mining Co.*, 2 M.M.C., at p. 38. My learned brother has indeed himself recently declared his own duty in the premises in his judgment delivered on the 14th of January last, in the *Victoria Municipal Voters List* matter (unreported), wherein he said:
>
> "It is admitted that the learned Chief Justice of this Court, about this time last year, decided in favour of the right to vote in cases such as this, and I do not think that I should do otherwise than follow."

I follow this decision.

The same view, I think, obtains in England. The Master of the Rolls said in *Parkin* v. *Thorold* (1852), 16 Beav. 59, at 63-4:

> I have repeatedly stated, that in my opinion uniformity of decision was so important to be obtained, that whenever I found a decision pronounced by one of the Vice-Chancellors, I should consider myself to be bound by that decision, where it related either to a new matter or was not opposed by contradictory decisions, or on some one of those principles of equity on which all decisions are founded; and that I should do so, even though, if

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it had originally come before me uninfluenced by any such decision, I might have come to a different conclusion.

Vice-Chancellor James said in *In re Hotchkiss's Trusts* (1869), L.R. 8 Eq. 643, at 647, that he did not think it seemly that two branches of a Court of co-ordinate jurisdiction should be found coming to contrary decisions upon similar instruments; and, that, in that case, he would simply affirm the Vice-Chancellor's decision with the intimation that it was his wish that the whole matter should be brought before the Court of Appeal.

In *Papworth* v. *Battersea Borough Council* (1915), 84 L.J.K.B. 1881, Scrutton, J., followed a considered decision of Horridge, J., saying at p. 1885, as follows:

> There is therefore in this very case a decision by a judge of co-ordinate jurisdiction to myself, of the same Division of the High Court, on the point of law. My view of the judges of this Division is that they follow, and should follow, the decision of another judge of the same Division on a point of law, leaving it to the Court of Appeal to say whether or not that decision was wrong. Therefore, without saying what my own view would have been on the matter if there had not been the decision of my brother Horridge, I follow my brother Horridge's decision that, as a matter of law . . .

In *Cramb* v. *Goodwin,* [1919] W.N. 86, Bailhache, J., speaking of a considered decision of Peterson, J., said, at p. 87,

> although that case was perhaps not strictly binding on him it was the prevailing practice in these Courts to follow a previous judgment by a Court of co-ordinate jurisdiction.

Again in *Russian and English Bank* v. *Baring Bros. & Co.,* [1935] 1 Ch. 120 (reversed, see [1936] A.C. 405, but not on this point) Clauson, J., at p. 124, said:

> Sitting in a Court of equal jurisdiction I should, of course, be bound to follow that view expressed by Bennett, J., . . .

This reference was to the decision, given at the end of the argument, on a petition to wind up the same Russian and English Bank—see *In re Russian and English Bank,* [1932] 1 Ch. 663.

In *In re Smith. Vincent* v. *Smith,* [1930] 1 Ch. 88, Maugham, J., speaking of a judgment of Tomlin, J., at *nisi prius,* said at p. 99:

> I take this opportunity of repeating what I have said on previous occasions, that where a learned judge, after consideration, has come to a definite decision on a matter arising out of this exceedingly complicated and difficult legislation, it is very desirable that the Court should follow that decision, and accordingly I should be strongly inclined, whatever my own view was, to follow what I take to be the positive decision of Tomlin, J.

At p. 97, he points out that Tomlin, J., had "carefully considered the decision of Clauson, J."

It will be noticed that the last four decisions were after the judgment of Bray, J., in *Forster* v. *Baker,* [1910] 2 K.B. 636, in which speaking of a decision of Darling, J., at *nisi prius,* in *Skipper & Tucker* v. *Holloway and Howard, ib.,* 630, immediately after the argument, he said at p. 638:

> He has undoubtedly decided the point in a case which came before him at *nisi prius.* The first question which arises is, am I bound by his decision? I have always understood that one judge is not bound by the decision of another judge on a point of law at *nisi prius,* and, therefore, I think I am bound to consider the case and to decide it according to my own opinion, at the same time, of course, giving great weight to the decision of Darling, J.

du Parcq, J., in *Green* v. *Berliner,* [1936] 2 K.B. 477, referred to a decision at *nisi prius* of Atkinson, J., at the conclusion of the argument in *Tarling* v. *Rome* (1936), 52 T.L.R. 220. At p. 493, he referred to what Bray, J., had said in *Forster* v. *Baker,* and came to the conclusion that he was not bound by Mr. Justice Atkinson's decision.

Again in *Gelmini* v. *Moriggia,* [1913] 2 K.B. 549, Channell, J., speaking of a considered judgment given by Mr. Commissioner Wills (afterwards Mr. Justice Wills) in another case said at p. 552:

> Although that decision was one at *nisi prius,* and therefore probably not binding on me, I think it was right.

Forster v. *Baker, supra,* has also been followed in Saskatchewan —see *Rural Municipality of Bratts Lake et al.* v. *Hudson's Bay Co.* (1918), 11 Sask. L.R. 357, in which Lamont, J., held he was not bound by the considered judgment of Brown, J., in another action.

In *Ross* v. *Fiset,* [1926] 3 D.L.R. 289, Maclean, J., following Lamont, J.'s decision, *supra,* held that he was not bound by a considered judgment of that learned judge in another case. In Manitoba the practice is that a decision of a judge is accepted and followed by any other single judge, unless in very exceptional circumstances. See *In re Fenton,* [1920] 2 W.W.R. 34.

Very often at *nisi prius,* especially in trials with a jury, a judge has to make decisions on points of evidence and law where it is impossible to give the matter the same consideration as if it had been possible for him to reserve judgment. Then, again, a

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judge frequently delivers judgment at *nisi prius* at the conclusion of the argument. With respect, I think Bray, J., was referring in *Forster* v. *Baker, supra,* to decisions of this sort and not to considered decisions, and probably had in mind what Mansfield, C.J., said in *Fentum* v. *Pocock* (1813), 5 Taunt. 192, at p. 195, as follows:

> It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at *nisi prius*.

There is no doubt, it might be right under exceptional circumstances not to follow the decision of a judge or Court of co-ordinate jurisdiction—see *Sheppard* v. *Sheppard, supra; McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386, at 400; *Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307, at 309 and *In re Rahim* (1912), 17 B.C. 276, at 279.

But the circumstances in the case which I have to consider are different to all the other cases which I have mentioned (except the *Russian and English Bank* case, *supra,* decided in 1935) in that a considered judgment of FISHER, J., was given in this very case. It seems to me, under the circumstances, it would be most extraordinary if I should refuse to follow his decision.

The board has not done anything further in the matter. It's counsel stated it was awaiting the decision of the Court. I have still to consider whether or not the plaintiff is entitled to the declaration asked for. Upon this point my learned brother did not give a decision. It, of course, was not necessary for him to do so. All he had to consider was whether or not the injunction should be granted.

The Alberta Court of Appeal has held that an action for a declaration that a person does not come within the provisions of the Act will lie—see *Kettenbach Farms Ltd.* v. *Henke,* [1937] 3 W.W.R. 703, followed by Ewing, J., in *In re The Farmers' Creditors Arrangement Act, 1934,* [1938] 2 W.W.R. 412.

The community was incorporated by letters patent under the Dominion Companies Act on the 21st of April, 1917, with a capital stock of $1,000,000, divided into 10,000 shares of $100 each. Its objects were very wide. For the purpose of this judgment, it is only necessary to state some of these, *viz.,* power

to carry on agricultural pursuits and to manufacture the products of the farm, the soil and the forest; to manufacture, purchase and to trade and deal in, either wholesale or retail, goods, wares and merchandise: to grow, produce, buy and sell, trade and deal in raw materials, grains, fruits and agricultural products and products of the soil and the forest. The community had twelve directors of whom P. Veregin was one.

After its incorporation, on the 7th of September, 1917, the community purchased from P. Veregin certain lands and personal property in the Provinces of British Columbia, Saskatchewan and Alberta for $600,000 which was paid by the allotment to each of its twelve directors of 500 fully paid-up shares. Later, in 1918, two additional directors were appointed and 500 fully paid-up shares were allotted to each. These lands covered by the trust deed were for the most part farm lands and had been occupied, prior to the transfer, by the members of an unincorporated association known as the "Christian Community of Universal Brotherhood" for whom Veregin held these lands in trust. Apparently it was the practice of the members of this unincorporated association to nominate such of their members as they wished, to be directors of the community and the shareholders, at the meeting to elect directors, duly elected these. Each of the first twelve directors, in September, 1917, and, the additional two directors on their election in 1918, gave (1) a power of attorney to the president and general manager for the time being of the community to transfer his shares to the unincorporated association or such body corporate as might become its successor, in the event of his ceasing to be a "member of the council or governing body of the said community" (meaning the association) and "in the event of the directors of the company by resolution authorizing the said president and general manager to execute a transfer," and (2) a declaration of trust that he held the 500 shares upon trust for, and subject to the direction of, the unincorporated association; and in the event of it becoming incorporated, "for the corporation the successor of the said community"; and in the event of the "community or its successor corporation" being dissolved, in trust for such persons or corporation as might be legally entitled to the shares.

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It will thus be seen that the community owned the lands in question. The members of the unincorporated association had not any interest, in law, in these lands.

On the 30th of March, 1926, the directors of the community, after discussing the heavy indebtedness and pressure of creditors upon the community for payment, passed a resolution setting out the terms upon which persons were to occupy its lands in British Columbia which in part is as follows:

After thorough discussion by the board of directors of the present condition of community affairs and of the visit to the community settlement in the Province of British Columbia by D. D. Munro, the loan manager of the Sun Life Assurance Co. of Canada, in Vancouver, B.C. the acting president found it necessary to draw the attention of the board of directors to the heavy indebtedness and pressure of the creditors upon the community for payment. The acting president stated that in view of the present conditions measures must be taken and regulations made to insure assessment if necessary, a reduction of such indebtedness during the year 1926. Therefore, it has been resolved that the following regulations shall be in force and carried out.

1st. Every member of The Christian Community of Universal Brotherhood, who has been assessed for the year 1925, and has not yet paid his assessment shall forthwith do so for the purpose of paying the community indebtedness. Such persons who are in arrears shall immediately make payments to the office of The Christian Community of Universal Brotherhood Limited, and such person or persons being still in default on May first, 1926, shall forfeit all the rights and privileges of membership in the community and shall deliver on demand to the community officers without further notice all and any property of the community then in his or her possession or tenure.

2nd. It is resolved that every person occupying or using the property of The Christian Community of Universal Brotherhood Limited, shall enter into an agreement with The Christian Community of Universal Brotherhood Limited, in the form and in the terms to be arranged by The Christian Community of Universal Brotherhood Limited, whereby he will bind himself to pay to The Christian Community of Universal Brotherhood Limited a certain amount.

The members of The Christian Community of Universal Brotherhood, who are residing in the Province of British Columbia and occupying and using community real and personal property are assessed for the year 1926 with the following amounts from their outside earnings:

(a) Working-men from the age over 20 to 55 years for nine months the sum of $300.00

For their winter work the sum of 50.00

or an equivalent amount of work for the community.

Such assessment to be paid to The Christian Community of Universal Brotherhood Limited office in the following manner:

At the expiration of first two and one half months $80.00 and thereafter $40.00 per month.

(b) Working-men age 19 and 20 for nine months..... $250.00
For winter work 25.00

Payment to be made for the first two and one-half months $60.00 and thereafter $30.00 per month.

(c) The older men of age over 55, which are able to work yet are assessed each for the season sum of $250.00. Ability to work to be decided by the district director or through the board.

Payments to be made for the first two and one half months $70.00 and thereafter $30.00 per month.

(d) Boys age of 17 and 18 years for the season work the sum of $175.00 (No assessment for winter work).

(e) The Christian Community of Universal Brotherhood Ltd. allows for its members in Province of British Columbia free of rental charges one third of an acre of good land per capita for raising vegetables, etc. for own use. Any other land in their possession over and above one third of an acre per capita shall be assessed on percentage basis of valuation of land, *viz.*:

(a) Fruit-bearing orchard value $400.00 per acre.

(b) Land under cultivation suitable for growing vegetables, etc., value $100.00 per acre.

(c) Land under natural hay meadow value $100.00 per acre.

The percentage basis of rent to be assessed yearly 20 per cent. of value of land. All land unsuitable for growing vegetables fruit or hay, such land shall be used by The Christian Community of Universal Brotherhood for growing grain for community use.

The occupants shall take good care of orchard at his own expense, such as cultivation, pruning, spraying, picking and packing. The Christian Community of Universal Brotherhood Limited will provide fruit-boxes and charge occupants account.

The Christian Community of Universal Brotherhood Limited will provide occupant with horses, equipped with harnesses, implements and machinery. All repairs necessary for breakage and wear of said implements, machinery, harness and shoeing horses during the season to be provided and placed on the implement and machinery at the expense of occupancy.

All products, such as fruit including dried fruit, vegetables, hay, etc., shall be marketed through office of The Christian Community of Universal Brotherhood Limited, at the following prices:

[Here follows a list of fruits and prices per lb.]

All proceeds from the sale of above referred to products first shall be applied on payments of all charges due The Christian Community of Universal Brotherhood Limited, and balance of proceeds The Christian Community of Universal Brotherhood Limited shall pay to the occupant.

. . . . .

All timber and forest products on the land belonging to The Christian Community of Universal Brotherhood Ltd., or on timber limit acquired from the Government, will be operated by The Christian Community of Universal Brotherhood Limited, and lessee shall have no right to market the forest products.

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In my opinion this resolution shows that the community was renting its lands. The members of the unincorporated association were the farmers and were doing "the farming and tillage of the soil." There is no evidence to show the community did any farming or tillage of the soil on the lands in question after 1926. The evidence shows that from 1926 the community confined its endeavours in British Columbia to logging and milling forest products, manufacturing and selling jam, and operating stores. It was not doing any farming in Alberta or Saskatchewan in 1938 or 1939. This was the position in June, 1939, when the alleged proposal was made. These facts I think distinguish this case from *Barickman Hutterian Mutual Corporation* v. *Nault et al.*, [1939] S.C.R. 223, in which the facts were as follow:

> The Barickman Hutterian Mutual Corporation was created a body corporate by an Act of the Legislative Assembly of the Province of Manitoba. The preamble recited that a religious community of farmers existed in the Province under the name of Barickman's Colony of Hutterian Brethren who had associated themselves together for the purpose of promoting and engaging in the Christian religion . . . according to their religious belief, and of having, holding, using, possessing and enjoying all things in common and were desirous of being incorporated.
>
> Section 1 of the Act enacted that certain named persons and all others who should become members were constituted a corporation. It provided that all the property of the Barickman Colony of Hutterian Brethren should be vested in the corporation and that the corporation should assume and pay all the debts of the colony; that no individual member of the corporation should have any assignable or transferable interest in the corporation or any of its property; that each and every member should give and devote all his time, labour, services, earnings and energies to the corporation freely and voluntarily without compensation or reward other than as provided in the Act or by-laws; that all property that each member had, or might be entitled to, at any time, should be the property of the corporation to be used for the common interest and benefit of each and all its members. In case any member ceased to be a member, he was not entitled to withdraw any of the property of the corporation, and in case

of death no interest in the corporation or its property passed to his heirs or legal personal representatives. The property, affairs, and concerns of the corporation were to be managed, and its business carried on, by a board of five directors who had full power to exercise all the powers of the corporation given to it by its by-laws and its incorporating statute.

Upon these facts the Supreme Court held the corporation was a farmer within the meaning of the Act. I think these facts clearly distinguish that case from the case I have to decide.

In the *Barickman* case, the corporation owned the farm lands, managed and directed the farming and owned all the produce of the farms. No one else had, or could have, any legal interest in the lands, the farming or the produce. In this case the community owns the lands, but does not farm them. Ownership of farming lands does not constitute the owner a farmer—much less, without more, can it be said that the principal occupation of that owner is farming or tillage of the soil. The tenants of the community were the persons whose principal occupation was farming or tillage of the soil.

The community relied upon a resolution (Exhibit 38) of its directors passed on the 10th of August, 1926, providing, as further security to its mortgagee, the Sun Life Assurance Company, half the produce which the community was to receive from farm lands in Alberta to be leased by it. It is sufficient to say by 1938 the community was not farming or tilling the soil in Alberta. It was also urged that Exhibit 39, a resolution of its directors passed on the 12th of January, 1932, showed the community was merely a corporation to hold the lands of members of the unincorporated association who were farmers and that this entitled the community to the benefit of the Act. The resolution set out that the unincorporated association was founded "on principles of spiritual undertaking" and that its members deprived themselves of all ownership in the lands which the community held as legal owner and which lands were the property of the members of the unincorporated association; that no member had the right to "appropriate . . . unto his ownership" any of such lands; that any member resigning from or being expelled by the unincorporated association deprived him-

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self of all rights to demand from the unincorporated association any share of the properties of the unincorporated association but through legal channels he might petition directors of the community who in their discretion might allot to him a certain share of the community's property. In my opinion this resolution is not evidence against the plaintiff, and in any case was not binding on the unincorporated association. Further it is in direct conflict with the resolution of the 30th of March, 1926, which the community acted upon, throughout.

I hold the community was not a farmer within the meaning of the Act.

The plaintiff is entitled to a declaration accordingly and to its costs against the community. It is not necessary, under the circumstances to consider the plaintiff's alternative submissions. Further consideration will be adjourned so that the plaintiff may make such application as it sees fit, in the event of the board deciding to proceed to deal with the community's "request for review."

Judgment accordingly.

MARTIN v. MARTIN.

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Sept. 20;
Oct. 25.

Practice—Debtor and creditor—Writ of capias ad respondendum—Writ wholly typewritten—Not signed by solicitor—R.S.B.C. 1936, Cap. 15, Secs. 3 and 13.

A writ of *capias ad respondendum* was wholly in typewriting and the name of the plaintiff's solicitor appeared upon it in typewriting only. Upon the application of the defendant the writ was set aside.

APPLICATION by defendant to set aside a writ of *capias ad respondendum* on the ground that it was not signed by the solicitor for the plaintiff. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 20th of September, 1939.

McAlpine, K.C., for the application.
J. A. MacInnes, contra.

Cur. adv. vult.

25th October, 1939.

MORRISON, C.J.S.C.: The point which I am called upon to decide is whether the relevant statute is complied with when a writ of *capias ad respondendum* is wholly in typewriting and there is nothing thereon, other than the typewriting, to show that it was issued by a solicitor. The writ was not delivered to the sheriff nor was it endorsed by a solicitor either in the presence of the sheriff or at all. In *The Queen* v. *Cowper* (1890), 24 Q.B.D. 533, a lithographed statement of the solicitor's name and the particulars of the County Court plaint were held to be insufficient. The reason for requiring the actual signature by the solicitor was for the purpose of making the solicitor responsible as an officer of the Court—*per* Fry, L.J. in *France* v. *Dutton*, [1891] 2 Q.B. 208. The case of *Squire* v. *Wright* (1936), 50 B.C. 411, was cited on behalf of the defendant. It is a judgment of His Honour Judge HARPER. It does not appear that the facts upon which the case was decided are sufficiently reported to enable me to determine that it is applicable. I think it is readily distinguishable. Even in the case of an ordinary writ of summons it is obligatory that the writ and copy shall be "signed

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by or on behalf of the solicitor leaving the same"—Order V., r. 12, Supreme Court Rules, marginal rule 34. Section 13 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1936, Cap. 15, is not applicable to the present facts but it does indicate the care which the Legislature thought was necessary to be observed. Section 20 of that statute provides for the enforcement of any order made thereunder by way of attachment or sequestration. If the actual signature of the solicitor is essential on writs in civil litigation *a fortiori* when the liberty of the subject is involved when proceedings should be construed *strictissimi juris*. The control which the Court exercises over solicitors would be impaired if a subject could be deprived of his liberty by writ wholly in typewriting though purporting to be issued by a typewritten signature of a solicitor of the Court. It can be readily seen the questions which would arise as to its authenticity. The writ therefore should be set aside.

Application granted.

HOWELL v. WALLACE AND GREEN.

S. C.
In Chambers
1939
Sept. 28;
Oct. 3.

Practice—Costs—Collision—Action against both drivers—Third-party notice by each driver against the other—Judgment against one driver and action against driver in which plaintiff a passenger dismissed—Costs as between defendants—Column 2 of Appendix N applicable.

Plaintiff, a passenger in G.'s car, sued G. and W. (driver of the other car) for damages resulting from a collision. Each defendant took out a third-party notice against the other. Upon summons for directions, an order was made for delivery of pleadings by each of the defendants. Each defendant counterclaimed against the other for damages to the motor-cars. Each defendant filed a statement of claim for contribution or indemnity "to the extent of the degree" which the other might have been at fault in contributing to the accident. The defendant W. was found wholly responsible for the accident and G. recovered $141.40 against W. on his counterclaim. G. claimed costs against W. (1) Costs of action, exclusive of disbursements, $805; (2) costs of third-party procedure, exclusive of disbursements, $525. The registrar allowed on the first bill $755, and on the second $445, under column 3. On review of taxation:—

Held, that the taxation should be under column 2, that the third-party proceedings taken by the defendants against each other were part of the proceedings in the action, and accordingly G. cannot recover more than $600 (exclusive of disbursements) on his whole bill.

APPLICATION for an order to review a taxation. Heard by ROBERTSON, J. in Chambers at Vancouver on the 28th of September, 1939.

Donaghy, K.C., for plaintiff.
W. S. Owen, for defendant Wallace.
McAlpine, K.C., for defendant Green.

Cur. adv. vult.

3rd October, 1939.

ROBERTSON, J.: This is an application for an order to review a taxation under the following circumstances:

The plaintiff, who was a passenger in Green's motor-car, sued him and Wallace for unstated damages, arising out of a collision of their motor-cars. Each of the defendants took out a third-party notice against the other. Upon a summons for directions an order was made for the delivery of pleadings by each of the

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defendants, for discovery, etc. It further provided that if it were found at the trial that Wallace was liable to the plaintiff, certain questions were to be tried, at, or after the trial, *viz.*, as to whether Green was at fault, the degree of fault, the extent or proportion of liability to be determined; and the like provision was made in case it were found that Green was liable. Each of the defendants counterclaimed against the other for damages to his motor-car. Each defendant filed a statement of claim for contribution or indemnity "to the extent of the degree" which the other might have been at fault in occasioning the accident.

At the trial the plaintiff recovered judgment against Wallace for $11,866.35. The action was dismissed as against Green. Green recovered $141.40 against Wallace on his counterclaim. The following order as to costs was made:

> And This Court Doth Further Adjudge that the defendant N. H. Wallace pay to the defendant Alban Victor Green his costs of the action and of the third-party proceedings herein forthwith after taxation.

Green's bill of costs against Wallace was divided into two parts: (1) Costs of the action, exclusive of disbursements, $805; and (2) costs of the third-party procedure, exclusive of disbursements, $525. The district registrar accepted his submission that he was entitled to tax his costs under column 3 and a maximum of $1,000 in respect of his costs of the action, and, in addition, a maximum of $1,000, in respect of his costs of the third-party procedure. The district registrar taxed and allowed the first part of the bill at $755, and the second part at $445, making in all $1,200. Wallace submits the costs should be taxed under column 2; that the maximum for the whole bill, exclusive of disbursements, should be $600, and that certain items which I shall refer to later should not be allowed, at all, or, should be reduced.

Appendix N provides for taxation of costs between party and party under one of four columns, according to the amount involved. In all other actions, causes and proceedings the costs are to be taxed under column 2. Neither of the defendants was a plaintiff as against the other. If it could be said he was, then as a definite sum was not claimed, rule 10A. of Order LXV. would apply and the costs would be taxable under column 2. They were parties, however, and Appendix N is a tariff between party and party, and therefore the costs should be taxed under column 2.

Then, Appendix N provides that in all actions in which the items in columns 1, 2 and 3 apply, the maximum amount of costs taxable by any party against any other party, exclusive of disbursements, shall not exceed, in the case of costs taxed under column 2, the sum of $600. In my opinion the third-party proceedings taken by these defendants against each other were part of the proceedings in the action. The items in Green's bill are all contained in Appendix N. I am of the opinion accordingly that Green cannot recover more than $600 (exclusive of disbursements) on his whole bill. Objection was also taken to items 2, 6 and 9. I think that Green is entitled to the two items (6), but in each case the amount should be reduced to $50 as the costs are to be taxed under column 2. I also think Green was entitled to item 2, but the amount should be reduced to $75. I think he is not entitled to item 9 as I think it is included in "all process for third-party procedure" which has been allowed.

I think that Wallace is entitled to the costs of this application. There will be an order accordingly.

Order accordingly.

STAPLES v. ISAACS AND HARRIS. (No. 2).

Practice—Discovery—Action for libel—Refusal to answer certain questions—Refusal to produce document—Tendency to incriminate—R.S.B.C. 1936, Cap. 90, Sec. 5—Rules 370c, 370i (3), and 370j.

Section 5 of the Canada Evidence Act applies to rules 370c and 370i (3), the effect of the rules being that a party being examined for discovery is in exactly the same position as a witness at a trial who is being cross-examined, except that the examination for discovery is limited to the issues raised.

In an action for libel, a defendant, who had refused on his examination for discovery to answer certain questions and to produce a document alleged to contain the libel, on the ground that the answers and the document would incriminate him, was ordered to attend for further examination and answer the questions and produce the document.

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APPLICATION by plaintiff to compel the defendant Isaacs to attend at his own expense and answer certain questions which he refused to answer on his examination for discovery in an action for libel, and to produce for inspection by counsel for the plaintiff a document alleged to contain the libel complained of. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vancouver on the 29th of September, 1939.

Bull, K.C., for the application.
McAlpine, K.C., contra.

Cur. adv. vult.

10th October, 1939.

ROBERTSON, J.: This is an application to compel the defendant Isaacs to attend at his own expense and answer certain questions which he refused to answer on his examination for discovery in an action for libel, and to produce for inspection by counsel for the plaintiff a document alleged to contain the libel complained of, which he also refused to produce on that occasion. The objection to answering the questions was based mainly on the ground that the answers would tend to incriminate him; in some cases there were the additional grounds that the questions were irrelevant in that they did not "touch the matters in question" and were not *bona fide* but were "fishing" questions. The objection to producing the document was that it would incriminate him. Isaacs admitted that he had read from this document to the meeting and that his solicitor had the document in question.

Except where altered by statute, there is no question that the general rule at common law is: "No one is bound to criminate himself"—see *Triplex Glass Co.* v. *Lancegaye Glass Ltd.*, [1939] 2 All E.R. 613.

The Court Rules of Practice Act, R.S.B.C. 1936, Cap. 249, Sec. 4, Subsec. (3), provides that the Supreme Court Rules, 1925, shall regulate the procedure and practice in the Supreme Court in the matters therein provided for. Two of these rules are:

370c. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided.

370i (3). Any one examined orally under these Rules shall be subject to cross-examination and re-examination; and the examination, cross-examination, and re-examination shall be conducted as nearly as may be as at a trial.

Section 5 of the Evidence Act, R.S.B.C. 1936, Cap. 90, is as follows:

5. No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

Section 3 of the Evidence Act enacts that that Act shall apply to "all proceedings and other matters whatsoever respecting which the Legislature has jurisdiction in this behalf."

In my opinion, therefore, it follows that section 5 applies to the rules above quoted. Accordingly Isaacs, although objecting, was bound to answer any relevant questions. He was fully protected by that section, in conjunction with section 5 of the Canada Evidence Act.

In *Blumberger* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 41, the plaintiff applied to compel the defendant to answer interrogatories which he had declined to answer on the ground that the answers might tend to incriminate him. McDONALD, J. refused the application but he pointed out the difference between a party to whom it was sought to administer interrogatories and a party who was being examined for discovery. He said at pp. 41-2:

It is clear that under the English practice relating to interrogatories the defendant would be excused from answering and that is the practice in Alberta. Under our rule relating to examination for discovery the immunity has been taken away inasmuch as Order XXXIA., r. (1) provides that "a party . . . may . . . be orally examined before the trial . . .

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and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of [*sic*] a witness." This rule thus provides that a party being examined for discovery is in the same position as a witness called upon the trial and such a witness loses his immunity by virtue of section 5 of our Evidence Act which provides that no witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him. The position appears to be this therefore: In Alberta the Evidence Act does not apply either to a witness being examined for discovery or upon interrogatories while in this Province a party being examined for discovery is to be treated as a witness and is, therefore, not protected, while a party being examined on interrogatories is not treated as a witness and is in the same position as a party being examined on interrogatories in England and is protected.

Chambers v. *Jaffray* (1906), 12 O.L.R. 377, is an Ontario decision in point. At the time of this decision the Ontario rules 439 and 451 were exactly the same as our rules 370c and 370i (3), *supra*—see Holmested & Langton's Ontario Judicature Act, 3rd Ed., at pp. 646 and 658, and the effect of the Ontario Evidence Act and the then Canada Evidence Act was the same as section 5 of the Evidence Act, *supra,* and the provision in that regard in the present Canada Evidence Act. In this action the defendant refused to answer on examination for discovery certain proper questions on the ground the answers would incriminate him. It was held that he was bound to answer. Meredith, C.J. said at p. 382, referring to consolidated rule 439:

> This rule, in my opinion, therefore, puts a party on his examination for discovery, as far as the question under discussion is concerned, in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground his answer is within the protection of sec. 5. This is secured to him by the words of the rule—"testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness."

As authorities to the contrary the decisions of the Courts in Alberta, *viz., Harrison* v. *King (No. 2)* (1925), 21 Alta. L.R. 381, and *Webster and Kirkness* v. *Solloway, Mills & Co. (No. 2)* (1930), 25 Alta. L.R. 8, were quoted. Unfortunately they do not assist in this matter because in that Province they have no rule corresponding to our rule 370c. The Court held that the party who refused to answer was not a witness.

Then it was submitted that section 5 of the Evidence Act does not apply to the production of documents.

Rule 370j provides:

370j (1.) Any one who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the matters in question in the cause, not privileged or protected from production, shall produce the same for the inspection of the party examining him upon the order of the Court or a Judge, or upon the direction of the Examiner before whom he is examined, and for that purpose a reasonable time is to be allowed.

Defendant's counsel referred to the case of *Campbell* v. *Woods, Imrie and The Canadian Press,* [1926] 2 D.L.R. 805; [1926] 2 W.W.R. 99. There the defendant was being cross-examined on his affidavit of documents, pursuant to a rule in the Province of Alberta, which permitted this to be done. He refused to answer questions on the ground of incrimination. Following *Harrison* v. *King, supra,* it was held that the defendant was not a witness and therefore could not be compelled to answer. See also *Webster* v. *Solloway, Mills & Co., Ltd.* (1930), 24 Alta. L.R. 632, to the same effect.

In our Courts, FISHER, J. held in *Lockett* v. *Solloway, Mills & Co., Ltd. (No. 2),* [1931] 3 W.W.R. 389, that a party against whom an order for inspection of documents was sought under rule 360, was not in the same position as a witness was and therefore entitled to refuse on the grounds of incrimination. See also *Blumberger* v. *Solloway, Mills & Co., Ltd., supra.*

In my opinion the effect of rules 370c and 370i (3) is that the witness is in exactly the same position as a witness at a trial who is being cross-examined except that the examination for discovery is limited to the issues raised. The rule "imports an examination of a searching character": see *Whieldon* v. *Morrison* (1934), 48 B.C. 492, at p. 497, in which the earlier cases of *Bank of British Columbia* v. *Trapp* (1900), 7 B.C. 354, and *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, in this Province are followed.

In *Hopper* v. *Dunsmuir, supra,* at p. 29, HUNTER, C.J. indicated that the cross-examination on discovery was one "in reality as well as in name." When the witness is asked to produce the document, he can then object to answer and thus protect himself. It is necessary to state what the issues are.

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The plaintiff alleges that Isaacs falsely and maliciously wrote, and did at a public meeting held at Vernon, B.C., on August 16th, 1938, read the "libels" complained of and thereby his character, credit and reputation were injured; and he claims damages.

In his defence Isaacs denied all the facts in the statement of claim; he says that if he wrote and published the libels (which is denied) they are "incapable of the alleged meaning or of any other defamatory or actionable meaning"; that the words complained of were part of a speech delivered by him at a meeting of fruit-growers held at the Vernon Fruit Union Hall at Vernon, B.C., on August 16th, 1938; that he is a fruit-grower and had a common interest with other fruit-growers attending such meeting and that the words were spoken and published (if at all) *bona fide* and without malice towards the plaintiff and under a sense of duty and in the honest belief that they were true and that therefore the occasion was privileged; and that they were a fair and *bona-fide* comment on matters of public interest. Finally he sets up that if he read and published the words complained of (which is denied) that the words in their natural and ordinary signification were true in substance and in fact. The plaintiff, of course, is entitled on the discovery to ascertain anything he can which will be of assistance to him in proving his case and also in disproving the defence. He is entitled to elicit from the defendant any facts which are relevant on the questions of malice and damages.

It was submitted some of the questions were irrelevant as they were directed to the defendant's source of information and the names of the persons to whom he gave copies of the alleged libels. *Edmondson* v. *Birch & Co., Limited,* [1905] 2 K.B. 523, an action for libel in which the defendant set up privilege, was referred to. The plaintiff applied to administer interrogatories inquiring what information the defendant had received which induced him to make the statement complained of and from whom the information was derived. The Court refused to allow the interrogatories, being of the opinion, from certain correspondence, that the interrogatories were not *bona fide* for the purpose of the action, but were asked in order to enable the

plaintiff to obtain information to take action against the person or persons from whom the information was derived. This case was distinguished in *Chapman* v. *Leach,* [1920] 1 K.B. 336—also an action for libel where privilege was pleaded—in which the plaintiff sued to administer similar interrogatories. Certain correspondence was relied upon by the defendant to show that the interrogatories were not *bona fide.* The Court allowed the interrogatories as it was of the opinion that the interrogatories were *bona fide.* In *de Schelking* v. *Cromie* (1918), 26 B.C. 345, the learned Chief Justice, then MORRISON, J., refused to order the defendant, a newspaper manager, to answer certain questions as to the sources of his information on the ground they were not *bona fide* for the purposes of the pending action. *Edmondson* v. *Birch & Co., Limited, supra,* was cited in *Hays* v. *Weiland* (1918), 42 O.L.R. 637, but does not appear to be mentioned in the judgment. This was also an action for libel contained in a pamphlet printed by the defendant. The defendant when being examined for discovery refused to name the person to whom he gave the printed copies, or questions which might give a clue to the identity of that person. It was held that the name of the person was a relevant fact and that the plaintiff was entitled to information with regard to that fact although it involved the disclosure of the name of the witness; also the rule that newspapers sued for libel were not bound to give the source of their information, on the ground of public policy, is applicable only to newspapers.

In *South Suburban Co-operative Society* v. *Orum,* [1937] 2 K.B. 690, the plaintiff sued for damages for alleged libel contained in a letter written by Orum and published in a newspaper. The Court of Appeal held that the rule which exempts a proprietor or publisher of a newspaper from declaring the name of a person who publishes information did not extend to private individuals. Scott, L.J., whose judgment Greer, L.J. said was to be taken to be the judgment of the Court, said at pp. 700-1:

> In the ordinary case of a libellous statement made upon the faith of information gathered from third parties, it is relevant to the issue of malice raised by a plea of fair comment for the jury to know, not only what the information was, but also any facts affecting the propriety of the defendant's action in accepting the information at its face value to the extent of making

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a defamatory statement about the plaintiff upon the credit of it. The whole of the circumstances in which the defendant obtained the information are or may be relevant; and of these circumstances not the least relevant will be the position, standing, character and opportunities of knowledge of the particular person upon whom the defendant says he relied for his information. If the defendant is in a position to give those particulars about his informants, the plaintiff is entitled to know them in order that he may criticize the defendant's conduct and also in order that he may make his own enquiries about the persons named, with a view to attacking the defendant's alleged reliance upon the information so received. If the defendant is not in a position to say from whom he got his information, this admission may in itself be a valuable piece of evidence for the plaintiff.

I think the questions directed to this point objected to by the defendant were proper questions. There is nothing to show that they were made *mala fide*. They have a bearing on the defence.

There will be an order that the defendant attend at his own expense before the district registrar of this Court at Kelowna, B.C., for further examination for discovery, pursuant to an appointment to be given by the district registrar and do then produce for the inspection of counsel for the purpose of such examination the document referred to in question 18 of the transcript of said examination, and do answer the following questions [the numbers of the questions set out].

The plaintiff is entitled to the costs of this application.

Application granted.

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YOUNG v. THE TORONTO GENERAL TRUSTS CORPORATION *ET AL.* (No. 2).

Aug. 8;
Nov. 13, 16.

Costs—Action brought by administrator on behalf of deceased's estate—Whether administrator personally liable for costs.

An action brought by the administrator of the estate of Esther Ann Young, deceased, against the defendants, was dismissed, giving leave to the parties to speak to the question of costs if they could not agree. The parties not having agreed, the question of costs was argued before the trial judge.

Held, that the defendants' costs be taxed, the same to be levied of the goods and chattels which were of the above-named Esther Ann Young, deceased, at the time of her death, in the hands of the plaintiff as her

administrator to be administered, if he has so much thereof in his hands to be administered, and if he has not so much thereof in his hands to be administered, then the costs to be levied of the proper goods and chattels of the said plaintiff.

ARGUMENT as to costs after dismissal of an action brought by the administrator of the estate of Esther Ann Young. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 8th of August, and the 13th and 16th of November, 1939.

Howard, for plaintiff.

Norris, K.C., for defendant Young.

Tysoe, for defendants The Toronto General Trusts Corporation and Mowat.

FISHER, J.: In this matter an action was brought by John Henry Young, administrator of the estate of Esther Ann Young, deceased, as plaintiff, against the defendants, and some time ago I dismissed the action [reported, *ante,* p. 284], giving leave to the parties to speak to the question of costs if they could not agree.

The parties not having agreed, the question of costs has been very fully argued before me. It is contended by counsel on behalf of the plaintiff, that, if the plaintiff is liable at all, he is only personally liable to the defendants for the costs of the action.

Reference has been made to Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 435, sec. 825, reading in part as follows:

> In ordinary cases an executor or administrator, who sues as such . . . , is personally liable for the costs of the action.

and citing *Boynton* v. *Boynton* (1879), 4 App. Cas. 733.

A reference to that case, however, does not seem to me to settle the question as to whether or not the costs of the defendants might not be made payable out of the estate, or that the order should not be along the lines set out in the form of judgment for plaintiff after a trial against an executor or administrator, as given in Chitty's King's Bench Forms, 16th Ed., 689, where the plaintiff has succeeded in an action against an executor or administrator of an estate.

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YOUNG v. THE TORONTO GENERAL TRUSTS CORPORATION *et al.*

Fisher, J.

In the *Boynton* case as reported in (1878), 9 Ch. D. 250, the head-note reads as follows:

A plaintiff died after having obtained a decree with costs, and having appointed one of the defendants, who had a concurrent interest with her, her executor. Two others of the defendants served notice of appeal. The executor after this obtained the common order of revivor. The appeal afterwards came on to be heard, and the bill was dismissed with costs as against the appellants:—

Held, that the executor had adopted the suit for all purposes, and that the costs were payable by him personally, and not merely out of the estate of the original plaintiff.

Upon appeal against this decision of the Court of Appeal which reversed a previous decision of Vice-Chancellor Hall, the Lord Chancellor (Earl Cairns), apparently delivering the judgment of the Court, and affirming the decision of the Court of Appeal, said in part as follows. See (1879), 4 App. Cas., *supra*, at p. 735:

A second and subsidiary question was raised, whether the order of the Court of Appeal was right in fixing the appellant, Charles Boynton, with the costs, in place of ordering them to be paid out of the estate of Lady Boynton. I think the decree is right.

As I have already intimated, I do not think this settles definitely the question which has been raised before me as to whether or not in the present case the costs may be made payable out of the estate.

During the argument many other authorities have been referred to, including *Southgate* v. *Crowley* (1835), 1 Bing. (N.C.) 518; 131 E.R. 1217; *Ashton* v. *Poynter* (1835), 1 C. M. & R. 739; *Horlock* v. *Priestley* (1837), 8 Sim. 621, and Chitty's Archbold's Q.B. Practice, 14th Ed., Vol. 2, pp. 1116-17, reading as follows: and also citing the *Boynton* case, *supra*:

The costs are now regulated by R. of S.C. Ord. LXV. (see *ante*, Vol. 1, p. 672), as in ordinary cases. Subject to this rule, if the judgment be for the plaintiff, he is entitled to costs as in ordinary cases; and where the judgment is for the defendant, he is, in general, entitled to costs as in ordinary cases. Before the stat. 3 & 4 W. 4, c. 42, s. 31, an executor suing as plaintiff was not generally held liable for costs, but by that statute "In every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the Court in which such action is brought, or a judge of any of the said superior Courts, shall otherwise order) be liable to pay costs to the defendant in case of being non-suited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right and upon a cause of action accruing to himself, and the defendant shall have judgment

for such costs, and they shall be recovered in like manner." This is, however, expressly repealed by stat. 42 & 43 V. c. 59 (2nd Sched., part 1), and stat. 46 & 47 V. c. 49, s. 4, and is only useful as a guide in applying Ord. LXV. As a general rule, executors plaintiffs are or will be made personally liable to costs when they do not succeed, and it is incumbent on them to show some facts which may satisfy the Court that they should be exempt in the particular case; and it is not enough to show hardship in the case of the plaintiff, unless it be shown that it was occasioned by the misconduct of the defendant. This liability extends to cases where the executor has obtained leave to continue an action commenced by his testator.

Reference was also made to *In re Blundell. Blundell* v. *Blundell* (1890), 44 Ch. D. 1; *Hawley* v. *Hand* (1919), 48 D.L.R. 384; Yearly Practice, 1939, pp. 205 and 206, and our own Supreme Court Rules, 1925, Order LXV., r. 1.

I have carefully considered the arguments of counsel and the authorities referred to, and have come to the conclusion that I have jurisdiction to order, and that I should order, as I do in this case, that judgment be entered for the defendants dismissing the action, with the defendants' costs to be taxed, the same to be levied of the goods and chattels which were of the above-named Esther Ann Young, deceased, at the time of her death, in the hands of the plaintiff as her administrator to be administered, if he has so much thereof in his hands to be administered, and if he has not so much thereof in his hands to be administered, then the said costs to be levied of the proper goods and chattels of the said plaintiff, John Henry Young.

Order accordingly.

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Sept. 22, 25, 26; Dec. 8.

DON INGRAM LIMITED v. GENERAL SECURITIES LIMITED.

Contract—Finance company to furnish funds to automobile dealer—Breach —Measure of damages.

The Studebaker Corporation of Canada Limited gave a franchise to the plaintiff for the retail distribution of its cars in a designated area in British Columbia; the defendant agreed to provide funds for their payment on arrival in Vancouver. Plaintiff, after securing defendant's approval as required, ordered the Studebaker Corporation to ship 26 cars to Vancouver. On their arrival, in breach of his contractual obligation, defendant refused to provide funds to release them, and as the plaintiff could not secure the money elsewhere, the franchise was cancelled by the Studebaker Corporation. It was found that as a result, the plaintiff's business was destroyed and the assets had to be sold at a loss. The plaintiff recovered judgment and damages were assessed: (1) Damages arising from loss of profits on the 26 automobiles, $2,000; (2) damages arising from loss of the franchise and consequent loss of business, $5,000; (3) damages arising from the loss on realization of the assets, $1,000.

Held, on appeal, affirming the decision of FISHER, J., that applying the main principles enunciated in *Hadley* v. *Baxendale* (1854), 23 L.J. Ex. 179, *viz.*, that fairly and reasonably considered, the loss of the franchise must in the usual course be treated as arising from the breach. Reasonably regarded, it was within the contemplation of the parties, the probable result of the breach at the time the contract was made. The items of damage allowed by the trial judge should not be disturbed.

APPEAL by defendant from the decision of FISHER, J. of the 19th of April, 1939 (reported, *ante*, p. 123) in an action for damages for breach of contract. The contract was one under which the plaintiff claims the defendant undertook, for reward, to make available to the plaintiff certain moneys and credit with which to finance a shipment of Studebaker automobiles, the plaintiff having the exclusive franchise for the wholesale and retail distribution of the automobiles in British Columbia. The defendant had had for about four years a general and exclusive contract with the plaintiff for the financing of the plaintiff's business operations. The plaintiff is a private Provincial company, and in 1935 obtained the exclusive franchise to sell Studebaker cars and trucks in British Columbia. The defendant is a Provincial company carrying on a general finance business for

reward. In 1934 an agreement was concluded between the plaintiff and defendant whereby the defendant agreed to finance the plaintiff for the purchase and sale of automobiles and supply working capital, and it was understood that the plaintiff was to finance only through the defendant. In October, 1937, a shipment of 24 cars was arranged between the plaintiff and the Studebaker Corporation, and the defendant company agreed to finance it. The plaintiff then arranged with the shipping company to transport the cars. Later one MacDougall, the manager of the defendant company, had misgivings about the financial situation, and seeing Ingram, the manager of the plaintiff company, suggested that he cancel the order which had been placed. As the cars had been shipped by that time it was impossible to do this. A first shipment of fifteen cars arrived at Vancouver on December 7th, 1937, and upon the plaintiff requesting the defendant to furnish funds in conformity with the contract, the funds were not supplied. Owing to the inability of the plaintiff to finance the shipment, the Studebaker Corporation cancelled the plaintiff's franchise on the 10th of January, 1938. The plaintiff having lost its business, was obliged to give up its premises, sell its assets and pay its liabilities. The learned trial judge allowed damages (a) Loss of profits on the 26 automobiles, $2,000; (b) damages arising from the loss of the franchise and consequent loss of business, $5,000; (c) damages arising from loss on realization of the assets, $1,000.

The appeal was argued at Victoria on the 22nd, 25th and 26th of September, 1939, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

Bull, K.C., for appellant: The true measure of damages is the loss that naturally results from the breach of the contract provided such loss is not too remote. It may be that the breach by the appellant was the *causa sine qua non*, but was not the *causa causans* of the loss: see *Duckworth* v. *Ewart* (1863), 2 H. & C. 129, at p. 143. There is no rule relating to the measure of damages which depends for its application on the personal worth of a person who claims the damages: see *South African Territories* v. *Wallington*, [1897] 1 Q.B. 692; *Western Wagon and*

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Property Company v. *West,* [1892] 1 Ch. 271, at p. 277. If the rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, applies, the damages should be limited to the amount fixed by the learned judge, namely $2,000. See also Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 94, sec. 116; *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, at p. 508; *Horne* v. *Midland Railway Co.* (1873), L.R. 8 C.P. 131, at pp. 139, 141 and 145; *Simon* v. *Pawson and Leafs Limited* (1932), 148 L.T. 154; *Fitzgerald* v. *Leonard* (1893), 32 L.R. Ir. 675. That the plaintiff is not entitled to damages for the loss of the goodwill of its business see *Bostock & Co. Limited* v. *Nicholson & Sons, Limited,* [1904] 1 K.B. 725; *Leonard & Sons* v. *Kremer* (1913), 4 W.W.R. 332; *Renewo Products Ltd.* v. *Macdonald & Wilson Ltd.* (1938), 53 B.C. 328. It was not suggested by the respondent that at the time the contract was made or prior thereto, any reference was made either by Ingram or MacDougall to the Studebaker franchise or any possibility of its loss, or the loss of respondent's business in the event of there being any breach of the contract, and even if MacDougall knew of the franchise he never could have contemplated that the failure to lend the money might result in respondent losing the contract. The award of $1,000 for the loss on realization of the assets by the respondent cannot be supported on any ground. The parties could never have contemplated such a loss as the result of a breach.

Locke, K.C. (*T. E. H. Ellis,* with him), for respondent: The appeal is against the assessment of damages only. The breach of contract in question was a deliberate and inexcusable one, with disastrous results to the plaintiff, putting it out of business entirely. The learned trial judge having made his assessment of damages on a correct principle, a Court of Appeal should not disturb the same: see *Warren* v. *Gray Goose Stage Ltd.,* [1938] S.C.R. 52, at p. 55; *McHugh* v. *Union Bank of Canada,* [1913] A.C. 299, at p. 309. Unless the trial judge was clearly wrong in making the assessment or the damages are unreasonably excessive, the same should not be reduced in any way. The *quantum* of damages is not excessive, but in fact is not sufficient. The plaintiff's business was a profitable one and it has been

wiped out entirely. On a breach of contract to furnish credit or lend money, substantial damages may be recovered. There was substantial evidence to support the findings, and no appeal has been taken against them. Failure to carry out a contract to furnish credit is very different from failure to carry out a contract to repay money previously borrowed: see Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 121, sec. 153. See also *Prehn* v. *The Royal Bank of Liverpool* (1870), 39 L.J. Ex. 41; *Larios* v. *Bonany y Gurety* (1873), L.R. 5 P.C. 346, at p. 357; *The Manchester and Oldham Bank Limited* v. *W. A. Cook and Co.* (1883), 49 L.T. 674, at pp. 678-9; *South African Territories* v. *Wallington,* [1897] 1 Q.B. 692, and on appeal [1898] A.C. 309; *The Wallis Chlorine Syndicate (Limited)* v. *The American Alkali Company (Limited)* (1901), 17 T.L.R. 656, at p. 657. Damages assessed are recoverable at law; they are (1) Damages which may fairly and reasonably be considered the natural and probable results of the breach; (2) damages which the party in default knew or ought to have known would result from the breach. These principles overlap to some extent and are discussed jointly. It was found the defendant had full knowledge of the consequences of the breach. He was vitally interested in the plaintiff's business. The evidence supports the learned judge's findings and his conclusions are supported by *Hadley* v. *Baxendale* (1854), 9 Ex. 341, and *Rivers* v. *George White & Sons Co. Ltd.,* [1919] 2 W.W.R. 189. The holding in *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499, and *Horne* v. *Midland Railway Co.* (1873), L.R. 8 C.P. 131, that there must be something amounting to an express or implied undertaking on the part of the defendant to be liable for special circumstances of his breach, has been rejected by later decisions, which establish the principle that the defendant's liability is not created by agreement but is imposed by law: see *Hydraulic Engineering Company* v. *McHaffie* (1878), 4 Q.B.D. 670, at p. 674; 16 L.Q.R. 286; *McMahon* v. *Field* (1881), 7 Q.B.D. 591; *Boyd* v. *Fitt* (1862), 14 Ir. C.L.R. 43; *Wilson* v. *The Northampton and Banbury Junction Railway Company* (1874), 43 L.J. Ch. 503, at p. 505. The *quantum* of damages assessed by the learned trial judge is not excessive and there is

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ample evidence on which the assessment could be based. It is submitted that the plaintiff suffered a loss to its credit and reputation, which was a natural and probable result of the defendant's breach of contract and was within the contemplation of the parties at the time the contract was made. The evidence establishes that the plaintiff suffered damages to a greater extent than that allowed by the learned trial judge. Two thousand dollars was allowed for loss of profits on the 26 automobiles. This is a straight mathematical calculation and the evidence shows the profit would have been $2,538. The evidence shows that the net loss on realization of assets is more than $1,000 over what was allowed. The evidence shows that the plaintiff made an annual profit of $4,900, and the sum of $5,000 allowed for the loss of the franchise should be substantially increased.

Bull, replied.

Cur. adv. vult.

On the 8th of December, 1939, the judgment of the Court was delivered by

MACDONALD, J.A.: Appeal from a judgment of FISHER, J. awarding respondent $8,000 damages in an action for beach of contract. Appellant agreed, for a consideration, to furnish funds to respondent to carry on a motor agency for the purchase and resale of motor-cars; also to provide respondent with working capital. The Studebaker Corporation of Canada Limited gave a franchise to respondent for the retail distribution of its cars in a designated area in British Columbia; the appellant, as intimated, agreed to provide funds for their payment on arrival in Vancouver. Respondent, after securing appellant's approval as required, ordered the Studebaker Corporation to ship 26 cars to Vancouver. On their arrival, in breach of his contractual obligation, appellant refused to provide funds to release them and as respondent could not secure assistance elsewhere the franchise was cancelled by the Studebaker Corporation. The breach is now conceded and the appeal confined solely to the question of damages. Appellant contends that the trial judge proceeded upon a wrong principle. A more complete statement of facts will be found in the judgment under review; the foregoing general statements, however, are sufficient for our purpose.

Appellant submitted that if respondent had sufficient, or reasonable capital and credit it could, after breach have procured the money elsewhere, possibly at a higher rate of interest with little, if any, damage ensuing. The right to recover damages for breach of contract in such a case as this does not depend upon the financial standing of the injured party. Respondent was obliged to mitigate the damages by securing funds elsewhere, if possible; its manager made reasonable efforts to do so and failed.

We are not concerned with a contract to loan money *solus* where, upon breach, it might be procured elsewhere in the market, possibly without loss. The whole situation, together with its background, must be considered to find whether or not the question of the loss of the franchise upon withdrawal of appellant's support was within the contemplation of the parties or, on the other hand, a "special circumstance" entailing liability only if appellant impliedly agreed to assume it. In my view damages for loss of franchise naturally, and in the usual course, followed the breach and no question of remoteness or of special circumstances arise.

Before respondent could start this agency at all, it had to secure (1) a franchise or a right to sell Studebaker cars in a certain area and (2) a financial arrangement to enable it to do so. That is an ordinary and usual method of conducting this business. It doubtless was a safe and satisfactory method of conducting it for all parties concerned in this triangular arrangement. The manufacturer would receive payment through moneys advanced by General Securities; the agent would be provided with funds to repay advances on the sale of the cars; the franchise would be secure and this agency maintained if all three parties (although not parties to one agreement) performed their respective parts. If one failed, the whole structure collapsed. We are not therefore concerned simply with the breach of an agreement by one to lend money to another on a certain date. Appellant too, as found by the trial judge, had full knowledge of all the circumstances; its manager knew, or reasonably must be taken to have known, that the franchise could only be maintained if the cars were paid for with money furnished by it.

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What more natural than that the immediate consequence of his default would be loss of the franchise?

We have therefore a structure jointly created. Respondent's business or agency was supported by two props: if one should be withdrawn the other was bound to fall. Appellant's manager maintained close relations with the business of the respondent and with the Studebaker Corporation; he was aware of this interdependent situation. The suggestion that upon breach the Studebaker Corporation would protect respondent by doing something (warehousing the cars) it was not obliged to do is not tenable. One cannot escape payment of damages by professing to believe that another, under no obligation to do so, would make good the breach he created.

We are therefore only concerned with applying the main principles enunciated in *Hadley* v. *Baxendale* (1854), 23 L.J. Ex. 179, *viz.*, that, fairly and reasonably considered, the loss of the franchise must in the usual course be treated as arising from the breach. Reasonably regarded it was within the contemplation of the parties—the probable result of the breach at the time the contract was made. I would not disturb any of the items of damage allowed by the trial judge nor would I increase the damages as requested by cross-appeal.

Appeal dismissed.

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

Solicitors for respondent: *Buell, Ellis & Sargent.*

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May 25;
June 5.

Criminal law—Conviction for murder—Appeal—Dismissed—Judgment not entered—Application to reopen case for further argument—Statement of accused on preliminary inquiry—Objection that statement was not a sworn one—Refused—R.S.C. 1927, Cap. 36, Secs. 684, 685 and 1001; Cap. 59, Sec. 4.

On motion by the accused to reopen the case after judgment was pronounced but not yet entered, objection was raised to the admission in evidence of the statement made by the accused at his preliminary inquiry on the ground that the statement was inadmissible because it was not a sworn one, and in any event it was not voluntary.

Held, that the statement was voluntary and there is nothing in the sections of the Criminal Code that were referred to (*i.e.*, sections 684, 685 and 1001) nor in section 4 of the Canada Evidence Act, that justify the restriction of such statements to those made under oath.

MOTION to the Court of Appeal to hear further argument in support of the appeal after judgment delivered but before entry. Heard by MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A. at Vancouver on the 25th of May, 1939.

Stuart Henderson, for the motion.
Clearihue, K.C., for the Crown.

Cur. adv. vult.

5th June, 1939.

MARTIN, C.J.B.C. (*per curiam*): On the 25th of May last we allowed the motion of the appellant to submit further argument in support of this appeal wherein we had, on the 16th of May, pronounced judgment, not yet entered, dismissing the same.

That argument resolved itself, in substance, into, first, the presentation of another objection to the admission in evidence of the statement made by the accused (appellant) at his preliminary inquiry (which we had ruled was properly admitted by the learned trial judge) *viz.*, that the statement was inadmissible because it was not a sworn one, and, further, that in any event it was not voluntary.

We have considered this further objection with the result that, in our opinion, the statement was voluntary, and there is nothing

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in the sections in the Criminal Code, R.S.C. 1927, Cap. 36, that were referred to, *viz.*, sections 684 (with Form 20), 685 and 1001, nor in section 4 of the Canada Evidence Act, R.S.C. 1927, Cap. 59, that would justify the restriction of such statements to those made on oath, nor can we find any expressions in the cases that were cited as bearing upon the question that support such a curtailment of the plain language of the statute.

There was also submitted, upon said further argument, a second, and new, ground of appeal, *viz.*, that the learned trial judge had commented, in effect, though not directly upon the failure of the accused to testify in his own behalf, contrary to the prohibition contained in subsection 5 of said section 4 of the Canada Evidence Act.

We have considered that question with the result that, in our opinion, it is clear there is no reasonable ground to support the submission that what was said by the learned judge could in its "natural and probable meaning" have produced such an effect upon the minds of the jury.

It follows that our judgment will stand as pronounced.

Motion refused.

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Aug. 4, 5.

HOME OIL DISTRIBUTORS LIMITED *ET AL.* v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Practice—Courts—Interim injunction pending appeal to Supreme Court of Canada—Motion to single judge of Court of Appeal—Powers under section 10 of Court of Appeal Act—R.S.B.C. 1936, Cap. 57, Sec. 10.

On a motion to restrain the coming into force of a price-fixing regulation of the board appointed under the provisions of the Petroleum Products Control Board Act, until the hearing of the appeal to the Supreme Court of Canada, heard by a single judge of the Court of Appeal under the powers granted by section 10 of the Court of Appeal Act, a restraining order was granted until the next sitting of the Court of Appeal, when that Court would deal with the motion.

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MOTION to a judge of the Court of Appeal under section 10 of the Court of Appeal Act, to restrain the coming into force of a price-fixing regulation of the board appointed under the Petroleum Products Control Board Act, until the hearing of the appeal to the Supreme Court of Canada. Heard by MARTIN, C.J.B.C. at Victoria on Friday, the 4th of August, 1939.

J. W. deB. Farris, K.C. (*Symes,* with him), for the motion.
Wismer, K.C., A.-G. (*J. P. Hogg,* with him), *contra.*

Cur. adv. vult.

5th August, 1939.

MARTIN, C.J.B.C.: This is a motion to, in effect, restrain the coming into force of a price-fixing regulation of the board on Monday next, and it is made to me in the exercise of the special jurisdiction conferred upon me by section 10 of the Court of Appeal Act, R.S.B.C. 1936, Cap. 57, the exercise of which is one of very considerable responsibility in a case of this exceptionally grave and important nature.

I have that sole responsibility cast upon me for the present in deciding what is best to be done in circumstances which are in my experience (being, I may say, one which will in a few days be of 41 years upon the Bench) unique, in that, apart from other aspects, whatever order I may make it is conceded that irreparable injury will result.

And there is the additional circumstance that if the ordinary course of entering the judgment had been followed this matter would have come before the Court a day or two after we pronounced our judgment on June 9th last ((1939), [*ante,* p. 48]), because we sat continually for three weeks thereafter, and if that course, as I say, had been followed, the present situation would not have been created, much valuable time would have been saved and the whole matter could have been then brought to a head by the Court's decision of what was best to be done in the situation.

What is asked by this motion is to restrain the operation of said regulation until after the hearing of the appeal from this Court which is now pending before the Supreme Court of Canada, and which in the ordinary course of events will, counsel inform me, be about October 10th, but judgment cannot in a case of this

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sort reasonably be expected immediately after argument of counsel, and so the case would probably be decided somewhere about the beginning of November at the earliest.

I have applied my mind to the best of my ability to this unusual situation, and while I am unable to accede to the full extent of the motion that I should grant a restraining order until the end of the hearing of the said appeal to the Supreme Court of Canada, yet I think the justice of the case requires that the restraining order should be granted until the next sitting of this Court, that is to say, September 12th, when this Court will meet here, and upon that occasion the Court can pronounce what is best to be done thereafter and the situation will probably have received a clarification which will, I think, be valuable.

It is unnecessary to go into all the reasons which have animated me in coming to this decision, but I must say I was impressed with the recent decision of the Privy Council, to which plaintiffs' counsel referred yesterday, that is to say, in *Ladore* v. *Bennett*, 21 C.B.R. 1; [1939] 2 W.W.R. 566, at 568 and 573, wherein their Lordships declared that the "purpose in view" of the Legislature—I quote from p. 573—is the purpose that the "Government of the Province had before them before promoting"—to use their words—before "promoting in the Legislature the statute now impugned."

That is important because one of the members of this Court, my brother MCQUARRIE, at p. 428 of his reasons herein published in [1939] 2 W.W.R. 418; [*ante*, at p. 56] to which reference was made yesterday, takes a view which, as I understand it, is largely contrary to the effect of their Lordships' decision. I am free to confess when the submission as to the "purpose in view," being that which is "promoted" in the Legislature by the Government of the day which controls legislation, was made to this Court I felt somewhat in doubt about its limits, while recognizing its force, since that submission went further than had been previously submitted to us, but it now appears to be a full justification of the learned counsel's submission in that important regard.

It is opportune to say how necessary it is to be careful in these matters of constitutionality because the state of the law in regard to the distribution of powers under the British North America

Act, 1867, in this country is something that we all know is so unsatisfactory that great efforts are being made in the highest quarters to effect a change.

Since the decision in *Ladore's* case, *supra,* on this point was made known to me yesterday—the full report has only reached us within the last few days—I now read its date and find that it had been decided just a month—on May 8th—before we pronounced our said judgment on June 9th—and if it had before that been possible to bring it to our attention, though not reported, it would have merited close consideration, by myself at least.

I think it is unnecessary to say more in reference to the entry of our said judgment than that on the application that was made to settle its minutes by the registrar yesterday morning, he, under the circumstances of this pending motion, very properly felt it would not be right for him to deal with the matter and so referred it to me as representing the Court under said section 10, and in view of the exceptional circumstances and the fact that I think it is right for the parties to have, if it is desired, the opinion of my brothers upon the continuation of this order on September 12th, I also refrain, in fairness to the plaintiffs, from taking any further steps to implement the entry of said judgment until I shall have the opinion of my brothers as to what is proper to do in said circumstances.

This is a case, I think, in which it will not be found to be against the public interest that this short postponement of the coming into effect of the board's regulation should take place.

I am reminded of a well-known saying of a very great man, one of the very greatest of mankind, no less than President Lincoln, and that immortal man made this statement in his first inaugural address in 1861, when he was as President facing the dark cloud of conflict overshadowing the North and the South, and he said: "Nothing valuable can be lost by taking time." In my opinion that is very appropriate to the present situation. I add that it is to be observed that Lincoln was not only so great a man, but a very sound lawyer.

In regard, then, to the form in which this special order that I have now directed shall be drawn up, I think it is safest to follow in substance that which was adopted by this Court before.

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HOME OIL DISTRIBUTORS LTD. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Nothing depends upon the mere form of it, as the Attorney-General very properly said yesterday, for its object is to prevent, in substance, the enforcement, *pro tem.*, of this regulation complained of, so if counsel will draw up the order that I now make and submit it to the registrar, it shall be signed immediately.

If there is anything more to mention, gentlemen, I shall be glad to hear you, but I think I have said everything necessary to meet the present situation.

[Counsel here said they had nothing more to add.]

Motion partly granted.

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1939
June 9;
Sept. 7.

WOOD v. JOHNSON.

Will—Interpretation—Whether devise to widow absolute or subject to trust.

By his will a testator bequeathed all his property of whatsoever kind or nature to his wife absolutely. This was followed in the will by a clause stating that in certain circumstances all the property herein transferred to her that remains unused by her at the time of her death shall be treated as held by her in trust for certain uses (see clause 4 below).

Held, that the widow had power to dispose by will of all property passing under her husband's will.

THE testator, John Samuel Wood, died without heirs of his body, and left, amongst other property, an undivided one-half interest in a hotel now known as the Pennsylvania Hotel and formerly known as the Woods Hotel. At the time of his death the other undivided one-half interest was owned by his widow Eliza Ann Wood. The testator died on August 16th, 1907, and his will was duly probated by his widow as executrix. The widow died in August, 1938, and by her last will and testament appointed the defendant Erminie Marie Johnson the executrix and sole beneficiary of her estate. Eliza Ann Wood did not in her lifetime dispose of the undivided one-half interest in the Woods Hotel but by her last will and testament she devised the said undivided one-half interest to the said Erminie Marie Johnson.

The question submitted for the Court's consideration was:

Did John Samuel Wood devise the said one-half interest in the Woods Hotel to his wife absolutely or was there a precatory trust imposed by his said will in favour of his brothers and sisters?

If there was a precatory trust, then one-half of the undivided one-half interest went to the brothers and sisters and to their next-of-kin.

The pertinent clauses of the will were the second, third and fourth clauses. The first clause merely directs that the testator's just debts should be paid. The second, third and fourth clauses read as follow:

Second.—Subject to the discharge of my said debts as above suggested I give, devise and bequeath to my wife Eliza Ann Wood, all of my property of whatsoever kind and nature, and wherever the same may be or situated, in whatsoever state or country, and of whatsoever condition the same may exist, giving to her absolutely the same right, power, and authority that I possessed while living to secure, hold and dispose of the same as her own individual property.

Third.—But in case a child should be born to her after my said death, an heir of my body, then in that case, I devise and bequeath out of the property that I have heretofore disposed of to my said wife an undivided one-tenth part of the same, but out of the same shall the said child be maintained, so long as the same may be sufficient for its said support, and the balance turned over to it at the time that it arrives at the age of its majority, if any shall remain unused.

Fourth.—In case that my said wife shall die without children, heirs of my body, and shall have failed to make a legal distribution of the said property hereby disposed of to her, then in that event it is my wish that all the property that is herein transferred to her that remains unused by her shall be treated as held by her in trust for the use and benefit of the heirs of her, and my body, and legally distributed among them share and share alike, that is to say that one-half shall go to her legal representative and one-half to my legal representatives as descending by law.

The question therefore was: Was the wife given the property in question absolutely or was the devise to her, if absolute, cut down to a life estate by the fourth paragraph of the said will?

Heard by MURPHY, J. in Chambers at Vancouver on the 9th of June, 1939.

Hamilton Read, for plaintiff.
McAlpine, K.C., for brothers and sisters.
Donaghy, K.C., for defendant.

Cur. adv. vult.

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7th September, 1939.

MURPHY, J.: I have made a careful study of the will of John S. Wood in an endeavour to ascertain what was the true intention of the testator. I excluded clause 3 of the will from consideration since admittedly on the facts it is inoperative. My conclusion is that Wood intended by his said will to give to his widow, Eliza Ann Wood, at least full control of all his property to use as she pleased and to dispose of as she pleased by will or otherwise. I arrive at this conclusion by reading clauses one and four together and applying to the language used therein the rule that a will is to be considered *ut res magis valeat quam pereat.* I see nothing in the numerous cases that have been cited to me that would necessitate any modification of my opinion. In *Shearer* v. *Hogg* (1912), 46 S.C.R. 492; 6 D.L.R. 255, the case strongly relied upon in support of the contrary view, the circumstances under which the will was drawn, the language used and the directions given to the widow as to support of children during her lifetime all differ I think materially from the corresponding features of the present case. I would answer the first question—Eliza Ann Wood had power to dispose by will of all property passing under the will of John S. Wood.

There will be no order as to costs.

Judgment accordingly.

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Sept. 27, 29;
Oct. 6.

[IN BANKRUPTCY.]

IN RE LOUGHEED.

Bankruptcy—Application for discharge by bankrupt—Order granted but suspended—R.S.C. 1927, Cap. 11, Secs. 142, Subsec. 2 (b), and 143 (a) (b) and (c).

A bankrupt applied for his discharge which was supported by the trustees and inspectors and a large majority of value of the creditors. One substantial creditor opposed the application, based on section 143 (*a*) of the Bankruptcy Act, which required him to satisfy the Court that the fact that his assets were not equal to 50 cents on the dollar, arose from circumstances for which he could not justly be held responsible. Effect was given to this objection:—

Held, that an order should be made for his discharge, but to be suspended for one month.

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1939

IN RE LOUGHEED

APPLICATION by a bankrupt for his discharge. Heard by ROBERTSON, J. in Chambers at Vancouver on the 27th and 29th of September, 1939.

Montgomery, for the application.
McFarlane, contra.

Cur. adv. vult.

6th October, 1939.

ROBERTSON, J.: Application by the debtor for his discharge. He made an authorized assignment on June 8th, 1934. Notices of the application of the debtor for his discharge and of the time and place of hearing were sent to each one of the creditors. Their claims amounted to nearly $900,000. Creditors totalling $322,000 have consented to the discharge of the debtor; a creditor representing $372,764.89 has expressed its willingness not to oppose the application. The inspectors of the estate have passed a resolution authorizing the trustee not to oppose the application. One substantial creditor for $55,320 opposes the application on three grounds. The first ground is based on section 143 (*a*) of the Bankruptcy Act, R.S.C. 1927, Cap. 11; the evidence on this point consists of the statement of the trustee that the causes of the bankruptcy of the debtor were due "primarily to the causes beyond his control such as depression in lumber trade and business generally."

As the assets of the debtor were not equal to 50 cents on the dollar on the amount of his unsecured liabilities, section 143 (*a*) required him to satisfy the Court that the fact that his assets were not of this value arose from circumstances for which he could not justly be held responsible. I do not think that the evidence is sufficient to satisfy the Court on this point.

The second objection is based on section 143 (*b*) which deals with the omission of the debtor to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding the making of the assignment. Counsel for the opposing creditor relies upon the questions and answers in Form No. 50, headed: "Questions to be put to the Debtor by the Official Receiver." Question 1 is,

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"Have you kept a cash book?" and the answer was "No, only cheque books," and question 4, "In what name do you carry on business?" and the reply was "The Abernethy Lougheed Logging Company Limited."

The debtor apparently got into difficulties by endorsing or guaranteeing the liabilities of this company. The evidence is not clear whether he carried on any business of his own. He was acting as an official of the company. The *onus* is on the creditor to prove this and I think he has failed.

The third objection was based on section 143 (*c*), *viz.*, that the assignor continued to trade after knowing himself to be insolvent. There is no satisfactory evidence of this. There is some evidence that the defendant, acting for a company, was doing some business, but there is no satisfactory evidence to show that he was trading or doing business on his own account.

As I have given effect to the first objection I must either refuse the discharge or suspend the discharge for a period which may be less than two years. See section 142, subsection 2 (*b*).

The debtor has been a bankrupt for over five years. The trustees and inspectors and a large majority in value of the creditors support his application. I, therefore, make an order granting the discharge to be suspended for one month. There is no suggestion that suspending the discharge for a long period would in any way benefit the creditors of the estate. I cannot therefore see any possible reason for suspending the discharge for any great length of time. I refer to *In re Frederick* (1938), 20 C.B.R. 157; [1939] 1 W.W.R. 224.

Order accordingly.

IN RE FERGIE ESTATE.

S. C.
In Chambers
1939
Sept. 26;
Oct. 12.

Testator's Family Maintenance Act—Application by son of testatrix for adequate provision under Act—Principles governing—R.S.B.C. 1936, Cap. 285.

The Testator's Family Maintenance Act is not a statute to empower the Court to make a new will for the testator, but allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife, husband or children, where adequate provision has not been made. The first inquiry in every case must be what is the need of maintenance and support, and secondly what property has the testator left.

In exercising its judgment as to what is not only adequate but also just and equitable, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator must be taken into account.

Held, in this case, that the testatrix had not made adequate provision for the proper maintenance and support of the applicant who was one of her sons.

APPLICATION by a son of the testatrix for adequate provision for his proper maintenance and support under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vancouver on the 26th of September, 1939.

C. F. MacLean, for petitioner.
G. Roy Long, for beneficiaries.
Brissenden, for executrix.

Cur. adv. vult.

12th October, 1939.

ROBERTSON, J.: This is an application by Harry Fergie, under the Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285. His mother, Lillian Alexandra Fergie, died on November 4th, 1938. She left an estate which at the time of this application was valued at $11,109.96. By her will dated October 16th, 1938, she left a legacy of $4,000 to her daughter-in-law Frances Fergie, wife of her son William Aylmer Fergie, $1,000 to a friend Mrs. Ora Bonness and the balance of her estate to her son William Aylmer. Mrs. Fergie was a widow. Harry Fergie was born on March 2nd, 1892. He has a wife,

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Beulah, and their daughter, who was born on August 11th, 1929. The applicant is a travelling-map salesman and makes an average monthly income of $150 out of which he must pay his travelling expenses and household expenses of all sorts. He has nothing besides this. When he was about eight or nine years of age he sustained severe and permanent injuries to his leg as the result of a fall from the mast of a ship while travelling from Australia to Japan, which resulted in the dislocation of his hip joint so that it is necessary at all times for him to use a cane. Both the nature of his work and his physical condition require that he should have the use of an automobile. He says his hip condition is growing steadily worse; that he suffers from intense pain; that it is necessary for him to have frequent osteopathic, X-ray and diathermic treatments in order to carry on his occupation; and that quite frequently his condition is such that he "has to stop away from his occupation for days at a time." William admits that his brother suffered these injuries as a child but says that did not prevent him from playing tennis, golf, swimming, riding a bicycle or carrying on other activities. In reply to this the applicant states that since the age of seventeen he has never ridden a bicycle or played golf, but admitted he can enjoy swimming to some extent. The applicant was not cross-examined on his affidavit and I see no real reason to doubt his evidence generally as to his injuries and his present condition.

William Aylmer Fergie was born on August 18th, 1893. As stated, his wife is Frances Fergie, the legatee mentioned in the will. They have three children, one boy age nineteen who supports himself, a girl age eighteen and a boy age sixteen, who are attending high school. He is a dentist and his income may be said to be $4,000 per year, and that, apart from this, his total realizable assets do not exceed $10,000. He has been practising his profession for 22 years. Mrs. Bonness who was not related to the testatrix is married; her husband has been out of work. She was an intimate friend of the testatrix and had been very good to her. It is sufficient to say that she stands in need of the legacy. The testatrix enjoyed happy relations with her daughter-in-law Frances. After the death of the testatrix there was found

in the envelope in which the will was found, a note signed by the testatrix which reads, in part, as follows:

October 18th, 1938.

My last will and wishes.

Dear Aylmer: I wish you to take care of your brother Harry Fergie. Not to let him want . . .

[Sgd.] Your loving mother,
Lillian Fergie.

It was submitted that the testatrix left Harry out of her will for two reasons, one because he had not written to her for several years and the other because when she was in California, some time prior to 1930, he had tried to have her put in a lunatic asylum. There is no doubt, and I so find, that the applicant did not write to his mother for two or three years before her death and no doubt she felt hurt at this. As to the second point there is no legal proof that Harry tried to do as she says. The evidence of the witnesses who said that the testatrix gave this as the reason for not leaving anything to Harry only served to prove that the testatrix made this statement. It shows her frame of mind but it does not prove the fact that Harry ever did attempt to put his mother in a lunatic asylum. He denies it. In a previous will, dated September 3rd, 1931, she gave him a half share with his brother in part of her property. Then there is a letter of hers to Harry dated February 25th, 1935, from which it would appear she was on terms of affection with him. Finally her note, *supra,* shows she still was anxious to help him.

In *In re Morton, Deceased* (1934), 49 B.C. 172, and other reported cases, I stated the principles which I thought the decisions showed should guide the Court in deciding a question of this sort. One of these was *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959, in which Stout, C.J. stated the principles to be followed by the Court in administering the New Zealand Act which is practically the same as ours. Two of these principles are as follow:

(1) That the Act is not a statute to empower the Court to make a new will for a testator; (2) that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife, husband or children where adequate provision has not been made for this purpose.

Later the learned Chief Justice said (p. 970):

The whole circumstances have to be considered. Even in many cases

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where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left.

The Privy Council agreed with the observations of the learned Chief Justice in *Bosch* v. *Perpetual Trustee Co.*, [1938] A.C. 463; 107 L.J.P.C. 53. In *Walker* v. *McDermott*, [1931] S.C.R. 94, the majority of the Court said at p. 96:

> If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

As to what persons would be included in those "having claims upon the testator" see *In re Estate of W. S. Pedlar, Deceased* (1933), 46 B.C. 481.

I find that the testatrix did not make adequate provision for the proper maintenance and support of Harry. Applying as best I can the principles referred to, I am of the opinion that the payment of $2,000 out of the testator's estate to Harry Fergie will be adequate, just and equitable in the circumstances. Costs of all parties including the executrix out of the estate.

Application granted.

S. C.
1939
Nov. 8, 15.

MARTIN v. MARTIN.

Husband and wife—Action under Order LXXA—Alimony—Quantum—Facts to be taken into consideration as to—Application for order to set up trust fund—Lack of jurisdiction.

In an action by the wife for alimony under Order LXXA of the Supreme Court Rules, 1925, it was held that the husband's action in leaving his wife was wholly without justification so far as the wife's conduct was concerned, and that she was entitled to alimony.

The basis of the wife's claim for alimony is the right of a deserted wife to pledge her husband's credit for the purpose of providing herself with maintenance according to her husband's station, and the Court in alimony cases such as this proceeds upon the principle of looking to what is just and reasonable under all the circumstances. It takes into

consideration the station in life and position of the parties and also the nature of the property of which the husband is possessed. The husband had a net income from the estate left him by his mother of about $171 per month, and he was ordered to pay his wife $100 per month and also $15 per month for the support of their child.

The wife's application for an order that he set up a trust fund to insure payment of said amounts or to enjoin him from receiving any income from his estate until he had done so, was refused on the ground of want of jurisdiction.

ACTION for alimony. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 8th of November, 1939.

C. S. Arnold, for plaintiff.
Carew Martin, for defendant.

Cur. adv. vult.

15th November, 1939.

MURPHY, J.: Action for alimony under Order LXXA of the Supreme Court Rules.

At the time of her marriage plaintiff was living with her widowed mother. The family was well to do, and she had a home that might be termed luxurious, her father having left a considerable estate. As matters have turned out, however, plaintiff personally takes only a contingent remainder under her father's will and under existing circumstances the chances of her ever receiving any financial benefit therefrom are practically non-existent. She has no other financial resources. Until her marriage she was wholly dependent upon her mother. Thereafter she has been wholly dependent upon her husband. During the year previous to her marriage she was taking a business course in a desultory way. She had not qualified herself for any business position when the courtship between her and defendant began. If she were now to undertake to qualify herself for such a position she would have to begin her training practically *de novo.*

Defendant is the grandson of one of the founders of the well-known western commercial house of Galt Limited. At the time of his marriage with plaintiff he was a freshman attending the University of British Columbia and was residing with his father

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in Vancouver. His mother, a Galt, had been dead for some years. When married he was in his nineteenth year and plaintiff was twenty-one. Under his mother's will he was entitled to an estate which was to be handed over to him when he became of age. In the meantime such part of the income thereof as the trustees deemed proper was to be used for his support and advancement in life. The value of the estate increased during his minority and when he attained his majority it amounted to practically $50,000. Plaintiff and defendant began keeping company in January, 1936. On April 27th, 1936, they eloped to Bellingham where they were married. Defendant had informed plaintiff that he had a monthly income of about $125 and would come into the *corpus* of his estate when he became of age. The arrangement between them was that until then the marriage was to be kept secret. On their return from Bellingham she went to her mother's house and he to his father's. After about two weeks had elapsed, however, they divulged the fact of the marriage to their respective families.

In September, 1937, plaintiff and defendant went to Seattle where the defendant intended to take a course in journalism at the University of Washington. He entered himself as a student in that institution and continued taking the course of journalism until April, 1938, when he dropped it and took on a course in English. He expects to graduate in 1940 and then proposes to continue his studies to obtain the degree of Ph.D. with a view to thereafter obtaining a position on some university faculty. Plaintiff and defendant took an apartment in Seattle in September, 1937, and continued to reside there together with occasional visits to and from their relatives. On June 27th, 1937, a boy was born to them. Up to March, 1939, I find they lived happily enough. There were occasional differences but I find these were of no importance. I do not accept defendant's evidence that there was serious discussion of separation or divorce. Nothing in the evidence indicates a reason why this should occur. Defendant was receiving about $180 a month as income from his estate. After the birth of the child his grandmother, Mrs. Galt, supplemented this with an allowance of $50 a month. She also paid all his tuition fees.

In March, 1939, defendant informed plaintiff that he was tired of her, left the apartment and went to reside in a fraternity house at the University of Washington. I find this action on his part was wholly without justification so far as the wife's conduct was concerned. She consulted a lawyer in Vancouver and finally her brother went to Seattle and interviewed defendant. Defendant took the stand that if his wife remained in Seattle he would not support her but that if she would return to Vancouver with her child he would give her $80 a month for their joint maintenance, pending further arrangements. At the brother's request he put his position into writing. This document is Exhibit 3. Thereupon plaintiff with her child came to Vancouver and has since been residing with her mother. Negotiations went on between the solicitors for plaintiff and defendant but no arrangement could be come to. On this state of facts I hold the plaintiff is entitled to alimony; indeed, if I understood his counsel aright, this is scarcely disputed. Defendant in my opinion has failed to realize the responsibilities entailed upon him by marriage and fatherhood. Plaintiff at the trial expressed her willingness to resume their marital life. When defendant was asked his attitude on this he at first replied evasively. When pressed he eventually took the position that he would not do so. I find that plaintiff was at all times not only willing but anxious to live with her husband.

There remains for decision only the question of *quantum*.

Late in August plaintiff heard from defendant's father that defendant proposed to go to either Yale or Harvard to continue his studies. Plaintiff thereupon issued the writ in this action. Defendant was then visiting his grandmother in Victoria and plaintiff had him arrested under a writ of *capias ad respondendum*. In order to obtain his release defendant had to deposit $3,300 in Court. The matter of the legality of the *capias* proceedings is now before the Court of Appeal. To obtain the money defendant withdrew $4,000 of his capital, $3,300 of which he deposited in Court. The Northern Trust Company of Winnipeg are trustees of his mother's will and his estate is still being administered by that company. A statement (Exhibit 8) furnished by it shows the book value of his estate, as of October 3rd,

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1939, to be $45,504.94, and the market value as of that date $45,076.94. In addition he has the $3,300 deposited in Court. He states the extra money withdrawn has been used for expenses. As against this he had an overdraft with the Northern Trust Company on income account of $751.24. The estate is invested in what would appear to be gilt-edge securities. The statement (Exhibit 8) shows that the defendant has a net income of $171.41 a month after allowing for income tax and interest on the overdraft of $751.24. Defendant paid to plaintiff the sum of $80 a month from April 1st, as agreed with her brother in Seattle, up to last month. He then cut the amount to $73 a month, alleging this to be necessary because her action, in issuing the *capias* against him, caused him to withdraw $4,000 of his estate which he had to convert into cash, thereby reducing his income. Under the divorce jurisdiction the amount usually allowed as alimony in England is one-third of the joint incomes of the husband and wife but this is not a hard and fast rule. The proceedings herein are not taken under the divorce jurisdiction of the Court. The English rule, if it can be termed one, is therefore not an authority. At best it can only serve as a guide by analogy. The basis of the wife's claim for alimony is the right of a deserted wife to pledge the husband's credit for the purpose of providing herself with maintenance according to her husband's station: *Dean* v. *Dean,* [1923] P. 172; 92 L.J.P. 109, at 111. The Court in alimony cases, such as this, proceeds upon the principle of looking to what is just and reasonable under all the circumstances. It takes into consideration the station in life and position of the parties and also the nature of the property of which the husband is possessed: *McCulloch* v. *McCulloch* (1863), 10 Gr. 320, at 322-3. Acting on this principle, and keeping in mind the facts hereinbefore set out, I fix the alimony payable to the wife at $100 per month. I direct that in addition the defendant shall pay to the plaintiff the sum of $15 a month for the support of their child. It is true that plaintiff and her child are being given board and lodging free of cost by plaintiff's mother at present. Defendant, however, has no legal right to cast that burden upon his mother-in-law. Compliance with this order will in my opinion work no hardship on defendant. With his

education and his family connection it would not I think be difficult for him to obtain remunerative employment. If he prefers to pursue his present plan of obtaining a Ph.D. degree, an ambition in itself praiseworthy, but not in my view to be fulfilled at the cost of reducing his wife and child to existence on the barest necessities of life, which is all that $71 per month will procure them, he can do so and comply with this order without any great impairment of his capital. Once he has graduated he can combine tuition with pursuance of his purpose. If he prefers to get the degree more speedily by devoting all his time to study or if he cannot get a teaching position the cost need not necessarily be great. Any resulting impairment of capital should be regarded as an investment which will greatly augment his income in the future.

Plaintiff requests that the defendant be ordered to set up a trust out of his capital to insure payment of the alimony and maintenance allowance for the child hereby directed and that he be enjoined from receiving any income from his estate until he has done so. In my opinion the Court has no jurisdiction to make any such directions and no authority has been cited to show that it has. Liberty to both parties to apply. If circumstances change in the future this order will of course be modified in accordance with such change. Plaintiff is entitled to her costs.

Judgment for plaintiff.

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Nov. 16, 17, 30.

WEINSTEIN v. THE CITY OF VANCOUVER.

Municipal corporation—Property sold for taxes—Certificate of title issued to city—Demolition of building on property as unsafe—Tenant of former owner had stored goods on part of premises—Goods damaged—Right of action—Occupier as trespasser—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 89.

The plaintiff, a junk-dealer, rented a portion of a warehouse from a former owner for storage of goods and merchandise dealt in by him in his junk business. The property was sold for taxes and the city obtained a certificate of title in January, 1939. Shortly after, the rental department were notified that the building would have to be demolished as unsafe, and in February a contract was let and the warehouse was pulled down, except the portion in which the goods were stored. Although the plaintiff was notified, the goods were not removed. As only partitions were left on the north and west side of the remaining portion of the building, water entered and the goods were damaged.

Held, that the city was acting as owner of the property and not under the by-law authorizing it to demolish buildings in a dangerous state of repair. Moreover the plaintiff was a trespasser because of section 89 of the Vancouver Incorporation Act, 1921 (Second Session), at the time of the demolition, and therefore without any legal rights enforceable against the city for damage to his goods as the result of the demolition, there being no forcible entry by the city.

ACTION for damages to goods and chattels of the plaintiff stored in a warehouse in the city of Vancouver, formerly owned by Belyea & Son. The plaintiff, who was a junk-dealer, had rented part of the building for storing his junk from Belyea & Son, and the property was sold for taxes in November, 1936, and ownership passed to the city of Vancouver in November, 1938, a certificate of title being issued to the city in January, 1939. The city officials inspected the property in December, 1938, and in January, 1939, the building department of the city notified the lands and rental department that the building must be demolished as unsafe. A contract was let and the building, with the exception of the portion in which the goods were stored, was torn down, this work being commenced on February 27th, 1939. The north and west sides of the portion of the building that remained standing was protected only by a partition, at the top of the west side there being an open space of about two feet.

The plaintiff had been ill for some time before this, and although he was notified, the goods were not removed. The goods were damaged owing to water getting through the partitions. The further facts are fully set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 16th and 17th of November, 1939.

H. Freeman, and *D. A. Freeman,* for plaintiff.
Lord, and *R. K. Baker,* for defendant.

Cur. adv. vult.

30th November, 1939.

MURPHY, J.: Lots 3 and 4, block A, district lot 200A, group 1, New Westminster District, hereinafter referred to as "the property," was formerly owned by H. S. Belyea and Ernest H. Belyea, hereinafter referred to as "Belyea & Son." In November, 1936, the property was sold for taxes pursuant to the provisions of the Vancouver Incorporation Act, 1921 (Second Session), Cap. 55. It was purchased by the defendant, was not redeemed and ownership thereof passed to the defendant on November 23rd, 1938. A certificate of indefeasible title was issued to the defendant on January 12th, 1939. Plaintiff, a junk-dealer, had in the month of May, 1938, rented a portion of the building on said property from Belyea & Son (who continued in occupation after the tax sale) on a monthly tenancy at a rental of $8 per month, the portion so rented being hereafter referred to as "the warehouse." Plaintiff made use of the warehouse for the storage of goods and merchandise dealt in by him in his junk business. Plaintiff paid his rent to Belyea & Son from May up until December 18th, 1938, but was in arrears for the balance of December and for the months of January and February, 1939. On February 6th, 1939, a notice was sent to him by Belyea & Son advising him that he was in arrears with his rent and demanding that it be paid up to date. Plaintiff, however, had become ill and on February 6th, 1939, was removed to the Vancouver General Hospital where he remained until February 26th, 1939. Upon his discharge from the hospital plaintiff was further confined to the house at his brother's home until March 6th, 1939. The

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lands and rental department of the defendant had the property inspected on December 28th, 1938. The inspector reported to the lands and rental department that the building should be demolished as a heavy fall of snow would probably break in the roof and as repairs would be too costly. Defendant has a by-law authorizing it to require the removal of buildings in a dangerous state of repair and in default of such removal by the owner has power itself to demolish such building and charge the expenses thereof to the owner. The by-law requires 30 days' notice to the occupants of any building ordered to be demolished. The word "may" is used in the by-law in reference to these notices but I would construe it as mandatory. Administration of the by-law is a function of the building department of the defendant and not of its lands and rental department. In January, 1939, the building department notified the lands and rental department that it required the removal of the building on the property as being unsafe. The lands and rental department notified Belyea & Son on January 3rd or 4th that the building would have to be demolished and that everything in it would have to be removed forthwith. Some time previous to February 20th Belyea & Son notified plaintiff's brother who notified plaintiff's wife of defendant's demands. The wife, who I hold acted throughout as plaintiff's agent, obtained legal advice to the effect that the defendant would have to give plaintiff one month's notice before proceeding with demolition of the building. These facts are set out in a letter from Belyea & Son to the lands and rental department of defendant. The letter itself in my opinion would not be evidence of said facts but it was put in as an exhibit on plaintiff's behalf as part of a statement of admitted facts and thereby I think became evidence thereof. In February, 1939, the lands and rental department of defendant made a contract with one Harry Betker to demolish the said building. Plaintiff's wife admits that she received notice from Belyea & Son about a week before the work of demolition began that the building was to be torn down. She says she did not inform her husband because he was seriously ill. She did nothing she states as she expected to receive a notice to vacate. This is an error on her part as, according to the letter of Belyea & Son of February 20th (if it is evidence as under

the circumstances I hold it is) she had consulted a lawyer and had been advised that a month's notice must be given before the building could be demolished. This advice was apparently given on the assumption that defendant was proceeding under its by-law. I have already held at the trial that such was not the case. Defendant was acting in its capacity as owner of the property as shown by the fact that the contract for demolition was not made by the building department, that being the department to which administration of the by-law is confined, but by the lands and rental department which has nothing to do with such administration and by the further fact that the matter was treated as an interdepartmental affair as shown by the notice from the building department to the lands and rental department requiring the removal of the building. Even if this were not so defendant in my opinion could rest its defence in this action, as framed, on such ownership for, as hereinafter stated, I hold the plaintiff to have been a trespasser *quad* defendant at the time the demolition occurred and consequently without any legal rights enforceable against defendant, at any rate when, as here, there was no forcible entry by defendant. Plaintiff's wife states she informed him of the proposed demolition on his return from the hospital on February 26th. She is, and has been for years, employed as stenographer in the office of The Toronto General Trusts Corporation. At the noon hour on February 27th she went to the building and found that the work of wrecking had begun. There were only workmen present, however, who informed her that they would tell their employer of her visit. She telephoned Woodford of the city building department and informed him that her husband was ill and that it would be impossible to remove the junk at once and requested postponement of the wrecking. Woodford replied that the matter was out of his hands. This was so because it had been handed over to the lands and rental department which dealt with property owned by defendant. On the afternoon of February 27th Robinson of the land and rental department telephoned plaintiff's wife and promised he would do what he could about the situation. She went next day at the same hour to the building and saw Betker. She informed him that she had been in touch with the city hall

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and wished him to leave her husband's goods protected. He replied that he had a contract and that she must deal with the city hall officials. The same day she telephoned Robinson and asked that the warehouse be left intact until the junk could be removed. I accept Robinson's statement that she told him that there was difficulty about moving the junk because the Davis Building was not finished. Davis was another junk-dealer who subsequently purchased part of the junk that plaintiff had in the warehouse. Robinson told plaintiff's wife that the defendant would leave the warehouse intact for a period of some weeks so that there would be time to dispose of the goods stored there. Betker was so instructed and he did remove only the portions of the building not occupied by plaintiff. On the north side of plaintiff's warehouse there was a partition that reached up to the roof. The roof was of the apex variety. On the west side the warehouse was divided from the rest of the building by a partition which reached up within a couple of feet of the sloping roof. The rear part of the warehouse was a lean-to and it also had a partition on the west side dividing it from space in the lean-to other than that occupied by the warehouse. Betker removed the front portion of the building and the west half of the apex roof and also the west half of the lean-to roof and the west wall. The result was that on the north side plaintiff's goods were protected from the weather only by a partition. This partition was not watertight. On the west side they were likewise protected only by a partition. As however this did not reach up to the sloping roof there was a space of about two feet open to the weather, running the full length of plaintiff's warehouse except possibly the portion thereof in the lean-to. Plaintiff's claim is that his junk was seriously damaged by rain and that as a result he suffered substantial financial loss. By section 67 of the Vancouver Incorporation Act, 1921, taxes are made a special lien on land and have preference to any claim, lien, privilege or encumbrance of any party except the Crown. By section 85 of the same Act when a parcel of land is sold for taxes all rights or property therein held by the person who at the time of sale was a registered owner of the land, and all rights or property therein held by his heirs, executors, administrators and assigns,

shall immediately cease and determine, except as by the said section provided. The only exception of importance to this case is the provision that the owner, his heirs, executors, administrators and assigns have the right of possession of the land during the period allowed by the Act for redemption. By section 89 of the said Act registration of any person who has purchased land at a tax sale and the issuance to him of a certificate of indefeasible title shall:

(*b*) Purge and disencumber the lands of and from all the right, title, and interest of any previous owner of said land, or of his heirs, executors, administrators, or assigns, and of and from all claims, demands, payments, charges, liens, mortgages, or encumbrances of any nature and kind whatsoever, excepting only such as such previous owner, or any person claiming by, through, or under him, was not competent to convey.

I construe these sections as having the effect of making plaintiff a trespasser *quoad* the defendant, at any rate from the date of the issuance of the certificate of indefeasible title. Such construction was placed upon legislation which in essentials I think does not differ from the provisions of the Vancouver Incorporation Act, 1921, in *Shewchuk* v. *Seafred (No. 2)*, 36 Man. L.R. 469, at p. 473; [1927] 2 W.W.R. 207; *Tomlinson* v. *Hill* (1855), 5 Gr. 231; *Re Hunt and Bell* (1915), 34 O.L.R. 256. That a trespasser has no recourse against the owner exercising his legal rights is I think shown, if authority be necessary, by *Jones* v. *Foley*, [1891] 1 Q.B. 730; 60 L.J.Q.B. 464. It follows that in my opinion this case must be dismissed.

One feature has given me some difficulty. Defendant had knowledge that Belyea & Son had rented the warehouse to plaintiff. If the evidence showed that defendant had notified Belyea & Son to pay the rent to it and had subsequently pressed Belyea & Son to make such payment, the question whether or not these facts would constitute Belyea & Son the agents of the defendant to rent the warehouse on its behalf would require serious consideration. Questions 12 to 15 inclusive of the examination of Woodford for discovery were put in at the trial and read as follows:

Well, did your department have any dealings with Belyea & Son? The inspectors early in December would call on him and notify him to pay the rent to the city, and would inspect the property.

And he did pay rent to the city? Not to my knowledge.

He didn't? Not to my knowledge, no.

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> Well was anything ever done by your department to enforce the collection of rent? I think there were several requests, but as far as forcing is concerned, I don't remember anything being done. I could not tell you.

This was the only evidence bearing on this feature. Plaintiff in his pleadings does not assert that he was a tenant of defendant. If he had done so the *onus* would be upon him to prove that such was the case. If Woodford had stated definitely as facts that the defendant had notified Belyea & Son to pay the rents to the defendant and that the defendant had made several requests to Belyea to do so I would have to consider whether or not I should allow an amendment to the pleadings to cover that situation. As Woodford did not do so and as plaintiff has set up no claim of tenancy, and as I cannot be sure on the scanty references to the dealings between Belyea & Son and defendant's officials that the feature was fully ventilated at the trial, I do not think it is open to me to give it consideration. In this connection the fact must be borne in mind that on January 3rd or 4th defendant notified Belyea & Son that the building would have to be demolished and that they must remove forthwith everything in the building. Plaintiff in his reply pleads estoppel on the ground that defendant knew that Belyea & Son had rented the warehouse to plaintiff and yet gave no notice to plaintiff that it was the owner. But plaintiff did not change his position in consequence of not having received such notice. His case, as already pointed out, is framed on absence of notice under the by-law and I hold on the evidence that plaintiff left his goods in the warehouse, not because it had been rented to him by Belyea & Son but under the arrangement made by his wife, acting for him, and the defendant, that it could allow them to remain there until he could dispose of them. Plaintiff's counsel argues that estoppel arises because defendant with the knowledge aforesaid stood by and did nothing. But mere silence or inaction is not in the absence of a duty to speak such conduct as amounts to a representation creating an estoppel: Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 496. I hold there was no duty on defendant to speak, so far as its right as owner to demolish the warehouse was concerned. If defendant were suing for use and occupation and if plaintiff had paid rent to Belyea & Son after defendant had become owner then it might well be that on the facts here in

such an action estoppel could be successfully pleaded as a defence to the extent that rent had been paid. But, as stated above, in my opinion as soon as defendant became owner by operation of law plaintiff became a trespasser *quoad* defendant and defendant could thereupon as owner demolish the warehouse without any notice to plaintiff. This legal situation could not I think be changed nor was any duty towards the plaintiff cast upon defendant by the mere fact that defendant knew that plaintiff was continuing in occupation as a tenant of Belyea & Son because of that firm having rented him a portion of the warehouse previous to defendant becoming owner by operation of law. I hold that the plea of estoppel fails. I feel, however, that I should deal with the claim for damages so that should I be in error in holding that defendant is not liable to plaintiff the whole matter may be before the Court of Appeal if the case is carried to that tribunal. On the claim of $112.40 for depreciation of mattresses I am not satisfied on the evidence that if such depreciation did take place it was occasioned to the extent claimed by rain falling upon them because of the action of the defendant in removing the portions of the building that it did remove. Any exposure to rain resulting from the defendant's action would begin on March 2nd and all of said mattresses were sold with the exception of one small parcel by March 16th. The precipitation during this period was not heavy as shown by Exhibit 4. The roof of the building was not waterproof before the defendant began its operations. The mattresses were piled one on top of the other. It scarcely seems possible that the extensive damage alleged could occur under such circumstances. Admittedly some bottom tiers were damaged by water other than rain that fell after the defendant's operations exposed the goods in the warehouse, in so far as they did do so, to the weather. I take the same view of the claim for $326.12 for depreciation of rags. These too were all sold within two weeks of March 2nd with the exception of two parcels. These rags were in sacks and boxes, also piled on top of one another, and for the same reasons it does not seem likely that the serious damage alleged could result exclusively from defendant's action. I do not consider that the claim of $73.12 for depreciation of grease has been satisfactorily established. There is no direct

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evidence that the defendant's action caused any of the grease containers to fall to the ground. It is suggested that vibration occasioned by the wrecking operations toppled the containers but no evidence that such vibration occurred was adduced. As to the claim of $137.05 for depreciation and damage to bottles I accept the evidence of Klein that rain falling upon bottles would not decrease their value since they must be cleaned in acid in any event. Rain would damage the rings on jars if it occasioned rust but again I doubt that the extensive damage claimed was occasioned exclusively by rain reaching the jars as a result of defendant's operations. I do not think any damage would have been occasioned to the barrels by the rain which reached them, as a result of the defendant's action, had they been stored bottom up. I accept Klein's evidence that there would be no depreciation of horsehair or pig hair because it had been wet. Some expense would of course be entailed in drying it. I do not mean to hold that the plaintiff's goods were not damaged to some extent by the rain that reached them as a result of the defendant's action but I am of the opinion that the amount of damage claimed is not attributable exclusively thereto. I see no foundation for the claim for hiring a watchman nor for the plaintiff's claim for his own time in selling the junk. In my opinion $300 would compensate the plaintiff for any damage that he has suffered as a result of the act of the defendant. Further, even if the damage so occasioned was greater than I think it was, a person cannot stand idly by and see his goods damaged as a result of the action of another, even if that action be wrongful, if it is within his power to prevent or lessen such damage by appropriate action. It is in my opinion no excuse for not so doing to say that plaintiff was ill. He had knowledge of what was going on through his wife, who, as stated, I hold was his agent and he himself had personal knowledge thereof on February 26th and was out and about by March 6th on which date he saw his lawyer about the matter. Plaintiff could have obtained other premises and could have removed his goods thereto. Four days elapsed after he had personal knowledge before the wrecking operations reached the warehouse. His goods could have been removed within that time or, at any rate, within a short time thereafter.

Plaintiff seems to have contemplated such a step because he says he went in search of premises but found he would have to pay $60 a month rent and then the premises would be small. Klein testified that storage companies would give a month's rent free if they got the job of trucking the goods to their warehouse. The rate of trucking is $1 per ton. Plaintiff endeavoured to controvert this evidence by saying that he had telephoned storage companies and had been told that such was not the case. This of course is not evidence but mere hearsay. I accept Klein's statement as correct but it is possible that storage companies would not give free rent for a month for such goods as plaintiff owned. I think, however, the sum of $300 would cover the cost of cartage and rent of storage premises for a month which, in my opinion, would be the utmost period for which defendant in any view of the case could be required not to interfere with the warehouse and would cover also any damage occasioned by rain in the interval before the goods could be removed had prompt action to do so been taken. If, therefore, I were of the opinion that plaintiff was entitled to succeed in this action I would give judgment in his favour for $300. As already stated, however, I am of the opinion that the action fails. It is dismissed with costs.

Action dismissed.

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May 12, 16;
Sept. 12.

HIATT v. ZIEN AND ACME TOWEL & LINEN SUPPLY LIMITED.

Negligence — Driving automobile — Master and servant — Negligence of servant—Damages.

The defendant company operates a towel and linen supply business on premises at 1142 Granville Street in the city of Vancouver. At the rear of the building is an open lot extending about 57 feet to a lane. Trucks of the company were loaded at the rear of the building and approached the place of loading from the lane. Next door and south of the defendant's premises were the building premises of a junk-dealer, and those delivering material to the junk-dealer approached the rear of his premises in trucks driven from the lane and partly over the defendant company's lot. Access to the rear of the junk-dealer's premises could not be had direct from the lane owing to obstructions at the lane end of his lot. On the day in question the plaintiff, a junk-dealer, drove his truck from the lane over the rear part of the defendant's lot to the back of the junk-dealer's building, and after transacting his business, backed his car into the defendant's lot preparatory to turning to face the lane. As he was about to start forward he saw a truck on the lane. He heard the gears of this truck being changed, and when he looked again the truck was backing into him. He yelled at the driver to stop, but the truck continued backing, and when close he put out his hand to fend off the impending collision, and on the trucks coming together his arm was badly crushed. In an action for damages the plaintiff recovered judgment.

Held, on appeal, affirming the decision of MCDONALD, J., that the defendant Zien was negligent in that he neither listened nor looked to ascertain whether anyone was behind him, constituting an actionable breach of duty towards the plaintiff, and leave and licence being established, the servant of the occupier did not exercise that degree of care necessary to absolve his employer from liability.

APPEAL by defendants from the decision of MCDONALD, J. of the 20th of February, 1939 (reported, *ante*, p. 17), whereby the plaintiff was awarded damages against the defendants for injuries sustained in an automobile accident. The premises at 1142 Granville Street in Vancouver were occupied by the defendant the Acme Towel & Linen Supply Limited, the property extending to the lane behind the building, there being a space of fifty-seven and one-half feet between the building and the lane. To the south of the Acme building is 1146 Granville Street, occupied by a second-hand furniture store, and at the

back of this store is an open space, the back of the store being 73 feet from the lane. On the 21st of January, 1938, the plaintiff came south on the lane with his truck, proceeded across the lot of the Acme Towel premises to the back of the second-hand furniture store. In coming out the plaintiff backed his car on to the Acme property within five or six feet of the lot north of the Acme property and 20 feet from the lane. At this time an Acme Towel truck came south on the lane, stopped and backed up for the purpose of putting the back of his truck close to the back of the Acme building. The plaintiff was in his way and as he backed the plaintiff yelled at him to stop but the driver did not hear him, and as the back of the Acme truck came closer to him the plaintiff put out his hand and his arm was crushed between the two cars. He did not sound his horn when he saw the other car backing into him.

The appeal was argued at Vancouver on the 12th and 16th of May, 1939, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

Maitland, K.C. (*Hutcheson,* with him), for appellant: We say the plaintiff was a trespasser. There is not a suggestion that anyone else at any time used our premises in the manner they were used by the plaintiff, namely, by backing right on to our pathway. As to our duty to a trespasser see Halsbury's Laws of England, 2nd Ed., Vol. 23, pp. 613-14; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358. Before we can be held liable we must know he was there: see Charlesworth on Negligence, 196; 45 C.J. 742; *Joseph Eva, Ld.* v. *Reeves,* [1938] 2 K.B. 393. There is no liability until the law recognizes some duty towards the person who makes a claim: see *Power* v. *Hughes* (1938), 53 B.C. 64, at p. 67; *Bottomley* v. *Bannister,* [1932] 1 K.B. 458, at p. 476. It was the plaintiff's own fault that he waited until we were within five or six feet of him before he did anything; he then put out his hand and screamed. He had a horn and did not use it. There was no excuse for his putting out his arm: see *S.S. Singleton Abbey* v. *S.S. Paludina,* [1927] A.C. 16, at p. 28; *Collins* v. *Middle Level Commissioners* (1869), L.R. 4 C.P. 279. If he had sounded

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his horn there would have been no accident: see *Bell* v. *Johnston Brothers, Limited* (1917), 25 B.C. 82; *Holmes* v. *Kirk & Co.* (1920), 28 B.C. 122; *McLeod* v. *Boultbee* (1931), 44 B.C. 375; *Gray* v. *Wabash R.R. Co.* (1916), 35 O.L.R. 510, at p. 516. The last opportunity here lay with the plaintiff and was not exercised. He at least contributed to the accident.

Lucas, for respondent: They both did business at the back of these stores. Zien drove the rear of his truck into the left front portion of Hiatt's truck. Zien failed to heed the cries of Hiatt when backing up and was entirely responsible for the collision. This custom of carrying on business in this area disproved any claim that the plaintiff was a trespasser, and the trial judge so found. The plaintiff putting out his hand was a gesture of the moment and the learned trial judge held that it was done in the agony of collision and exculpated the plaintiff of all blame: see *Jones* v. *Boyce* (1816), 1 Stark. 493; *Maclenan* v. *Segar,* [1917] 2 K.B. 325; *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129; *Thornton* v. *Fisher,* [1928] App. D. 398; Clerk & Lindsell on Torts, 9th Ed., 257. Assuming the plaintiff was a trespasser, in the circumstances the defendants are responsible for the damage suffered as Zien knew or ought to have known that the plaintiff might be in his path: see *Degg* v. *Midland Railway Co.* (1857), 1 H. & N. 773, at p. 782; *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404; *Mourton* v. *Poulter,* [1930] 2 K.B. 183; *Attorney-General* v. *Northern Petroleum Tank Co., Ltd.,* [1936] I.R. 450, at p. 467; Halsbury's Laws of England, 2nd Ed., Vol. 23, pp. 613 and 614.

Maitland, replied.

Cur. adv. vult.

12th September, 1939.

MARTIN, C.J.B.C.: I agree with the reasons of my brother SLOAN.

MACDONALD, J.A.: This appeal concerns the liability of the occupier of premises for injuries suffered by the plaintiff (respondent), a licensee or trespasser, dependent on the facts. I refer to the judgment of the trial judge and my brother SLOAN for a more detailed statement of the facts; also for a useful

discussion of the law. The trial judge found that respondent was on appellant's property by the leave and licence of the occupier. Should this finding be reversed? He had the benefit of a view. The oral evidence, no doubt substantiated by the view, disclosed that respondent with his truck, to reach the back door of the furniture store had to pass over appellant's property. Raised ground and a telephone-pole prevented free ingress through the furniture store back lot; it was therefore necessary on leaving the lane to drive diagonally across appellant's lot. The plans (Exhibits 3 and 4) also indicate a building at the rear of the furniture-store lot, adjoining the raised ground and the telephone-pole, all preventing entrance from the lane through this lot. The only qualification is the possibility that entrance might be effected without encroaching upon appellant's adjoining lot by driving close to the telephone-pole over raised ground. Tracks indicate that this was not done. Respondent said: "You cannot go by the telephone-pole; you have to drive further over to the north; [*i.e.*, on appellant's lot] all the tyre marks are further to the north." The view would make this clear. Tyre marks in one place and their absence in another would indicate the practice. The trial judge said [*ante*, p. 18]:

> It was the custom of the plaintiff and others coming in from the lane, which runs north and south, to use the vacant plot [that is appellant's back lot] for the purpose of turning their trucks about after they had finished with their business. This custom is sworn to by three witnesses and there is no evidence to the contrary and I think the only fair inference that can be drawn is that the defendant company, through its employees, was aware of it and made no objection.

While reference to customary use is "for the purpose of turning their trucks" to get out again, the evidence shows it was also necessary to do so for purposes of ingress.

It is suggested that this finding of the trial judge is more sweeping than the evidence warrants. Only two or three witnesses testified to this practice; that, it was submitted, was not sufficient evidence to establish custom and in addition no evidence was offered to show knowledge on the part of the occupier. Custom is not the appropriate term. Our inquiry is as to leave and licence. On that point the trial judge made a finding of fact, *viz.*, that the respondent was there "by the leave and licence of the defendant company." There is evidence to support

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that conclusion. The view, as stated, disclosed that all car marks bound for either place of business crossed appellant's lot. The condition of the surface was as valuable as the evidence of eye-witnesses. Respondent might have examined for discovery as to appellant's knowledge. The trial judge, however, was free to infer that owners over several years could not avoid knowledge of this practice. I am satisfied that a neighbourly accommodation was inferentially granted; no doubt it still continues. I think, therefore, the learned trial judge's finding that the plaintiff was there by the leave and licence of appellant should not be disturbed.

Assuming, however, contrary to the view expressed that respondent was a trespasser the trial judge would still hold appellants responsible for the accident. One is tempted to discuss it, although it is not necessary to do so. There is difficulty in reconciling the decision in *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, and *Mourton* v. *Poulter,* [1930] 2 K.B. 183, where it is discussed with *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358 (for discussion see 17 Can. Bar Rev. 445). May one place a motor-car in motion either way without first ascertaining that no one, whether a trespasser or not, is in his way? Is it a comprehensive and satisfactory statement to say that there must be a deliberate intention to do harm to the trespasser—a malicious act; or is reckless disregard of consequences enough? Should we regard a motor-car as a dangerous instrument and its use somewhat analogous to carrying on blasting operations or as in *Mourton* v. *Poulter* to the felling of a tree? Placing either object in motion by felling the one or propelling the other in any direction raises the question whether or not it would be a wilful act of volition. Must the trespasser assume that risk? It may be that humanitarian considerations are at least as important as property rights and that where danger to life or limb is involved the responsibility of the occupier may not be less because of the *status* of the victim.

Again is it necessary that the occupier must know that the trespasser is before him or behind him, or is it enough that he ought to know, having regard to modern conditions and density of population? These may be questions for later determination. I offer no opinion at this stage.

There is no question, in my opinion, that with leave and licence established the servant of the occupier did not exercise that degree of care necessary to absolve his employer from liability.

I would therefore dismiss the appeal.

SLOAN, J.A.: This is an appeal from the judgment of Mr. Justice MCDONALD in an action wherein the plaintiff succeeded in obtaining judgment against the defendants for damages for personal injuries.

The defendant company operates a towel and linen supply business and occupies premises at 1142 Granville Street in the city of Vancouver. At the rear of the building occupied by the concern is a lot which extends eastward to a lane. Trucks of the company were loaded at the rear of the building and approached the place of loading by driving from the lane over the vacant lot.

Next door to the premises of the defendant company was situate (at 1164 Granville Street) the business of a dealer in junk and it was the habit of those who wished to deliver material to this dealer to approach the rear of his premises in trucks driven from the lane over the lot of the defendant company. Convenient and ready access to the rear of the premises of the junk-dealer could not be had direct from the lane to the lot at the back of his premises because of obstructions to this course at the lane end of the lot.

The plaintiff is a dealer in junk and possessed a truck. On the day in question he drove from the lane over the property of the defendant company to the rear of 1146 Granville Street. After transacting his business he then backed his car into the lot of the defendant company preparatory to turning to face the lane. When his car was in a position parallel to the lane facing south about 20 to 25 feet west of the lane and on the property of the defendant company he noticed a truck coming south on the lane. He heard the gears of this truck being changed and when he looked again this truck (one belonging to the defendant company and driven by the defendant Zien) was backing toward him. Hiatt started "screaming" but the truck still backed up until it crushed Hiatt's arm with which he had endeavoured to fend off the impending collision. Zien admits he never saw

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Hiatt's truck behind him. It was, of course, clearly visible had he looked.

The question then is whether, under the circumstances I have briefly mentioned, Hiatt is entitled to recover from the defendants.

The first question for determination is whether there has been a breach of duty by the defendants toward the plaintiff for as Lord Wright in *Lochgelly Iron and Coal Co.* v. *M'Mullan*, [1934] A.C. 1, at p. 25, said:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.

In order to determine what duty was owing by the defendants to the plaintiff it is essential and indeed basic to an appreciation of the obligations owing him that he be classed as a licensee or trespasser. The learned trial judge found that the plaintiff was a licensee—a finding based upon the evidence, including a view, and I cannot say he reached the wrong conclusion.

What duty then did the defendants owe to the plaintiff as such licensee? It is clear that they owed him a duty not to act negligently toward him as a person whom they knew or ought reasonably to have known was lawfully upon the defendant's premises. As Cockburn, C.J., said in *Gallagher* v. *Humphrey* (1862), 6 L.T. 684, at 685:

> The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant —for the negligence of his servants is his—is added to that risk and danger.

(And see Charlesworth: The Law of Negligence, p. 188 and *Tough* v. *North British Railway Co.*, [1914] S.C. 291).

The learned trial judge found that Zien was negligent in that he "neither listened nor looked to ascertain whether anyone was behind him," and that, in effect, is a finding of "superadded" negligence and constitutes an actionable breach of duty toward the plaintiff.

The learned trial judge also held that the plaintiff even if a trespasser was entitled to recover, under the circumstances of this case, but I find it unnecessary to consider that aspect of the matter.

Counsel for the defendants urged, as an alternative submission, that the plaintiff was guilty of contributory negligence. I have carefully read the evidence to find support of this contention but I am unable to say that the plaintiff could reasonably have avoided the consequences of the defendant's negligence. He did all he could do under the circumstances and while he did not sound his horn I should think that loud shouts or "screams" would be a more effective warning of an impending impact than the sounding of a horn. He was not guilty of contributory negligence, in my view, in driving his car to the place where the collision occurred nor in remaining there.

There is nothing in the evidence to suggest, to my mind, that he had any opportunity of either going ahead or backing up from the place where he was stationed when he became aware of the imminent danger of the collision. Nor can I say that in endeavouring to fend off the defendant's truck with his hand he was the author of his own injury. That action, while unfortunate in its result, was, as the learned judge has found, an instinctive gesture in the agony of collision.

In the result I would dismiss the appeal.

Appeal dismissed.

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

Solicitor for respondent: *E. A. Lucas.*

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REX v. CARMICHAEL.

Intoxicating liquors—Interdicted person—Liquor in his possession—Conviction—Appeal by way of case stated—Affidavit of appellant required—R.S.B.C. 1936, Cap. 160, Secs. 70 and 104.

Section 104 of the Government Liquor Act applies to an appeal by way of case stated from a conviction under said Act, and the affidavit required under said section must be made by the person appealing from his conviction.

APPEAL by accused by way of case stated from his conviction by James H. Mitchell, stipendiary magistrate for the county of Yale, on the charge of having in his possession or under his control, liquor, on July 26th, 1939, while an interdicted person, contrary to the provisions of the Government Liquor Act. Argued before MANSON, J. at Vancouver on the 4th of December, 1939.

McAlpine, K.C., for appellant.
H. W. McInnes, for respondent.

Cur. adv. vult.

7th December, 1939.

MANSON, J.: Case stated by James H. Mitchell, Esquire, a stipendiary magistrate for the county of Yale. On August 9th, 1939, the magistrate convicted Carmichael at Oliver, in this Province, for having in his possession or under his control liquor, on July 26th, 1939, while an interdicted person, contrary to the provisions of the Government Liquor Act, R.S.B.C. 1936, Cap. 160. The conviction is questioned upon two grounds: (1) That there was no evidence that Carmichael was an interdicted person on July 26th, 1939; (2) that Carmichael was not an interdicted person within the meaning of section 70 of the Government Liquor Act after July 21st, 1939.

Preliminary objection was taken by counsel for the Crown that no affidavit pursuant to section 104 of the Government Liquor Act had been filed by Carmichael—that this was an appeal and that therefore such an affidavit was necessary. That a case stated is an appeal is not open to doubt. *Vide Regina ex rel. Brown* v.

R. Simpson Co. (1896), 28 Ont. 231; 2 Can. C.C. 272, a decision of the Divisional Court of the old High Court of Justice of Ontario. To the same effect is the decision of the Appellate Division of the Supreme Court of the Province of Alberta in *Rex* v. *Macdonald,* 18 Alta. L.R. 39; 37 Can. C.C. 298; [1922] 2 W.W.R. 166. The Full Court of Nova Scotia took the same view in *Rex* v. *Coulter* (1934), 8 M.P.R. 326; 63 Can. C.C. 60, and in *Rex* v. *Young (No. 1)* (1934), 8 M.P.R. 323; 63 Can. C.C. 62.

Counsel for Carmichael submitted that section 104 of the Government Liquor Act in any event applied only to appeals other than by way of case stated. The pertinent part of the section reads as follows:

> No appeal shall lie from a conviction for any violation or contravention of any of the provisions of this Act unless the party appealing shall within the time limited for giving notice of such appeal make an affidavit before any justice that he did not by himself or by his agent, servant, or employee, or any other person, with his knowledge or consent commit the offence charged in the information; and such affidavit shall negative the charge in the terms used in the conviction, and shall further negative the commission of the offence by the agent, servant, or employee of the accused, or any other person, with his knowledge or consent; which affidavit shall be transmitted with the conviction to the Court to which the appeal is given. . . .

There are no words limiting the application of the section to any one type of appeal. Provision for appeal by way of case stated was in the Summary Convictions Act, now R.S.B.C. 1936, Cap. 271, at the time of the passing of section 104, *supra.* Appeal by way of case stated has been a well-recognized mode of appeal for a great many years. It must be assumed that the Legislature was familiar with this mode of appeal when it passed section 104. Furthermore, the obvious intent of the section was to prevent a person convicted from appealing unless he accompanied his appeal with an affidavit of innocence. The Legislature had in mind "persons convicted" who might wish to appeal and not, I think, modes of appeal.

Reference was made by counsel for Carmichael to *Rex ex rel. McDougall* v. *Army & Navy Veterans Association of Regina,* 21 Sask. L.R. 189; 46 Can. C.C. 389; [1926] 3 W.W.R. 695, a decision of the Court of Appeal of the Province of Saskatchewan. The latter Province has in its Liquor Act, R.S.S.

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1930, Cap. 232, a provision similar to our section 104, to wit, section 143. The provisions for appeal in Saskatchewan are contained in The Liquor Act, to wit, sections 141 and 142. The latter section specifically provides for an appeal by way of case stated. In section 143 (1) this language is used:

> Except in case of an appeal from the dismissal of an information under this Act, no appeal shall lie either under section 141 or under section 142, unless the party appealing shall, within the time limited for giving notice of such appeal, deposit with the justice who tried the case, an affidavit that he did not, by himself or by his agent, servant or employee or any other person with his knowledge or consent commit the offence charged in the information.

The draftsman of the above-quoted section *ex abundanti cautela* referred to both sections 141 and 142. In my view it was unnecessary to do so. While it is true that the provisions of section 104 of our statute may limit the right of appeal of persons convicted under the Government Liquor Act, and are perhaps to be strictly construed, nevertheless, I can find no indication that the section is not to extend to appeals by way of case stated. In my view the preliminary objection must be sustained. It follows that it becomes unnecessary for me to decide the other novel and interesting point raised. The conviction will be confirmed.

Conviction confirmed.

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McGINNES v. MURPHY.

Negligence—Damages—Boy nearly ten years old killed by automobile—Action by father as administrator of son's estate—Claim under Administration Act—Claim also under Families' Compensation Act—Assessment of damages—Avoidance of duplication of damages—R.S.B.C. 1936, Cap. 5, Sec. 71 (2)—R.S.B.C. 1936, Cap. 93, Secs. 3 and 6.

A boy nearly ten years old was struck and killed by an automobile driven by the defendant. In an action brought by the boy's father as administrator of the estate of his son, claiming damages under the Administration Act for the benefit of the estate of the deceased, and under the Families' Compensation Act for the benefit of the father and mother, it was found that the defendant's negligence was the sole and effective cause of the accident. On the assessment of damages:—

Held, that to prevent duplication of damages, it is necessary in the assessment of damages under the Administration Act to indicate the portion of the amount allowed for loss of expectancy of life in being deprived of the anticipated privilege of caring for his dependants. General damages were assessed under the Administration Act at $5,000, of which $1,000 was ascribed to the element of deprivation of privilege of caring for dependants. General damages were assessed under the Families' Compensation Act at $1,000, but it was ordered that the general damages under the Administration Act should be abated to the extent that the plaintiff and his wife were the beneficiaries under the administration to the portion of said $5,000 ascribed to the deprivation of the privilege of caring for dependants.

ACTION by plaintiff as administrator of the estate of his deceased son, who was run down and killed by the defendant owing to the negligent driving of his automobile. The plaintiff claimed under the Administration Act for the benefit of the estate of deceased, and under the Families' Compensation Act for the benefit of deceased's parents. Tried by MANSON, J. at Vancouver on the 7th, 11th and 12th of December, 1939.

L. H. Jackson, for plaintiff.
J. L. Lawrence, and *H. D. Arnold,* for defendant.

Cur. adv. vult.

9th January, 1940.

MANSON, J.: At the trial of this action, a running down case, I disposed of the issue of negligence, holding that the defendant's negligence was the sole and effective cause of the accident which resulted in the death of Bernard Adam McGinnes, the infant child of the plaintiff, a boy of nine years and eleven months of age.

The plaintiff sues as administrator of the estate of the deceased son. He claims under the Administration Act, R.S.B.C. 1936, Cap. 5, for the benefit of the estate of the deceased and under the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, for the benefit of the father and mother.

Counsel for the defendant objected to the plaintiff's statement of claim under the latter Act on the ground that the address of the mother was not given and on the ground that the occupation of neither the father nor mother was given as required by sec-

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tion 6. An amendment was allowed at the trial which overcame these two objections. Counsel for the defendant further objected to the statement of claim under the Families' Compensation Act on the ground that no particulars of "the nature of the claim" were given. Section 6 reads as follows:

> In every such action the plaintiff on the record shall, in his statement of claim, furnish and set forth the names, addresses, and occupations of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

The section had its origin in section 4 of 9 & 10 Vict., Cap. 93, which reads as follows:

> And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

The draughtsman of our statute, in attempting to modernize the language of the English statute, did not, if I may say so, do so in a particularly happy fashion. It will be noted that the original Act required "a full particular of the person or persons for whom and on whose behalf such action shall be brought." A compliance with that language would necessitate the giving, *inter alia,* of the relationship of the person or persons to be benefited, whereas our section does no more than require that the names, addresses and occupations of such persons be given and yet certainly the relationship of those persons is material. The draughtsman of our statute, inadvertently doubtless, omitted the word "particulars" after the first word "and" in the last clause. Even with the insertion of the word "particulars" the clause has on its face none too clear a meaning. One would have supposed, were the English statute not referred to, that it was a stipulation requiring particulars of the relationship to the deceased of the person for whose benefit the action is brought. Apart from the relationship, without further particulars, the nature of the claim is clear from the fact that the action is brought under the statute. The form of pleading prescribed by our rules appropriate to this type of action, namely, No. 4 of Appendix C, p. 146 of the Supreme Court Rules, 1925, does not assist. In England the practice is well established. In Bullen

& Leake, 9th Ed., p. 380, the appropriate precedent is set forth. Substantially it runs as follows:

> Particulars pursuant to statute are delivered herewith [*or*, are as follows:—]
>
> Names of the person [*or*, persons] on whose behalf the action is brought:—
>
> Eva, the widow of the deceased.
>
> William, aged ——, his son [*or*, illegitimate, or adopted son].
>
> The nature of the claim in respect of which damages are sought:—
>
> The said *C. D.* was a —— in the employ of —— and was earning —— a week, and was the sole support of his said wife and children and by his death they have lost all means of support and living [*or, as the case may be*].

If the English practice is followed certainly everything required by our statute will be complied with. Counsel for the plaintiff referred to *Chapman* v. *Rothwell* (1858), El. Bl. & El. 168; 27 L.J.Q.B. 315; 120 E.R. 471. There Lord Campbell, C.J. observed [27 L.J.Q.B.]:

> No doubt pecuniary damage has been held to be necessary to sustain the action, but is not the mere claim, as far as the declaration is concerned, sufficient?

At a later point the learned Chief Justice observed:

> The question of pecuniary injury is a matter of evidence only.

The Court was unanimous in adopting the view expressed by Lord Campbell. Counsel for the plaintiff relied upon the *Chapman* case which does not appear to have been overruled, although not in accord with the practice as laid down in Bullen & Leake, and it is noteworthy that the learned editors of Bullen & Leake do not cite the *Chapman* case. In my view the precedent given above is in accord with the general rules of pleading and ought to be followed here. The plaintiff did include a paragraph in his statement of claim as follows:

> The plaintiff claims general damages against the defendant for the benefit of the parents of the said Bernard Adam McGinnes, whose death was caused as aforesaid.

Under the circumstances I do not feel justified in dismissing the claim under the Families' Compensation Act, although the plaintiff gave no particulars as to the occupation of the deceased boy, nor of the support which he was giving to his parents, nor indeed did he allege anywhere in his pleadings except by implication that loss had been sustained by the parents by the death of their son.

The question of damages to be allowed under the two statutes remains to be determined. Under the Administration Act special

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damages are allowed in the sum of $28, being the amount of the bills of the hospital and the physician.

General damages: The boy was in all respects in good health. He was of bright disposition and obedient and helpful to his parents to the extent of his ability having regard to his years. In view of the fact that to the estate accrues the damage to the deceased by reason of loss of expectation of life, and that as Lord Wright said in *Rose* v. *Ford,* [1937] A.C. 826, at 853; 106 L.J.K.B. 576:

> One of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced.

I think it necessary in the assessment of damages to indicate the portion of the amount I allow for loss of expectancy of life which I ascribe to the fact that the deceased was deprived of his anticipated privilege of caring for dependants. I think that is necessary to prevent possibility of duplication of damages. While Adamson, J. did not show the mathematical detail in his judgment in *Stebbe* v. *Laird* (1937), 45 Man. L.R. 541; [1938] 1 W.W.R. 173, he, nevertheless, did do in substance exactly what I propose to do in the case at Bar. He arrived at the result by eliminating the factor common to both actions in his assessment of damages under the Administration Act. In adopting the course I have adopted here I am doing what I did in *Mackenzie* v. *Harbour and British Columbia Electric Ry. Co. Ltd,* 53 B.C. 88; [1938] 2 W.W.R. 333.

General damages are assessed under the Administration Act at the sum of $5,000, of which amount I ascribe $1,000 to the element of deprivation of privilege of caring for dependants.

General damages are assessed under the Families' Compensation Act at $1,000.

There will be abatement in the general damages allowed under the Administration Act to the extent that the plaintiff and his wife are the beneficiaries under the administration of the portion of the $5,000 ascribed to the deprivation of the privilege of caring for dependants.

Judgment accordingly with costs.

Judgment for plaintiff.

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Insurance, automobile—Action against insured—Application of insurer to be added as third party—Form of order—R.S.B.C. 1936, Cap. 136, Sec. 175 (7).

On an application by an insurance company to be added as a third party in an action in which the insured was a party defendant, it was ordered that the form of the order should follow that made in *McDermid* v. *Bowen* (1937), 51 B.C. 401, except that there should be included a direction to the effect that the fact that the assurance company is a party to the action shall not be disclosed to the jury in case the trial is had by a judge with a jury.

MOTION by the Home Assurance Company of Canada to be added as a third party to this action under the provisions of subsection (7) of section 175 of the Insurance Act. Heard by MANSON, J. in Chambers at Vancouver on the 14th, 15th, 19th and 22nd of December, 1939.

W. H. Campbell, for plaintiff.
Denis Murphy, Jr., for defendant.
Tysoe, for Home Assurance Company of Canada.

Cur. adv. vult.

2nd January, 1940.

MANSON, J.: The Home Assurance Company of Canada applies (a) to be added as a third party to this action under the provisions of subsection (7) of section 175 of the Insurance Act, being Cap. 133, R.S.B.C. 1936; (b) for an order that pleadings shall be delivered as between the third party and the plaintiff and the defendant and the third party and that the question of liability of the assurance company to indemnify the defendant against the damages and costs, if any, awarded to the plaintiff in the action and against his costs of defending the action be tried and disposed of in such manner as may be directed by the trial judge or by a judge in Chambers upon application after the final disposition of the issues between the plaintiff and the defendant; (c) that the time for pleadings be fixed; (d) for an order that the defendant do within ten days from the date of

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service of the order deliver a statement of claim as against the third party, setting out the grounds on which he claims indemnity from the third party, and that the time for defence and reply as between the defendant and the third party be fixed; (e) for an order that as between plaintiff and the third party and the defendant and the third party all necessary proceedings be taken for the discovery and production of documents and that the plaintiff and defendant may examine the third party for discovery pursuant to the Rules of the Court; (f) for an order that the third party be at liberty to appear by counsel and to defend this action and that the fact that the assurance company is a party to the action shall not be disclosed to the jury in case the action shall be tried by a judge with a jury; (g) for an order that the third party shall be at liberty to apply for a trial of this action by a jury should it be so advised, and for an order that the costs of this motion shall be costs in the cause to the plaintiff and as between the defendant and the third party when they shall be disposed of by the judge presiding at the trial or other final disposition of the issues raised between the defendant and the third party.

Subsection (7) of section 175 reads as follows:

> Where an insurer denies liability under a motor-vehicle liability policy, it shall have the right upon application to the Court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

Question has arisen as to the appropriate form of the order. That was considered by the learned Chief Justice of this Court in *McDermid* v. *Bowen* (1937), 51 B.C. 401. The matter was considered in Ontario in 1936 in *Marshall* v. *Adamson,* [1936] 1 D.L.R. 635. That case went to the Court of Appeal of Ontario and subsequently to the Supreme Court of Canada, *vide* [1937] O.R. 872; [1937] 4 D.L.R. 292 and [1939] 1 D.L.R. 609. The statute in Ontario is in the very words of the statute in this Province. In the judgment of the Court of Appeal in the *Marshall* case, Middleton, J.A. states at p. 875: [O.R.]

> An order was made adding the insurance company as a third party, directing the trial of an issue between the defendant and the third party and permitting the insurance company's solicitor to withdraw as the defendant's solicitor and substituting his own solicitor in his stead. The order

permitted the third party to appear and take part in the trial of the issues between plaintiff and defendant: see *Marshall* v. *Adamson*, [1936] O.R. 103. This order was justified by the provisions of The Insurance Act, R.S.O. 1927, ch. 222, sec. 183, as enacted by 1932, 22 Geo. V., ch. 25, sec. 2, and amended by 1935, 25 Geo. V., ch. 29, secs. 32-36, which constitutes an entirely novel procedure.

In the Supreme Court of Canada (the *Marshall* case is there styled *Provident Assurance Co.* v. *Adamson*) Mr. Justice Davis who delivered the judgment of the Court refers to the third-party proceedings at p. 611 in this language: "In what is called the third-party proceedings . . ." No exception seems to have been taken in the Court of Appeal nor yet in the Supreme Court of Canada to the terms of the order joining the assurance company as a third party. It is noted that the trial of the third-party issue was a separate trial from that of the original issue in the action between the insured man, Marshall, and Adamson, though both issues were tried by the same judge, Mr. Justice McTague. *Vide* Davis, J. at p. 614. I have perused the order made by the learned Chief Justice in the *McDermid* case. It seems to be substantially in its terms the same as the order made in the *Marshall* case. I am advised by counsel that in this Province similar orders have been made by three other learned members of this Court. The practice seems to be well established and there appear to be no special facts which would warrant an order different in form from that made by the learned Chief Justice, except that there should be included a direction to the effect that the fact that the assurance company is a party to the action shall not be disclosed to the jury in case the trial is had by a judge with a jury. Such a clause appears to have been included in the *McDermid* order as drawn, but to have been stricken out, as the registrar informs me, by consent.

It is ordered accordingly. Costs in the cause to the plaintiff and as between the defendant and the third party they shall be disposed of by the judge presiding at the trial or other final disposition of the issues raised between the defendant and the third party.

Order accordingly.

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SLOAN v. MAUDE-ROXBY.

Action—Collision between motor-cars—Plaintiff injured—Settlement made by plaintiff with adjuster of defendant's insurer—Binding effect of.

The plaintiff having sustained serious injuries resulting from a collision between two motor-vehicles, was taken to a hospital. Fourteen days later he was visited at the hospital by an adjuster of the insurance company which had insured the defendant. The adjuster went to the hospital three times, and on the third occasion was attended by a solicitor, who had prepared a release for execution by the plaintiff. The release was signed by the plaintiff who received in consideration therefor a cheque for $2,000 which he subsequently cashed.

Held, that although the plaintiff had received no independent advice except that of the doctor in attendance upon him, and was not on equal terms with the adjuster, and the amount received appeared to be inadequate for the injuries received, the release was binding on him so as to prevent his maintaining an action for damages against the defendant.

ACTION for damages resulting from a collision between two automobiles. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vernon on the 16th and 17th of November, 1939.

Lindsay, for plaintiff.
L. St. M. Du Moulin, and *D. McK. Brown*, for defendant.

MANSON, J.: The plaintiff was injured as a result of a collision between two motor-vehicles, on the 12th of June, 1938. The plaintiff sustained quite serious injuries, including a comminuted fracture of the right femur, a broken nose, a mild concussion and bruises of not so extensive a character. Fourteen days later, plaintiff was approached at the hospital by the adjuster of the insurance company which had insured the defendant. The adjuster visited the plaintiff in the hospital a second time a day or two later, and on a third occasion, *i.e.*, on July 2nd, when the said adjuster was attended by his solicitor, who had prepared a release for execution by the plaintiff. The release was given in consideration of the sum of $2,000, a cheque for which amount was given to the plaintiff a day or two

later, and a receipt given by him. The plaintiff in due course cashed the cheque.

The matter comes before me now upon an issue as to whether or not the release binds the plaintiff so as to prevent his success in this action. The determination of the issue has given me very considerable anxiety. It is impossible to be quite certain of all the material facts, particularly when the plaintiff is dependent upon his own evidence to a very great extent as to his mental capacity at the time he signed the release. If there was mental incapacity at that time, certainly the plaintiff is a very poor witness to testify with respect to his mental condition. The plaintiff was, as he calls himself, a bushman, in other words, a worker in the woods. He had a reasonably average education. He appears to have taken his first year high school in Saskatchewan. He was poor, but whether penniless or not does not appear; but it would seem clear that his earning capacity prior to the accident was not great, and his work was intermittent. Perhaps it is not fair to say that his capacity to earn money was not great; perhaps his capacity was quite average; but he did not in the times through which we have been passing find it easy to get employment continuously. Two thousand dollars doubtless looked like a lot of money to the plaintiff, and one has considerable doubt as to whether he had any real appreciation of the detail of the expense to which he would be put as a result of the accident, and altogether likely he had no real appreciation of the uncertainty of the period which would be required to recover from such injuries as he had sustained. The *genus* of the adjuster is noted for its friendliness and tact. The adjuster in this particular case is said to have been quite a friendly individual on the occasion of his first visit, which lasted something less than one hour, apparently, without disclosing why he was there. On the second occasion he was more specific in his conversation, and in his friendly way arrived somewhere near the point, *i.e.*, what would the injured man settle for? The injured man said that he did not want to settle, and that he told the adjuster that he had better wait a while; but the adjuster pressed upon him the advisability of settling, and told him that if he settled then he would have his money and "would know where he was getting

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off at." Doctor Alexander knew that the adjuster was negotiating a settlement, and refused to give him any estimate of the probable period of hospitalization beyond saying that with luck it might not be more than six months. He told the adjuster that the figure of $1,500 which had been mentioned to him was not in his opinion an adequate sum; and he told the adjuster further that he intended to tell his patient so. He did advise his patient to that effect. The exact detail of his advice does not appear in the evidence; but I think I may infer that he went so far as to discourage his patient from a settlement, certainly of $1,500, and, possibly, from settling at all at that time. I do not think it can be said that the patient and the defendant as represented by the adjuster were on equal terms. The adjuster is a trained individual whose business it is to obtain settlements on the best terms possible from the standpoint of his principal. The plaintiff had no independent advice other than the advice of the doctor.

Having said that much, one must look at the other side of the situation. The plaintiff signed a form of document which appears to have been read over to him, and perhaps additionally read by himself, and which he says now that he understood at the time he signed. If the evidence went no further than the mere statement of the plaintiff that he understood at the time that he signed I would not be disposed to take his statement as at all conclusive; but there is other evidence, and evidence which, as it seems to me, is important. The plaintiff is not a boy; he is 35 years of age; he is of average education, and he did not impress me as being dumb. Possibly he may have a streak of stubbornness, and rather too much self-assurance. In any event, the fact remains that, despite the fact that his accident was only two weeks away, and the fact that he was still in pain, although not apparently severe pain, he undertook, or rather did not refrain from negotiating on his own behalf. True he did suggest to the adjuster that he wait awhile, but he listened to the adjuster, who figured for him the length of his incapacity and his wages and all the rest, and doubtless with all the guile that these expert adjusters make use of. He discussed the offer with the adjuster of $1,500 and he refused it, and offered to succumb for $2,000. Assuming that there was negligence on the part of the defendant,

and no contributory negligence on the part of the plaintiff, I have no hesitation in saying that $2,000 was an inadequate sum to the extent of $750 or $1,000. However, the plaintiff bargained and took the responsibility for not acting on the advice of his doctor. He conducted his own negotiations. He was a man of average intelligence, 35 years of age, as I have pointed out. And although he had no independent advice, and was not on equal terms with the adjuster as representing the defendant, I cannot now permit the plaintiff to go behind the settlement which he made.

There will be no costs.

Action dismissed.

HENN v. FOREMAN *ET AL.*

Fraudulent conveyances—Husband and wife—Judgment creditor of husband—Conveyance by husband to wife—Property paid for by wife—Held in trust by husband—Declaration by husband—Validity—Costs—R.S.B.C. 1936, Cap. 106.

In an action by a judgment creditor of the defendant husband for a declaration that a certain deed of one-half interest in a lot in favour of his wife, is a fradulent conveyance under the Fraudulent Conveyances Act, and is null and void as against the plaintiff, the judgment was proven with failure to pay, although no execution was issued and it was further submitted as *indicia* of intention to defraud, that on the day before the plaintiff's first trial, the lot in question was mortgaged for $1,000, and on the day after judgment mortgaged again for $2,000, but subsequently to the issue of the writ in this action the second mortgage was released. The defendant produced a declaration executed four years prior to the impugned transaction signed by the husband acknowledging that all the moneys used in construction of their home came from his wife's estate, and that he held a one-half interest in the property in trust for her, and no evidence was given that this was not a genuine document. Evidence was given by independent witnesses showing that prior to the purchase of the lot the wife obtained over $49,000 from her father's estate and the lot was purchased with her money, further that a one-half interest in the lot was placed in the husband's name to enable him to exercise the franchise. The plaintiff recovered judgment on the trial.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the plaintiff must establish an intention to delay, hinder or defraud creditors, and one must look at all the circumstances surrounding the transfer as to whether it was executed with that intent. In view of

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all the evidence it is wrong to find that the declaration signed by the husband was not genuine when the question was not put in issue at the trial. Both defendants gave evidence and were not challenged on this point, and looking at the document in the absence of expert evidence, it is reasonably clear to the layman that it was not prepared and executed recently. Treating it as *bona fide*, all suspicious circumstances in connection with the execution of the mortgages disappear. They were given in the ordinary course of business. The action was dismissed.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 18th of April, 1939, in an action by the plaintiff as a judgment creditor of the defendant Ralph P. Foreman, to set aside a conveyance of an undivided one-half interest in a house and lot situate at Port Haney, British Columbia, and made by the defendant Ralph P. Foreman to his wife Eileen Foreman in December, 1938, on the grounds that the said conveyance was a fraudulent conveyance and against the provisions of the Fraudulent Preferences Act and the Fraudulent Conveyances Act. The plaintiff sued defendants Ralph P. Foreman and his wife Eileen Foreman as the registered owners of the property in question, and also one Olaf Sveere Krefting and Mary C. Kennedy as mortgagees, but the action was discontinued as against the defendant Krefting before delivery of the statement of claim. Judgment was given for the plaintiff as against Ralph P. Foreman and his wife, but it was dismissed as against Mary C. Kennedy.

The appeal was argued at Vancouver on the 16th of June, 1939, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

McCrossan, K.C., for appellants: Under the Fraudulent Conveyances Act the plaintiff must prove that the conveyance in question was contrived and devised in fraud to defeat, hinder or defraud creditors. The statute does not apply to *bona fide* transactions made for good consideration. The conveyance herein was, on the evidence, a *bona fide* conveyance by a trustee, of land which at all times was the property of the *cestui que trust*, who owned the beneficial interest. No act of the trustee can prejudice the title of his *cestui que trust*: see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 194, sec. 347. No presumption of a gift from a wife to her husband arises from a transfer into his name, or into their joint names. The husband is presumed to be a

trustee for his wife: see Halsbury's Laws of England, 2nd Ed., Vol. 17, pp. 666-7; *Mercier* v. *Mercier,* [1903] 2 Ch. 98. The bankruptcy of the trustee cannot affect the title. Actual fraud must be proven: *Hickerson* v. *Parrington* (1891), 18 A.R. 635; *Fisher* v. *Kowslowski* (1913), 5 W.W.R. 91; *W. Morris* v. *A. Morris,* [1895] A.C. 625, at p. 628; *Robertson* v. *Robinson,* [1928] 2 D.L.R. 343, at p. 350. The wife enjoys rights higher than those of a mere creditor: see *The Molson Bank* v. *Halter* (1890), 18 S.C.R. 88, at p. 94. The *onus* is on the plaintiff to prove fraud: see *In re Johnson* (1881), 20 Ch. D. 389, at pp. 393-4; *Robert Dollar Co.* v. *Walker* (1926), 36 B.C. 405, at pp. 410-11. Under the Fraudulent Preferences Act the plaintiff must prove (a) That the grantor was insolvent; (b) that the conveyance was made to defeat his creditors; (c) that it has the effect of giving a preference to a creditor. No evidence is given to prove the essential matters aforesaid. The *onus* is on the plaintiff to prove the insolvency: see *Clarke* v. *Sutherland,* [1917] 3 W.W.R. 624; *McCrae* v. *White* (1883), 9 S.C.R. 22, at p. 26. The conveyance was in no sense a cloak to defeat creditors: see *Union Bank of Canada et al.* v. *Murdoch et al.,* [1917] 2 W.W.R. 112; *Boulton* v. *Boulton* (1898), 28 S.C.R. 592; *Union Bank* v. *Tyson* (1915), 7 W.W.R. 1117.

Norris, K.C., for respondent: The evidence clearly shows the fraudulent intent of the parties. To ascertain this fact the Court will look at the surrounding circumstances: see *In re Holland. Gregg v. Holland,* [1902] 2 Ch. 360, at p. 372; *Ex parte Mercer. In re Wise* (1886), 17 Q.B.D. 290, at p. 298; *Twyne's Case* (1601), 2 Co. Rep. 212. Both appellants had knowledge of the County Court action. Ralph P. Foreman is a beneficial owner of an undivided one-half interest in the property. The declaration of trust must be looked upon with suspicion: see Phipson on Evidence, 7th Ed., 222; *Koop* v. *Smith* (1915), 51 S.C.R. 554, at p. 558. As to interfering with the findings of fact of the trial judge see *McCoy* v. *Trethewey* (1929), 41 B.C. 295. Their own evidence shows Ralph P. Foreman had a beneficial interest in the property. The respondent's judgment was not paid although demand was made for payment. This is sufficient proof of insolvency: see *Knox* v. *Shaw,* [1927] 2 W.W.R. 494, at p. 498; *Hopkinson* v. *Westerman* (1919), 48 D.L.R. 597.

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The learned judge did not give credence to the appellant's witnesses.

McCrossan, replied.

Cur. adv. vult.

On the 12th of September, 1939, the judgment of the Court was delivered by

MACDONALD, J.A.: Appeal from a judgment of MORRISON, C.J.S.C., setting aside a transfer from husband to wife of an undivided half-interest in a small lot purchased originally for $600 and registered in their names as joint tenants. Respondent in an action for assault obtained judgment against the husband for $416.95 including costs. The submission is that, to avoid payment, the husband transferred his undivided one-half interest in the lot to his wife. It is further submitted as *indicia* of intention to defraud that on the day before the trial of the civil action for assault appellants jointly mortgaged the lot for $1,000 and on the day after judgment mortgaged it again for $2,000. Shortly thereafter the husband transferred the undivided half-interest to his wife subject to the mortgages. Subsequent to the issuance of the writ in this action the second mortgage was released.

Respondent to succeed must establish an intention to delay, hinder or defraud creditors. One must look at all the circumstances surrounding the transfer and determine whether or not it was executed with the intent aforesaid. The evidence was very scanty. A few admitted facts only were proven by respondent, *viz.,* the judgment: failure to pay although no execution was issued: the transfer to the wife and the execution of mortgages.

In *Koop* v. *Smith* (1915), 51 S.C.R. 554 a bill of sale of chattels was given by a brother financially embarrassed to his sister. It was held that where there were suspicious circumstances in respect to a transaction between relatives the fact of relationship put the burden of explanation upon the parties thereto; also that the evidence of relatives should "be scrutinized with care and suspicion" (p. 558). Accepting this statement as binding I am clearly of the opinion that appellants fully discharged this burden. A declaration was produced, executed four

years prior to the impugned transaction, signed by the husband and reading as follows:

Haney, B.C.

Dec. 23, 1934.

In event of anything happening to me before the matter can be cleared up by proper transfer I wish to acknowledge that all of the moneys used in construction of our home at Haney, B.C. [the lot referred to] come from my wife's estate and that I hold a one-half interest in the property in trust for her and will as soon as convenient give her a deed for the same.

Signed Ralph P. Foreman.

There is no evidence (nor is it a fair inference to suggest) that this is not a genuine document. While objection was taken to its admission no attempt was made by cross-examination or otherwise to impugn it. Credible evidence too was given by independent witnesses showing that prior to the purchase of the lot the wife obtained a substantial sum of money from her father's estate. Both parties testified it was purchased with her money, placed in a joint account. A real-estate agent who attended to the transfer testified that title was placed in the husband's name to enable him to exercise the franchise.

The Chief Justice gave no reasons; he merely directed that judgment should be entered in terms of the statement of claim. If we must assume that all essential findings of fact were made I would say, with respect, it was clearly wrong, in view of all the evidence, to find that the document referred to was not genuine *a fortiori* when the question was not put in issue at the trial. Both appellants gave evidence and were not challenged on this point. Looking at the document too in the absence of expert evidence it is reasonably clear to the layman at all events that it was not prepared and executed recently.

We are not concerned with whether or not it constitutes a valid trust. It is enough to say that it was honestly executed and negatives any attempt to defraud. Treating it as *bona fide* all suspicious circumstances in connection with the execution of the mortgages disappear. They were given in the ordinary course of business. Whatever may be said of the right to execute them jointly it would not affect the question of intent to defeat creditors.

I would, therefore, allow the appeal and dismiss the action.

Appeal allowed.

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8th December, 1939.

This is a question of costs. Mr. *Harper* raised the point that under section 28 of the Court of Appeal Act the costs should not follow the event where the title to real estate or some interest therein is in question. We construe that section to mean that, although by the first two lines, it is, apart from showing good cause, mandatory that costs follow the event in all except the specified exceptions in clauses (*a*) to (*d*), there is a discretion to make a similar order in cases covered by the exceptions. There is no reason why the usual practice should not be followed in this appeal.

Order accordingly.

Solicitors for appellants: *McCrossan, Campbell & Meredith.*
Solicitors for respondent: *Harper & Anderson.*

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POWELL v. NORGREN: HAMMER, GARNISHEE.

Mechanic's lien — Wages of workmen — Judgment against employer— Employer sells logs—Judgment creditor garnishees purchaser—Liens filed by workman—Purchaser fails to comply with sections 37 and 39 of Woodmen's Lien for Wages Act—R.S.B.C. 1936, Cap. 17, Sec. 10; Cap. 310, Secs. 37, 38 and 39.

Norgren, a logger, employed Johonson and Thorsen in his logging operations, and on October 4th, 1937, he owed Johonson $72.50 and Thorsen $88.90. On October 5th, 1937, one Powell recovered judgment against Norgren for $155.42. Norgren sold his logs to one Hammer, a lumberman, and on October 15th, 1937, Powell, the judgment creditor, attached by an order issued under the Attachment of Debts Act, the moneys owing by Hammer to Norgren. On October 31st, 1937, Johonson and Thorsen filed statements of claim of lien for wages under the Woodmen's Lien for Wages Act upon the logs and timber of Norgren. On October 27th, 1937, Hammer paid into Court $158.85, being the sum he owed Norgren for the logs. It was *held* that the lien-holders had priority as against the judgment creditor.

Held, on appeal, reversing the decision of LENNOX, Co. J. (MCQUARRIE, J.A. dissenting), that the case turns on the construction of sections 37, 38 and 39 of the Woodmen's Lien for Wages Act. Section 37 provides that a buyer of logs shall, before making payment therefor, require the seller to furnish a pay-roll or sheet of the wages and showing, if not paid, the amount of wages or pay due to the workmen, and section 39 obligates the buyer to retain "for the use of the workmen" the sum set opposite their respective names which have not been paid. The requirements of

sections 37 and 39 of said Act were not complied with by the buyer Hammer, and in consequence there has been a failure to comply with the conditions precedent necessary to the creation of a trust in favour of the workmen in the fund in question. The workmen have no charge or lien on the fund in Court, as it never became impressed with a trust in their favour. Their remedy was an action against Hammer under section 38 of said Act.

APPEAL by plaintiff from the decision of LENNOX, Co. J., of the 6th of April, 1938. The plaintiff recovered judgment against the defendant for $155.42, in the County Court of Westminster on the 15th of October, 1937, and on the 15th of October, 1937, the plaintiff having obtained a garnishing order against the garnishee, said garnishee paid into Court the above sum and $6.10 costs on the 28th of October, 1937. The claimants, Albert Johonson and Joseph Thorsen filed liens under the Woodmen's Lien for Wages Act upon certain logs of the defendant on the 21st of October, 1937, in respect of work done in felling said timber for the defendant between the 15th of September, 1937, and the 4th of October, 1937. The defendant had sold the logs to the garnishee and at the time the liens were filed the logs were at the mill of the garnishee. On the application of the plaintiff for payment out of Court to the plaintiff, the moneys paid into Court under the garnishing order, it was held that the lien-holders had priority on the proceeds of the logs as against the judgment creditor.

The appeal was argued at Vancouver on the 17th of May, 1938, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The learned judge erred in holding that the lien-claimants had any *status* or right to appeal on the judgment creditor's application for payment out and he should have ordered payment out to the judgment creditor: see *McDonald* v. *Cocus Island Treasures Ltd.* (1932), 46 B.C. 360.

Adam Smith Johnston (*Rennie,* with him), for respondents: The lien-holders have a prior claim against the logs under the Woodmen's Lien for Wages Act: see *Levene* v. *Maton* (1907), 51 Sol. Jo. 532; *Tatroff* v. *Ray* (1934), 49 B.C. 321; *Lowe Chong Company* v. *B.C. Coast Vegetable Marketing Board* (1937), 51 B.C. 559; *The Leader* (1868), 18 L.T. 767. The

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judgment creditor only takes subject to the equities. The judge below did properly under section 16 of the Attachment of Debts Act.

McAlpine, replied.

Cur. adv. vult.

10th January, 1939.

MARTIN, C.J.B.C.: The appeal is allowed. We are unable to take the view that was taken by the learned judge whose judgment was relied upon to establish the trust, *i.e.*, Mr. Justice Beck, in *Pomerleau* v. *Thompson* (1914), 5 W.W.R. 1360, because we feel that our statute, under the circumstances of this case, at most imposed an obligation, and created no trust.

Our reasons will appear more fully in the judgments that will be handed down.

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

MCQUARRIE, J.A.: With all due deference I must dissent from the judgment of the majority of the Court. I agree with the conclusions of Beck, J., in *Pomerleau* v. *Thompson* (1914), 5 W.W.R. 1360. In addition to the authorities cited by Mr. Justice Beck, I would refer to *Levene* v. *Maton* (1907), 51 Sol. Jo. 532, which is mentioned in the Annual Practice, 1938, p. 870.

I would therefore dismiss the appeal.

SLOAN, J.A.: The facts upon which the proceedings below and this appeal were founded are as follow:

Norgren was a logger and employed Johonson and Thorsen in his logging operation. On the 4th of October, 1937, Norgren owed the sum of $72.50 to Johonson and $88.90 to Thorsen for labour and services performed by them in such logging operation as "fallers." On the 5th of October, 1937, one Powell recovered judgment against Norgren for the sum of $155.42. The record before us does not disclose the cause of action upon which the judgment was based. Norgren had been selling his logs to one Hammer, a lumberman, and on the 15th of October, 1937, Powell the judgment creditor attached, by an order issued under the Attachment of Debts Act (R.S.B.C. 1936, Cap. 17), the moneys owing by Hammer to Norgren to an amount to satisfy the judgment and costs of the attachment proceedings. On the

21st of October, 1937, Johonson and Thorsen filed statements of claim of lien for wages under the Woodmen's Lien for Wages Act (R.S.B.C. 1936, Cap. 30), upon logs and timber of Norgren. On the 25th of October, 1937, Hammer was advised that the liens had been filed but on the 27th of October paid into Court, pursuant to the Powell attachment order, the sum of $158.83. This sum was owing by Hammer in respect to his purchase of these logs from Norgren upon which Johonson and Thorsen claimed their liens but Hammer did not "suggest" that this sum was claimed by the lien-claimants (section 14, Attachment of Debts Act). Once the fund was in Court the contest then arose as to whether this sum should be paid out to Powell or to Johonson and Thorsen. We are not concerned with the actual logs or any rights of seizure thereof.

The learned judge below held Johonson and Thorsen entitled to the fund and Powell appeals to us to set aside this order. Several grounds of appeal were advanced, some of a technical nature complaining of the procedure adopted below, but I propose to deal with this matter upon what I consider to be the substantial question, *i.e.*, who is entitled to the fund in Court?

In my view the claimants Johonson and Thorsen have no lien upon these moneys. I reach this conclusion with reluctance but can see no escape from it. It is clear that the Woodmen's Lien for Wages Act was enacted for the purpose of protecting the right of woodmen to receive payment for "labour or services" rendered in logging operations within the Province, and in my view it is the duty of the Court, where possible and necessary, to construe such a statute in favour of the woodmen in order that the intent of the Legislature may be effectuated. I have approached this case with that principle in mind but with deference cannot reach the same conclusion as that reached below.

This case turns upon the construction proper to be placed upon sections 37, 38, and 39 of the Act in question.

Section 37 provides, in effect, that a buyer of logs shall, before making payment therefor, require the seller to furnish a pay-roll or sheet of the wages and showing if not paid, the amount of wages or pay due to the workmen. Section 39 then obligates the buyer to retain "for the use of the workmen" "the sum set opposite their respective names which have not been paid."

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Sloan, J.A.

It is apparent that if the buyer complies with the statutory obligation set upon him by section 37 then by virtue of section 39, the fund in his hands becomes impressed with a trust in favour of the unpaid workmen. In this case the buyer did not comply with section 37 and in consequence, in my opinion, there has been a failure to comply with the conditions precedent necessary to the creation of a trust in favour of the workmen in the fund in question. It is true that the workmen cannot be said to be responsible for the failure of the buyer to comply with section 37 and it would appear unjust that they should suffer untoward consequences through no fault of their own but when we consider section 38, it seems to me that the Legislature had in contemplation this possible event and provided for it. By section 38 a buyer making payment to a seller without requiring production of the pay-roll or wage-sheet is liable at the suit of any workman for the amount of pay due and owing to him. In my view the result is that when the buyer neglects to carry out the statutory obligation contained in section 37 the fund in his hand is free from any trust or charge in favour of the workmen but as the penalty for the buyer's non-compliance with section 37 he renders himself personally liable, under section 38, at the suit of the workmen for those wages which are due and owing to them.

In this case the workmen have no charge or lien on the fund in Court as it never became impressed with a trust in their favour; their remedy was an action against Hammer under section 38 of the Act.

I have considered the judgment of Beck, J., in *Pomerleau* v. *Thompson* (1914), 5 W.W.R. 1360, 1362, wherein he held in a similar case that the moneys in Court were "a fund upon which the workmen and labourers have a lien for their wages." I regret I cannot reach that conclusion in this case.

With respect, the appeal is therefore allowed.

O'HALLORAN, J.A. agreed with SLOAN, J.A.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *D. J. McAlpine.*

Solicitors for judgment debtor and garnishee: *Whiteside & Duncan.*

Solicitor for lien-claimants: *H. G. Johnston.*

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May 4, 5, 16.

Criminal law—Charge of counselling to commit arson—Dismissed on the trial—Appeal by the Crown—Non-direction and misdirection amounting to non-direction claimed—No objection taken by the Crown on the trial.

On the trial a jury found the accused not guilty on a charge that he did unlawfully counsel William Eric Munroe to commit the crime of arson by counselling the said William Eric Munroe to wilfully set fire to buildings and structures the property of the False Creek Lumber Company Limited. The Crown appealed and asked for a new trial on the ground of misdirection by the trial judge although no objection was taken by the Crown to the charge on the trial.

Held, on appeal, *per* MARTIN, C.J.B.C. and SLOAN, J.A., that the submission that Crown counsel may remain in silence and take no objection to misdirection in favour of the accused nor ask for instruction upon a relevant point of law on which there has been non-direction and then on acquittal seek to place the accused again in jeopardy because of the Crown's neglect to request a proper instruction is entirely foreign to the fundamental principles of criminal jurisprudence and therefore the appeal should be dismissed.

Per MACDONALD, MCQUARRIE and O'HALLORAN, JJ.A.: On the objection that failure by Crown counsel to object to the charge is fatal to the Crown's appeal it is unnecessary to express a final opinion. The story told by the youth who actually fired the mill and now undergoing sentence, together with other witnesses, was so weird and fantastic that if not unbelievable a jury acting fairly should not find the accused guilty. Having regard to the nature of the evidence justice does not require that the accused should be placed in jeopardy a second time and therefore the appeal should be dismissed.

APPEAL by the Crown from the verdict of a jury acquitting the respondent *coram* MORRISON, C.J.S.C. on a charge that he did in the city of Vancouver, on the 15th of May, 1938, wilfully, without legal justice or excuse and without colour of right set fire to buildings and structures belonging to the False Creek Lumber Company Limited situate at 995—6th Avenue West, in the said city, and that he did unlawfully counsel William Eric Munroe to commit the crime of arson by counselling said William Eric Munroe to wilfully set fire to buildings and structures, the property of the False Creek Lumber Company Limited. On the trial the charge of arson was struck out and the case proceeded on the charge of counselling alone.

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The appeal was argued at Victoria on the 4th and 5th of May, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

A. B. Macdonald, K.C. (*Hurley,* with him), for appellant: In April and May, 1938, the mill was in financial difficulties. Munroe was superintendent of the mill. He had no financial interest in it. He was paid $200 per month. We say there was interference by the judge in rejecting evidence: see *Rex* v. *Cracknell* (1931), 56 Can. C.C. 190; *Rex* v. *Curlett* (1936), 66 Can. C.C. 256, at p. 262. We did not take any objection to the charge on the trial: see *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217; *Rex* v. *Bourgeois,* [1937] 2 W.W.R. 97.

McAlpine, K.C., for respondent: The appeal comes under section 1014, subsection 2 of the Criminal Code. The jury was not misled: see *Rex* v. *De Bortoli* (1927), 38 B.C. 388. Counsel has a duty to take objection as to non-direction: see *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 68, at pp. 75-6; *Regina* v. *Fick* (1866), 16 U.C.C.P. 379, at p. 384; *Rex* v. *Jarvis Sr.,* [1937] 3 D.L.R. 29, at pp. 48-9; *Rex* v. *Williams* (1934), 49 B.C. 379, at p. 382; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, at pp. 116-7; *Rex* v. *Lew* (1912), 17 B.C. 77; *Rex* v. *Duckworth* (1916), 26 Can. C.C. 314, at p. 361; *Reg.* v. *Theriault* (1894), 2 Can. C.C. 444, at p. 455. A man should not be placed in jeopardy twice: see *Rex* v. *Mulvihill* (1914), 19 B.C. 197.

Macdonald, in reply, referred to *Rex* v. *Boak* (1925), 36 B.C. 190; *Rex* v. *Shandro,* [1923] 1 W.W.R. 405; *Rex* v. *Rasmussen,* [1935] 1 D.L.R. 97; *Rex* v. *Recalla,* [1935] 4 D.L.R. 353.

Cur. adv. vult.

16th May, 1939.

MARTIN, C.J.B.C.: I have had the benefit of seeing the reasons of my brother SLOAN and being in accord therewith I have not much to add to what has been already said.

I agree with my brother in the way he "sums up" the modern practice in criminal cases of relaxing in favour of the accused the civil rule requiring objections to a judge's charge to be

taken at the time, and with the Appellate Court of Saskatchewan in *Rex* v. *Curlett* (1936), 66 Can. C.C. 256, 258 that said relaxation "should not apply to an appeal by the Crown."

It is to be remembered that by section 1021 (8) of the Code,—

> On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto, under this Part, no costs shall be allowed on either side.

Compare our recent decision hereon in *Rex* v. *Crowe* (1938), 53 B.C. 173.

The practical, and grave consequence of this is that the Crown if its appeal is allowed for misdirection without objection, will get a new trial because of its own oversight at the expense of the accused, though if it were a civil case it would even if successful, in this Province, under section 60 of the Supreme Court Act have to pay the costs of the appeal forthwith.

That an accused person, only too often without resources, should under such circumstances again be called upon to defend himself at his own continued expense against the unlimited resources of the Crown is something so grave, so startling and so entirely foreign to the history, theory, and practice of our criminal jurisprudence, that till now it has never, to my knowledge been advanced, and therefore should receive our primary consideration.

During the many years when, before I was elevated to this Court upon its inauguration in 1909, I was a trial judge in this Province, I endeavoured to preserve the "theory of our jurisprudence" aptly cited by my brother SLOAN from *Rex* v. *De Bortoli,* 38 B.C. 388; [1927] S.C.R. 454, and it never occurred to me that I could rely upon the prisoner in the dock, or his counsel, if he had one, to point out to me any misdirection, or non-direction amounting to misdirection, in the accused's favour arising out of my charge: in other words I regarded, and still regard, the prisoner's counsel as briefed to defend, in all honourable ways, of course, not to convict his client, and it is no part of his duty to supply omissions or remedy oversights of Crown counsel which are of benefit to said client.

It is to be remembered that if the Crown can get one new trial because of its own failures it can also get two or more of them if it continues to err, with the shocking result that the

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subject would be crushed with a successive burden of costs, delay and anxiety, and often languish long in gaol in default of bail in general and in particular under the novel provisions of section 1025A, Cap. 44 of 1938, Sec. 49, before a final and unassailable conviction had been recorded against him, or indeed one of acquittal for him: in either case he would have undergone such hardships, occasioned by the errors of the prosecution, that it might have been better if he had pleaded guilty at the beginning of his trial, even if found innocent at the end.

The said ancient "theory" of the Court being vigilant to protect the interests of the accused was strikingly illustrated when in 1821 Mr. Richard Martin, M.P. for Galway (*vide* Dic. Nat. Biog. Vol. xxxvi., p. 292) brought in his bill in the House of Commons to permit persons charged with capital crimes to make their defence by counsel (Capital Crimes Defence Bill) he was met with the objection that it would only "result in unnecessary delay because the Court was counsel for the prisoner" and that "that there was seldom or never a case in which the judge did not act as counsel for the prisoner" (Hansard's House of Commons Debates, p. 945, February 27th, 1821), and though leave was given to bring in the bill yet it was on 30th March (pp. 1511-4) negatived on second reading after strong opposition by the Attorney-General, Sir Robert Gifford, and the Solicitor-General, Sir John Copley, who took the position that "every assistance was afforded to prisoners upon their defence" and that "the proposition would operate greatly to the prejudice of those persons." Fortunately for our civilization, and at long last, on 17th February, 1836, two years after the death of "Humanity" Martin in 1834, a new and enlightened Attorney-General (Sir John Campbell, later Chief Justice and Lord Chancellor) came forward to support a bill "to vindicate the law of England from a deep and disgraceful stain," which bill became the "Prisoners' Counsel Act," 1836, 6 & 7 Will. IV., Cap. 114; Halsbury's Statutes of England, Vol. 4, p. 459; Hansard's House of Commons Debates, 1836, pp. 497-500.

It would not in my opinion add to our "enlightenment," over one hundred years later, to hold that the result of this removal of a "stain" from our jurisprudence was to cast upon the pris-

oner's counsel the novel burden of being "vigilant" to see that the proceedings taken against his client were conducted by the Crown counsel in a way that would lead to his conviction.

This Court, therefore, should, in my opinion, decline to entertain this appeal because to do so would be to violate a long established and fundamental principle of public justice.

MACDONALD, J.A.: Appeal by the Crown from the verdict of a jury acquitting the accused of unlawfully counselling one William Eric Munroe to set fire to the property of the False Creek Lumber Company Limited. The plant was partially destroyed. A new trial was sought because of objectional statements made to the jury. The trial judge, MORRISON, C.J.S.C., in his charge said:

> There is another thing I must tell the jury, that is that the Crown should show that the prisoner had the exclusive opportunity of doing what he is charged with. Are you satisfied that he was the only one who could have set fire to that mill?

This of course imposes upon the Crown an impossible burden and there is no justification in law for the submission. A further statement objected to by Crown counsel follows:

> They [referring to four witnesses who testified against the accused] have made these suggestions because they come in here to try to send this man to a life period in custody, which is the penalty for a verdict against him for what he did, and any man who would do what the prisoner is charged with, deserves that; no question about that.

I couple with the foregoing this further statement:

> The only people interested were the insurance companies, and there is no doubt they are interested when a fire occurs properly, according to the terms of the contract they have to pay, that is their contract, and you can readily see that if they can show that the fire occurred in an improper way, they are not responsible to pay any money. If this man is sent to the penitentiary the insurance companies, I would think, would not have to pay a cent. That is another sprag which the defence are perfectly justified in putting in the wheels of the Crown. He is defending himself from a life sentence in the penitentiary.

The jury were told that if they convicted the accused the insurance companies "I would think would not have to pay a cent." Counsel for the accused defended this statement. He submitted the question of insurance on the property entered into the case and formed part of the evidence. I suggest it was not properly part of the case for the Crown or for the defence to place before

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the jury the intimation that they ought to acquit the accused because in that event the insurance companies would be compelled to recoup the company for the fire loss. I do not know the terms or conditions of the fire insurance policies: it is not in evidence. I only know that this statement to the jury is so highly objectionable that a mere statement of the facts discloses it.

It will also be observed that the jury were told in words so precise that there can be no doubt of the intimation conveyed, that if they convicted the accused he would receive a sentence of life imprisonment in the penitentiary. At the time of the trial the maximum sentence was in fact not life but fifteen years. I do not discuss whether or not the law, as it stood at the date of the alleged offence, would apply; in any event a trial judge would not likely impose life imprisonment in view of the declaration of Parliament known at the time of the trial. The question of a possible life sentence is mentioned twice. The jury were told that if guilty he deserved such a sentence "no question about that"; and again, that the accused was defending himself against "a life sentence in the penitentiary." Counsel for the accused did not defend this statement; again it is only necessary to state it to reveal its objectionable character.

No objection was taken by Crown counsel to the charge. It was submitted that after planting in the minds of the jury considerations not only improper but wholly extraneous to the case an objection, even if it led to modification or withdrawal would not effect a cure. I think that is so. I prefer not to join in the view expressed by the Chief Justice, that failure to object is fatal to the Crown's case. Whether or not the Crown in that respect is in a less favourable position than the accused may be decided when an occasion for doing so arises. I do not find it necessary to express a final opinion on the point. I dismiss the appeal on grounds more favourable to the accused.

After carefully considering all the evidence I am of the opinion that the story told by the youth who actually fired the mill, and now undergoing sentence, together with other witnesses, was so weird and fantastic that if not unbelievable a jury acting fairly should not find the accused guilty. The trial

judge would be within his rights in law in expressing his opinion of the evidence. Having regard therefore to the nature of the evidence justice does not require that the accused should be placed in jeopardy a second time. A jury properly directed ought to acquit.

I would dismiss the appeal.

McQUARRIE, J.A.: I agree with our learned brother MACDONALD that it is unnecessary for us to render a decision on the point raised by counsel for the respondent that because no objection was taken on the trial by counsel for the Crown to the charge to the jury this appeal should be dismissed. I am of opinion that no substantial wrong or miscarriage of justice has actually occurred in this case. I also think that the verdict can be supported having regard to the evidence. Furthermore I do not consider that a new trial would serve any useful purpose for the reason that I think it would only result in another verdict of acquittal. I would therefore dismiss the appeal.

SLOAN, J.A.: The respondent Munroe was tried at the Vancouver Assize on a charge of unlawfully counselling another to commit the crime of arson. He was acquitted and from that acquittal the Attorney-General appeals to us, alleging misdirection of the learned trial judge. It is common ground that Crown counsel did not object below to the charge and counsel for the respondent now maintains before us that because Crown counsel failed to object below he cannot now be heard to complain. This objection, if sound, determines this appeal in favour of the respondent and is an effective bar to our consideration of the merits of the Crown's appeal. I have reached the conclusion that the objection is well taken and that the appeal should be dismissed. Because of the scarcity of judicial opinion upon the point I consider it advisable to state the reasons impelling me to form this opinion.

First it is necessary to consider what is the general rule applied in civil appeals with respect to the failure to object below to the charge or direction concerning which complaint is made to an Appellate Court. The general rule is restated in *Nevill* v. *Fine Art and General Insurance Company,* [1897]

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A.C. 68, at 76, in which it was held, in effect, that an objection below is a condition precedent to the right to be heard to complain in an Appellate Court. See also *Seaton* v. *Burnand*, [1900] A.C. 135 and in the Supreme Court of Canada; *Thompson* v. *Fraser Companies Ltd.*, [1929] 3 D.L.R. 778, at 786; *Johnston & Ward* v. *McCartney*, [1934] S.C.R. 494, at 500 and *Spencer* v. *Field*, [1939] S.C.R. 36.

In *Regina* v. *Fick* (1866), 16 U.C.C.P. 379, A. Wilson, J., in delivering the judgment of the Court, imported the civil rule into criminal practice. He said at pp. 384-5:

> It has only to be added that there was no complaint made at the trial as to any point on which a direction was not given, nor upon which an erroneous or insufficient direction was given; nor any request made that any other or fuller charge should have been made than was made; and, in the absence of such an objection or request, it would be contrary to all practice to allow an objection to be raised at a time when it cannot be directly cured, and which, if it had been made at the proper time, might have been remedied on the spot; and in this respect there is no difference between a civil and a criminal proceeding, at any rate when the prisoner is defended by counsel.

In *Rex* v. *Curlett* (1936), 66 Can. C.C. 256, wherein the Crown was appellant, Harvey, C.J.A., in delivering the judgment of the Appellate Division of the Alberta Supreme Court, said at p. 258:

> . . . there seems no reason why the same rule that applies in civil cases as to non-direction should not apply to an appeal by the Crown as the same reasons would seem to underlie both.

That judgment appears to be the latest authoritative pronouncement on the subject on appeals by the Crown.

So far as appeals from conviction are concerned and with respect to other views (see *e.g.*, Fisher, J.A., in *Rex* v. *Jarvis Sr.*, [1937] 3 D.L.R. 29, at 58) I am of the opinion the general trend of authority holds that while it is the duty of counsel to object below (*Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217, at 246; *Rex* v. *Armstrong* (1933), 59 Can. C.C. 177) failure to do so is not necessarily fatal to the right of a convicted appellant to raise the issue on appeal (*Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, at pp. 108, 127, 132; *Rex* v. *Lew* (1912), 17 B.C. 77; *Rex* v. *Wann* (1912), 7 Cr. App. R. 135, at 137; *Rex* v. *Duckworth* (1916), 26 Can. C.C. 314, at 345; *Rex* v. *Recalla*, [1935] 4 D.L.R. 353, at 357; *Rex* v. *MacDonald*, [1939] 4

D.L.R. 61, at 65), but while "the Court should be chary about introducing estoppels against an accused" (*Rex* v. *Droux* (1936), 65 Can. C.C. 221, at 229) his failure to object may be an element for consideration in the determination of the propriety of the charge and on the issue of apprehended prejudice to the accused. *Rex* v. *Lew, supra; Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *Hill* (1928), 49 Can. C.C. 161, at p. 164 (leave to appeal refused [1928] S.C.R. 156); *Rex* v. *Melyniuk & Humeniuk* (1930), 53 Can. C.C. 296, affirmed 58 Can. C.C. 106; *Rex* v. *Fred MacTemple* (1935), 64 Can. C.C. 11, at p. 20.

To sum up at this point it seems clear to me that while the civil rule was imported into criminal jurisprudence (although Barry, C.J.K.B., in *Rex* v. *Rasmussen* (1934), 62 Can. C.C. 217, at 235 thought otherwise) there has been a relaxation of the rule to the extent indicated on appeals by convicted persons. I can find, however, no similar relaxation in favour of the Crown on appeals from acquittals. Indeed it would be strange if it were so especially when consideration is given to the historical position of the Crown in criminal proceedings and the necessity for holding to those ancient safeguards which surround an accused on trial, perhaps for his life. The submission that Crown counsel may remain in silence and take no objection to misdirection in favour of the accused nor ask for instruction upon a relevant point of law on which there has been non-direction and then on acquittal seek to place the accused again in jeopardy because of the Crown's neglect to request a proper instruction "when the matter could have been instantly rectified" (*Rex* v. *Lew, supra,* at p. 78) seems to me to be an untenable one and a contention which is basically unsound.

To uphold the Crown in a position of that kind would mean that counsel for the accused would be forced to assume, while defending his client, the duties of the prosecution. I cannot subscribe to any theory which would force defence counsel to object to an instruction in the charge, even if improper in law, which operates in his favour and to the detriment of the Crown.

Nor do I think it the duty of defence counsel to be astute, in the case of non-direction, to request the Court to charge the jury

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against the interests of his client. Has defence counsel to do all he can to assist in the conviction of the accused in order to obviate the possibilities of a new trial after acquittal because of misdirection or non-direction? Such a contention is foreign to my conception of proper obligations and duties of defence counsel. And what if the prisoner is undefended by counsel? In that case as MARTIN, J.A. (now C.J.B.C.) said in *Rex* v. *De Bortoli* (1927), 38 B.C. 388, at p. 392,

> the theory of our jurisprudence is that the "Bench" in effect acts as counsel for him, and is vigilant to see that nothing is done that would prejudice him.

Can it be said with any reason that because the "Bench" erred in favour of an undefended prisoner without objection by Crown counsel that on acquittal the Crown can once more be permitted to try the accused? I think not. The Crown has tried the accused on terms of its own choosing and if the verdict is an acquittal that is an end of it. Whether the prisoner is defended or undefended when Crown counsel elects to go to the jury without objection to the charge then he is in my opinion bound by the resultant verdict. And see *Wexler* v. *Regem*, [1939] 2 D.L.R. 673, in which Crown counsel was held bound by the trend of the trial below and the issues submitted to the jury without objection.

In the result I would dismiss the appeal for the reasons indicated.

O'HALLORAN, J.A.: I concur in the reasons and conclusion of my learned brother MACDONALD. I would dismiss the appeal.

Appeal dismissed.

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Evidence—Summary Convictions Act, Sec. 103—Orders "made in pursuance of statute" — Judicial notice — Orders by Board under the Natural Products Marketing (British Columbia) Act—Applicability to—R.S.B.C. 1936, Cap. 165; Cap. 271, Sec. 103.

Section 103 of the Summary Convictions Act provides: "(1) No order, conviction, or other proceeding made by any Justice shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Lieutenant-Governor in Council, or of any rules, regulations, or by-laws made in pursuance of a statute of the Province, or of the publication of such proclamation, order, rules, regulations, or by-laws in the Gazette. (2) Such proclamation, order, rules, regulations, and by-laws and the publication thereof shall be judicially noticed." On appeal by way of case stated from a conviction for violation of orders made by the British Columbia Vegetable Marketing Board:—

Held, that said section should be strictly interpreted and does not clearly express an intention to include under the expression "rules, regulations or by-laws made in pursuance of a statute of the Province" an order made by a board which receives its powers to make orders not from a Provincial statute itself but from the Lieutenant-Governor in Council, who constitutes the board and vests in it certain powers pursuant to the provisions of the Natural Products Marketing (British Columbia) Act. In the case of a prosecution for a violation of orders made by such board, said section 103 does not therefore authorize the magistrate to dispense with the necessity of evidence being produced before him to prove the existence of the orders under which the charge is laid. Said section neither authorizes nor compels the magistrate to take judicial notice of the fact, and the conviction is quashed.

APPEAL by way of case stated by D. Gillies, Esquire, police magistrate in and for the district of Burnaby, under the provisions of the Summary Convictions Act. The facts are set out in the reasons for judgment. Argued before FISHER, J. at Vancouver on the 8th and 15th of January, 1940.

Geo. A. Grant, for plaintiff.
Fleishman, for defendant.

Cur. adv. vult.

27th January, 1940.

FISHER, J.: This is a case stated by D. Gillies, Esquire, police magistrate in and for the district of Burnaby, under the pro-

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visions of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271. On November 29th, 1939, the magistrate found the said Henry A. Fedler (appellant) guilty of the charge that he on Thursday, November 2nd, 1939, at Burnaby in the county of Westminster and in the area described in the scheme unlawfully did store potatoes without having the designated tags attached to containers contrary to the form of statute in such case made and provided and orders pursuant thereto." The case is stated in paragraphs numbered and reading as follows:

4. At the hearing of the said information and complaint it was proved before me by oral evidence that the appellant on the date in question at a location within the jurisdiction of the said police court, stored thirty-eight sacks of potatoes in containers which were not tagged as required by the scheme and orders made in pursuance of the Natural Products Marketing (British Columbia) Act, chapter 165, R.S.B.C. 1936, and amending Acts.

5. It was thereupon contended by counsel for the appellant that the charge should be dismissed for that the respondent had failed to prove and that it was necessary for him to prove that the scheme to regulate the marketing of vegetables had been published in the British Columbia Gazette, and further that no copy of the British Columbia Gazette had been tendered in evidence by the respondent and that no documentary evidence had been adduced of any orders of the said Board.

5A. None of the said proclamation or notice, scheme, or orders was exhibited or filed in the trial *Rex* v. *Fedler*.

6. I being of opinion that the charge in the said information and complaint was in other respect proven and that as contended by the respondent I should take judicial notice in and by virtue of section 103 of the said Summary Convictions Act of the proclamations or notice of the Lieutenant-Governor in Council approving and bringing the said scheme into effect and of the existence of an order or orders of the said Board prohibiting the storage of potatoes in untagged containers, matters which were actually in my knowledge, found the charge proven and accordingly convicted the accused of the said charge.

7. The question for the opinion of the Court is whether, upon the above statement of facts, the said determination was correct in point of law and what should be done in the premises.

The main contention of counsel for appellant before me was that the respondent had failed to prove and that it was necessary for him to prove the existence of an order or orders of the said British Columbia Vegetable Marketing Board prohibiting the storage of potatoes in untagged containers. In reply to this contention counsel on behalf of the respondent first refers to Paley on Summary Convictions, 9th Ed., 746, and submits that the case stated states definitely there was some evidence before the magistrate of the existence of an order in the premises and

that this is sufficient and conclusive. Reading the case stated as a whole, however, I think it is quite clear that the magistrate does not state that there was any evidence produced before him in Court proving the existence of any order but that he relied upon the contention of the respondent before him that he should take judicial notice in and by virtue of section 103 of the Summary Convictions Act of an order or orders of the said Board prohibiting the storage of potatoes in untagged containers. I therefore come to deal with the contention of counsel for the respondent based upon said section 103 of our Summary Convictions Act, reading as follows: [already set out in head-note.]

Counsel for the appellant refers to Paley on Summary Convictions, 9th Ed., 301-2:

> As regards the proof of bye-laws made under statutory authority other than that referred to, the terms of the particular statute should be consulted, and in the absence of any mode of proof being specified the party relying upon the bye-law should be prepared with strict proof of compliance with the requirements as to the making and promulgation of the bye-law specified by the statute under which it has been made.

Reference is also made to *Regina* v. *Bennett* (1882), 1 Ont. 445, especially at p. 458, where Cameron, J. says:

> I can find no authority for holding that Courts can without proof take judicial notice of orders in council, or of their publication in the Official Gazette without production of the Gazette. Production of a copy of the Official Gazette, printed by the Official Printer, would be evidence of the passing of any order in council published in such Gazette. In the present case it was essential to establish two things before the defendant could be found guilty of an offence under the Temperance Act; first, the passing of an order in council under section 96; and secondly, its publication in the Canada Gazette. These things have not been established, and the conviction must therefore be quashed.

Salmond, Jurisprudence, 6th Ed., at p. 28, says:

> A judge may know much in fact of which in law he is deemed ignorant, and of which, therefore, he must be informed by evidence legally produced. Conversely he may be ignorant in fact of much that by law he is entitled judicially to notice, and in such a case it is his right and duty to inform himself by such means as seem good to him. The general rule on the matter is that courts of justice know the law, but are ignorant of the facts. The former may and must be judicially noticed, while the latter must be proved.

In *Reg.* v. *Westley* (1859), 29 L.J.M.C. 35; 8 Cox, C.C. 244, at 250, Pollock, C.B. said:

> The Court is bound to take notice of all statutes.

In *Regina* v. *Dowslay* (1890), 19 Ont. 622, Galt, C.J. said at pp. 622-3 in part as follows:

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There were several objections raised but it is only necessary to consider the first, *viz.*: There was no proof before the said justices of the peace, at the time of the said charge, of the existence of the said by-law under which the conviction in question is alleged to have been made.

. . . In an affidavit filed on this application, Mr. Lawson states: "I had the said original by-law with me in Court, and at the request of the said parties I read portions of the said by-law in the presence and hearing of said justice."

It is manifest from the foregoing, that no copy of the said by-law authenticated in the manner provided by the Act was produced; and I fail to see how the justices of the peace could act on the production of a paper not by any officer of the municipality, but by the solicitor of the complainant, and alleged by him to be the original by-law, and it is not shown that this paper was under the seal of the corporation.

In the case of *In re Ramsden* (1846), 3 D. & L. 748; 15 L.J.Q.B. 234, it was held by Wightman, J. that the Court could not take judicial notice of any rules and orders which the Commissioners of the Court of Bankruptcy might have made under the authority of 5 & 6 Vict., Cap. 122, Sec. 70.

Having in mind the above authorities and what would appear to have been the law before the passing of, or apart from, said section 103 of our Summary Convictions Act, I would say that said section should be strictly interpreted. It is interesting to note that the section is different from a somewhat similar section, *viz.*, 1128 of the Criminal Code, R.S.C. 1927, Cap. 36 (which was apparently passed in 55 & 56 Vict. as section 894 of Cap. 29) in that the words "by the Governor in Council" or "by the Lieutenant-Governor in Council" do not appear after the word "made." It would seem therefore that the rules, regulations or by-laws of which judicial notice must be taken cannot be limited to those "made by the Lieutenant-Governor in Council." In *Rex* v. *Elderman* (1911), 19 Can. C.C. 445, it was held by the Supreme Court of Nova Scotia on an appeal by the prosecutor from Patterson, C.C.J. that section 68 of the Summary Convictions Act of Nova Scotia, R.S.N.S. 1909, Cap. 161, a section almost identical with our said section 103, requires judicial notice to be taken of municipal by-laws. In view of such decision I am not prepared to hold that judicial notice may not be taken of municipal by-laws though in the absence of such decision I would have thought the terms of the particular statute as to the mode of proof specified should be consulted (see Paley,

supra). In any event, however, I think it may be said that municipal by-laws are generally made in pursuance of a statute of the Province in the sense that they are made by a council to which the power of making by-laws has been given by the statute itself. On the other hand, in the present case it is argued on behalf of the respondent that said section 103 allows and requires judicial notice to be taken of any orders that may be made by the said British Columbia Vegetable Marketing Board and the argument must be based upon the submission that such orders are made in pursuance of a statute of the Province, *viz.*, the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165. Having carefully considered such Act I think it is quite apparent that the Act itself does not give any board the power to make orders but authorizes the Lieutenant-Governor in Council to constitute a board and to vest in it powers to make orders (see especially sections 4 (2) and 5 (*a*) and (*k*) of said Act). I also think that the general rule that facts must be proved would make it necessary for the prosecution to prove that the board so constituted had exercised the powers vested in it and made the orders in question herein before the magistrate could properly convict the accused of doing something contrary to such orders. This general rule should not be departed from here unless an intention to allow the magistrate to dispense with the necessity of evidence being produced to prove the existence of such orders and to take judicial notice of the fact is clearly expressed by the words used in said section 103 of our Summary Convictions Act. One might say, with all respect, that, if the magistrate is at liberty to inform himself by such means as seem good to him, other than by evidence produced in Court, as to the orders made by the Board and to say then that they are matters "actually in his knowledge" (see case stated, paragraph 6) he may misinform himself on matters vital to the accused. Under such circumstances I am of the opinion, as already indicated, that said section 103 should be strictly interpreted and I am also of the opinion that the section strictly interpreted does not clearly express an intention to include under the expression "rules, regulations, or by-laws made in pursuance of a statute of the Province," orders made by a board which receives its

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powers to make orders not from a Provincial statute itself but from the Lieutenant-Governor in Council who constitutes the board and vests in it certain powers pursuant to the provisions of the said Natural Products Marketing (British Columbia) Act.

My conclusion on the case stated therefore is that said section 103 did not authorize the magistrate to dispense with the necessity of evidence being produced before him to prove the existence of the orders under which the conviction in question is alleged to have been made. In my view said section neither authorized nor compelled the magistrate to take judicial notice of the fact. The question asked in the case as aforesaid must accordingly be answered in the negative and the conviction quashed.

Conviction quashed.

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Criminal law—Murder—Verdict—"Not guilty on account of insanity"—Committed to mental home—Petition for release—Dismissed—Appeal—Discretion of judge—Jurisdiction to interfere—Criminal Code, Secs. 966 and 969—R.S.B.C. 1936, Cap. 162, Sec. 2.

Petitioner's husband was tried for murder in 1932, and the jury's verdict was "not guilty on account of insanity." The Court then ordered that he be kept in safe custody at a Provincial mental home. In 1938 the wife petitioned for an order directing an inquisition as to her husband's mental condition. She swore that she had seen him and spoken to him on numerous occasions at the home, and that for over two years he had been sane. She gave no other evidence as to his mental condition. The petition was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J., that assuming the right to apply for an inquisition under section 4 of the Lunacy Act, said section and other relevant sections of the Act show the expressed intention of the Legislature to clothe the Judge in Lunacy with a wide discretion. The *onus* is on the plaintiff, and there is no evidence to support her statement that her husband has been sane for over two years. The Court of Appeal ought not to interfere if satisfied that the learned judge has exercised his discretion judicially, and no ground has been shown that would justify interference.

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APPEAL by petitioner from the order of McDONALD, J. of the 19th of September, 1938, dismissing her petition for an order directing an inquisition whether her husband, David Murdoch, is sane or insane. David Murdoch was tried in November, 1932, for the murder of one Jean Nolan at Kelowna, on the 19th of January, 1932, and the jury brought in a verdict of not guilty on account of insanity. The Court then made an order that Murdoch be kept in strict custody. On the 6th of December, 1932, an order in council was passed pursuant to section 966 of the Criminal Code, under which the Lieutenant-Governor in Council ordered that Murdoch be remanded from Oakalla Prison Farm to the Provincial Mental Home at Colquitz, where he is still in custody. On the 25th of January, 1932, the said Murdoch was committed for trial for murdering a police officer on the same day that he murdered Jean Nolan, but he was not tried owing to his detention in the Mental Home.

The appeal was argued at Victoria on the 18th and 19th of January, 1939, before MARTIN, C.J.B.C., McQUARRIE and O'HALLORAN, JJ.A.

Lucas, for appellant.

Hurley, for respondent, raised the preliminary objection that there is no appeal. This is a verdict under section 966 of the Criminal Code and there is the question as to whether it is a verdict of conviction or acquittal. The case of *Rex* v. *Ireland* (1910), 4 Cr. App. R. 74 was overruled: see *Rex* v. *Machardy* (1911), 6 Cr. App. R. 272; *Rex* v. *Hill* (1911), 7 Cr. App. R. 26, at p. 28; *Felstead* v. *The Director of Public Prosecutions* (1914), 10 Cr. App. R. 129, at pp. 135 and 140; *Rex* v. *Trapnell* (1910), 22 O.L.R. 219, at p. 222. He is not necessarily confined as a lunatic, but is undergoing imprisonment: see *Re Alexandre v. Duclos* (1907), 12 Can. C.C. 278, at pp. 281-2. The jury should find that accused was guilty but was insane when he committed the offence: see *The Queen* v. *Martin* (1854), 2 N.S.R. 322, at pp. 323 and 325; *Rex* v. *Coleman* (1927), 47 Can. C.C. 148; *Delorme* v. *Sisters of Charity of Quebec* (1922), 40 Can. C.C. 218. Even in the case of acquittal he is delivered under the provisions of the Code: see

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Rex v. *McAdam* (1925), 35 B.C. 168, at p. 174. The question is whether he is imprisoned as a law-breaker or detained as a lunatic. Section 4 of the Lunacy Act is *ultra vires* of the Province in so far as dealing with criminal lunatics in relation to release from or detention in custody: see *In re Windham. Windham* v. *Giubilei* (1862), 31 L.J. Ch. 720.

Lucas, contra: The Dominion cannot deal with the subject outside the criminal law: see McKechnie on Magna Carta, 436. He is not undergoing punishment for his deed. Lord Reading said in *Felstead* v. *The Director of Public Prosecutions* (1914), 10 Cr. App. R. 129, that it was really a dismissal of the case.

Lucas, on the merits: The operation of the criminal law is exhausted. If an inquisition is ordered under section 4 of the Lunacy Act the Criminal Code is no longer in question. It is then determined whether he is sane or insane, and nothing more. The crime is disposed of. Parliament has made provision for his detention when the jury declare him insane. There should not be an inquiry as to whether the insanity has run its course.

Hurley: Parliament says we will not register a conviction but you must be kept in custody. He is imprisoned as an offender, and being restrained that is a punishment. Section 4 of the Lunacy Act cannot be invoked by or on behalf of the alleged lunatic with a view to his release. Secondly, if it can be invoked for that purpose the material is insufficient to justify the making of the order. No person can apply for an inquiry into his state of mind with a view to his release: see *Ex parte Gregory,* [1901] A.C. 128; Heywood & Massey's Lunacy Practice, 5th Ed., 8. The Lunacy Act does not deal with liberation, only with restraint. As to the second ground that the material is insufficient, the affidavit in support is by the alleged lunatic's wife. She is not an expert and the application should be supported by the affidavits of two medical men.

Lucas, in reply: If we cannot get him out under the Lunacy Act, there is no remedy.

Cur. adv. vult.

7th March, 1939.

MARTIN, C.J.B.C.: I would dismiss the appeal.

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

O'HALLORAN, J.A.: David Murdoch was tried at the Vernon Fall Assizes on the 10th of November, 1932, for the murder of one Jean Nolan at the City of Kelowna on the 19th of January, 1932. The jury brought in a verdict of "not guilty on account of insanity" at the time of committing such offence, and the Court thereupon made an order pursuant to section 966 (2) of the Criminal Code that he be kept in strict custody in the Provincial Mental Home at Colquitz until the pleasure of the Lieutenant-Governor was known. On the 6th of December, 1932, an order in council was passed pursuant to sections 966 and 969 of the Criminal Code directing that David Murdoch be kept in safe custody at the Provincial Mental Home at Colquitz until he should be delivered thence by due course of law. He has been detained in custody accordingly.

On the 25th of January, 1932, David Murdoch was committed for trial on a charge of murdering one Archibald McDonald, a police officer at the city of Kelowna on the same day he was alleged to have murdered Jean Nolan, but he has not yet been tried on the said charge owing to his detention in the Mental Home as aforesaid.

On the 26th of August, 1938, his wife Anna Murdoch launched a petition to the Judge in Lunacy under the Lunacy Act, Cap. 162, R.S.B.C. 1936, for an "order directing an inquisition whether the said David Murdoch is sane or insane." This was supported by affidavit of the petitioner wherein she deposed:

> I have seen and spoken with my said husband on numerous occasions at the said Mental Home and I say that for a period of two years prior to this date, my said husband, the said David Murdoch, has been sane and of sound mind.

No other evidence was adduced in support of the petition. In answer the Deputy Attorney-General filed an affidavit, in paragraph 6 whereof appears the following:

> That I was present at the trial of the said Murdoch for the murder of Jean Nolan and heard the evidence of insanity produced on his behalf at the said trial upon which the jury reached their verdict, and from the evidence so adduced and from the reports received from Dr. Gee, a medical doctor and psychiatrist on the staff of the Provincial Mental Hospital,

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who examined the said Murdoch on the 10th day of September, 1938, and from Dr. Dobson, a medical doctor and psychiatrist of Vancouver, who examined the said Murdoch in 1932 and 1936, and from the supervisor of the Provincial Mental Home at Colquitz, who is in charge of the said Murdoch, I verily believe the said Murdoch is insane and is suffering from paranoia in its final stages, having fixed delusions of persecution, and that if he were released he might inflict serious bodily harm upon those whom he believes have persecuted him, and for that reason it is not in the public interest that he be released.

On the 19th of September, 1938, Mr. Justice MCDONALD dismissed the petition. This appeal is taken therefrom.

Counsel for the respondent the Attorney-General of the Province, moved to quash the appeal on the grounds (1) that the provisions of the Lunacy Act, *supra,* invoked by the appellant do not apply to such a person as David Murdoch; (2) alternatively if the Lunacy Act does apply, section 4 thereof and other relevant sections are *ultra vires* as entrenching on section 969 of the Criminal Code. In answer thereto counsel for the appellant contended that the verdict of the jury "not guilty on account of insanity" was a verdict of acquittal and in consequence the power of the Criminal Code was exhausted thereby and David Murdoch therefore left the domain of the criminal law and came within the domain of property and civil rights and that accordingly section 969 of the Criminal Code is *ultra vires* to the extent that it entrenches upon section 4 and other relevant sections of the Lunacy Act. It was admitted by counsel that due notice had been served upon the Attorney-General of Canada and the Attorney-General of British Columbia as required by the Constitutional Questions Determination Act, Cap. 50, R.S.B.C. 1936. Counsel for the appellant and respondent discussed as well the legal consequences of a verdict of "Not guilty on account of insanity" in Canada compared with a verdict of "guilty but insane" in England. We heard counsel both for and against our jurisdiction. We also heard argument on the merits and reserved judgment on the motion to quash as well as on the main appeal.

Counsel for the respondent also questioned the jurisdiction of this Court to entertain the appeal on the ground that the Judge in Lunacy was *persona designata.* This objection relating to an Act of the Legislature was overruled during argument,

however, by reason of section 32 of the Interpretation Act, Cap. 1, R.S.B.C. 1936, *vide Rex* v. *Chin Sack* (1928), 40 B.C. 68, MARTIN, J.A. (as he then was) at p. 72.

The real issue as stated pointedly by counsel for the appellant is not the sanity or insanity of David Murdoch but rather the right of the petitioner on the evidence submitted to have his sanity or insanity inquired into by inquisition pursuant to section 4 of the Lunacy Act, *supra,* whereunder:

> The Judge in Lunacy may, upon application, by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs.

By reason of the view I have reached I shall assume in the appellant's favour for the purpose of this appeal only, but without so deciding: (1) that a person in Murdoch's position may be entitled to apply for an inquisition under section 4, *supra,* of the Lunacy Act; and (2) that the said section and other relevant sections of the Lunacy Act are *intra vires.*

Section 4, *supra,* of the Lunacy Act confers a discretionary power upon the Judge in Lunacy. Counsel for the appellant so admitted in answer to the Court during argument. Study of the relevant sections of the Lunacy Act shows the expressed intention of the Legislature to clothe the Judge in Lunacy with a wide discretion.

If it is satisfied that the learned judge has exercised his discretion judicially, *viz.,* according to common sense and according to justice, a Court of Appeal ought not to review it unless a miscarriage of justice results from its exercise: *vide Golding* v. *Wharton Saltworks Company* (1876), 1 Q.B.D. 374 (striking out pleadings), James, L.J., p. 375, applied in *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460, MARTIN, J.A. (as he then was) at p. 462; *Jarmain* v. *Chatterton* (1882), 51 L.J. Ch. 471 (refusal to commit for contempt). *In re Wray* (1887), 56 L.J. Ch. 1106 (refusal to grant leave to issue a writ of attachment for contempt), Cotton, L.J., p. 1107; *Mangan* v. *Metropolitan Electric Supply Company,* [1891] 2 Ch. 551 (trial by jury), Lindley, L.J. 553; and the House of Lords in *Evans* v. *Bartlam* (1937), 106 L.J.K.B. 568, involving an appeal from an order setting aside a default judgment—refer Lord Atkin at p. 571 and Lord Wright at pp. 574-6.

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In my view it cannot be contended successfully that the learned judge did not exercise his discretion judicially, *viz.*, according to common sense and justice. As Lord Wright said at p. 574 in *Evans* v. *Bartlam, supra,* the appellant has not satisfied the *onus* of showing that the discretion of the learned judge has been wrongly exercised and further at p. 575:

> The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication.

Here the petitioner did not show merits; she did not show an issue to be tried, that is to say she did not make out a case to enable the learned judge to exercise a discretion in her favour. She submits neither grounds nor qualifications upon which to base her positive statement, that her husband has been of "sane and sound mind" for two years previous. The petition is not supported by an affidavit from a medical practitioner; nor is it alleged that she had sought to have the patient examined by a medical practitioner. Section 4 of the Lunacy Act, *supra,* is similar to section 90 (1) of the English Lunacy Act of 1890. Under the English practice the petition must be supported by affidavits of two medical practitioners, who are required to set out the facts upon which their opinions are based—*vide* Halsbury's Laws of England, 2nd Ed., Vol. 21, p. 306, and Heywood & Massey's Lunacy Practice, 5th Ed., 2, 10, and 11. While the Lunacy Rules which came into force in this Province on the 1st of November, 1927, do not require affidavits of medical practitioners in support, yet the *onus* is on the petitioner to make out a case; this cannot be done on the mere statement of the petitioner without grounds for the statement nor qualifications to make the statement being shown.

Furthermore the learned judge had before him the affidavit of the Deputy Attorney-General, *supra,* citing the opinion of two medical doctors and psychiatrists, as well as the supervisor of the Mental Home to the effect that David Murdoch

> is insane and is suffering from paranoia in its final stages having fixed delusions of persecution. . . .

This affidavit was neither cross-examined upon nor replied to. The learned judge had before him not a mere conflict of affidavits, but an unsupported statement of the petitioner answered by the

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unchallenged affidavit of the Deputy Attorney-General citing the opinions of three reputable specialists to the contrary. The appellant's counsel, in my judgment, has failed entirely to satisfy the *onus* of showing that the learned judge was wrong.

The appellant has not contended there was a miscarriage of justice. It was not included as a ground in the notice of appeal. It does not appear, and no suggestion has been made that a miscarriage of justice will result from the learned judge's exercise of his discretion. It was not suggested either that the petition involves any property or property rights of the patient or the management of his affairs.

For these reasons no ground is shown that the learned judge was wrong nor to justify interference with the discretion exercised by him.

I would dismiss the appeal.

Appeal dismissed.

REX AND CITY OF VANCOUVER v. WOODS.

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March 13;
April 17.

Municipal law—Freight motor-vehicle—Licence under Highway Act—Operation of vehicle within the city of Vancouver without a city licence—Liability—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (130)—R.S.B.C. 1936, Cap. 116.

The defendant operates a freight-truck between Hope and the city of Vancouver, for which he holds a licence under the Highway Act covering a public freight-vehicle. On August 18th, 1938, defendant took his truck into the city of Vancouver where he obtained a load of goods and then returned to Hope. A charge of using his vehicle for the purposes of his business within the city of Vancouver without procuring a licence in respect thereof from said city was dismissed, and an appeal by way of case stated to the Supreme Court, was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (O'HALLORAN, J.A. dissenting), that the section of the by-law of the city of Vancouver under which the licence fee is imposed is in compliance with the powers given by section 163 (130) of the Vancouver Incorporation Act, and a licence under the Highway Act does not operate to prevent the city of Vancouver from imposing a licence on the respondent, or to prevent his being charged as aforesaid and convicted.

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APPEAL by the Crown from the decision of FISHER, J. of the 15th of February, 1939 (reported, *ante,* p. 25), dismissing an appeal by way of case stated from police magistrate Wood, Vancouver, who dismissed a charge against the defendant that at the city of Vancouver on the 15th of August, 1938, being a person using a vehicle for the purposes of his business within the city of Vancouver, unlawfully did fail to procure a licence in respect thereof from the city of Vancouver and pay therefor the specified fee. The defendant resides at Hope, B.C. He is in the freighting business and operates a freight-truck between Hope and Vancouver, and holds a licence under the Highway Act covering a public freight-vehicle. This licence permits the operation of a vehicle from Hope to Vancouver over the trans-provincial highway, and from Hope to Spuzzum through Chilliwack, New Westminster, Choate, Emory Lodge and Yale. The city contends that in addition to this licence the defendant must take out a licence under City By-law No. 2296 and its amendments.

The appeal was argued at Vancouver on the 13th of March, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

McTaggart, for appellant: The licence he has takes him to Vancouver, but the moment he enters the city he must have a city licence: see *The King* v. *F. R. Stewart & Co.* (1928), 39 B.C. 401; *Rex* v. *Sutherland* (1930), 42 B.C. 367.

Respondent, in person: The licence I have says I can drive on "every highway." The streets in the city of Vancouver are included in the definition of "highway."

Cur. adv. vult.

17th April, 1939.

MARTIN, C.J.B.C. (*per curiam*): The appeal is allowed, our brother O'HALLORAN dissenting. We are of opinion, *i.e.,* my brother MACDONALD and myself, that the Provincial licence under which the accused was "operating his vehicle" (a freight-truck) "from [terminus] Hope to [terminus] Vancouver on

the [route] transprovincial highway" does not entitle him to do more at the most than merely to enter within the corporate limits of Vancouver, but not after such entry to make delivery of freight and also pick up freight for delivery within or without Vancouver without limitation (which the appellant frankly told us he was doing) without having obtained the ordinary city licence that persons carrying on that sort of business within the corporate limits are required to take out. If the Provincial licence had authorized delivery between the "centre" of Vancouver and Hope, as *cf. e.g.*, in *Rex* v. *Minister of Transport*, [1927] W.N. 128, wherein the motor-bus proprietors had a licence from the corporation of Hull to "run a service between the centre of Hull and Hessle . . . of which about three miles were within Hull," there would have been more, at least, to urge in support of the appeal.

O'HALLORAN, J.A.: I am in agreement with the conclusion reached by Mr. Justice FISHER from whose judgment this appeal is taken. The respondent holds a "carrier's licence" for the operation of a "public freight-vehicle" from Hope to Vancouver, issued by the Minister of Public Works of British Columbia. These "carriers' licences" and the rigid requirements surrounding their issuance were authorized by the Legislature in 1930 and 1935 as amendments to the Highway Act in those years (refer section 62 *et seq.* of the Highway Act, Cap. 116, R.S.B.C. 1936). In support of the city of Vancouver by-law under which the respondent was charged we were cited the power given in the Vancouver Incorporation Act as revised, consolidated and amended in B.C. Stats. 1921 (Second Session), Cap. 35, Sec. 163, Subsec. (130), to pass, alter, and repeal by-laws:

> For licensing all persons or corporations using any carts, wagons, trucks, or automobiles, or other conveyances, for the purpose of their business, and for classifying such carts, wagons, trucks, or automobiles; for controlling and restricting the weight and width of all loads and for differentiating in the fees to be imposed on such classes of carts, wagons, trucks, or automobiles.

Speaking for myself, I follow the view that there is no power thereunder to license a "public vehicle" operated under the respondent's "carrier's licence" and as defined in the subsequent amendments to the Highway Act. Even if the Vancouver

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Incorporation Act could be construed to include "public vehicles" as defined in the Highway Act, yet I am of the view that, when for the good and welfare of the people of the Province, including the people of the city of Vancouver, the Provincial Legislature, as the parent legislative body (from which all municipal powers spring) itself assumed the powers of prohibition, regulation and governance of "public vehicles" as defined in the Highway Act, such municipal power (if any) was thereby superseded.

The cited section of the Vancouver Incorporation Act purports to empower the municipality to control and restrict the weight and width of all loads. But these matters are specifically dealt with in the provisions of the Highway Act and regulations thereunder; and the "carrier's licence" issued to the respondent contains specific and mandatory directions that the overall width of his truck shall not exceed seven feet, and the maximum freight load carried shall not exceed five tons. If under the asserted power of the city of Vancouver to control and restrict the weight of loads carried by "public vehicles" the respondent were refused entry within its boundaries because of a city by-law requiring a lesser maximum weight there could be little doubt that the city would be trenching upon a power exercised by the department of the Provincial Minister of Public Works, under the provisions of the Highway Act.

A municipal by-law must be strictly construed which attempts to regulate or control the respondent's "carrier's licence" issued by the Minister of Public Works. The by-law should not be given effect to unless the power is conferred upon the municipality by the Legislature in express and unequivocal language. Neither the language of the by-law nor the circumstances in *The King* v. *F. R. Stewart & Co.* (1928), 39 B.C. 401 have relation to the issue here; it did not concern a "public vehicle."

We were pressed by appellant's counsel with the contention that the municipal by-law should be interpreted "benevolently"; we were referred to *Kruse* v. *Johnson,* [1898] 2 Q.B. 91 (Mathew, J. dissenting). That was a decision of a specially constituted Divisional Court of seven members upon a by-law attacked on the sole ground that it was unreasonable. The authority of that decision is limited therefore to an issue involv-

ing the reasonableness of a by-law. The issue here is not the reasonableness of the by-law, but the power of the city council to pass it, if interpreted in the manner contended by the appellant.

The by-law in *Kruse* v. *Johnson, supra,* was to the effect that no person should sing or play upon a musical instrument in any public highway within 50 yards of a dwelling-house after being required to desist by a constable, or an inmate thereof. It was passed under a statutory authority enabling the county council of Kent to

> make such by-laws as to them seem meet for the good rule and government of the borough and for the prevention and suppression of nuisances. . . ."

The appellant argued in that case that the statutory authority to make by-laws was limited to acts which were, or in their nature were likely to be, a nuisance or annoyance to others; and that it was unreasonable to hold that the singing of hymns under the circumstances there set out was a contravention of the by-law. It was in relation to the language of the by-law, the benevolent language of the statute, and the appellant's argument that Lord Russell of Killowen, C.J., was led to say at p. 99:

> . . . I think Courts of justice ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness.

In *Hayes* v. *Thompson* (1902), 9 B.C. 249, the Chief Justice of British Columbia of that time (the Honourable GORDON HUNTER) stated at pp. 253-4:

> . . . the cases cited to the effect that I should be slow to hold the by-law unreasonable are not in point, as the question here is not whether it is unreasonable or not, but whether the municipality has power to pass it.

Section 339 of the Vancouver Incorporation Act, *supra,* was not referred to and is not in point. With great respect I am unable to reach the same view as the majority of the Court, and would dismiss the appeal.

Appeal allowed, O'Halloran, J.A. dissenting.

Solicitor for appellants: *A. E. Lord.*

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Jan. 20, 23;
March 7.

REX *EX REL.* MUNROE v. ISLAND PACIFIC OIL COMPANY LIMITED.

Fire Marshal Act—Regulations—Gasoline-pump and tank on kerb of street —New pump installed after passing of regulations—Whether installation of new pump contrary to regulations—R.S.B.C. 1936, Cap. 100, Sec. 46.

Under section 46 of the Fire Marshal Act, the Lieutenant-Governor in Council may make regulations, *inter alia*, "(*b*) Regulating the manufacture, sale, storage, carriage and disposal of any combustible, explosive or inflammable matter:" Under this section an order in council was passed as follows: "(5) No pump or measuring-device used for the purpose of retailing inflammable liquids shall hereafter be erected or installed on any public street or highway. Every pump or measuring-device used in connection with a service station hereafter constructed or equipped shall be so located that it will not be necessary for a motor-vehicle to stand on the public street or highway while being serviced thereat."

Prior to the passing of the above order in council, the defendant operated a gasoline-pump installed on the kerb, part of the public street, with a tank underneath. In May, 1938, he removed the old pump and substituted therefor in the same place a new and up-to-date pump for the "disposal" of gasoline. The tank was not disturbed, but necessary connections were made with the new pump. A charge that the defendant unlawfully erected a pump or measuring device for the purpose of retailing inflammable liquids, *viz.*, gasoline, on a public street in the city of Victoria contrary to the provisions of the Fire Marshal Act and the regulations made thereunder, was dismissed, and on appeal to the county court the magistrate's decision was affirmed.

Held, on appeal, reversing the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that the Fire Marshal Act has general application throughout the Province so far as it deals with fire hazards. The installation of a "pump" is within the meaning of the regulation referred to, and the defendant is guilty of the charge as laid.

APPEAL by the Crown from the decision of SHANDLEY, Co. J. of the 8th of December, 1938, dismissing an appeal from the police magistrate at Victoria on a charge that the respondent did on the 5th of May, 1938, unlawfully erect a pump or measuring-device for the purpose of retailing inflammable liquids on a public street, Courtney Street, in the said city, contrary to the provisions of the Fire Marshal Act and the regulations made thereunder. The respondent had an old

gasoline-tank and pump close to the kerb, and where cars serviced would stand on the street at 615 Courtney Street. On the 5th of May, 1938, a new meter-pump was installed in place of the old one, over the old tank. The new pump was a pump or device for retailing gasoline.

The appeal was argued at Victoria on the 20th and 23rd of January, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

C. L. Harrison, for appellant: The regulations are authorized by subsection (2) (*b*) of section 46 of the Fire Marshal Act. Number 5 of the regulations provides that every pump or measuring device shall be so located that it will not be necessary for a motor-vehicle to stand on a public street. The question is whether putting in a new pump over the old tank is an infraction of the Act: see *Montreal* v. *Morgan,* [1920] 3 W.W.R. 36. It is not prohibition, it is regulation. There is prohibition to an extent, but it does not come within prohibition proper: *Clayton* v. *Peirse,* [1904] 1 K.B. 424, at p. 427; *Re Karry and City of Chatham* (1910), 21 O.L.R. 566, at p. 573; *Slattery* v. *Naylor* (1888), 13 App. Cas. 446; Craies's Statute Law, 4th Ed., 276. That the by-law is not unreasonable see *Scott* v. *Glasgow Corporation,* [1899] A.C. 470.

Clearihue, K.C., for respondent: A pump proper consists of a pump and a tank. This is merely a repair by putting a new pump on an old tank. This tank and old pump were there before 1931. In passing the regulations the idea was to preserve the old pumps. It says "no further pumps shall be hereafter erected" and preserves the present rights of owners. All above the kerb is new, and is simply a repair. The new pump simply replaces the old one, and decreases the fire hazard: see Maxwell on the Interpretation of Statutes, 8th Ed., 19. The regulations do not refer to construction in Victoria, as by statute Victoria is given control of pumps: see B.C. Stats. 1919, Cap. 97, Sec. 14 (1). Acts must be consistent with one another: see *Steen* v. *Wallace,* [1937] 3 W.W.R. 654; *Grieve* v. *Edinburgh and District Water Trustees,* [1918] S.C. 700. Delegated power must be strictly construed: see *Virgo* v. *The City of Toronto* (1894),

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22 S.C.R. 447; *In re Clay* (1886), 1 B.C. (Pt. 2) 300; *Rex* v. *Pope* (1906), 4 W.L.R. 278. It is *ultra vires* in so far as it deals with pumps on streets: see *Marshall* v. *Blackpool Corporation,* [1935] A.C. 16, at p. 22. The power to regulate cannot be used to prohibit for a purpose outside of the Act: see *Thomas* v. *Sutters,* [1900] 1 Ch. 10, at p. 15. This is a fire Act and does not apply to the streets: see Maxwell on the Interpretation of Statutes, 8th Ed., 73.

Harrison, in reply, referred to *Bailey* v. *Regem,* [1938] S.C.R. 427; *Willingale* v. *Norris,* [1909] 1 K.B. 57, at p. 64; *Regina* v. *Petersky* (1895), 4 B.C. 385.

Cur. adv. vult.

7th March, 1939.

MARTIN, C.J.B.C.: I would allow the appeal.

MACDONALD, J.A.: This is an appeal from the judgment of SHANDLEY, Co. J. An information and complaint was laid charging that on or about the 5th of May, 1938, the respondent unlawfully erected a pump or measuring-device for the purpose of retailing inflammable liquids, *viz.*, gasoline, on a public street, in the city of Victoria, contrary to the provisions of the Fire Marshal Act and the regulations made thereunder. The magistrate dismissed the complaint and on appeal to His Honour Judge SHANDLEY his decision was affirmed. The section of the Fire Marshal Act (Cap. 100, R.S.B.C. 1936) authorizing the regulation in question is 46 (1) and (2) (*a*) and (*b*), reading as follows:

> 46. (1.) The Lieutenant-Governor in Council may from time to time make regulations for carrying out the purposes of this Act, including matters in respect whereof no express or only partial or imperfect provision has been made.
>
> (2.) Without thereby limiting the generality of subsection (1), it is declared that the power of the Lieutenant-Governor in Council to make regulations shall extend to:—
>
> . . . . .
>
> (*b.*) Regulating the manufacture, sale, storage, carriage, and disposal of any combustible, explosive, or inflammable matter:

Under this section an order in council was passed containing the following as clause 5: [already set out in head-note.]

The respondent for some time operated a gasoline-pump installed on the kerb, part of the public street, with a tank underneath. On the 5th of May, 1938, he removed the old pump and substituted therefor in the same place a more up-to-date pump for the "disposal" of gasoline. The tank was not disturbed but necessary connections were made with the new pump.

It follows that if section 46 (1) and (2) (*b*) of the Fire Marshal Act was validly enacted (and that it not disputed) and section 5 of the order in council properly passed thereunder we are only concerned with a question of construction to see if the installation of the new pump, in substitution for the old, constituted a breach of that regulation. That it is a "pump" or "measuring-device" cannot be questioned. It is also used to retail an inflammable liquid, *viz.*, gasoline.

The respondent submitted that a "pump" or "measuring-device" was not installed; that an old pump only (renewal) was displaced by a new one or repair work undertaken. I cannot agree.

The tank or connections are not integral parts of the "pump" just as a well is not a part of the pump used to draw water from it. This was not, therefore, with respect, repair work or, as stated by His Honour, "the renewing of any part of an existing measuring-device"; it was the installation of a "pump" within the meaning of the regulation referred to. The pump is a mechanical contrivance complete in itself erected to draw gasoline from the tank and it is used for the "disposal" of gasoline to customers. It is, therefore, within the meaning of the words used in the first sentence of clause 5.

Nor can I with deference agree that the Provincial Fire Marshal Act has no application to highways or public streets, because not mentioned therein. It has general application throughout the Province and in all places so far as it deals with fire hazards.

We were referred to the Victoria City Act, 1919, being Cap. 99, B.C. Stats. 1919, Sec. 14 (1) to show that this authority if given at all was conferred upon the city of Victoria. The section referred to, however, does not deal with the regulation and disposal of inflammable matter; even if it did that would not prevent the Provincial Legislature in a general Act from exer-

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cising overriding powers on the same subject-matter. It is deemed by Provincial legislation a fire hazard to locate a gasoline-pump on the street because in the event of a collision with a truck or other vehicle a fire might ensue. To say that the substitution of a new pump for an old one lessens the risk is not conclusive against this view. By preventing the installation of new pumps the old ones, through obsolescence, will gradually disappear, thereby finally effecting the removal of all pumps from the street and thus eliminating the hazard.

I would allow the appeal.

O'HALLORAN, J.A.: This is an appeal by the Attorney-General of British Columbia involving the validity of a regulation made by the Lieutenant-Governor in Council under the Fire Marshal Act, Cap. 100, R.S.B.C. 1936. Under section 46 of the said Act the Lieutenant-Governor in Council may make regulations, *inter alia*:

(2) (*b.*) Regulating the manufacture, sale, storage, carriage, and disposal of any combustible, explosive, or inflammable matter;

A material regulation made thereunder reads as follows: [Clause 5 of order in council, already set out in head-note.]

The respondent Island Pacific Oil Company Limited was charged before the police magistrate of the city of Victoria, that it:

On or about the 5th day of May, 1938, at the city of Victoria aforesaid, did unlawfully erect a pump or measuring-device for the purpose of retailing inflammable liquids on a public street, to wit, Courtney Street, in the said city of Victoria, contrary to the provisions of the Fire Marshal Act and the regulations made thereunder.

The respondent conducted a "service station"; it had a gasoline-pump on "the sidewalk close to the street" used in connection with this service station; it was charged with installing a new pump in lieu of the one already in place. The learned magistrate held the respondent had not committed a breach of regulation No. 5, as it was conducting a service station constructed or equipped before the regulation came into force, and dismissed the charge.

The Attorney-General appealed then to SHANDLEY, Co. J., the learned judge of the county of Victoria, who dismissed the appeal on three grounds: (1) that the regulation refers only

to the erection of an entire new measuring-device and does not refer to the repairing or renewing of any part of an existing measuring-device as he held was done in this case; (2) the Fire Marshal Act gives no control over streets or highways, its authority being limited in section 46 (2) (*f*) to "buildings or premises"; and (3) that the regulation is *ultra vires* as it prohibits the erection of a pump or measuring-device on a street or highway whereas section 46 (2) (*b*), *supra,* of the Fire Marshal Act gives power to regulate only and not to prohibit. From this decision the Attorney-General appeals.

Counsel for the Attorney-General did not contend that section 46 of the Fire Marshal Act confers the power to prohibit, but argued that regulation No. 5, *supra,* was regulatory only within the power given by section 46 (2) (*b*), *supra,* for

> regulating the . . . sale, storage . . . and disposal of any . . . inflammable matter.

His contention in brief was that the purpose of the Fire Marshal Act was fire-prevention, and that regulations for such purpose obviously implied prohibition to the extent required for such purpose. In my view, the appeal should be dismissed on either of two main grounds: (1) For the reason given by the learned police magistrate, *viz.,* that regulation No. 5, *supra,* does not apply in the present instance, for the service station in question was constructed and equipped before the regulation came into force; and (2) as found by His Honour Judge SHANDLEY, regulation No. 5 is prohibitory whereas the power to regulate only is given in the parent statute.

As to the first ground: In the second and "master" sentence of regulation No. 5 the test is not whether the gasoline-pump is constructed or equipped thereafter but it is whether the service station is constructed or equipped thereafter. Therefore, regulation No. 5 has no application to gasoline-pumps thereafter erected in existing service stations, such as the present, but is restricted in its application to gasoline-pumps erected thereafter in service stations constructed or equipped after the regulation came into force. The language of the regulation would imply that the prevention of possible fire-danger from this source was made secondary to the protection of present investments in existing

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service stations. As a matter of fact there was little, if any, evidence of fire-danger in this case.

As to the second ground that regulation No. 5 is prohibitory whereas the power to regulate only is given in the present statute. Studying section 46 (2) of the Fire Marshal Act, *supra,* we find that in subsections (*a*) and (*b*) the word "regulating" alone is used, whereas in subsections (*c*), (*d*) and (*f*) the words "regulating or prohibiting" are both used. This alone is sufficient in my view to compel the conclusion that when the word regulate alone is used in section 46 (2) (*b*), *supra,* it was not intended to include prohibitory powers. A power to regulate as distinct from a power to prohibit implies the continued existence of that which is to be regulated. Regulation may imply restriction it is true; but restriction in itself denotes continuance of the condition regulated but in a lesser degree. Elimination of gasoline-pumps on streets or sidewalks prohibits their continuance; it is prohibition and was so found as a fact by the learned county court judge. The evidence left him no alternative. He had before him the known circumstances to which the regulation was being applied. Regulation on the other hand implies the continuance of gasoline-pumps on streets or sidewalks but subject to restrictions which do not prohibit them. As stated by Lord Davey, who delivered the judgment of their Lordships in the leading case of *Municipal Corporation of City of Toronto* v. *Virgo,* [1896] A.C. 88, at p. 93:

> No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

It should be remarked that no question of nuisance or maintenance of order was urged in this appeal.

The language of section 46 (2) of the Fire Marshal Act indicates by the use of the words "regulate" and "prohibit" in apposite parts of the same section, that it was intended to emphasize the distinction between the two. It should be clear therefore that when the Legislature intended to give power to prohibit,

it did so by express words—*vide Municipal Corporation of City of Toronto* v. *Virgo, supra,* also at p. 93. If it were intended to include in the word "regulate" alone, powers of prohibition to carry out the object of the statute, *viz.,* fire-prevention, then there would have been no need to include the power to prohibit in at least three other places in section 46 (2).

In neither *Slattery* v. *Naylor* (1888), 13 App. Cas. 446 nor *Re Karry and City of Chatham* (1910), 21 O.L.R. 566 (Meredith, J.A. dissenting) was the power to prohibit and the power to regulate given in the same or related sections of the parent statutes. The *Slattery* case was not considered in point in *Municipal Corporation of City of Toronto* v. *Virgo, supra,* although it was cited in argument and both Lord Macnaghten and Sir Richard Couch sat as members of the Judicial Committee in both appeals. In any event *Re Karry and City of Chatham, supra,* must be read in the light of a decision of the Full Court of this Province in *Rex* v. *Sung Chong* (1909), 14 B.C. 275 (HUNTER, C.J.B.C., IRVING and MORRISON, JJ., HUNTER, C.J.B.C. dissenting) which followed *Municipal Corporation of City of Toronto* v. *Virgo, supra.*

The city of Victoria has been given extensive powers to pass by-laws for the prevention and suppression of fires under subsections (77) to (88) of section 59 of the Municipal Act, Cap. 199, R.S.B.C. 1936, including the prevention and regulation of trades dangerous in causing or promoting fires; also under sections 46 (4) and 47 of the Fire Marshal Act, *supra,* it is provided:

> 46. (4.) Nothing in this Act shall prevent any municipality from making by-laws relating to any matter within the scope of this Act, but every by-law so made shall have effect as long and as far only as it is not repugnant to any provision of this Act or the regulations.
>
> 47. Nothing in this Act shall absolve a municipality from its duty to enforce any law or regulation relating to any matter within the provisions of this Act.

The city of Victoria has wide powers of prohibiting, authorizing and regulating the construction, use or maintenance of gasoline-pumps on its streets and sidewalks, for in addition to section 59 (231) of the Municipal Act, *supra,* by section 14 of the Victoria City Act, 1919, Cap. 99, B.C. Stats. 1919:

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14. It shall be lawful for the Council to make, alter, or repeal by-laws for or in relation to any of the following matters, namely:

(1.) For authorizing, regulating, or prohibiting the construction, placing, use, or maintenance, on, under, or over any public sidewalks or streets in the municipality, of pumps, stands, tanks, pipes, hose, or fixtures for the supply or delivery of gasoline, oil, air, or water, . . . , and whether all or any part thereof have been heretofore or shall hereafter be so constructed, placed, used or maintained. . . .

While we are informed by counsel, that the city of Victoria has not exercised these wide powers of prohibition and regulation yet it should not be in doubt that gasoline-pumps could not have been erected on the streets or sidewalks of Victoria or at least could not be allowed to remain there without the tacit consent or authority of the city council whether considered from the viewpoint of construction or street regulation as such, fire-prevention as such or from these united viewpoints. One would be slow to believe that the Legislature intended to give to a Provincial authority under the term regulate alone, the power to prohibit the replacement of gasoline-pumps on the streets or sidewalks of Victoria, the erection and continuance whereof could not have occurred without the authority of the city council which has full power of prohibiting and regulating the same; and more particularly so when the city of Victoria fire chief is a local assistant to the fire marshal—*vide* section 6 of the Fire Marshal Act, *supra*. For these reasons I would dismiss the appeal.

Appeal allowed, O'Halloran, J.A. dissenting.

Solicitor for appellant: *C. L. Harrison.*
Solicitor for respondent: *J. B. Clearihue.*

CORPORATION OF THE CITY OF VICTORIA AND IRWIN v. CORPORATION OF THE DISTRICT OF OAK BAY.

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May 12, 22; *Sept.* 12.

Water works—Supply from city of Victoria to municipality of Oak Bay—Cost of water furnished—B.C. Stats. 1873, Cap. 20; 1911, Cap. 71, Sec 1; 1925, Cap. 69, Sec. 13.

The city of Victoria was incorporated in 1862 (the incorporating Act having been repealed in 1867), and its water supply was obtained from Elk Lake and Beaver Lake. In 1873 an Act was passed by the Legislature authorizing the city to construct a water-works system and empowering the city to supply water to consumers within its limits and to residents of areas contiguous to the city. Oak Bay was incorporated in 1906, and from 1906 to 1909 residents of Oak Bay were supplied by water directly from the city. In 1909 an agreement was entered into between the city and the corporation of Oak Bay whereby the city supplied the corporation with water instead of directly to the individual residents. In 1909 the city was authorized to extend its water works to include Sooke watershed (to be completed in eight years). In 1889 The Esquimalt Water Works Company came into existence with statutory authority to supply water from Goldstream watersheds to certain areas (not including the corporation of Oak Bay) and in 1911 at the instance of the corporation, the Oak Bay Act, 1910, was amended by inserting section 27, by which The Esquimalt Water Works Company was given power to sell water to Oak Bay, and the Schedule to the Act provided that upon the completion of the Sooke water system, the city could supply Oak Bay with water. This Act was never put into effect with relation to Oak Bay, and the city continued to supply water to Oak Bay as before until 1925, when the city expropriated the works of The Esquimalt Water Works Company, which was confirmed by statute in 1925, empowering the city to supply water to any corporation, the price in case of dispute to be settled by arbitration. The city continued to supply water to the corporation, and on May 2nd, 1938, issued a writ claiming, *inter alia*, $4,978.82 for water supplied during the first three months of 1938. This amount is based upon the rate charged to city consumers under the authority of a city by-law. The corporation counterclaimed and sought a declaration that the city is bound by the Act of 1911 to supply water to the corporation, and that it is entitled to have the price settled by the Comptroller of Water Rights under the provisions of paragraph 4 of the Schedule to the said 1911 Act.

Held, on appeal, varying the decision of McDONALD, J., namely, that it be set aside to the extent of its declaration that the defendant is entitled to have the price of the water "furnished" to it by the plaintiff "settled" under the provisions of clause 4 of the Schedule to the Oak Bay Act, 1910, Amendment Act, 1911, because the Court is of opinion that said

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clause never came into operation and therefore cannot be invoked by the defendant.

Held, further, that by the first clause of said Schedule reciprocal obligations were, and still are, imposed upon the city and the municipality, by which the former is compelled to furnish and the latter to "accept and pay for" water as therein provided, but no provision is made for fixing the price thereof by that or any other clause or by any section of the Act.

Held, further, that the city cannot resort to section 13 of The Esquimalt Water Works Company Winding-up Act, 1925, to "fix by arbitration" the price of water supplied, because the municipality has not made the necessary "request" upon the city so to do, the lack of which request is set up as a defence by the city in its reply and defence to the counterclaim.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 13th of January, 1939, in an action for the price of water supplied in bulk by the city of Victoria to the municipality of Oak Bay for the first three months of 1938, and for a declaration that the city's only duty is to supply water to the municipality at the rates prescribed by the city by-laws, and that the municipality is bound to pay the prescribed rates. By statute of 1873 the city was empowered to supply water to any corporation not within the city through the agency of the water commissioner, and water was supplied through this statute to Oak Bay until about 1911, when the supply obtained from Elk Lake and Beaver Lake was not sufficient, and the city commenced the construction of works to bring water from Sooke Lake and this work was completed in 1915. The Oak Bay Act, 1910, Amendment Act, 1911, was passed, under section 1 of which The Esquimalt Water Works Company was given power to sell to Oak Bay, and the Schedule to the Act provided that upon the completion of the Sooke works the city should supply Oak Bay with water. This Act as far as the Esquimalt Company is concerned was not put into effect, and the city continued to supply Oak Bay with water as before until 1925, when the city expropriated the works of the Esquimalt Company and obtained from the Legislature the rights conferred by the statute 16 Geo. V., Cap. 69, confirming the expropriation of the Esquimalt works and empowering the city to supply water to any corporation, the price in case of dispute to be settled by arbitration. The municipality of Oak Bay claim they are governed by the Act of 1911

and the Schedule to the Act. The city claim that Act was never put into operation and that they are governed by the Act of 1925.

The appeal was argued at Vancouver on the 19th and 22nd of May, 1939, before MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.

Maclean, K.C. (*F. L. Shaw,* with him), for appellants: Water was first supplied to Oak Bay by the city under powers conferred by section 27 of chapter 20 of the statutes of 1873. The city continued to supply water to Oak Bay, and in 1911 an Act was passed allowing Oak Bay to get its water from The Esquimalt Water Works Company until the city had completed its works for bringing a larger supply of water from Sooke Lake. This was completed in 1915. The 1911 Act with relation to The Esquimalt Water Works Company was never put into force and the city continued to supply Oak Bay. In 1925 a further Act was passed confirming the expropriation by the city of The Esquimalt Water Works Company and empowering the city to supply outside corporations with water. The case depends on the interpretation of the statutes of 1911 and 1925. The Act of 1911 was not put into force and the city continued to supply water to Oak Bay under the Act of 1873 until the 1925 Act was passed. We are now governed by the Act of 1925.

Locke, K.C. (*H. G. Lawson, K.C.,* with him), for respondent: Section 1 of the Act of 1911 added section 27 to the Oak Bay Act and conferred a privilege on Oak Bay to purchase from The Esquimalt Water Works Company. The municipality never took water from The Esquimalt Water Works Company, but the Act remained in force and the municipality continued to take water from the city under the provisions of that Act and has done so up to the present time. That the 1911 Act is in force see *Viscountess Rhondda's Claim,* [1922] 2 A.C. 339, at pp. 347-8. The statute must receive a liberal construction: see Maxwell on Statutes, 3rd Ed., p. 204; *The Duke of Buccleuch* (1889), 15 P.D. 86, at p. 96; Craies's Statute Law, 4th Ed., 71. The statute of 1925 is classified with the private Acts, and Oak Bay is not referred to in that Act: see Craies's Statute Law, 4th Ed., pp. 504-5. A private Act will not repeal a former Act

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unless there are words expressly repealing: see *The Trustees of the Birkenhead Docks* v. *The Birkenhead Dock Company* (1853), 23 L.J. Ch. 457; *Esquimalt Waterworks Company* v. *City of Victoria Corporation,* [1907] A.C. 499, at p. 509; Broom's Common Law, 8th Ed., 20. Our rights are under the 1911 Act. The price of water to be fixed by section 4, and if not under a *quantum meruit.*

Maclean, in reply, referred to Maxwell on Statutes, 8th Ed., 160 and 163. These Acts are not private Acts: see *British Columbia Electric Railway Company, Limited* v. *Stewart,* [1913] A.C. 816.

Cur. adv. vult.

12th September, 1939.

MARTIN, C.J.B.C.: This appeal from the judgment on the defendant's cross-appeal is allowed in part, and said judgment is set aside to the extent of its declaration that the defendant is entitled to have the price of the water "furnished" to it by the plaintiff "settled" under the provisions of clause 4 of the Schedule to the Oak Bay Act, 1910, Amendment Act, 1911, B.C. Stats. 1911, Cap. 71, because, briefly, we are of opinion that said clause never, under the conditions and circumstances, came into operation, and therefore cannot be invoked by the defendant.

And we are also of opinion that by the first clause of said Schedule reciprocal obligations were, and still are, imposed upon the city and the municipality by which the former is compelled to "furnish" and the latter to "accept and pay for," water as therein provided, but no provision is made for fixing the price thereof by that or any other clause, or by any section of said Act.

Furthermore, we are of opinion that the city cannot on the pleadings and facts now before us resort to section 13 of The Esquimalt Water Works Company Winding-up Act, 1925, B.C. Stats. 1925, Cap. 69, to "fix by arbitration" the price of water supplied because the municipality has not made the necessary "request" upon the city so to do, the lack of which request is, be it noted, set up as a defence by the city in its reply and defence to said counterclaim.

These brief reasons are given now so that the parties to this matter of considerable public importance may know the heads

of our decision without delay and we shall amplify said reasons within a few days: the question of costs may thereafter be spoken to.

MACDONALD, J.A.: I agree in the result.

SLOAN, J.A.: This appeal involves the respective rights and obligations of the contending parties to supply, take and pay for water.

A short summary of the facts is essential to an understanding of the dispute. The city of Victoria (hereinafter referred to as "the city") was incorporated by an ordinance of the Legislature of this Province in 1867. Its water supply was obtained from Elk Lake and Beaver Lake and in 1873 an Act was passed by the Legislature authorizing the city to construct a water-works system. This Act empowered the city to supply water to consumers not only within but also without the limits of the city and the residents of areas contiguous to the city were so supplied by water and were charged the same rate as those users dwelling in the city.

An area adjoining the city was incorporated a municipality in 1906 under the name of Corporation of the District of Oak Bay (hereinafter referred to as "the corporation") and from 1906 to 1909 residents of that area were supplied by water directly by the city.

In 1909 an agreement was entered into between the city and the corporation whereby the city supplied the corporation with water instead of, as formerly, supplying such service directly to the individual residents.

In 1909 the city was authorized to extend its water works to include the Sooke watershed and was required to have such works completed within eight years. At this juncture it is necessary to bring into the narrative The Esquimalt Water Works Company. This company came into existence in 1885 and had statutory authority to supply water from the Goldstream watersheds to certain areas which however did not include that area included within the corporation. In 1910 the corporation applied to the Legislature to be empowered to take water from the Esquimalt Company which application of necessity also involved an expan-

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sion of the powers of the Esquimalt Company. The city successfully opposed the proposed legislation.

In 1911 the corporation renewed its application for the enabling legislation and the following section was enacted:

27. Notwithstanding anything to the contrary contained in the Esquimalt Water Works Act, 1885, and the Esquimalt Water Works Extension Act, 1892, the Esquimalt Water Works Company shall have power to supply and the Council [*i.e.*, of the Corporation] shall have power to take, purchase, or otherwise acquire water from the Esquimalt Water Works Company, on such terms as may be arranged by agreement between the said Council and the Esquimalt Water Works Company: Provided that every such agreement shall be embodied in a by-law, which by-law shall, before the final passage thereof, be submitted to the electors of the municipality who are entitled to vote upon a by-law to contract a debt, and shall be assented to by a majority in number of the electors who shall vote upon such by-law: Provided, further, that the powers hereby conferred upon the Council and the Esquimalt Water Works Company shall be subject to the conditions set out in the Schedule of this Act.

SCHEDULE.

The powers conferred by this Act are so conferred under and subject to the following conditions, which shall be binding on all parties concerned:—

In this Schedule the word "City" shall mean the Corporation of the City of Victoria, and the word "Corporation" shall mean the Corporation of the District of Oak Bay.

1. It shall hereafter, at all times, be recognized that an obligation exists upon the part of the City to furnish the Corporation with a supply at all times of water of the same class and quality as that supplied to the inhabitants of the City of Victoria, and that a corresponding obligation exists on the part of the Corporation to receive, accept, and pay for such supply of water.

. . . .

3. The Corporation shall not, in the first instance, enter into any contract with the Esquimalt Water Works Company for a supply of water for a longer period than five years from the date of the passing of this Act, but provision may be made in said contract for an extension for another period of three years if the City shall not be ready, at the said period of five years, to supply water to the Corporation from Sooke Lake, Sooke River, or their tributaries.

4. If at the expiration of the said contract, or any extension thereof as aforesaid, the City shall have acquired a supply of water from Sooke Lake, Sooke River, or their tributaries, and completed the initial work of construction connected therewith, and shall be in a position, and shall give the Corporation three months' notice of its readiness to furnish an adequate supply of water in bulk from such source to the Corporation at the boundary of the municipality, at a pressure sufficient for the domestic needs of the Corporation, excepting Gonzales Hill (and in case a dispute shall arise between the City and the Corporation as to whether the water is being furnished at the said pressure, then such dispute shall be referred to and

settled by the said Chief Water Commissioner), then, the Corporation shall forthwith cease to take water from the Esquimalt Water Works Company, and the right of the Esquimalt Water Works Company to supply such water shall likewise cease and determine, and the Corporation shall thereafter take water in bulk from the said City, at the said boundary-line, at a price to be then agreed upon, or, failing such an agreement, at a price to be settled by the said Chief Water Commissioner, and such price shall be readjusted in the same manner between the said municipalities every five years thereafter.

. . . .

6. Neither municipality shall make any attempt before the Legislature, or otherwise, to derogate from the provisions of this Schedule, except with the consent of the other municipality.

The provision in paragraph 3 of the Schedule has reference to the eight-year period in which the city was to complete its Sooke area water-works undertaking.

The position then in 1911 may be summarized as follows: The corporation was permitted (subject to the fulfilment of certain conditions precedent) to meet its water needs from the supply of the Esquimalt Company for, at most, eight years, and as the price for this concession and for the conferring of this power, was bound "to receive accept and pay" for its water supply from the city "at all times" (which perpetual obligation must be regarded as subject to any temporary arrangement with the Esquimalt Company). The city on its part was obligated to supply the corporation with water "at all times."

The corporation and Esquimalt Company did not enter into any agreement under the 1911 Act, but the fact that the power to make such an agreement was never exercised does not extinguish the obligation of the corporation under the 1911 Act to take its supply of water from the city "at all times" because that obligation was the price exacted by the Legislature for the grant of the power, not its exercise. The concomitant, and no doubt then welcome obligation fastened upon the city by the 1911 Act to supply the water is not a defeasible one dependent upon the exercise or non-exercise of the power conferred upon the corporation by the quoted section of the 1911 Act.

Until 1915 the corporation continued to be supplied by the city under the 1909 agreement.

In 1915 an agreement was entered into between the city and corporation for a supply of water for a further period of five

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years and in 1921 by agreement the supply of water from the city was arranged for another five years.

In 1925 the Legislature passed The Esquimalt Water Works Company Winding-up Act, 1925, by which the city expropriated the undertaking of the Esquimalt Company. The apposite portions of section 13 of that Act read as follow:

> 13. The Corporation of the City of Victoria shall be empowered and shall supply water to any adjoining municipality owning its own distribution system, or to any duly constituted water authority having powers to distribute water by retail, within North Saanich or elsewhere within the area set out in section 6 of the "Victoria Water Works Act, 1873," in so far as the water-pressure will allow, if requested by the Municipal Council of such municipality or by such authority, and shall be entitled to demand and receive from any such municipality or authority, and every such municipality or authority making such request shall pay to the said Corporation per thousand gallons for all water delivered in bulk at some point on the municipal boundary of the City of Victoria or at such other point on the main pipe-line conveying water to the City of Victoria as may be most convenient and advantageous, a sum not exceeding five per cent. in excess of gross cost.
>
> . . . .
>
> In the event of any dispute with any adjoining municipality or water authority aforesaid as to the gross cost of water, the same shall be submitted to arbitration, such arbitration to be governed by the provisions of the "Arbitration Act," and for the purposes of arriving at the gross cost of water the arbitrators shall allow the cost of collection, storage, and carriage to the point of delivery aforesaid, maintenance, interest, sinking fund, and serial debenture requirements, and reasonable amount for depreciation and for a contingencies fund.

After the passage of the 1925 Act a further agreement was entered into between the city and corporation for a supply of water from the city for a period of three years and in 1929 a similar agreement was made for the further period of eight years. This last agreement terminated on the 31st of December, 1937. The various agreements to which I have made reference were made pursuant to the authority conferred upon the city by the Act of 1873, and each agreement entered into after 1911 contained a clause the effect of which was to preserve to the parties whatever statutory rights each might have.

The city continued to supply the corporation with water and on the 2nd of May, 1938, issued a writ against it claiming, *inter alia*, $4,978.82 for water supplied during January, February and March of 1938. This amount is based upon the rate charged

to city consumers under the authority of a city by-law which by-law is of no application herein.

The corporation counterclaimed and sought a declaration that the city is bound by the 1911 Act to supply water to the corporation and that it is entitled to have the price for such water settled by the Comptroller of Water Rights under the provisions of paragraph 4 of the Schedule to the said 1911 Act.

The issue is really a narrow one and is to be settled largely by determining whether the rights and obligations of the parties are to be governed by the 1911 or 1925 Act.

In my view the 1925 Act does not apply. While by its section 13 (quoted above) the city is empowered to supply water to an adjoining municipality it can only do so under this Act "if requested" so to do by "the Municipal Council of such municipality." No such request was ever made under this Act by the corporation. As the learned trial judge points out the corporation on the 29th of May, 1926, gave a specific notice to the city of its contention that the Act of 1911 governed the method of settling the price and while I do not agree that the 1911 Act can be so construed nevertheless the notice is a direct negation of any "request" under the 1925 Act. It should also be noted that the city in its defence to the counterclaim (paragraph 4) specifically denies that any "request" was made to it by the corporation under the 1925 Act and alleges that such "request"

> is a statutory condition precedent to the application of that Act to the matters in question in the action.

That pleading correctly states the situation and is conclusive of the point.

It is my opinion for the reasons previously stated that by the 1911 Act the city is obligated to supply the corporation with water and the corporation is obliged in turn to receive and pay for such water. I am glad to agree with the learned trial judge on this aspect of the matter but with respect I cannot agree with his conclusion that resort may be had to paragraph 4 of the Schedule to the 1911 Act as a means of determining the method of payment for the water supplied. The Chief Water Commissioner (now the Comptroller of Water Rights) was designated by said paragraph 4 as the official to determine what price should

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be paid by the corporation to the city upon the fulfilment of certain conditions precedent but those conditions under which he had jurisdiction to function as a price-fixing official never came into existence. I cannot, with respect, strain the ordinary meaning of paragraph 4 in order to apply it to a situation it was never designed to meet. When resort cannot be had to paragraph 4 there is nothing in the 1911 Act which has any bearing on this price-fixing problem nor was it even remotely suggested to us that in the absence of an agreement there is anything in the 1873 Act which is of assistance. The result is then, that while under the Act of 1911 the city must supply water to the corporation and the corporation must take and pay for it, there is no way for us, in the form in which this action was brought and tried, to determine what price the corporation must pay nor is there any authority, statutory or otherwise, which permits us to refer this matter to the Comptroller of Water Rights so that he may determine that issue.

In the result I would amend the judgment below in accordance with the views I have herein expressed.

Appeal allowed in part; cross-appeal allowed in part.

Solicitor for appellants: *F. L. Shaw.*
Solicitor for respondent: *H. G. Lawson.*

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In Chambers
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Nov. 21.

THE KING v. HADDRELL.

Industrial Conciliation and Arbitration Act—Unlawfully going on strike—Informations—Appearance—Adjournment without case being called or formally adjourned—Refusal to appear on ground of lack of jurisdiction—Warrants issued on original information—Arrest and conviction—Certiorari—B.C. Stats. 1937, Cap. 31, Sec. 46.

Six accused (including Haddrell) were separately charged on information laid under section 46 of the Industrial Conciliation and Arbitration Act, and appeared before the stipendiary magistrate at Bralorne, B.C., pursuant to summonses returnable there. At the instance of counsel for all the accused, the cases were adjourned to be heard at Goldbridge, B.C. On the hearing at Goldbridge the charge against one of the

accused (Cameron) was heard, but not being finished was adjourned until the next day, when his case was finished and he was found guilty. The Court was then adjourned until next day, but on both adjournments the charges against the remaining five accused were not called and formally remanded. On the opening of Court next morning, counsel for all the accused notified the Court that the five accused (including Haddrell) would not attend on the ground that the magistrate had lost jurisdiction because their cases at the conclusion of each day had not been called and formally remanded. Warrants were then issued on the same day on the original informations, the five accused were arrested and taken before the magistrate, when they were tried and convicted. On *certiorari* proceedings to set aside the conviction of Haddrell on the ground that the magistrate had lost jurisdiction:—

Held, that the warrant issued following the form of a warrant in the first instance to apprehend the defendant, was properly issued. The accused was legally brought before the Court, jurisdiction existed, and the application was dismissed.

APPLICATION by defendant for a writ of *certiorari* in connection with his conviction on a charge that he, being an employee of Pioneer Gold Mines Limited, did unlawfully go on strike, a dispute having arisen prior to an application having been made for appointment of a conciliation commissioner, contrary to section 46 (1) of the Industrial Conciliation and Arbitration Act. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 21st of November, 1939.

Lucas, for the application.
D. J. McAlpine, contra.

FISHER, J.: This is an application on behalf of one Charles Haddrell for a writ of *certiorari* in connection with a certain conviction made by stipendiary magistrate Sumner on or about the 13th day of November, 1939, whereby the said Charles Haddrell was convicted for that:

He, between the 7th and 10th days of October, 1939, at Pioneer Mines, in the County of Cariboo, who then being an employee of Pioneer Gold Mines Limited, did unlawfully go on strike, a dispute having arisen prior to an application having been made for appointment of a conciliation commissioner contrary to section 46 (1) of the Industrial Conciliation and Arbitration Act, being chapter 31, B.C. Stats. 1937, and amendments thereto.

There would appear to be no question about the jurisdiction of the magistrate over the offence, or, it may be said, as to the actual

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presence of the accused at the time of the trial and conviction; but it is submitted that in view of what had occurred, with respect to which the counsel seem to be in agreement, the magistrate had lost jurisdiction. In *Hall* v. *Taylor* (1926), 46 Can. C.C. 50, at p. 51, the Court said as follows:

> If jurisdiction was not lost, then the applicant's contention is without basis. If the magistrate did lose jurisdiction for the time being, and I will assume for the sake of argument that he did, it was still competent for him to try the charge *de novo*. And it seems to me that this was done; for when a person charged with some offence comes before a magistrate and pleads to the charge, it is immaterial whether he has come of his own accord or in pursuance of an intimation or command contained in a summons served upon him, or comes by any other invitation or upon any other business, if he pleads to the charge he thereby waives the irregularity or absence of the usual steps necessary to his appearance following the laying of the information.

In this case I have to say that if jurisdiction was not lost, then the applicant's contention is without basis. I am not expressing an opinion at this time as to whether the magistrate did lose jurisdiction for the time being, but I am assuming for the sake of argument as was assumed in the *Hall* v. *Taylor* case referred to, that he did, and even on that assumption I would hold that it was still competent for him to try the charge, and in this particular case I do not base my judgment on the decision in *Rex* v. *Iaci* (1925), [35 B.C. 95]; 44 Can. C.C. 275, referred to in the *Hall* v. *Taylor* case, but I base my decision on the ground that the warrant issued, following the form of a warrant in the first instance to apprehend the defendant, was properly issued. The basis of the attack upon such warrant is apparently put by Mr. *Lucas* of counsel for the applicant on the ground that the warrant was a "bare" warrant without any information on which to found it. In other words, the submission of counsel on behalf of the applicant is that the force of the information was expended or that the proceedings lapsed; the submission apparently being along the lines that the accused, if he is to be brought into Court again, must be brought in on what has been called a fresh information. I am not assuming to deal with what the situation would be if he had been brought in on a fresh information, because in this case it is not contended by Mr. *McAlpine* on behalf of the prosecution that there was a fresh information. If I understand correctly the submission of Mr. *McAlpine*, he does not admit

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that it would not have been in order to proceed when counsel on behalf of the accused appeared without the accused and took the objection, but states that by way of precaution he requested that the procedure be adopted of the issuance of a warrant in the first instance. This procedure was followed, and in my view the accused was legally brought before the Court and that jurisdiction then existed and that the conviction made by the magistrate cannot be set aside for want of jurisdiction on an application such as this by way of *certiorari*, and the application is dismissed.

Application dismissed.

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Railway company—Negligence—Defective sign-post—Deficiency contributing to accident—Effect of Provincial sign-posts—Board of railway commissioners—"Declaration" by board subsequent to accident—Effect of—R.S.C. 1927, Cap. 170, Secs. 267 and 309 (c).

The plaintiff and his wife were passengers in a car driven by one Valentine on the evening of the 21st of August, 1937, when they were proceeding along the Island Highway towards Victoria. They approached the Colwood crossing of the defendant company's railway, about eight miles from Victoria, shortly after 10 o'clock. The regular crossing-sign was to the left of the driver and across the track from him, and there were two Provincial sign-posts close to the road on the driver's right, one 300 feet from the track and the other about ten feet from the track. It was raining and the visibility was very poor. The windshield had a wiper moving on the left side but not on the right. The driver did not see the signs, he was suddenly warned of the approaching train by the plaintiff's wife and immediately stopped his car unknowingly on the tracks. About four or six seconds later he was struck by the engine. The plaintiff's wife received injuries from which she soon after died, and the plaintiff was injured. An action by the plaintiff for damages on his own behalf and for the death of his wife was dismissed. On appeal, it was alleged that the damage sustained was caused by the failure of the defendant to "erect and maintain" sign-boards as required by section 267 of the Railway Act, in that (a) the one sign-board erected was not sufficient; (b) that it was not properly placed; and (c) that it was not "painted white with black letters."

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Held, reversing the decision of MANSON, J., that the evidence justifies the finding that the statutory requirement to maintain the "painted white" condition of the sign had not been complied with, and that the deficiency in the sign-post contributed to the accident is supported by the statements of the driver of the car who said he did not see the signs, and this is not remedied by resort to signs erected under a Provincial statute.

On the submission that because the railway board under section 309 (c) of the Railway Act made a "declaration" on the 18th of September, 1937 (28 days after the accident, while the state of the sign-board remained the same), that the "crossing is protected to the satisfaction of the board," no Court can question anything that might even inferentially have been included in arriving at such "satisfaction" including the state of the sign-board:—

Held, that it would be an "encroachment" to an unreasonable extent to hold that this declaration by the board, governing only future speed in "passing" a crossing, can legally be expanded into a sweeping *nunc pro tunc* adjudication, debarring any person from his otherwise unquestioned right to maintain an action for prior, at least, injury caused by a specific breach of duty imposed by section 267 of the same statute.

APPEAL by plaintiff from the decision of MANSON, J. of the 29th of May, 1939, in an action for damages resulting from a collision between an automobile driven by one Richard Valentine, in which the plaintiff and his wife were passengers, and a train of the defendant company. The accident took place at 10 minutes after 10 on the night of the 21st of August, 1937, at Colwood crossing, where the tracks of the defendant company cross the Island Highway about eight miles from the city of Victoria. Valentine was driving his car on the highway towards Victoria. It was a dark rainy night and the visibility was very poor. The driver stopped his car on the track, and four or six seconds later he was struck by the engine of a train that was on its way to Victoria. The plaintiff's wife died from the injuries she received, and the plaintiff himself received serious injuries. It was held on the trial that the effective cause of the accident was that the driver of the car did not exercise care appropriate to the circumstances, and the plaintiff failed to establish that any deficiency in the defendant's sign contributed to the accident.

The appeal was argued at Victoria on the 4th, 5th and 6th of October, 1939, before MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

R. D. Harvey, for appellant: The learned trial judge refused to accept the decision of the Court of Appeal on appeal from the first trial. He is bound by that decision: see *Western Canada Power Co.* v. *Bergklint* (1916), 54 S.C.R. 285, at pp. 298-9; *Badar Bee* v. *Habib Merican Noordin,* [1909] A.C. 615; *Ram Kirpal Shukul* v. *Mussumat Rup Kuari,* 11 Ind. App. 37. A highway-crossing sign should have been placed on the right side of the road in order to be in the line of sight of motor-vehicles approaching the crossing when going to Victoria, as required by the Railway Act. The defendant was negligent in failing to maintain a proper condition of repair and properly-painted sign erected at the railway crossing. Of the three signs to the driver's right only one of them, that was 300 feet from the crossing, had "R.R." on it, and another was too close to the crossing to be of any practical use. The public have a right to rely on the railway complying with statutory conditions: see *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375, at p. 381; *Ullock* v. *Pacific Great Eastern Ry. Co.* (1921), 30 B.C. 31; *Doyle* v. *Canadian Northern Ry. Co.* (1919), 24 C.R.C. 319; 46 D.L.R. 135; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380, at p. 399; *The Canada Atlantic Railway Company* v. *Henderson* (1899), 29 S.C.R. 632, at p. 636; *Smith* v. *C.P.R.,* [1920] 3 W.W.R. 1028; *Green* v. *C.N.R.* (1932), 40 C.R.C. 157; *Smith* v. *South Eastern Railway Co.,* [1896] 1 Q.B. 178. The learned judge should have found that had the defendant maintained proper railway-crossing signs the driver would have had a better opportunity to have avoided the accident. The learned judge misdirected himself on the question of ultimate negligence. Assuming the plaintiff's driver was negligent, there was ultimate negligence on the part of the railway company in not maintaining proper signs, this negligence being of a continuing nature: see *Loach* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 177; [1916] 1 A.C. 719; *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423; *Gavin* v. *Kettle Valley Ry. Co.* (1918), 26 B.C. 30; *Key* v. *British Columbia Electric Ry. Co.* (1930), 43 B.C. 288; [1932] S.C.R. 106; *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512; *Green* v. *C.N.R.* (1932), 40 C.R.C. 157. Even if Valentine contributed to the accident this cannot be

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imputed to the plaintiff and his wife: see *The "Bernina"* (1888), 13 App. Cas. 1; *Lynam* v. *Dublin United Tramways Co.*, [1919] 2 I.R. 445; *Oliver* v. *Birmingham and Midland Motor Omnibus Co.*, [1933] 1 K.B. 35; *Evans* v. *South Vancouver and Township of Richmond* (1918), 26 B.C. 60, at p. 70; *Grand Trunk Rway. Co. of Canada and City of Montreal* v. *McDonald* (1918), 57 S.C.R. 269; *Tollpash* v. *C.N.R.*, [1932] 1 W.W.R. 846; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134; *Coop* v. *Robert Simpson Co.* (1918), 42 O.L.R. 488; *Napierville Junction Ry. Co.* v. *Dubois*, [1924] S.C.R. 375; Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 687; *Koeppel* v. *Colonial Coach Lines Ltd.*, [1933] S.C.R. 529. The learned judge drew inferences against the driver Valentine not warranted by the evidence: see *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491; *Green* v. *C.N.R.* (1932), 40 C.R.C. 157, at p. 169. The statement of the plaintiff just after the accident should not have been allowed in: see *Groh and Jeffrey* v. *Ritter* (1935), 50 B.C. 129, at p. 132; *Funk* v. *Pinkerton* (1938), 52 B.C. 528. Having allowed in the statement, the sworn evidence of Chesworth and Valentine at the coroner's inquest should have been allowed in: see Phipson on Evidence, 7th Ed., 471-2; *Reg.* v. *Coll* (1889), 24 L.R. Ir. 522; *Reg.* v. *Coyle* (1855), 7 Cox, C.C. 74; *Rex* v. *Benjamin* (1913), 8 Cr. App. R. 146; *Flanagan* v. *Fahy*, [1918] 2 I. R. 361.

A. Alexander, for respondent: The plaintiff's case is based solely on the failure to maintain a proper railway-crossing sign at Colwood crossing in three respects: (a) Failure to erect a crossing-sign on each side of the highway; (b) failure to have it in a proper position; (c) failure to keep it in proper repair. One sign-board with two boards in a cross-arm position is all that the Act requires. There is no evidence to show that the sign-post could have been put in a better position than its present position. There is no regulation as to when a sign-post should be repainted, and there is no breach of statutory duty in that regard. On the admissibility of board orders and their effect as evidence of facts found therein, the orders are admissible in evidence: see *Boland* v. *C.N.R.* (1933), 42 C.R.C. 211, at p.

216; *Canadian Northern Ry. Co.* v. *Robinson* (1910), 43 S.C.R. 387, at p. 404; *Seibel* v. *G.T.P. Ry.*, [1920] 2 W.W.R. 318, at 321; *Underhill* v. *C.N.R.* (1915), 8 W.W.R. 271; *McPhee* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 67, at p. 71; *Clark* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 314; *Jaremko* v. *Nelson & Fort Sheppard Ry. Co. and Great Northern Ry. Co.*, [1937] 3 W.W.R. 696; *Littley* v. *Brooks and Canadian National Ry. Co.*, [1930] S.C.R. 416, at p. 426. The board has been given exclusive jurisdiction to pass upon the safety of crossings after an accident: see McMurchy & Denison's Railway Law, 3rd Ed., 487. On the conclusiveness of its findings of fact see *Canadian Northern Ry. Co.* v. *Robinson* (1910), 43 S.C.R. 387; *Canadian Pacific Ry. Co.* v. *Canadian Oil Cos., Ltd.* (1912), 47 S.C.R. 155, and on appeal [1914] A.C. 1022. On the respective jurisdictions of the board and of the Provincial Courts see *Duthie v. Grand Trunk R.W. Co.* (1905), 4 C.R.C. 304; *The Bell Telephone Co. of Canada* v. *Canadian National Railways,* [1932] S.C.R. 224; *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Columbia Bithulitic Limited* v. *British Columbia Electric Rway. Co.* (1917), 55 S.C.R. 1, at p. 12. There was no proof whatever that the alleged negligence as to sign-posts was the effective cause of the accident. Valentine was blinded and confused as he approached the crossing and stopped on the track. His carelessness in failing to keep a proper look-out was the cause of the accident. The person seeking damages must give proof: see *Pere Marquette R.W. Co.* v. *Crouch* (1909), 13 C.R.C. 247, at p. 261; *McArthur* v. *Dominion Cartridge Company,* [1905] A.C. 72; *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; *Grand Trunk Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180. A jury's finding to be valid must be founded on something stronger than conjecture, supposition or surmise: see *McLaren* v. *Canadian Pacific Ry. Co.*, [1938] 3 W.W.R. 593. In support of the judgment it is sufficient if it cannot be said that his refusal to draw the inference that the defendant's negligence was the effective cause of the accident is clearly wrong: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243. It is submitted that the learned trial judge's inference that the lack

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of caution of Valentine was an effective cause is probably right. The findings of fact by the learned trial judge should not be interfered with: see *McCoy* v. *Trethewey* (1929), 41 B.C. 295.

Harvey, replied.

Cur. adv. vult.

12th January, 1940.

MARTIN, C.J.B.C.: In this action it is, in substance, alleged that the damage sustained was caused by the failure of the defendant to "erect and maintain" at the rail-level crossing in question "sign-boards" as required by section 267 of the Railway Act, Cap. 170, R.S.C. 1927, and general order No. 501 of the Board of Railway Commissioners made thereunder, in that (a) the one sign-board there erected was not sufficient; (b) that it was not properly placed; and (c) that it was not "painted white with black letters."

As to (a) and (b) the learned judge below, MANSON, J., held, and in my opinion, rightly held against those allegations of breach of duty.

As to (c) he held that "the white paint on the up-island side of the cross-arm was either wholly or almost wholly washed off by the weather but the black lettering remained and was visible at some distance . . . ," which is in effect a finding, and the only one that the evidence justifies, that in this respect the said statutory requirement to "maintain" the "painted white" condition of the sign had not been complied with. To escape from the consequences of that finding the defendant submitted below that this deficiency did not contribute to the accident, and the learned judge gave effect to that submission saying:

> In my view the plaintiff did not establish that any deficiency in the defendant's sign-post contributed to the accident. To so find would be a matter of inference and one not warranted upon the evidence.

With every respect, the evidence does not, in my opinion, warrant that conclusion but, on the contrary, supports the specific statements of the driver of the motor-car, Valentine, aged 59, that he "didn't see any signs on the road" of the railway being there (*i.e.,* at that crossing), and "it didn't occur to me I was nearing the crossing," and, I "did not see that sign that night," "on account of the weather chiefly I think," the night being

rainy with poor visibility and rain on the windshield outside and "fog" on it inside—which is all the more reason why the sign should be maintained in its "white paint" state so as to attract attention under all conditions, good or bad, and especially bad; and this breach of an obligation under a Federal statute to maintain an eye-arresting sign of distinctive construction and appearance well known for many years upon which travellers primarily rely for safety cannot be remedied by a resort to signs erected under a Provincial statute.

It is only necessary to add that in my opinion the evidence does not warrant the conclusion that "the alertness of the driver was more or less dulled" by the "heavy" air from the three people in the closed car—a Chevrolet sedan—and, finally, that in drawing all the said inferences from the evidence this Court is in as favourable a position as the learned judge below because, as he says in his judgment, the evidence is for "the greater portion" and in most essentials, that which was given at the first trial and read by agreement on the second one.

It is, however, submitted that because the railway board under section 309 (c) of the Railway Act made a "declaration" on the 18th of September, 1937 (28 days after the accident, while the state of the sign-board remained the same) that the "crossing is protected to the satisfaction of the board," no Court can question anything that might even inferentially, though not specified, have been included in arriving at such "satisfaction," including the state of the sign-board, and several cases were cited in support of the plenary powers of the board in matters of "public order," but herein, it is to be noted, there are "no facts in question" found by the board "as between the parties hereto," as there were, *e.g.*, in *Canadian Northern Ry. Co.* v. *Robinson* (1910), 43 S.C.R. 387, at 399, nor any "dispute arising" or "issue between the complainants and the company," as in *Canadian Pacific Ry. Co.* v. *Canadian Oil Cos., Ltd.* (1912), 47 S.C.R. 155, at 160, 175, 178-9.

After a consideration of all said cases, however, and others, and without questioning them upon their respective facts, or that the board is "a statutory Court"—*Canadian National Ry. Co.* v. *Bell Telephone Co. of Canada and Montreal L.H. & P.*

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Cons. [1939] S.C.R. 308, 314—having plenary powers within the ambit of its jurisdiction, they do not, in my opinion, cover this case because the sole object to be attained by said section 309 is to regulate the speed of trains under four categories, and to attain that and to found the required "satisfaction" of future "protection" under the presently relevant subsection (*c*) (dealing with conditions of resuming usual speed after an accident has happened) many factors of different kinds have to be taken into consideration and the whole *locus* inspected and the necessary conditions imposed and carried out before the board sanctions by its "declaration," which is in effect a permit, the return to "passing at a speed greater than ten miles an hour." No limit is placed upon the conditions that the board may impose to secure its "satisfaction" under ever-varying circumstances, and they may be few, simple, and readily carried out, or many, elaborate and long in construction, involving, *e.g.*, the reduction of curves and the removal of obstacles to vision—*cf. Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81, 96-8, and *Grand Trunk Ry. Co.* v. *Perrault* (1905), 36 S.C.R. 671, 677-8.

In the present case it appears that no conditions were imposed by the board, or as the witness Fraser puts it, no "requirements" were made by the board's inspector before "we received a clearance," upon which the former speed was resumed in "the crossing at rail level" without any change. A completely new and freshly-painted sign, however, was "installed" he says "a few days after the [first] trial, a year ago."

But though it so happens that no conditions were imposed in the granting of said permit to resume speed in "passing" the crossing at the time the permit was given and for future "passing," yet it speaks and operates from that time only and cannot, in my opinion, be resorted to as a justification for a prior breach of statutory duty, thereby giving it also an additional and retroactive effect, with results that are astonishing indeed, one of which, *e.g.*, would be that the writ in this action might well have been issued before the permit, and not only that, but this, or any, action might well have been tried and judgment pronounced before the permit if the carrying out of the conditions had taken a long time.

Is it seriously to be supposed that if a trial were pending in the Court below and at the same time proceedings to obtain a permit were pending before the board, that said Court would stay proceedings till the board's "satisfaction" had been declared? Or that, after judgment on said trial, this Court would under our Appeal Rule 5 be compelled "without special leave" to receive the permit as "further evidence" of a "matter which has occurred after the date of the decision from which the appeal is brought"? And yet if the respondent's submission be sound both of these results must follow.

In *Duthie* v. *Grand Trunk R.W. Co.* (1904), 4 C.R.C. 304 it was well said in a leading judgment of the board itself, on its own powers, delivered by its very learned Chief Commissioner, the Hon. A. C. Killam that, p. 311:

> The Board is purely a creature of statute. The general principle applicable to such a body is that its jurisdiction is only such as the statute gives by its express terms or by necessary implication therefrom.

And (pp. 311-12):

> Parliament may incidentally encroach upon the field of Provincial legislation. Such encroachments, however, are not to be presumed, but must be clearly indicated and be limited to the extent reasonably necessary for giving effect to the enactments of Parliament upon subjects within its powers.

And p. 314:

> In making such [orders and regulations] the Board is not, in general, to adjudicate respecting rights arising out of past transactions or matters, but to lay down rules for future conduct. Throughout the Act, the Board is authorized to make orders of various kinds directing or requiring acts to be done, or sanctioning, approving or prohibiting other acts. In other cases the Act itself, . . . , requires or prohibits various acts.

These citations are in principle entirely applicable to the question before us, and in my opinion it would be an "encroachment" to an unreasonable extent to hold that this declaration by the board governing only future speed in "passing" a crossing (the validity of which is not attacked, only its applicability) can legally be expanded into a sweeping *nunc pro tunc* adjudication debarring any person from his otherwise unquestioned right to maintain an action for prior, at least, injury caused by a specific breach of duty imposed by section 267, or otherwise, of the same statute.

It was, however, alternatively submitted that if the said

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declaration did not establish the exclusive jurisdiction of the board as to adequate "protection" of the crossing and consequent compliance with said section 267, yet it should be admitted in evidence to support the sufficiency of the sign-board, and reliance was placed upon *Littley* v. *Brooks and Canadian National Ry. Co.*, [1930] S.C.R. 416. That decision, of course, depends upon the facts of the case and when they are examined they bear no relevant resemblance to those before us, because the order of the board that was held to be admissible in evidence was made eleven years before the accident, and also was not made under any section in any way corresponding to present section 309 (*c*) and the special inquiry to sanction resumption of normal speed after an accident thereby provided, but was merely an order of general application requiring certain precautions to be taken to secure for the future the safety of the public at large while using the crossing and, to that end, directing that certain east-bound cars should slow down to five miles per hour and that a red light should after dark be hung by the company over the centre of the highway (see this order given in the report below, 36 O.W.N. 268-9). In admitting this order as limited evidence the Supreme Court, *per* Rinfret, J., said pp. 426-7:

> We think, therefore, that the Order was admissible not as a rule that would be enforced against the railway company, but as affording evidence of an adjudication by a competent tribunal upon the dangerous character of the crossing—a matter of public concern—at the time the Order was pronounced (Taylor, on Evidence, 10th Ed., pp. 442-443 and 1213) and presenting a standard of reasonableness upon which a jury might act . . . and subject, of course, to the right of the defendants to show that, since the Order, the conditions at or about the Dundas street crossing have ceased to be substantially the same as when the Order in question was made.

This restriction of the evidence to "the time when the order was pronounced" (in that case eleven years before the accident) precisely and conclusively supports the view hereinbefore expressed that the declaration made after this accident is wholly irrelevant, no authority having been cited to support the submission that a *nunc pro tunc* effect can be given thereto.

This determines the case in favour of the plaintiff (appellant) but so that it may not be overlooked, it should be noted that if the said declaration could be admitted in evidence then the further question would arise as to the jurisdiction of the board

in making it, to its own "satisfaction," to dispense with, or absolve the railway company from the consequences of, non-compliance with any of the requirements for the protection of travellers specified by said section 267, and said general orders made thereunder. Could it, *e.g.*, dispense with the specified words "Railway Crossing" not being painted on the sign-board "in both the English and French languages" in Quebec? And if not, then could it dispense with the specified size of the letters, or the colours of the sign-board or, indeed, the whole sign-board itself in any part of Canada? Where is the line of demarcation?

It follows, therefore, that, under present circumstances the said declaration was not, in my opinion, admissible for any purpose, and upon the whole case the appeal should be allowed and judgment entered for the plaintiff for the amount of damages provisionally fixed by the learned judge below.

MACDONALD, J.A.: I was unavoidably absent when judgment herein was delivered. As two members of the Court had a firm opinion in the matter, I suggested that the delivery of judgment should not be deferred.

I was concerned only in reserving judgment with two questions —Firstly, whether or not the railway crossing sign-post was properly maintained as required by the statute and, if not, if it contributed to the accident. Secondly, if the act of the Transport Board in approving the condition of the sign-post displaced the civil rights of a stranger to the railway company lawfully exercising his rights on a public highway. At this stage I do not propose to express an opinion on either of these points and merely formally concur in the allowance of the appeal.

MCQUARRIE, J.A.: After having considered the evidence carefully I think it is clear that Valentine, the driver of the automobile in which the appellant and his deceased wife were passengers, was guilty of negligence in not keeping a proper look-out and for stopping his automobile on the railway crossing when the train was approaching that crossing with the powerful head-light of the locomotive illuminating the crossing or, as Valentine put it in his evidence, "glaring on me." In my opinion it is unnecessary for me to review the evidence of Valentine in this

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respect for his alleged reasons in justification of his conduct. As to these matters I would accept the findings of the learned trial judge. It appears to be common ground that the appellant is not affected by the negligence of Valentine. As I see it the appellant to succeed in this action must show that the railway-crossing sign at the crossing in question was not sufficient and did not comply with the provisions of the Railway Act, Cap. 170, R.S.C. 1927, as amended and the regulations passed thereunder. That involves two questions: (1) Should there have been crossing-signs on both sides of the railway track? and (2) Was the crossing-sign at this point properly placed and properly maintained? As to (1) I am of opinion that the crossing-sign on one side of the track is sufficient. As to (2) this is a matter which requires serious consideration unless the appellant is bound by an order of the board which I shall mention later. It was conceded by the respondent that "the sign was not in a freshly-painted condition at the time of the accident." It is contended by the appellant that under the Railway Act and amending Acts and under the rules, orders and regulations passed by the Board of Railway Commissioners for Canada (now the Board of Transport Commissioners) the respondent was required to maintain proper railway-crossing signs capable of being readily illuminated and visible from both sides of the track. The respondent contends that the statutory regulations are silent as to the frequency of the painting of signs required and that the necessity for repainting must at all times be a matter of judgment. The respondent also contends that there was no breach on its part of any statutory duty. I am afraid, however, that I cannot agree with the latter contention. The evidence indicates that the paint had, owing to constant exposure to the elements over a period of years, almost entirely disappeared on the railway-crossing sign and if that had not been the case and the said sign had been in a properly maintained condition Valentine would have been warned that he was on the railway tracks when he stopped his automobile, notwithstanding his said negligence. In that connection I may say that I am not overlooking the Provincial Government's signs which, according to the evidence, were in proper condition for the purposes for which they were

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intended. I am of opinion, therefore, that the condition of the railway sign was the effective cause of the accident and subject to the correctness of my view on the remaining contention of the respondent renders the respondent liable in damages. It is urged by the respondent that the board having affirmed by an order the report of its inspector, made after the accident, that the crossing is sufficiently protected no other Court has jurisdiction to hold that there was a breach of any statutory provision on the part of the respondent. On this point I am of opinion that the Court is not barred by any such order of the board from holding that the railway-crossing sign referred to had not been properly maintained in accordance with the Act and regulations. I would, therefore, allow the appeal and give judgment for the appellant for the damages contingently fixed by the learned trial judge in his reasons for judgment.

Appeal allowed.

Solicitors for appellant: *Harvey & Twining.*
Solicitors for respondent: *Tiffin & Alexander.*

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March 24; *May* 10.

Criminal law—Habeas corpus—Nature of remedy—Power of Province to give right of appeal—Charge of possessing opium—Accused pleaded guilty—Alleged misunderstanding of charge—R.S.B.C. 1936, Cap. 57, Sec. 6.

The fact that the detention or imprisonment in respect of which the remedy of *habeas corpus* is invoked arose out of a criminal charge, does not make the *habeas corpus* proceeding a criminal proceeding. It is not a proceeding against the Crown nor by the Crown against a subject, nor is it a continuance of or a step in the cause under which the detention has taken place. It is a proceeding for the enforcement of the civil right of personal liberty and the inquiry which it evokes is not into the criminal act, but to the right of the person in custody to his liberty, notwithstanding the criminal act and conviction. Therefore a Provincial Act which gives the right of appeal in *habeas corpus* and which, moreover, provides that where the Crown is the successful appellant the Court may order the rearrest of the accused, is *intra vires* even in respect to its application to a detention arising out of a criminal

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charge; it does not infringe upon the exclusive right given the Dominion by section 91 (27) of the B.N.A. Act to legislate upon "the criminal law and the procedure in criminal matters."

Rex v. *McAdam* (1925), 35 B.C. 168, not followed.

Per MARTIN, C.J.B.C.: Citation of cases in support of the ruling that Courts of criminal appeal feel it incumbent upon them to review their own and other decisions when they are satisfied that error has crept in.

An accused of Chinese origin pleaded guilty to a charge of having opium in his possession. On *habeas corpus* proceedings he deposed that he understood he was pleading guilty to a charge of smoking opium, and it was held by MANSON, J. that as the doubt as to whether he fully understood the charge laid was not resolved by the affidavits filed by the Crown, which included one of the interpreter on the trial, the conviction should be quashed.

Held, on appeal, reversing the decision of MANSON, J., that the evidence in support of the charge leaves no reasonable doubt that the respondent had full knowledge of the nature of the charge to which he pleaded guilty, and the appeal should be allowed and the writ set aside.

APPEAL by the Crown from the decision of MANSON, J. of the 17th of August, 1937 (reported, 52 B.C. 158), on *habeas corpus*, quashing the conviction of the accused on a charge of unlawfully having opium in his possession contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto. Upon the application for the writ of *habeas corpus* the accused, who is a Chinaman, and an interpreter being necessary on the trial, swore that he understood that the charge against him was for smoking opium, and pleaded guilty. He was given the benefit of the doubt and the conviction was quashed.

The appeal was argued at Vancouver on the 24th of March, 1938, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Hurley, for the Crown.

Paul Murphy, for accused, raised the preliminary objection that there was no jurisdiction to hear the appeal on the ground that this is a criminal proceeding: see *Rex* v. *McAdam* (1925), 35 B.C. 168, at p. 172; *Rex* v. *Chow Wai Yam* (1937), 52 B.C. 140, at p. 145; *Ex parte Fong* (1928), 50 Can. C.C. 213. The only cases in which there is an appeal in *habeas corpus* matters are those arising out of civil proceedings: see *In re Tiderington* (1912), 17 B.C. 81; *In re Wong Shee* (1922), 31 B.C. 145; *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Ex parte Byrne* (1883), 22 N.B.R. 427; *The Queen* v. *DeCoste* (1888), 21

N.S.R. 216; *Rex* v. *Barre* (1905), 11 Can. C.C. 1; *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832; *Rex* v. *Romanchuk* (1924), 42 Can. C.C. 231; *Smith* v. *The King,* [1931] S.C.R. 578; Holdsworth's History of English Law, Vol. I., pp. 202-3; Vol. IX., pp. 112 to 125.

Hurley, contra: This is a civil right that comes within section 92 (13) of the British North America Act. A writ of *habeas corpus* has nothing of the insignia of a criminal proceeding, and it is not necessary that it be heard in a criminal Court. The remedy sought is remedial and not criminal. The case of *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832, has no application here as it was an appeal in a criminal matter: see *Re Rex* v. *Blank* (1926), 45 Can. C.C. 82; *Ex parte Tom Tong* (1883), 108 U.S. 556; *Rex* v. *Morn Hill Camp Commanding Officer. Ex parte Ferguson,* [1917] 1 K.B. 176; *Rex* v. *Nat Bell Liquors, Ld.,* [1922] 2 A.C. 128; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 706, sec. 1205. That the object sought is remedial see Short & Mellor's Crown Office Practice, 2nd Ed., pp. 309-10; *Rex* v. *McMicken,* [1923] 3 W.W.R. 879; *Reg.* v. *Spilsbury,* [1898] 2 Q.B. 615; *Ex parte Fong. Moquin* v. *Fong* (1928), 44 Que. K.B. 476.

Judgment reserved on preliminary objection.

Hurley, on the merits: Accused was charged at Ashcroft of having opium in his possession, and he pleaded guilty and was sentenced to six months in gaol and a fine of $300, and in default of payment to three months more in gaol. He applied for a writ of *habeas corpus* with *certiorari* in aid, claiming that as he did not know the language, he misunderstood the charge and thought he was being charged with smoking opium. In fact, he had in his possession two decks of opium in addition to what he was smoking.

Murphy: In the case of *Rex* v. *Olney* (1926), 37 B.C. 329, it was held that there should be a new trial. The judge below in *habeas corpus* proceedings had the jurisdiction to inquire into the jurisdiction of the magistrate, and the magistrate had no jurisdiction to entertain a plea of "guilty": see *Rex* v. *Mlaker,* [1923] 3 W.W.R. 988. The accused was there with all his apparatus for smoking and that was all. No suggestion of

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trafficking in opium. When the interpreter makes an explanation to the accused that explanation must be told word for word to the magistrate. On the question of jurisdiction see *Rex* v. *Richmond* (1917), 29 Can. C.C. 89.

Hurley, replied.

Cur. adv. vult.

10th May, 1938.

MARTIN, C.J.B.C.: This is an appeal by the Crown from an order of MANSON, J., made on the return of a writ of *habeas corpus* with *certiorari* in aid thereof, discharging the respondent from imprisonment following his conviction, by Jervis, S.M., for the county of Cariboo, for unlawfully having opium in his possession, and also assuming to quash the said conviction upon the ground that the said convict did not understand that he was pleading guilty to that charge of possessing opium, but to one of smoking it.

Upon the appeal being opened the respondent's counsel moved to quash it on the ground that this Court has no jurisdiction to entertain it, as being a "criminal proceeding," and reliance was placed on our prior decision in *Rex* v. *McAdam,* 35 B.C. 168; [1925] 3 W.W.R. 257; 44 Can. C.C. 155, wherein upon a like motion of the Attorney-General of this Province, then being the respondent, we upheld that ground of objection against the appellant then under arrest for rape.

Now we are asked by the same Attorney-General, this time as the appellant, to review our judgment in *McAdam's* case and with him in that request (as noted in the judgment of my brother O'HALLORAN) is associated the Attorney-General of Canada (in view of the constitutional importance of the question throughout Canada) as appears by the official correspondence placed on record at the opening of this argument. And in this relation it is proper to refer to my own observations at p. 173 of *McAdam's* case, and to those of that great judge, Chief Baron Palles, on "feebly argued" criminal cases, in *The Queen* v. *Dee* (1884), 14 L.R. Ir. 468, 485.

My brother O'HALLORAN in his said judgment (which, if I may be permitted to say so, is a valuable contribution to this grave question) has dealt with the matter so fully that I shall

confine myself to the citation of some cases in addition to those he cites, in support of the view that Courts of criminal appeal feel it incumbent upon them to review their own and other decisions when they are satisfied that error has crept in.

The present Court of Criminal Appeal in England, exercising its jurisdiction on the statute —Criminal Appeal Act, 1907— on which our practice is based since 1923 (Criminal Code Amendment Act, Cap. 41), has almost from its inception followed this course in many cases, among them being:

Rex v. *Mortimer* (1908), 1 Cr. App. R. 20, wherein the decision in *Thurborn's Case* (1849), 1 Den. C.C. 387, on a Crown Case Reserved, was disapproved:

Rex v. *Ettridge* (1909), 2 Cr. App. R. 62, wherein the Court at the request of the Crown, p. 63, reviewed and overruled its own decision in *Rex* v. *Davidson* (1909), *ib.* 51:

Rex v. Best, [1909] 1 K.B. 692, wherein the Court overruled *Reg.* v. *Harris* (1893), 17 Cox, C.C. 656, on a Crown Case Reserved, as being "not a sound decision":

Rex v. *Hill* (1911), 7 Cr. App. R. 26, 28, wherein the Court said its own decision in *Rex* v. *Machardy* (1911), 6 Cr. App. R. 272, which had been reargued before a Full Court, was "not very easy to understand" and "we . . . would all be very glad if it could at some time be reconsidered by a higher Court":

Rex v. *Fraser* (1911), 7 Cr. App. R. 99, wherein the Court declared it was "not prepared to follow" its own decision in *Rex* v. *Joiner* (1910), 4 Cr. App. R. 64:

Rex v. *Baskerville* (1916), 12 Cr. App. R. 81, wherein the Court of five judges, "specially constituted" for the purpose of examining the

> decisions of this Court upon the nature of the corroboration required . . . because they do not always appear to be to the same effect

(pp. 92-3) disapproved its own decision in *R. v. Everest* (1909), 2 Cr. App. R. 130, as going "too far":

Rex v. *Power* (1919), 14 Cr. App. R. 17, wherein the Court definitely overruled its own decision in *Joiner's* case, *supra*:

Rex v. *Norman,* 131 L.T. 29; 18 Cr. App. R. 81; [1924] 2 K.B. 315, wherein the Court, consisting of thirteen judges, four dissenting, overruled, after a second reargument, p. 317 (K.B.), its own decision in *Rex* v. *Stanley,* [1920] 2 K.B. 235;

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123 L.T. 271, though it was stated in argument that it had been followed in fifteen cases in the Court—p. 87 Cr. App. R.

In this Province, my late brother WALKEM in *In re Fong Yuk* (1901), 8 B.C. 118, declined to follow, in *habeas corpus,* a decision of BEGBIE, C.J., in *Re Ah Gway* (1893), 2 B.C. 343; and my late brother GALLIHER and I in *Rex* v. *McInulty* (1914), 19 B.C. 109, 113, reconsidered and changed a view we expressed in *Rex* v. *Iman Din* (1910), 15 B.C. 476 (*cf.* Darling, J., in *Rex* v. *Bright* (1916), 12 Cr. App. R. 69, 70).

To this already lengthy list I shall only add one recent case, from the Full Court of Nova Scotia, *Rex* v. *Dwyer,* [1938] 3 D.L.R. 394, on *certiorari,* wherein it is noted in the leading judgment, by Hall, J., at p. 402 that:

> By *The Queen* v. *Walsh*, 29 N.S.R. 521, decided in 1897, this Court expressly overruled its previous decision in *The Queen* v. *McDonald* (1886), 19 N.S.R. 336, . . .

Since our judgment, on 6th January, 1925, in *McAdam's* case the same question arose in Quebec on appeal in *Ex parte Fong, Moquin* v. *Fong* (1928), 44 Que. K.B. 476; 50 Can. C.C. 213; [1929] 1 D.L.R. 223, cited by my brother O'HALLORAN, and our judgment was considered, but not followed, p. 492 (Que. K.B.), by Greenshields, J., with whom Tellier, Bernier and Hall, JJ., concurred (p. 227 Can. C.C.; p. 236 D.L.R.), as did also, in effect, Cannon, J. in the apt passage cited by my brother O'HALLORAN. This is in exact accord with the judgment of the same Court in *Regimbald* v. *Chong Chow* (1925), 38 Que. K.B. 440, delivered two months—on 5th March—after our judgment in *McAdam's* case, wherein the Court unanimously held, to cite the correct head-note,—

> A judgment on a writ of "*habeas corpus*" is always a judgment in civil matters, and it being final, is appealable:

It is a coincidence that in that case, as in this, the applicant for *habeas corpus* had pleaded guilty to the possession of opium.

It follows from these authorities that our decision in *McAdam's* case should in my opinion "yield to considerations which are paramount to it in importance" (as we held in *In re Rahim* (1912), 17 B.C. 276, 279) and therefore the objection to our jurisdiction in "matters of *habeas corpus,*" conferred by

section 6 of the Court of Appeal Act, Cap. 57, R.S.B.C. 1936, must be overruled.

It is proper here to add that before we came to this conclusion we endeavoured to arrange that this reconsideration of *McAdam's* case should be heard by the full Bench, but were unable to do so. In this connexion may be noted the observation of Lord Justice Slesser in *In re Shoesmith,* [1938] 2 K.B. 637, at 645:

> . . . I respectfully agree with my Lord that there is no rule of law that prevents this Court, either sitting with a full complement of its members or with a quorum of its members, from reviewing its own decisions.

Coming then to the appeal on the merits, there is nothing that I can profitably add to the judgment of my brother O'HALLORAN, and therefore this appeal is allowed and the order appealed from set aside and we order the respondent to be forthwith arrested and recommitted to the custody of the keeper of the common gaol from which he was improvidently taken.

SLOAN, J.A.: I concur in the reasons for judgment of the Chief Justice and my brother O'HALLORAN.

O'HALLORAN, J.A.: On the 28th of January, 1937, at Ashcroft before A. W. Jervis, Esquire, a stipendiary magistrate in and for the county of Cariboo, the respondent pleaded guilty to a charge of unlawful possession of opium (in the form set out in the information and complaint); he was convicted and sentenced to six months in prison with a fine of $300 and costs of $2.50, or in default of payment to a further three months' imprisonment with hard labour. No appeal was taken but on the 14th of July, nearly six months later, he obtained leave to issue a writ of *habeas corpus* with *certiorari* in aid. On the 17th of August, 1937, MANSON, J., quashed the conviction and discharged him from custody on the ground that the respondent did not understand he was pleading guilty to a charge of unlawful possession of opium, but understood he was pleading guilty to a charge of smoking opium. Notice of appeal to this Court was given on the 16th of October, 1937, and the appeal came on for hearing at the Vancouver Sittings in March, 1938. Counsel for the respondent moved to quash on the ground this Court had no

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jurisdiction to entertain the appeal. We heard counsel both for and against the jurisdiction; we also heard the appeal on the merits, reserving judgment on the motion to quash as well as on the main appeal.

In 1920 the Court of Appeal Act was amended specifically giving the right of appeal in *"habeas corpus,"* and also providing:

> In cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the rearrest of the accused person.

The jurisdiction of this Court to hear the appeal is questioned on the ground that the appeal is part of "The Criminal law . . . including the procedure in criminal matters" exclusively vested in the Dominion under section 91 (27) of the British North America Act, and therefore that it does not come within the right of appeal given by the Provincial Legislature. To approach a decision on this important question, it is essential to have clearly before us (1) the nature and scope of the writ of *habeas corpus ad subjiciendum;* and (2) the facts in the case at Bar.

As imported into this Province prior to Confederation the writ of *habeas corpus ad subjiciendum* carried with it all the efficacy attached to it for centuries under the Common Law of England as well as by the statute of 1627 (petition of right) confirming the right of *habeas corpus* to persons deprived of their liberty, and the statutes of 1640, 1679, and 1816. No Habeas Corpus Act has been passed by the Legislature of British Columbia. MACDONALD, C.J.A., said at p. 148, in *In re Wong Shee* (1922), 31 B.C. 145:

> The right to the writ of *habeas corpus* is not given by Dominion statute but is part of the common and statutory law of England introduced into and made part of the law of this Province.

It is essentially a common-law writ applicable in all cases of wrongful confinement except, of course, where the authority is that of a Court of superior jurisdiction—*In re Robert Evan Sproule* (1886), 12 S.C.R. 140. Our greatest judges and legal writers have consistently described it as one of the most important safeguards of the liberty of the subject. *Vide* authorities cited in the exhaustive judgment of MARTIN, J.A. (now Chief Justice of British Columbia) in *Rex* v. *McAdam* (1925), 35 B.C. 168,

at 172 *et seq.*: *vide* also the valuable annotation on "Constitutionality of Appeals in Habeas Corpus" by R. M. Willes Chitty, K.C., [1926] 2 D.L.R. 1. It is a prerogative writ, that is to say, it is not ministerially directed, but is one of the extraordinary remedies known as prerogative writs, which are issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate, *vide* Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 704. Of its very nature it is a civil right—a transcendant remedy given to every person to invoke the aid of the High Court and the judges of that Court to defend his personal freedom in all cases of wrongful confinement, arising in civil or criminal proceedings. The test to be applied is—Is the person held without jurisdiction, or is the jurisdictional power abused? The remedy of *habeas corpus* is not to supplant the procedure in or the trial of the issue in civil or criminal matters. As the very wording of the writ itself shows wrongful confinement of a subject, that is a detention or imprisonment which is incapable of legal justification is the basis of jurisdiction in *habeas corpus.*

The language of Martin, J., of the Quebec Court of King's Bench in *Rex* v. *Labrie* (1920), 61 D.L.R. 299, at p. 309, adopted by Cannon, J., of the same Court in *Ex parte Fong,* [1929] 1 D.L.R. 223, at p. 237, with respect, illustrates in apt terms that the great common-law writ loses none of its characteristics as a civil right when invoked in a matter arising out of criminal proceedings:

"The writ of *habeas corpus* is one of the prerogative writs. It is a civil writ issued out of a Court of civil jurisdiction, and in the present case [as in the case at Bar] it relates to criminal matters only in so far as it goes to the cause of detention, which in this case is a conviction by a Court of criminal jurisdiction, but the judgment or order of release is a judgment of the Superior Court. The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty. It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction."

The proceedings for the writ are initiated by the person wrong-

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fully confined, invoking an inquiry into his right to liberty notwithstanding his criminal act or conviction—it is not a proceeding against the Crown, nor the Crown against the subject, nor is it a continuance of or a step in the cause civil or criminal under which the detention has taken place. As Lord Bramwell, with whom Lord Watson concurred, said in *Cox* v. *Hakes* (1890), 60 L.J.Q.B. 89, at p. 98:

> There is no *lis;* there is no action; these proceedings are entitled *ex parte.*

The practice often prevailing of entitling *habeas corpus* proceedings *"Rex* v. *John Doe,"* or *"John Doe* v. *The King"* is founded in and assists in misconception of the nature, scope and purpose of this high prerogative writ. This practice conveys the wrong impression that the Crown is a prosecuting or defending party; in *habeas corpus* arising out of a criminal matter, the use of such a style of cause wrongly implies a criminal proceeding. Lord Halsbury, L.C., at p. 92, *Cox* v. *Hakes, supra,* said:

> It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before, or represented before, the judge except the person detaining, and that person only because he had the custody of the applicant, and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment.

The same reasoning applies to a writ of *habeas corpus* arising out of a criminal matter. In *Carus Wilson's Case* (1845), 7 Q.B. 984; 115 E.R. 759, in which imprisonment occurred for refusal to pay a fine and tender an apology to the Jersey Court, the Solicitor-General stated he was not acting for the Crown, *vide* foot-note p. 761.

At the risk of repetition I cite the unanimous opinion of the Supreme Court of the United States in *Ex parte Tom Tong* (1883), 108 U.S. 556, wherein Mr. Chief Justice Waite, who delivered the opinion of the Court, said at pp. 559-60:

> Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. . . Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution.

The Supreme Court of the United States adopted the same view in *Kurtz* v. *Moffit* (1885), 115 U.S. 487, the opinion of the Court being delivered by Mr. Justice Gray at p. 494, and in *Farnsworth* v. *Montana* (1889), 129 U.S. 104, at 113, in the course of the opinion of the Court delivered by Mr. Justice Blatchford. The important conclusion springing from this weight of authority points to the remedy of *habeas corpus* as a civil proceeding to enforce a civil right interfered with by illegal detention in a civil or criminal matter and which detention is incapable of legal justification.

Then what are the facts in the case at Bar? The appellant, not represented by counsel, pleaded guilty in a Court of inferior jurisdiction to a charge of unlawful possession of opium contrary to the relevant provisions of The Opium and Narcotic Drug Act, 1929, a Dominion statute, and was sentenced accordingly. After the time for appeal had expired he obtained his release on *habeas corpus* with *certiorari* in aid, on the ground as found by the learned judge below that he did not understand he was pleading guilty to a charge of unlawful possession of opium.

We have therefore all the elements to invoke the common-law writ, *i.e.*, a conviction in a criminal matter in a Court of inferior jurisdiction wherein the magistrate is alleged to have denied the accused a fair trial, thereby abusing his jurisdiction —a violation of the essentials of justice. The application by way of *habeas corpus* was a new proceeding: it was not a step in or continuance of the criminal proceedings under which the accused was convicted; the magistrate who ordered the conviction was *functus officio* and the time for appeal had expired, so that the criminal proceedings were at an end. The application was made to MANSON, J., a judge of the Supreme Court of British Columbia sitting in Vancouver on the 4th of August, 1937, in vacation as a judge of civil jurisdiction. The application it is true arose out of a criminal cause, but the remedy by *habeas corpus* had no relation to the criminal cause for as stated the criminal proceedings were at an end. The issue raised by *habeas corpus* did not extend to the guilt or innocence of the applicant. The sole ground was that the convicted person had not received a fair trial, a civil right to which he was entitled.

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The next conclusion to which I am impelled is that in the case at Bar, the remedy sought by *habeas corpus* and the manner in which it was sought do not form part of the criminal law, nor form part of the procedure in criminal matters within section 91 (27) of the B.N.A. Act. The nature of the remedy and the procedure incidental to it were no different than if the respondent had been illegally detained in a matter not arising out of a criminal charge. It is obvious I would say that there is a distinction between the writ itself and the charge out of which it arises. The criminal charge out of which *habeas corpus* arises may or may not form part of the criminal law and criminal procedure under section 91 (27) of the B.N.A. Act but the remedy of *habeas corpus* is solely within the Provincial jurisdiction. In my view this distinction is the only one consonant with the essential characteristics and history of the common-law writ, and the division of powers between the Dominion and Provincial jurisdictions. An illustration of the distinction between the writ itself and the original proceedings out of which it arises is provided by section 36 of the Supreme Court Act, Cap. 35, R.S.C. 1927, granting appeals to the Supreme Court of Canada except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari,* or prohibition "arising out of a criminal charge" or arising out of any claim for extradition made under any treaty. The language there cited recognizes a distinction between the remedy by way of *habeas corpus,* and the criminal charge out of which it arises. If the remedy of *habeas corpus* became a criminal matter because it arose out of a criminal charge this distinctive language would not be necessary. If similar language were contained in section 91 (27) of the B.N.A. Act or in section 6 of our Court of Appeal Act then the right of appeal in this case would have been denied. This distinctive language in the Supreme Court Act was considered by this Court in *Rex* v. *Sue Sun Poy* (1932), 46 B.C. 321, where both *Rex* v. *McAdam, supra,* and the Supreme Court of Canada decision in *Jungo Lee* v. *Regem,* [1927] 1 D.L.R. 721 were urged unsuccessfully in limitation of the appeal jurisdiction of this Court. It should be observed as well that our Provincial statute expressly contemplates an appeal in a *habeas corpus* arising out of a

criminal matter as provision is made for rearrest of the accused person if the appeal from the order granting discharge is successful.

Decisions in the English Courts such as *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832, as to the meaning of a "proceeding in a criminal cause or matter" in section 47 of the Judicature Act of 1873, are of no help in determining the issue in this Province for the obvious reason they are not governed in their interpretation by the division of powers between Provincial and Dominion jurisdictions. If Yorkshire, for example, were a Province of England, with similar powers reserved to this Province, much wider argument and greater stress would undoubtedly be placed on what constitutes a civil right within a Provincial jurisdiction than may now be found in the English decisions. In the *Woodhall* case, Lord Esher, M.R., said at p. 835:

> The result of all the decided cases is that the words "criminal cause or matter" in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any "criminal matter" in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters.

This statement of course does not apply to section 91 (27) of the B.N.A. Act, which must be read in the light of Provincial powers particularly in relation to civil rights. "A proceeding in a criminal cause or matter" within the meaning of section 47 of the Judicature Act is by no means necessarily a criminal matter within section 91 (27) of the B.N.A. Act: *vide Seaman* v. *Burley*, [1896] 2 Q.B. 344; *The Copeland-Chatterson Co., Ltd.* v. *Business Systems Co., Ltd.* (1908), 16 O.L.R. 481, at p. 486 *et seq.*, and *Chung Chuck* v. *The King*, [1930] A.C. 244. Further by way of illustration it is to be noted in section 36 of the Supreme Court Act, *supra*, that a writ of *habeas corpus* arising out of a claim for extradition is distinguished from one arising out of a "criminal charge." The Extradition Act is a Dominion statute—Cap. 37, R.S.C. 1927—dealing with a specific matter and defining the procedure to be followed. *Ex parte Alice Woodhall, supra, The Queen* v. *Weil* (1882), 9 Q.B.D. 701, and *Rex* v. *Governor of Brixton Prison. Ex parte Savarkar*, [1910] 2 K.B. 1056, were extradition cases, and

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therefore do not assist in determining the point involved in this appeal.

In support of the conclusion that jurisdiction exists to entertain this appeal, it is noteworthy that the jurisdiction exists in Ontario—*In re Hall* (1883), 8 A.R. 135 (extradition); *Regina* v. *Murray* (1897), 28 Ont. 549; *Rex* v. *Spence* (1919), 45 O.L.R. 391, and *vide Ex parte Martin*, [1927] 3 D.L.R. 1134. In Quebec, *Ex parte Fong*, [1929] 1 D.L.R. 223; and in Nova Scotia *Rex* v. *Morris* (1920), 69 D.L.R. 117. In the latter case where *Ex parte Alice Woodhall, supra,* had been urged as an authority to the contrary Mellish, J., said at p. 126:

> I think that such appeal lies, and that the Provincial statute allowing such an appeal is not *ultra vires* on the ground that it is legislation dealing with criminal procedure. I do not think that legislation to secure the liberty of the subject from a legal imprisonment can properly be called legislation making, altering or affecting criminal law or criminal procedure.

In the Manitoba case of *Rex* v. *Barre* (1905), 11 Can. C.C. 1, and the Alberta case of *Rex* v. *Thornton* (1915), 30 D.L.R. 441, an express statutory right of appeal did not exist as in Ontario, Quebec, Nova Scotia and British Columbia. The conclusion is all the more satisfactory when it is found not to be in conflict with the jurisdiction conferred on the highest Courts of other Provinces by Provincial Legislatures. It is perhaps in point here to remark that the jurisdiction of this Court to entertain the appeal was maintained by counsel for the Attorney-General of the Province, who stated to the Court this course was concurred in by the Attorney-General for Canada with the latter's authority to counsel to inform the Court of his association with the Province in maintaining the right of appeal.

Rex v. *McAdam, supra,* was cited as an authority against the jurisdiction of this Court. That decision, however, depended on the interpretation placed upon *Ex parte Alice Woodhall, supra,* which has been distinguished as inapplicable in the case at Bar. My Lord the Chief Justice has referred to *In re Rahim* (1912), 17 B.C. 276, as a previous instance in which this Court found itself unable to follow an earlier decision concerning the right of appeal as it affected the liberty of the subject in *habeas corpus* proceedings. The Court (MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A., IRVING, J.A. dissenting) in the *Rahim*

case overruled a decision of the old Full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454. In the *Rahim* case, MACDONALD, C.J.A., with whom MARTIN and GALLIHER, JJ.A. agreed, said at p. 279:

> I must, with very great reluctance, decline to follow the *Ikezoya* case. At the same time I wish to make it plain that I fully recognize that judicial comity which leads one Court to follow the decisions of another of co-ordinate jurisdiction. While the rule is a salutary one, I think it must yield in some cases to considerations which are paramount to it in importance.

I would therefore overrule the preliminary objection and hold this Court has jurisdiction to entertain the appeal.

Then as to the main appeal. The remedy of *habeas corpus* with *certiorari* in aid is not an appeal from conviction; it is not part of the criminal procedure. It is not open to the learned judge below nor to this Court to consider whether the magistrate came to the right conclusion or was in error. The remedy is available in respect to orders made without jurisdiction or in excess of jurisdiction or in violation of the essentials of justice —*vide* MARTIN, J.A. (now Chief Justice of British Columbia) in *In re Low Hong Hing* (1926), 37 B.C. 295, at 302 *et seq.* The learned judge appealed from found there was a violation of the essentials of justice in that at the hearing the Crown did not make certain the accused fully understood the charge to which he pleaded guilty. If the learned judge was right then the order for discharge should not be disturbed. The learned judge had before him (1) The affidavit of the respondent sworn through an interpreter on the 8th of July, 1937, five and half months after the conviction to the effect he does not speak or understand the English language; that a young Chinese 21 years of age born in this country, was called by the prosecution to act as interpreter; that this interpreter did not understand the Chinese language sufficiently to explain the exact nature of the charge and he pleaded guilty because he understood that if he did so a fine of $50 would be imposed; that immediately on the conclusion of the hearing he remonstrated with the interpreter when informed of the sentence, but the interpreter told him it was too late and nothing could be done; further that if he had been advised by the interpreter at the trial that he was charged with the offence of having opium in his possession, he

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would have insisted upon retaining counsel and defending the case, but as he was advised the charge was one of smoking and the penalty would be a fine only, he pleaded guilty. (2) The affidavit of the interpreter Henry Leong who specifically denies the statements in the respondent's affidavit concerning him and states he has had considerable experience as a Chinese interpreter and faithfully and adequately explained to the respondent he was charged with having opium in his possession and did not at any time tell him he was charged with smoking or discuss with him in any manner his possible punishment or penalty. (3) The affidavit of sergeant Fred Markland of the Provincial police that the respondent speaks English fairly well and also

15. While prisoner was in the lock-up and before his first appearance in Court he asked to see Long Foo, a Chinese business man of Ashcroft, and a friend of the prisoner.

16. Long Foo saw me after he had seen the prisoner and told me that the prisoner would gladly plead guilty on a smoking charge or possession of a pipe if I would change the charge, and that the prisoner would see that I would be well paid if I would do so.

17. Afterwards I told the prisoner that I would not change the charge.

Neither sergeant Markland nor Henry Leong were cross-examined upon their affidavits. No affidavit from Long Foo was produced. Allowing for objection to the admissibility of some statements in sergeant Markland's affidavit yet it remains unchallenged that he told the respondent he would not change the charge. This evidence corroborating as it does other evidence in the affidavits of sergeant Markland and Henry Leong, with respect, leaves no reasonable doubt that the respondent had full knowledge of the nature of the charge to which he pleaded guilty. There is therefore nothing to show a violation of the essentials of justice, and accordingly no cause shown to quash the conviction and discharge the respondent on a writ of *habeas corpus* with *certiorari* in aid. I would allow the appeal and set aside the writ of *habeas corpus* with *certiorari* in aid. I would also order the rearrest of the respondent to serve the remainder of his sentence in the terms of his conviction pursuant to the power given in section 6 of the Court of Appeal Act, *supra*.

Appeal allowed.

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Negligence—Car travelling in front of motor-cycle—Car stops on right side of street—Driver opens door on left over paved portion of street—Motor-cyclist in passing strikes open door and is thrown—Oncoming bus runs over his arm—Damages.

To open the left-hand door of a car into the travelled portion of the highway without taking the very greatest precaution before so doing, amounts to negligence.

ACTION for damages. The plaintiff was driving a motor-cycle behind a motor-car which was driven by the defendant. The defendant slowed down and turned slightly to his right. When his left wheels were about two feet from the edge of the paved portion on the right side of the street he stopped. The plaintiff then swerved to his left to pass him, when the defendant opened the left door of his car. The plaintiff's right leg struck the opened door and he was thrown to the pavement. An oncoming bus ran over his left arm. The facts are fully set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 26th and 27th of February, and the 1st of March, 1940.

Tysoe, for plaintiff.
Bull, K.C., for defendant.

Cur. adv. vult.

19th March, 1940.

MANSON, J.: The accident out of which this action arose occurred on Hudson Street, in the city of Vancouver, on the 19th of January, 1939. The plaintiff, an experienced cyclist, had crossed the Eburne Bridge and was proceeding in a northerly direction along Hudson Street a short distance behind the defendant who was driving a two-door automobile. An automobile passenger-bus was proceeding in a northerly direction along Hudson Street, a short distance behind the plaintiff. Hudson Street is paved down the centre to a width of 23.8 feet. The outer edge of the pavement on either side is covered with a thin covering of dirt and gravel thrown up from the strips of unpaved roadway to the east and west of the paved strip. The

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unpaved strips to east and west of the paved strip are 12.8 feet wide. The clean surface of the paved portion of the street is approximately eighteen feet wide. The defendant's wife was a passenger in the front seat with her husband. When the defendant had gotten a little to the north of the point where 76th Avenue enters Hudson Street from the east, he brought his car to a gradual stop with the intention of getting out and turning the driving of the car over to his wife. He stopped his car with the left-hand wheels between a foot and two feet in from the easterly edge of the paved strip. The plaintiff, at some point between the Eburne Bridge and 76th Street, heard a horn which he took to be the horn of a car behind him. He looked over his left shoulder to see if a car behind him was about to pass him, looked again to the front and swung to the left with the intention of passing the defendant's car. It was necessary for him to swing to the left as he had been riding within two or three feet of the edge of the paved surface and could hardly clear the defendant's car which, as pointed out, stopped with its left-hand wheels near the easterly edge of the paved surface. In passing the defendant's car the plaintiff lost his balance, fell to the left and the right front wheel of the bus, which had been travelling behind him, ran over his left arm.

Two explanations are offered as to why the plaintiff lost his balance and fell to the pavement. His own explanation is that as he was passing the defendant's car the left-hand door was suddenly opened and caught him in the upper portion of the right leg. The other explanation is that the plaintiff lost his balance when he looked back, did not recover it when he looked to the front again, attempted to pass the defendant's car, swayed to the right, came into contact with either the left rear or left front fender of the defendant's car and then toppled off his bicycle to the pavement.

There is more than the usual discrepancy in the evidence led and very definite discrepancies on material points in the story of what occurred as among defence witnesses. Counsel have been good enough to supplement my notes made at the trial by transcripts of substantial portions of the evidence. Consideration, and reconsideration of the detail of the evidence has led me

to the conclusion that the explanation given by the plaintiff as to the cause of his upset is the correct one. The plaintiff himself impressed me favourably. He was modest in his demeanour, and his story was simply and clearly told. It was corroborated by other witnesses and a wound on the upper portion of his right leg is logically accounted for by his explanation. It is difficult to otherwise account for it. I find it hard to believe that the witnesses McKay and Mrs. Hand were actually in a position to see whether the plaintiff collided with the open door of the defendant's car. I am of opinion that they, unwittingly probably, have substituted reconstruction for memory. They both rather quibbled as to whether the car door was open. McKay admitted that it was at least unlocked and opened a bit, and Mrs. Hand, although she was ready to swear that the door was not opened, qualified her statement by saying, "I would consider a door being opened if it was six inches ajar, otherwise I would not consider a car door being opened." The defendant admitted that the door was opened but he says, not more than ten inches. That question arose immediately after the accident as to whether the defendant's open door had caused the accident, is clear from the evidence. The defendant, when questioned by a constable not many minutes after the accident, stated that the cyclist did not run into his car and that his door was not open. The latter statement does not correspond with the evidence of the defendant at the trial, nor with the evidence of defence witnesses generally. The preponderating weight of the evidence is on the side of the plaintiff.

Two further questions arise for consideration: First—was the plaintiff guilty of negligence which contributed to the accident in his manœuvre to pass the defendant's car; secondly—was the opening of the left-hand door of the car into a traffic lane negligence in the circumstances. With respect to the first question, it is conceivable that the plaintiff might have exercised greater care in his manœuvre. While it is altogether probable that the plaintiff, as he turned to look backwards, would lean to his left and would lean immediately to his right as he turned to the front again and thus give some impression of wobbling to those looking at him, I am not at all convinced that the wobbling

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was sufficient to cause the plaintiff to lose his balance. Upon the evidence, I cannot find that he touched any portion of the defendant's car except the opened door. In passing he might have given a wider berth to the defendant's car which, as mentioned above, did not stop abruptly, but gradually. On the other hand, he had a right to anticipate that the defendant would not open the left-hand door of his car into traffic. In my view the plaintiff was not guilty of negligence which contributed to the accident. As to the second question, opening the left-hand door of a car when one is parked anglewise at the kerb, is one thing; it is an entirely different thing to open a left-hand door into a traffic lane. The defendant could have brought his car to rest well off the paved surface of Hudson Street. The unpaved surface was a little wet and muddy, but perfectly solid and safe for his car. To open the left-hand door of a car into the travelled portion of the highway without taking the very greatest precaution before so doing, amounts to negligence. In the particular circumstances of the case at Bar the defendant, in my view, was guilty of the negligence which brought about the accident and consequential injuries which the plaintiff sustained.

Special damages are allowed as claimed. General damages are assessed at $2,500.

Judgment for plaintiff.

APPENDIX.

Case reported in this volume appealed to the Supreme Court of Canada:

HOME OIL DISTRIBUTORS, LIMITED *et al.* v. ATTORNEY-GENERAL OF BRITISH COLUMBIA *et al.* (p. 48).—Affirmed by Supreme Court of Canada, 23rd April, 1940. See [1940] 2 D.L.R. 609.

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CONFLICT OF LAWS—*Action on tort—Accident in foreign country—Administration Act and Families' Compensation Act—Right of action under—Damages—R.S.B.C. 1936, Caps. 5 and 93.*] The plaintiff brought action under the Administration Act and the Families' Compensation Act for damages resulting from the death of her husband in an accident that took place in the State of Washington. The defendant Brunt was sales manager of the defendant company, and as such had authority to make the trip in which the accident occurred from Vancouver to Seattle, and to use the company's car. Brunt asked deceased to accompany him with a view to having his assistance in attempting to bring about a possible extension of the defendant company's business in the State of Washington. A railway-train was travelling on the track parallel to the arterial highway on which the defendant Brunt was driving, and in attempting to pass in front of the train the accident occurred, resulting in the death of the plaintiff's husband. The accident was found to be solely due to the negligence of the defendant Brunt. *Held*, that an action will not lie in one country for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the *forum;* and secondly, it must not have been justifiable by the law of the country where it was done. The wrong in this case is actionable in British Columbia. The second condition can be fulfilled in two ways: (a) If the wrong is actionable in the foreign jurisdiction it is satisfied; (b) if the wrong is punishable in the foreign jurisdiction it is satisfied. Therefore the action was maintainable against the individual defendant, but as the plaintiff was obliged to rely on the second alternative condition of her right of action, namely, punishability, and the presumption was that since the company was not punishable under British Columbia law it was not punishable under the foreign law, and the plaintiff did not prove that it was so punishable, the Court had no jurisdiction so far as the action was against the company. YOUNG v. INDUSTRIAL CHEMICALS COMPANY LIMITED AND BRUNT. **309**

CONSTITUTIONAL LAW — *Property and civil rights—Trade—Provincial jurisdiction—Coal and Petroleum Products Control Board Act—Price-fixing powers of Board—Validity—Report of Commission—Admissibility in evidence—B.C. Stats. 1937, Cap. 8, Secs. 14 and 15—B.N.A. Act, 1867 (30 & 31 Vict.), Cap. 3, Secs. 91 (13) and 92 (2).*] Section 14 of the Coal and Petroleum Products Control Board Act, which purports to give the Board, with the approval of the Lieutenant-Governor in Council, price-fixing powers with respect to the sale of coal and petroleum products for use in the Province, was held on the trial to be *ultra vires*, since the direct result and the intended result of the exercise of the said powers would be an interference with external trade in petroleum products, and therefore the section, under the guise of accomplishing a local purpose, encroaches on the Dominion's jurisdiction over "the regulation of trade and commerce," and section 15 of said Act, which provides that where the Board has fixed a price for coal or petroleum or any petroleum product, it may with the approval of the Lieutenant-Governor in Council, declare that any covenant in any existing agreement for the purchase or sale within the Province of coal or petroleum or a petroleum product for use in the Province shall be varied so that the price shall conform to the price fixed by the Board, was held to be *ultra vires. Held*, on appeal, reversing the decision of MANSON, J., that the Act is *intra vires*, since its pith and substance is an Act to regulate particular businesses entirely within the Province, with control over products within its territorial jurisdiction and power to fix prices, not only of locally produced products, but also those imported from a foreign jurisdiction. On the submission that the Act is *ultra vires* as its purpose and intent was to protect the coal industry of the Province from competition from fuel-oil which is derived from the crude oil imported from California, and that the intent and effect of fixing the retail price of gasoline at a lower figure than now obtains is to force the petroleum industry to make an increase in the price of fuel-oil, thus affording coal a preferred position in the local market:—*Held*, that the Province may divest a local company of part of its profits for the dual purpose of protecting the consuming public from the excessive cost of gasoline and of, at the same time, affording the coal industry protection from unfair and ruinous competition from fuel-oil sold below cost. This class of legislation is within the power exclusively assigned to the Province to make

sary to express a final opinion. The story told by the youth who actually fired the mill and now undergoing sentence, together with other witnesses, was so weird and fantastic that if not unbelievable a jury acting fairly should not find the accused guilty. Having regard to the nature of the evidence justice does not require that the accused should be placed in jeopardy a second time and therefore the appeal should be dismissed. REX v. MUNROE. - - - - **481**

4.——*Contributing to child's delinquency —Can. Stats. 1929, Cap. 46, Secs. 33 (1) (b) and 37; 1935, Cap. 41, Sec. 3.*] The purpose of The Juvenile Delinquents Act, 1929, is to prevent the morals of a child becoming endangered. Prior to the addition of subsection (4) to section 33 it was necessary that there be evidence that the child's morals were in fact endangered, but it was not necessary that it be shown upon the evidence that the child participated in an immoral act. The purpose of the addition of subsection (4) by the 1935 amendment was to relieve the Court of the necessity of speculating as to whether or not the child's morals were in fact undermined. REX v. HAMLIN. - - - - - **14**

5.——*Conviction for distributing opium —Order for deportation—No notice of right to appeal to the minister—Habeas corpus— Release of accused—Appeal — R.S.C. 1927, Cap. 93, Secs. 23 and 78.*] The accused was convicted on a charge of distributing opium. Pursuant to complaint that accused was subject to deportation the Deputy Minister of Immigration ordered that he be taken into custody for examination by a Board of Inquiry. Accused's sentence expired on April 9th, 1938, and an immigration officer duly appointed and pursuant to the order of said Deputy Minister, examined the accused on the 11th of April, 1938, and ordered that he be deported. On *habeas corpus* proceedings accused complained that the order for deportation contained no notice that he had a right to appeal to the Minister of Mines and Resources, and he was released. *Held*, on appeal, reversing the order of MANSON, J., that the absence of the notice at the end of Form C in the Immigration Act is not an essential part of it and not, therefore, strictly speaking, necessary. The omission should not be regarded as more than an irregularity which does not go to the extent of invalidating the order itself. The Board had jurisdiction over the subject-matter, and nothing occurred therein which can be construed as being a

violation of natural justice. The submission of the Crown that there was no jurisdiction in the Court below to frustrate the Board's action, in view of the provisions of sections 23 and 78 of the Act, should prevail. THE KING *ex rel.* THE MINISTER OF JUSTICE AND THE MINISTER OF MINES AND RESOURCES v. CHIN SHUK. - **158**

6.——*Conviction for murder—Appeal— Dismissed—Judgment not entered—Application to reopen case for further argument— Statement of accused on preliminary inquiry —Objection that statement was not a sworn one—Refused—R.S.C. 1927, Cap. 36, Secs. 684, 685 and 1001; Cap. 59, Sec. 4.*] On motion by the accused to reopen the case after judgment was pronounced but not yet entered, objection was raised to the admission in evidence of the statement made by the accused at his preliminary inquiry on the ground that the statement was inadmissible because it was not a sworn one, and in any event it was not voluntary. *Held*, that the statement was voluntary and there is nothing in the sections of the Criminal Code that were referred to (*i.e.*, sections 684, 685 and 1001) nor in section 4 of the Canada Evidence Act, that justify the restriction of such statements to those made under oath. REX v. WRIGHT. - - **421**

7.——*Driving a motor-car while intoxicated—Evidence of intoxication—Upon indictment or upon summary conviction—Distinction as to punishment—Criminal Code, Sec. 285 (4).*] On a charge of driving a motor-car while intoxicated, under section 285 (4) of the Criminal Code it is incumbent upon the prosecution to show that accused was so intoxicated that "if permitted to drive a motor-car it would be a danger to the public." *McRae v. McLaughlin Motorcar Co.*, [1926] 1 D.L.R. 372, followed. It will be noted that when a charge is laid upon an indictment under subsection 4 (*a*) of section 285 of the Criminal Code, the punishment is much greater than when an accused is found guilty upon a summary conviction under subsection 4 (*b*) of said section. It is obvious therefore, that Parliament, when enacting the legislation, drew a distinction as to the classes of cases which might arise under the section, and put a responsibility on the Crown to decide which subsection should be invoked when proceedings are started. REX v. LEAHY. - - - - - - - **104**

8.——*Evidence—Accomplice—Corroboration—Warning to jury — Misdirection—No*

substantial wrong.] The rule requiring warning as to the evidence of an accomplice applies equally whether such evidence be or be not corroborated. It is proper for the trial judge to advise a jury not to convict on the unconfirmed testimony of an accomplice, but such advice should be coupled with the instruction that while there is danger in basing a conviction on such uncorroborated testimony, it is within their legal province to do so. It is improper to direct a jury that it is their duty to convict if they believe the evidence of an accomplice, when such evidence stands alone and is uncorroborated. Every charge must be read as a whole and the specific direction complained of scanned as an integral part thereof. Misdirection is no ground for reversal of conviction where the jury properly directed would have reached the same conclusion, no substantial wrong or miscarriage being involved. REX v. NOWELL. - **165**

9.——*Habeas corpus—Nature of remedy—Power of Province to give right of appeal—Charge of possessing opium — Accused pleaded guilty—Alleged misunderstanding of charge—R.S.B.C. 1936, Cap. 57, Sec. 6.*] The fact that the detention or imprisonment in respect of which the remedy of *habeas corpus* is invoked arose out of a criminal charge, does not make the *habeas corpus* proceeding a criminal proceeding. It is not a proceeding against the Crown nor by the Crown against a subject, nor is it a continuance of or a step in the cause under which the detention has taken place. It is a proceeding for the enforcement of the civil right of personal liberty and the inquiry which it invokes is not into the criminal act, but to the right of the person in custody to his liberty, notwithstanding the criminal act and conviction. Therefore a Provincial Act which gives the right of appeal in *habeas corpus* and which, moreover, provides that where the Crown is the successful appellant the Court may order the rearrest of the accused, is *intra vires* even in respect to its application to a detention arising out of a criminal charge; it does not infringe upon the exclusive right given the Dominion by section 91 (27) of the B.N.A. Act to legislate upon "the criminal law and the procedure in criminal matters." *Rex* v. *McAdam* (1925), 35 B.C. 168, not followed. *Per* MARTIN, C.J.B.C.: Citation of cases in support of the ruling that Courts of criminal appeal feel it incumbent upon them to review their own and other decisions when they are satisfied that error has crept in. An accused of Chinese origin pleaded guilty to a charge of having opium in his possession. On *habeas corpus* proceedings he deposed that he understood he was pleading guilty to a charge of smoking opium, and it was held by MANSON, J. that as the doubt as to whether he fully understood the charge laid was not resolved by the affidavits filed by the Crown, which included one of the interpreter on the trial, the conviction should be quashed. *Held*, on appeal, reversing the decision of MANSON, J., that the evidence in support of the charge leaves no reasonable doubt that the respondent had full knowledge of the nature of the charge to which he pleaded guilty, and the appeal should be allowed and the writ set aside. *Ex parte* YUEN YICK JUN. REX v. YUEN YICK JUN. - - - - **541**

10.——*In possession of poppy heads—Declared to contain opium—Used for medicine—"Mens rea"—The Opium and Narcotic Drug Act, 1929, Can. Stats. 1929, Cap. 49, Secs. 4 (1) (d) and 17.*] On a charge of having portions of the opium poppy in his possession, the accused claimed that he had the poppy heads solely for the purpose of making poppy tea, which he alone used as a medicine. An analyst declared that the poppy heads contained opium. The learned trial judge held that he could find the accused guilty on the evidence given, but as he had given a very reasonable explanation he found the accused not guilty on the ground that no "*mens rea*" had been shown. *Held*, on appeal, reversing the decision of WHITESIDE, Co. J., that while the accused had given a very reasonable explanation and while under section 17 of the said Act the accused may maintain a successful defence by proving his lack of knowledge of the fact that he did have a drug in his possession, he did not succeed on this defence, but upon the erroneous view of the law taken by the Court below in placing upon the Crown the burden of proving *mens rea* as an essential ingredient of the offence charged, and the appeal should be allowed and a new trial ordered. REX v. GANDA SINGH. - **191**

11.——*Murder—Verdict—"Not guilty on account of insanity"—Committed to mental home — Petition for release — Dismissed—Appeal—Discretion of judge — Jurisdiction to interfere—Criminal Code, Secs. 966 and 969—R.S.B.C. 1936, Cap. 162, Sec. 2.*] Petitioner's husband was tried for murder in 1932, and the jury's verdict was "not guilty on account of insanity." The Court then ordered that he be kept in safe custody at a Provincial mental home. In 1938 the wife

petitioned for an order directing an inquisition as to her husband's mental condition. She swore that she had seen him and spoken to him on numerous occasions at the home, and that for over two years he had been sane. She gave no other evidence as to his mental condition. The petition was dismissed. *Held*, on appeal, affirming the decision of McDONALD, J., that assuming the right to apply for an inquisition under section 4 of the Lunacy Act, said section and other relevant sections of the Act show the expressed intention of the Legislature to clothe the Judge in Lunacy with a wide discretion. The *onus* is on the plaintiff, and there is no evidence to support her statement that her husband has been sane for over two years. The Court of Appeal ought not to interfere if satisfied that the learned judge has exercised his discretion judicially, and no ground has been shown that would justify interference. MURDOCH v. THE ATTORNEY-GENERAL OF BRITISH COLUMBIA. - - - - - - - - **496**

12.——*Procuring an abortion—Charge—Misdirection — New trial — Criminal Code, Secs. 303 and 1014.*] The accused was convicted upon an indictment under section 303 of the Criminal Code, charging that "with intent thereby to procure miscarriage, the accused did unlawfully use upon the person of Ann Tannassee a certain instrument, to wit, a syringe." The jury, while being instructed by the learned trial judge that the case had, upon the facts proved, turned out admittedly not to be one of using an instrument with intent to procure miscarriage, as charged, were then directed to decide it as one for unlawfully using "other means whatsoever with the like intent," though that offence was not charged. *Held*, on appeal, that the jury did not return a verdict upon the charge as laid, and therefore there has been a trial upon a false issue and there must be a new trial. REX v. DALE. **134**

13.——*Speedy trial—Carnal knowledge of a girl under fourteen years of age—Evidence of child of tender years—Corroboration—Lesser offence included in greater—Indecent assault on female—Criminal Code, Secs. 301 (1) and 835—R.S.C. 1927, Cap. 59, Sec. 16.*] On a charge of having carnal knowledge of a girl under the age of fourteen years, the learned trial judge believed the evidence of the girl, but concluding that her evidence was not corroborated in some material particular implicating the accused, he could not convict him on that charge. He found, however, that the accused was guilty

of the lesser offence of "indecent assault on a female" as empowered by section 835 of the Criminal Code, and sentenced him to one year's imprisonment. Counsel for the accused took objection to the girl's evidence being received, on the ground that prior to the reception of her evidence the trial judge did not examine her as to her understanding of the nature of an oath. *Held*, overruling the objection, that although the learned judge did not examine the girl as to her understanding of the nature of an oath, she was examined by Crown counsel as to this and he was entitled to act upon information elicited by him. REX v. JING FOO. **202**

HIGHWAYS—*Sidewalk in city—Driveway constructed by abutting owner across sidewalk—Snow and ice on driveway—Liability of owner.*] Under an agreement with the city of Vancouver the defendant company constructed a driveway across the sidewalk that adjoined one side of its building. On a morning in February, the plaintiff, while walking on the sidewalk which was icy and had a light coat of snow on it, fell as he stepped on the driveway and was injured. The defendant was obliged under said agreement to maintain the driveway but there was no evidence of any defect in it or want of repair. A city by-law as to the cleaning of snow and ice from the sidewalks, although referred to, was not put in evidence, and there was no evidence to show that the defendant had not swept off the sidewalk that morning before the accident. *Held*, that an abutting owner or occupant who has not assumed the duty of removing snow and ice from the sidewalk in front of his building or has not been guilty of a breach of a by-law respecting its removal, is not liable for injuries to pedestrians resulting from a natural fall of snow or ice on to the sidewalk. The defendant was not the owner or occupier of the driveway, he merely had the right of ingress and egress over it, and he owed no duty to pedestrians in respect to it. Furthermore the plaintiff did not exercise care appropriate to the prevailing conditions. The action therefore fails. HOBBS v. DAVID SPENCER LIMITED. - - **153**

2.——*Steps on city property giving access to building—Snow and ice on steps—Plaintiff falls on steps and is injured—Defendant monthly tenant in building—Liability.*] The defendant was a monthly tenant of a building which was entered from steps that were constructed wholly on city property. The plaintiff, when leaving the building, fell and was injured when walking down the steps. There were snow and ice on the steps at the time of the accident. In an action against the tenant of the building for damages:—*Held*, that as the defendant was not, in law, in occupation of the steps in question, there was no duty owing by the defendant to the plaintiff in respect thereof, and the action fails. PATTERSON v. KEARNEY & COMPANY LIMITED. - - **140**

HUSBAND AND WIFE—*Action under Order LXXA—Alimony — Quantum—Facts to be taken into consideration as to—Application for order to set up trust fund—Lack of jurisdiction.*] In an action by the wife for alimony under Order LXXA of the Supreme Court Rules, 1925, it was held that the husband's action in leaving his wife was wholly without justification so far as the wife's conduct was concerned, and that she was entitled to alimony. The basis of the wife's claim for alimony is the right of a deserted wife to pledge her husband's credit for the purpose of providing herself with maintenance according to her husband's station, and the Court in alimony cases such as this proceeds upon the principle of looking to what is just and reasonable under all the circumstances. It takes into consideration the station in life and position of the parties and also the nature of the property of which the husband is possessed. The husband had a net income from the estate left him by his mother of about $171 per month, and he was ordered to pay his wife $100 per month and also $15 per month for the support of their child. The wife's application for an order that he set up a trust fund to insure payment of said amounts or to enjoin him from receiving any income from his estate until he had done so, was refused on the ground of want of jurisdiction. MARTIN v. MARTIN. **434**

2.——*Judgment creditor of husband—Conveyance by husband to wife—Property paid for by wife—Held in trust by husband—Declaration by husband—Validity.* **471**
See FRAUDULENT CONVEYANCES.

INDUSTRIAL CONCILIATION AND ARBITRATION ACT — *Unlawfully going on strike — Informations — Appearance—Adjournment without case being called or formally adjourned—Refusal to appear on ground of lack of jurisdiction—Warrants issued on original information—Arrest and conviction — Certiorari — B.C. Stats. 1937, Cap. 31, Sec. 46.*] Six accused (including Haddrell) were separately charged on information laid under section 46 of the Industrial Conciliation and Arbitration Act, and appeared before the stipendiary magistrate at Bralorne, B.C., pursuant to sum-

with the defendant W., covenanting and agreeing to sell W. said lands. W. went into possession and the plaintiff entered into a verbal agreement with W. to erect a dwelling on the land. The plaintiff spent in material and labour on the building $772.62, and received in part payment $121. A mechanic's lien was filed for the balance of $658.62, and action was brought for the enforcement of the lien. *Held*, that the defendant comes within the purview of section 2 of the Mechanics' Lien Act as an "owner" as she has "an estate or interest legal or equitable in the lands in question." The lands were improved by the erection of the house thereon to from $875 to $900, and the plaintiff is entitled to enforce his lien for the amount claimed. CLARKE v. WILLIAMS, LYONS AND FELL. - - **370**

2.——*Wages of workmen — Judgment against employer — Employer sells logs—Judgment creditor garnishees purchaser—Liens filed by workman—Purchaser fails to comply with sections 37 and 39 of Woodmen's Lien for Wages Act—R.S.B.C. 1936, Cap. 17, Sec. 10; Cap. 310, Secs. 37, 38 and 39.*] Norgren, a logger, employed Johonson and Thorsen in his logging operations, and on October 4th, 1937, he owed Johonson $72.50 and Thorsen $88.90. On October 5th, 1937, one Powell recovered judgment against Norgren for $155.42. Norgren sold his logs to one Hammer, a lumberman, and on October 15th, 1937, Powell, the judgment creditor, attached by an order issued under the Attachment of Debts Act, the moneys owing by Hammer to Norgren. On October 31st, 1937, Johonson and Thorsen filed statements of claim of lien for wages under the Woodmen's Lien for Wages Act upon the logs and timber of Norgren. On October 27th, 1937, Hammer paid into Court $158.85, being the sum he owed Norgren for the logs. It was held that the lien-holders had priority as against the judgment creditor. *Held*, on appeal, reversing the decision of LENNOX, Co. J. (MCQUARRIE, J.A. dissenting), that the case turns on the construction of sections 37, 38 and 39 of the Woodmen's Lien for Wages Act. Section 37 provides that a buyer of logs shall, before making payment therefor, require the seller to furnish a pay-roll or sheet of the wages and showing, if not paid, the amount of wages or pay due to the workmen, and section 39 obligates the buyer to retain "for the use of the workmen" the sum set opposite their respective names which have not been paid. The requirements of sections 37 and 39 of said Act were not complied

with by the buyer Hammer, and in consequence there has been a failure to comply with the conditions precedent necessary to the creation of a trust in favour of the workmen in the fund in question. The workmen have no charge or lien on the fund in Court, as it never became impressed with a trust in their favour. Their remedy was an action against Hammer under section 38 of said Act. POWELL v. NORGREN: HAMMER, GARNISHEE. - - **476**

MENS REA. - - **193, 191**
See CRIMINAL LAW. 2, 10.

MENTAL CAPACITY—Action for declaration that settlor of unsound mind. - - - - - **284**
See DEED OF SETTLEMENT.

MINES AND MINERALS—*Interest in "mining property"—Action to recover—Plaintiff not holder of free miner's certificate—Effect of—Partnership agreement — Interpretation —R.S.B.C. 1924, Cap. 167; Cap. 181, Sec. 12.*] The defendant, *Tait*, a barrister, was employed by the liquidator of the Zeballos River Mining Company in November, 1934, and becoming interested in the district, interviewed local miners, including one Morrison, who was agent for the owners of the Gold Peak and Privateer groups of mineral claims. In March, 1935, the plaintiff Winsby obtained an option from Morrison on the Gold Peak and Privateer groups, and consulted *Tait* with a view to forming a syndicate to take up the option. Winsby and *Tait* then entered into a partnership agreement on the 21st of March, 1935, whereby each would be entitled to a half-interest in all moneys earned and accruing from the option held by Winsby. Shortly after, in endeavouring to get the records in shape, *Tait* and Winsby with Morrison met two of the owners of the Gold Peak and Privateer groups, and the two owners repudiated the option given by Morrison. The option was lost and *Tait* and Winsby then directed their efforts to forming a syndicate to promote two other claims known as the Van Isle and Rimy. Winsby was continually in *Tait's* office until the 16th of July. After that he did not visit the office and appeared to take no further interest. In December, 1935, the Privateer claims were relocated by one Ildstad under the name of the Pilgrim group, and a conflict developed between the Pilgrim and Privateer groups. In July, 1935, *Tait* and one Pitre, with the approval of Winsby, formed the Nootka Gold Mining Syndicate

for acquiring the Van Isle and Rimy claims, and opened a camp on the Van Isle claim, and the trustee of the Nootka Gold Mining Syndicate sold these claims to the Man-O-War Mines Limited in November, 1937, for a block of shares in the Man-O-War Mines Limited, Winsby claiming an interest in these shares under the agreement of the 21st of March, 1935. Pitre, on behalf of himself and *Tait* obtained an option on the Pilgrim group on the 8th of November, 1936, and *Tait* obtained an option from the owners of the Privateer group on the 10th of December, 1936. *Tait* and Pitre then proceeded with development work on the property and proved the mine to be an extremely rich property. The plaintiff brought action on the 5th of January, 1938, for an accounting and an interest in the Pilgrim and Privateer groups under the agreement of the 21st of March, 1935. The defendants plead alternatively that at no date material to this action and prior to the 4th of January, 1938, was the plaintiff a free miner or lawfully possessed of a free miner's certificate, and by reason thereof the defendants rely on the provisions of the Mineral Act. It was held on the trial with reference to the plaintiff not having a free miner's certificate that the Mineral Act is no bar to the proceedings for an account in this action, that the option covering the Gold Peak and Privateer groups originally held by the plaintiff lapsed at or near the end of May, 1935, and the partnership between the plaintiff and defendant was dissolved on the 20th of November, 1937, when the option and all other assets of the Nootka Gold Mining Syndicate were sold to the Man-O-War Mines Limited. *Held*, on appeal, affirming the decision of FISHER, J. as to the appeal, and allowing the cross-appeal from the declaration in the judgment respecting partnership (*per* MARTIN, C.J.B.C., MACDONALD and SLOAN, JJ.A.), that section 12 of the Mineral Act says "Subject to section 13, no person or joint-stock company shall be recognized as having any right or interest in or to any mining poperty unless he or it has a free miner's certificate unexpired." Therefore the mining options upon which the plaintiff relies, options of "mining property" could not be held unless the holder of them, *i.e.*, the person asserting the interest and benefit of them, is in possession of a free miner's certificate. *Per* MCQUARRIE and O'HALLORAN, JJ.A.: That the partnership between the plaintiff and defendant *Tait* terminated on the 11th of July, 1935, and the plaintiff is

not entitled to any interest in the Privateer Mine Limited. He is only entitled to his share on the stock of the Man-O-War Mines Limited received on the sale of the assets of the Nootka Gold Mining Syndicate to Man-O-War Mines Limited on the 20th of November, 1937. WINSBY v. TAIT AND TAIT & MARCHANT. - - - **335**

2.——*Option to purchase group of claims by individuals—Syndicate formed—Transfer of option to syndicate—Company formed—Transfer of option by syndicate to company—First option holders agents for syndicate—Non-disclosure of interest—Action against agent by member of syndicate.*] The plaintiff, a member of a syndicate, alleged, *inter alia*, that the trustee for and agent of the syndicate failed to disclose to its members that he was buying for its members property in which he had an interest, and therefore he should account for the profits made by him. Rescission could not be granted because the property had been transferred by the syndicate to a company. *Held*, that even assuming the plaintiff did not know the facts, relief could not be given her or the syndicate in the circumstances; the Court would not fix a new price; the right of the syndicate was to be paid its loss on the whole transaction, and no proof of damages on the whole transaction was given. The principle applicable is that if the agent's duty is to advise the principal as to the purchase of stocks or shares having a market value, and he sells to his principal stocks and shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter, if the property sold by the agent to the principal is a specific property having no market value, for the Court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction: if he has suffered no such loss there can be no damages. CAMERON v. CARR *et al.* **85**

MINING PROPERTY—Interest in—Action to recover. - - - **335**
See MINES AND MINERALS. 1.

MISDIRECTION. - - - **481**
See CRIMINAL LAW. 3.

2.——*New trial.* - - - **134**
See CRIMINAL LAW. 12.

3.——No substantial wrong. - **165**
See CRIMINAL LAW. 8.

left window with the result that he was severely injured. The defendant's employee did not hear the plaintiff's shouts nor did he look to see if anyone was behind him. *Held*, that the defendant company was liable even if the plaintiff was a trespasser, and even if the defendant's employee did not actually know the plaintiff was there, as he knew that the plaintiff might be there, he should have looked and if he had he would have seen that the plaintiff was there. [Affirmed by Court of Appeal.] HIATT v. ZIEN AND ACME TOWEL AND LINEN SUPPLY LIMITED. - - - **17, 450**

3.——*Car travelling in front of motor-cycle—Car stops on right side of street—Driver opens door on left over paved portion of street—Motor-cyclist in passing strikes open door and is thrown—Oncoming bus runs over his arm—Damages.*] To open the left-hand door of a car into the travelled portion of the highway without taking the very greatest precaution before so doing, amounts to negligence. LOOY v. ELLEY. - - - - - - - - - **557**

4.——*Collision at intersection—Driver on right—Duty to keep proper look-out—Evidence at inquest—Administration Act, R.S.B.C. 1936, Cap. 5—Damages.*] Although a motorist who is on the right of another car when approaching an intersection has the right of way, the obligation is nevertheless on him to use due care under the circumstances. *Held*, that the driver on the right had not looked properly to his left before entering the intersection and that had he done so he must have seen the other car in time to have avoided the collision, and was therefore guilty of contributory negligence. CORNISH v. REID AND CLUNES. - - - - - - - - **137**

5.——*Collision between automobile and street-car—Appeal—Misdirection—New trial—Costs of abortive trial to abide result of new trial—R.S.B.C. 1936, Cap. 56, Sec. 60.*] On appeal by the plaintiff from the dismissal of his action against the defendant company for damages resulting from a collision between an automobile in which he was a passenger and a car of the defendant company, the appeal was allowed on the ground of misdirection, but as the appellant did not raise below, as he should have done, the objection here taken to the direction of the learned judge, he must, as section 60 of the Supreme Court Act directs, pay the costs of this appeal. *Held*, further, that the general rule is that the costs of the abortive trial should follow the result of the second trial "except under very exceptional circumstances," and that is the direction which the Court gives in the present case in the absence of "very exceptional circumstances." PIKE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - **279**

6.——*Damages—Boy nearly ten years old killed by automobile—Action by father as administrator of son's estate—Claim under Administration Act—Claim also under Families' Compensation Act—Assessment of damages—Avoidance of duplication of damages—R.S.B.C. 1936, Cap. 5, Sec. 71 (2)—R.S.B.C. 1936, Cap. 93, Secs. 3 and 6.*] A boy nearly ten years old was struck and killed by an automobile driven by the defendant. In an action brought by the boy's father as administrator of the estate of his son, claiming damages under the Administration Act for the benefit of the estate of the deceased, and under the Families' Compensation Act for the benefit of the father and mother, it was found that the defendant's negligence was the sole and effective cause of the accident. On the assessment of damages:—*Held*, that to prevent duplication of damages, it is necessary in the assessment of damages under the Administration Act to indicate the portion of the amount allowed for loss of expectancy of life in being deprived of the anticipated privilege of caring for his dependants. General damages were assessed under the Administration Act at $5,000, of which $1,000 was ascribed to the element of deprivation of privilege of caring for dependants. General damages were assessed under the Families' Compensation Act at $1,000, but it was ordered that the general damages under the Administration Act should be abated to the extent that the plaintiff and his wife were the beneficiaries under the administration to the portion of said $5,000 ascribed to the deprivation of the privilege of caring for dependants. MCGINNES v. MURPHY. **460**

7.——*Damages—Defect in sidewalk—Injury to pedestrian—Reasonable repair—High-heeled shoes—Loss of daughter's payments for board during illness—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.*] The sidewalk in question consists of concrete slabs. One of the slabs had sunk (or the one south of it had risen) with the result that there was a rise as between it and the southerly slab next to it. The defect came to the knowledge of defendant through its overseer and some champering was done with a view to remedying the defect, but a

NEGLIGENCE—*Continued.*

ridge remained after the champering, somewhat less in height than before. The plaintiff, who wore high-heeled shoes, stumbled on the ridge and fell, suffering injuries. *Held*, that the sidewalk was not in reasonable repair within section 320 of the Vancouver Incorporation Act, 1921, and the city was liable in damages. *Held*, further, that as the plaintiff, a widow, had to keep at home one of her daughters who had been working and had been paying her mother for room and board, the loss was an element of special damages to the plaintiff. GREGSON v. CITY OF VANCOUVER. - - - **21**

8.——*Defective sign-post—Deficiency contributing to accident.* - - **529**
See RAILWAY COMPANY.

9.——*Electric train—Intending passenger crossing tracks in front of train beyond station—Struck by train—Negligence of motorman—Trespass.*] A girl eighteen years old, in attempting to catch a west bound interurban tram at Gladstone Station, ran up a path and crossed the double tracks from the south side about thirty feet west of the north platform of the station, the train being on the north tracks. On reaching the south tracks she signalled the tram by waving her arm, but continued across the north tracks in front of the tram. There was a steep embankment just beyond the north rail with a drop of sixteen feet, and owing to this she stopped too soon and was struck by a protruding step on the front end of the first car. As there were no passengers at the Gladstone Station, the motorman continued on without stopping. He saw the girl waving when he was opposite the middle of the platform and he put on his brakes, but the tram (going about fifteen miles an hour at the time), went some distance beyond the point of impact before stopping. It was held on the trial that the motorman was solely to blame. *Held*, on appeal, reversing the decision of MCDONALD, J. (MCQUARRIE, J.A. dissenting), that the motorman was in no way negligent towards the injured plaintiff however her *status* may be regarded. *Per* SLOAN, J.A.: The plaintiff was a trespasser at the time and place in question, and the only duty owing to her was that described by Lord Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, at p. 365. THOMPSON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - **230**

10.——*Shop premises—Defective flooring between entrance and sidewalk—Duty of occupant to invitee—Window-shopper steps through flooring—Personal injuries—Damages.*] The plaintiff, wishing to have a better view of goods through a window on premises occupied by the defendant, stepped from the sidewalk on to tiling in front of the entrance. The tiling gave way and both her feet went into a hole about a foot deep and up to her knees, and she was injured. The defendant was a tenant of the premises for eighteen months prior to the accident. For the first fifteen months of his occupancy the premises were used as a shop, and after that as a warehouse for the storage of furniture. The word "Furniture" was on the window in small letters. *Held*, that the goods apparently displayed for sale on the premises were such as to constitute an invitation to the plaintiff to approach and examine the goods. She was therefore an invitee and the defendant was under a duty towards her to take reasonable care to see that the premises were safe. The defects in the tiling had existed for a length of time, such as would make them known to the defendant and give him warning of the danger. He should have had the floor inspected and repaired and not having done so he was liable. CLARK v. ATHERTON. **217**

11.——*Street-car runs over child's leg—Assessment of damages—Damages excessive—Jurisdiction of appellate Court.*] About 4 o'clock in the afternoon on a clear day, a street-car of the defendant company, going east on Powell Street in Vancouver, stopped at the corner of Dunlevy Avenue and then proceeded on at about fifteen miles an hour, when the motorman saw some children playing at the north kerb in about the middle of the next block, when he slowed down to about twelve miles an hour and commenced to sound his gong. When about twenty feet west of the building in front of which the children were playing, a girl eight years of age suddenly dashed out to cross the street and was followed by the infant plaintiff, a Japanese boy of three years of age. The motorman claimed he immediately put on the emergency brake and the girl succeeded in crossing the track in front of the car, but the infant boy ran into the car just as it was stopping, about six feet behind the front of the car, and the front wheel ran over one of the boy's legs, necessitating amputation about six inches above the knee. The learned trial judge accepted the evidence of two of the plaintiff's witnesses and found that the motorman was not keeping a proper look-out

TRIAL—*Judgment delivered—Formal judgment not entered—Application to reopen trial—New evidence and further argument—Refused.*] Although a trial judge may reopen the trial after judgment on an application to adduce new evidence and for further argument, the power to reopen is one which ought to be exercised with the very greatest care. On an application to reopen the trial there was no suggestion that the witness might not have been called at the trial, and where it appeared that even if the evidence were admitted the result would have been the same, the application should be refused. GUARASCIO v. PORTO. - **297**

WATER WORKS—*Supply from city of Victoria to municipality of Oak Bay—Cost of water furnished—B.C. Stats. 1873, Cap. 20; 1911, Cap. 71, Sec. 1; 1925, Cap. 69, Sec. 13.*] The city of Victoria was incorporated in 1862 (the incorporating Act having been repealed in 1867), and its water supply was obtained from Elk Lake and Beaver Lake. In 1873 an Act was passed by the Legislature authorizing the city to construct a water-works system and empowering the city to supply water to consumers within its limits and to residents of areas contiguous to the city. Oak Bay was incorporated in 1906, and from 1906 to 1909 residents of Oak Bay were supplied by water directly from the city. In 1909 an agreement was entered into between the city and the corporation of Oak Bay whereby the city supplied the corporation with water instead of directly to the individual residents. In 1909 the city was authorized to extend its water works to include Sooke watershed (to be completed in eight years). In 1889 The Esquimalt Water Works Company came into existence with statutory authority to supply water from Goldstream watersheds to certain areas (not including the corporation of Oak Bay) and in 1911 at the instance of the corporation, the Oak Bay Act, 1910, was amended by inserting section 27, by which The Esquimalt Water Works Company was given power to sell water to Oak Bay, and the Schedule to the Act provided that upon the completion of the Sooke water system, the city could supply Oak Bay with water. This Act was never put into effect with relation to Oak Bay, and the city continued to supply water to Oak Bay as before until 1925, when the city expropriated the works of The Esquimalt Water Works Company, which was confirmed by statute in 1925, empowering the city to supply water to any corporation, the price in case of dispute to be settled by arbitration. The city continued to supply water to the corporation, and on May 2nd, 1938, issued a writ claiming, *inter alia*, $4,978.82 for water supplied during the first three months of 1938. This amount is based upon the rate charged to city consumers under the authority of a city by-law. The corporation counterclaimed and sought a declaration that the city is bound by the Act of 1911 to supply water to the corporation, and that it is entitled to have the price settled by the Comptroller of Water Rights under the provisions of paragraph 4 of the Schedule to the said 1911 Act. *Held*, on appeal, varying the decision of MCDONALD, J., namely, that it be set aside to the extent of its declaration that the defendant is entitled to have the price of the water "furnished" to it by the plaintiff "settled" under the provisions of clause 4 of the Schedule to the Oak Bay Act, 1910, Amendment Act, 1911, because the Court is of opinion that said clause never came into operation and therefore cannot be invoked by the defendant. *Held*, further, that by the first clause of said Schedule reciprocal obligations were, and still are, imposed upon the city and the municipality, by which the former is compelled to furnish and the latter to "accept and pay for" water as therein provided, but no provision is made for fixing the price thereof by that or any other clause or by any section of the Act. *Held*, further, that the city cannot resort to section 13 of The Esquimalt Water Works Company Winding-up Act, 1925, to "fix by arbitration" the price of water supplied, because the municipality has not made the necessary "request" upon the city so to do, the lack of which request is set up as a defence by the city in its reply and defence to the counterclaim. CORPORATION OF THE CITY OF VICTORIA AND IRWIN v. CORPORATION OF THE DISTRICT OF OAK BAY. - - - - - **517**

WILL—*Interpretation—Whether devise to widow absolute or subject to trust.*] By his will a testator bequeathed all his property of whatsoever kind or nature to his wife absolutely. This was followed in the will